

September to December 2019

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Review was granted in the following case during the month of September 2019:

Secretary of Labor v. Knight Hawk Coal, LLC., Docket No. LAKE 2019-87 R (Judge McCarthy, August 16, 2019)

Review was denied in the following cases during the months of October and November 2019:

Secretary of Labor v. Hoffman Construction Company, Inc., Docket No. LAKE 2019-180 (Judge Rae, September 10, 2019)

Secretary of Labor v. Consol Pennsylvania Coal Company, LLC, Docket No. PENN 2018-169 (Judge Moran, October 11, 2019)

No review was granted or denied during the month of December 2019.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 26, 2019

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

v.

M-CLASS MINING, LLC

Docket No. LAKE 2012-519

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY: Rajkovich, Chairman; Young and Althen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). At issue is Order No. 8432253, issued to M-Class Mining, LLC (“M-Class”) by the Department of Labor’s Mine Safety and Health Administration (“MSHA”).

The order alleges that a miner failed to wear gloves while performing work on energized electrical equipment, resulting in a violation of 30 C.F.R. § 75.1720(c).¹ The alleged violation was designated as significant and substantial (“S&S”), highly negligent, and a result of the operator’s unwarrantable failure to comply with the safety standard. MSHA proposed a penalty of \$41,500 for this violation.

M-Class and the Secretary of Labor each filed motions for summary decision regarding the validity of this order. The Judge granted M-Class’s motion for summary decision, denied the Secretary’s cross-motion for summary decision, and vacated the order. 39 FMSHRC 839, 849 (Apr. 2017) (ALJ). In doing so, the Judge drew an inference favorable to the movant, M-Class.

Upon review, the Commission vacates the Judge’s summary decision in favor of M-Class and remands the case for further proceedings in accordance with this decision.

¹ Section 75.1720(c) requires a miner to wear “[p]rotective gloves when handling materials or performing work which might cause injury to the hands; however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.” 30 C.F.R. § 75.1720(c).

I.

Factual Background

On May 23, 2011, Mark McCurdy, a maintenance foreman and certified electrician, was working at M-Class's #1 Mine, a large underground coal mine in Macedonia, Illinois. During his shift, he tried to determine why a continuous mining machine intermittently stopped functioning. 39 FMSHRC at 841. McCurdy checked the machine's external radio circuits and internal wiring. He also checked it for loose parts, the range of the remote, and reviewed the machine's computer log. *Id.* While making these checks, McCurdy alternately turned the machine off and on several times.

After initially turning the machine off and locking out its power center, he checked its remote and external radio circuitry. He opened the cover of the control panel of the machine to check its internal wiring. McCurdy then restored power to the machine and turned the machine back on. After doing so, he operated the remote in order to bump the head of the machine, *i.e.*, shake the machine to cause a shutdown. McCurdy reviewed the machine's computer log for any record of malfunctioning components. He did not wear gloves while operating the remote because he testified that he thought that he might inadvertently press the wrong buttons on the remote.

McCurdy then used the control breaker to repeatedly reboot the machine. After rebooting, he again checked the computer log for any changes as a result of the reboot. He turned the machine off, again, and locked out the power center. After doing so, he rechecked the internal wiring, which had remained uncovered since he first turned off the machine. He then restored power to the machine and turned it back on, and again operated the remote to bump the head of the machine. In addition, he checked whether the limited range of the remote was causing the machine to intermittently stop functioning. After that check, McCurdy left the immediate area of the machine to talk with two other miners who were changing a tire on a shuttle car.

When he returned, the internal wiring of the machine remained exposed and energized since the last time he had examined the machine. McCurdy did not put on the gloves that were lying on the machine. He testified that he knelt down in front of it, and looked at the electrical panel, trying to decide what to do next. McCurdy Dep. at 19, 36. He testified, "then next thing I know I was beside the miner getting shocked." Dep. at 18. McCurdy stated that he could not remember how his finger contacted a live wire.

The Judge found there was no evidence to contradict McCurdy's recounting of the events, that McCurdy was credible, and that the Secretary did not challenge McCurdy's credible recounting of the events.² McCurdy was hospitalized for one day as a result of the electric shock.

² During MSHA Inspector Robert Bretzman's deposition, however, he differentiated between troubleshooting and performing electrical work within the controller box. He testified that he believed that McCurdy inserted his hand into the controller box and, at that point, he was no longer troubleshooting, but instead, was performing work within the box. Bretzman Dep. at 65-68.

MSHA Inspector Robert Bretzman subsequently investigated the accident. On May 24, 2011, MSHA issued Order No. 8432253 to the operator as a result of the accident. The order alleged a violation of 30 C.F.R. § 75.1720(c). This standard requires miners to wear “[p]rotective gloves when handling materials or performing work which might cause injury to the hands” unless such gloves “would create a greater hazard by becoming entangled in the moving parts of equipment.” The order alleged that McCurdy was troubleshooting the energized traction controller without wearing gloves in violation of 30 C.F.R. § 75.1720(c). The order also asserted that the action was aggravated conduct constituting an unwarrantable failure.

The Secretary and M-Class each moved the Judge for summary decision relying upon deposition testimony. The Judge denied the Secretary’s cross-motion for summary decision and granted summary decision in favor of M-Class. The Judge found that the Secretary had failed to prove a violation, *i.e.*, he had not shown by a preponderance of the evidence that McCurdy failed to wear gloves while performing work which might cause injury to his hands. As a result, the Judge vacated the order. 39 FMSHRC at 848-49.

The deposition testimony discussed an “imaginary line” that, when crossed, establishes a miner is “working” on energized equipment. From the testimony and exhibits, it is clear this “imaginary line” is a degree of proximity to a live wire, the crossing of which, according to the Secretary, requires use of personal protective equipment such as gloves.

The Judge concluded that the facts were undisputed and that the Secretary failed to carry his burden of proof. The core of the Judge’s ruling was:

McCurdy’s testimony indicates he was knowledgeable and trained in proper procedures, such as the convention against crossing the “imaginary line” into an energized electrical panel, and exhibited proper respect for them; he was an experienced electrician who would not be expected to intentionally or needlessly expose himself to potentially fatal injuries by reaching into an energized panel barehanded. I find the evidence insufficient for the Secretary to prevail on an argument that McCurdy was tracing wires or performing other work that posed a risk of injury to his hands at any one time when he was not wearing gloves.

Id. at 848 (citations omitted).³

³ The Judge also found that:

[T]he Secretary’s evidence is insufficient to . . . rule out the possibility that [McCurdy’s] contact with the unidentified electrical component resulted from a loss of balance, a fall, or some other inadvertent motion that led him to accidentally contact the electrical panel. The regulation cannot have intended to punish him for accidentally contacting a live wire when the Secretary cannot
(continued...)

In addition, the Judge rejected the Secretary’s interpretation of the standard “that gloves must be worn at all times whenever a miner is troubleshooting.” *Id.* at 847. In doing so, the Judge stated that such an interpretation was contrary to an exception allowing miners to not wear gloves when doing so would pose a greater hazard.

II.

Standard of Review

The Commission reviews a summary decision de novo. *See Lakeview Rock Prods., Inc.* 33 FMSHRC 2985, 2988 (Dec. 2011). When reviewing a record on summary decision, a Judge must evaluate the evidence in the light most favorable to the non-moving party. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). Consequently, “inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.” *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *see also Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962).

Summary decision should not be granted “unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances.” *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (internal quotations omitted). Summary decision is appropriate only if there are no material facts in dispute and the movant’s position is entitled to judgment as a matter of law. *West Alabama Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1886-87 (Sep. 2015). When the record before the Judge contains disputed material facts, the proper course of action is to vacate the grant of summary decision and remand the matter for an evidentiary hearing. *See Energy West Mining, Co.*, 17 FMSHRC 1313, 1316-17 (Aug. 1995). Cross-motions for summary judgment must be considered separately and on their own merits. *Hanson*, 29 FMSHRC at 10.

³ (... continued)

prove he was taking the sort of foreseeable risk that would have obligated him to wear gloves.

39 FMSHRC at 847.

III.

Disposition

The Secretary presents three arguments on appeal. Two are disposed of easily. The third requires remand.

A. The Secretary Wrongly Argues that the Standard Requires the Wearing of Gloves whenever a Miner is “Troubleshooting” an Electrical Problem.⁴

The Secretary sweeps too broadly in contending that, with one limited exception, all “troubleshooting” of electrical components requires a miner to wear gloves. An initial and obvious deficiency is that the Secretary does not attempt to define the nature of activities that constitute “troubleshooting.” Use of a broad and completely undefined term to establish the parameters of a violation requiring imposition of a civil penalty raises immediate and insuperable notice difficulties. It is fair to state, for example, that the first step of troubleshooting is thinking about the problem and ways in which one might solve the problem. This could include looking at schematics and/or a host of other activities at a distance from a machine that do not present any danger to a person’s hands. It would be entirely unnecessary, if not impractical, to require gloves under those circumstances. Certainly, that is not the aim of a standard intended to protect miners from the danger of touching exposed live wires.

Separately, although the facts of a given situation may cause application of the standard to be a close case, the standard itself is quite clear. It requires the wearing of gloves “when handling materials or performing work which might cause injury to the hands.” Clearly, this standard may present disputed issues of whether a miner is performing work fairly determined to be within the scope of the standard. However, the standard provides clear notice to the regulated parties and a standard against which to judge a Respondent’s actions. The Judge correctly rejected the Secretary’s contention that section 75.509 in Volume 5 of MSHA’s Program Policy

⁴ As a second argument, the Secretary contends that the Judge misinterpreted the standard because the Judge read an exception into the standard that the standard does not contain. The Judge’s observation regarding the removal of gloves to facilitate handling of the remote was only for rejecting a contention that the nature of troubleshooting could be determined on the basis of whether the miner was or was not wearing gloves. 39 FMSHRC at 847. The Judge’s reference to the exception did not read an additional exception into the standard. It merely directed attention to the fact that the focus of the standard is on whether the miner’s actions create a danger of injury to his hands.

Manual means that all troubleshooting requires use of gloves.⁵ V MSHA, U.S. Dep't of Labor, Program Policy Manual Part 75, at 53 (Feb. 2003).

We cannot vary from the plain words of the standard because parties may sometimes disagree whether the work presented a danger of injury to the hands. Such factual disputes are the gravamen of many Mine Act hearings.⁶

B. The Judge Impermissibly Drew an Inference Favorable to the Movant in Granting Summary Decision.

The Secretary contends that the Judge erred at the summary decision stage by making an inference favorable to the Respondent—namely, that the Secretary could not prove McCurdy was performing work that created a foreseeable risk of injury to his hands. We agree.

Section 75.1720(c) is a broad standard. The Commission has consistently applied the reasonably prudent person test to broadly-worded standards. *See, e.g., U.S. Steel Mining Co.*, 27 FMSHRC 435, 439 (May 2005). In *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1626-27 (July 2016), the Commission stated that certain standards are “drafted in general terms in order to be

⁵ As noted above, Inspector Bretzman differentiated between troubleshooting and performing electrical work within the controller box. Bretzman Dep. at 20. Bretzman’s belief was that McCurdy inserted his hand into the controller box and, at that point, he was no longer troubleshooting but performing work within the box. Apparently, MSHA’s position before the Commission is that a miner must always wear gloves during “troubleshooting” even if that person is just thinking about the problem or not close to the electrical source. This makes no practical sense. Our dissenting colleagues apparently draw the same illogical conclusion in asserting “[t]his type of intellectual deliberation occurring next to energized equipment counts as work as much as any physical labor McCurdy undertook in his attempt to repair the miner—in fact, it is an integral part of the repair process.” Slip op. at 2. On summary judgment, the record was devoid of evidence to support our colleagues’ conclusory inference that the intellectual deliberations, in this case, constituted not merely “work” but “work which might cause injury to the hands.” Indeed, the purpose of remand is to allow presentation of evidence on this outcome-determinative point. We simply do not give either party the benefit of a conclusory inference.

⁶ Excising one sentence from the Judge’s decision, our colleagues suggest that the gravamen of the Judge’s decision was a finding that McCurdy was not “performing work.” Slip op. at 2. That is incorrect. The Judge found that the Secretary did not prove by a preponderance of the evidence that McCurdy was engaged in work that might cause injury to his hands. The Judge held “[t]he regulation cannot have intended to punish him for accidentally contacting a live wire when the Secretary cannot prove he was taking the sort of foreseeable risk that would have obligated him to wear gloves.” 39 FMSHRC at 847. Thus, rather than inserting an “intent” requirement into the regulation, the Judge applied the burden of proof standard to the Secretary’s obligation to prove McCurdy was engaged in work “which might cause injury to the hands” 30 C.F.R. § 75.1720(c). Similarly, the operator did not rely upon an absence of any work but rather absence of proof that the miner’s specific activity might cause injury to his hand. Resp’t’s Resp. in Opp. to PDR at 5, 8-9.

broadly adaptable to the varying circumstances of a mine.” It ruled that such broadly-worded standards are appropriate for application of the reasonably prudent person test.

Under this test, an alleged violation is appropriately measured against whether a reasonably prudent person, familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard within the purview of the applicable regulation. *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 711 (Aug. 2008); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). In this case, the miner was a certified electrician. Consequently, the outcome-determinative issue is whether a reasonably prudent certified electrician, familiar with the hazard, should have recognized a risk of injury to his hands, thus requiring the use of gloves.

The record before the Judge did not present a sufficient basis for a final determination of this issue. The Judge’s finding that the Secretary could not prove his case amounts to an inference that, upon a hearing on a full record, the Secretary could not prove a violation. The drawing of such an inference constituted error. There remain disputed and/or unresolved facts and issues, the resolution of which could be outcome-determinative. To be clear, the issue is *not* the specific act McCurdy was doing when he was shocked. It is not a matter of differentiating between whether he was thinking about what to do next, versus whether he was inserting his hands into the equipment. The miner need not be intentionally working on the equipment itself if the task he is performing poses a risk of injury.

Inferentially, the Judge concluded that the evidence did not prove McCurdy inserted his hand into the controller box to trace wires, but only that he was kneeling before the controller box and thinking about what to do next when an accident occurred. That is not the end of the case if, under the specific circumstances at the site, a reasonable certified electrician kneeling before the controller box would have put on gloves to mitigate a risk of injury.

From the deposition testimony and briefing of the parties, it appears that three interrelated facts bear on whether McCurdy should have recognized a risk of injury to his hands requiring the donning of gloves. These are: (1) the positioning of the miner’s hands, (2) the electrical source of potential danger, and (3) the entire range of mine-specific circumstances that might affect the risk of danger in light of the source of danger and actions of the miner.

Without doubt, an immediate question that arises in this case is the proximity of the miner’s hands to the power source as he knelt before the controller box. The regulation does not seek to prevent only intentional contacts with live wires but also contacts that might result from an inadvertent movement. Therefore, the miner must keep his hands at a distance from the power source sufficient to mitigate the likelihood of touching an exposed wire. At the same time, this does not mean that every accidental contact is a per se violation of the standard. Again, the standard requires an examination of the actions of a miner under the specific circumstances unique to the facts of the case. If, here, the miner was acting reasonably, an inadvertent action would not give rise to a violation.

This leads to a second important consideration. In addition to the deposition testimony about an imaginary line, the Secretary’s Petition for Discretionary Review refers to a number of reports by safety agencies and institutions regarding the risk of shock. These reports discuss and advise upon the distance at which a person should put on personal protective equipment when approaching a live electric power source. These include a manual published by the National Institute for Occupational Safety and Health (“NIOSH”). NIOSH, *Electrical Safety, Safety and Health for Electrical Trades, Student Manual Revised Edition* Pub. 2009-113 (April 2009), <https://www.cdc.gov/niosh/docs/2009-113/pdfs/2009-113.pdf>. The publication discusses “approach boundaries” characterized as a key to protecting oneself from electric shock.⁷

From these sources, it is clear even to laymen that an important consideration of the danger to hands is the source of the possible shock, including the voltage at such source. The strength of the source of the danger is an element of the distances to which trained and qualified persons may approach the electric source without personal protective equipment.

Here, McCurdy testified that he was kneeling in front of the controller thinking about what to do. Essentially, therefore, McCurdy testified he was not working on the controller box but simply thinking about what he would do next. However, that testimony does not provide any information at all about the danger of electrical components in the control box or the distance of his hands from the box as he, according to his testimony, considered a next step. With McCurdy having testified to an absence of memory, and two more years having passed, it may be unlikely that a hearing will produce much more evidence on this subject. However, evidence, including testimony about prior troubleshooting instances and/or about the strength and danger of the electrical components in the box, may be helpful in deciding the reasonableness of McCurdy’s decision not to don the gloves.

Finally, other circumstances specific to the particular event may come into play. As noted, the Judge may seek testimonial evidence regarding McCurdy’s past practice when troubleshooting energized electrical components, relevant industry and his own practices regarding the use of protective gloves in close proximity to energized electrical wiring of continuous mining machines, and ground and lighting conditions at the time of the shock. For example, were the ground conditions at the site stable, dry, wet, rough, or otherwise relevant to

⁷ The NIOSH manual states that the boundaries are drawn from the National Fire Protection Association’s NFPA 70E. NFPA, *Standard for Electrical Safety in the Workplace*, 70E (2018 Ed.). That publication defines a “limited approach boundary” as “[a]n approach limit at a distance from an exposed energized electrical conductor or circuit part within which a shock hazard exists.” *Id.* at 70E-10. In turn, “a restricted approach boundary” is “[a]n approach limit at a distance from an exposed energized electrical conductor or circuit part within which there is an increased likelihood of electric shock, due to electrical arc-over combined with inadvertent movement.” *Id.* The “prohibited approach boundary” is the distance you must stay from exposed live parts to prevent flashover or arcing in air. We do not delve into the specific of these texts. It is sufficient to note that such manuals contain discussions of the location of a qualified person’s hand vis-à-vis the need for personal protective equipment in light of the source of a potential shock. They may provide a basis for expert testimony or analysis.

any danger? Was the current on the machine direct or alternating?⁸ Could McCurdy's hand have been attracted to the wire?⁹ Where in the controller box was the wire located that was touched by McCurdy? Was it located in an area prone to incidental contact or does its position make an inadvertent contact unlikely?

Although there were cross-motions for summary decision, from the foregoing, it is clear that summary decision was inappropriate. The Judge inferred that McCurdy never intentionally touched the energized wires barehanded, even though an inspector's notes suggested that McCurdy did so. 39 FMSHRC at 848; *see also* Inspector Bretzman's notes on May 23, 2011 at 16 (stating that McCurdy traced energized wires immediately prior to the shock). Further, the Judge assumed that McCurdy, as an experienced electrician, would never have exposed himself to potentially fatal injuries by reaching into the energized panel barehanded. 39 FMSHRC at 848.

⁸ Inspector Robert Bretzman testified in his deposition that he was trying to determine whether McCurdy "was into something other than the 110." Bretzman Dep. at 64.

⁹ Inspector Bretzman testified that he was concerned "because [McCurdy] was locked into the power and it was not—it's not my experience that 110 will lock you in that hard to where you can't get out." *Id.* at 63.

In short, on M-Class' motion, the Judge viewed critical evidence in the light most favorable to M-Class, the party that moved for summary decision—not the Secretary. This was erroneous. The finding that the Secretary did not present sufficient evidence to prevail, however, does not mean that the Secretary could not prevail at a hearing where evidence is presented on such matters, as discussed above.

IV.

Conclusion

We hereby vacate the Judge's decision and remand this case for further proceedings in accordance with this decision.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

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

Commissioners Jordan and Traynor, concurring in part and dissenting in part:

Although we agree with our colleagues that the Judge erred in granting summary decision to M-Class, we believe no remand is required regarding the issue of whether a violation of 30 C.F.R. § 75.1720 occurred. On that question, we conclude that summary decision for the Secretary is appropriate. Remand is only necessary to determine whether the citation was properly designated significant and substantial and resulted from the operator's unwarrantable failure, and to determine the level of negligence and the amount of the penalty.

The cited standard requires miners to wear protective gloves when handling materials or performing work which might cause injury to the hands.¹⁰ Notably, the standard at issue does not require a *likelihood* of injury to the hand—it only requires a *possibility* of injury to the hand. Here, of course, there is no need to consider the possibility that McCurdy's actions might result in injury; it is undisputed that McCurdy's hand *was* injured. The relevant question is therefore would a reasonable miner have foreseen that possibility of injury and therefore understood the corresponding need to wear gloves?

McCurdy's injury occurred during his attempts to fix the continuous miner. After taking a number of steps to figure out why the machine was intermittently losing power, McCurdy left to check on two miners working on a shuttle car in the crosscut. When he returned, he paused momentarily, kneeling in front of the energized continuous miner and its open electrical panel. He was thinking about what to do next, with his gloves sitting on top of the machine and his tools sitting on the machine and in his bibs. *Id.* at 848. He testified that he was “[l]ooking in the panel” and specified: “I was knelt down beside the miner I remember kneeling down beside the panel.” McCurdy Dep. at 18-19.

McCurdy's testimony as to what happened immediately prior to his injury is very sparse. McCurdy states that the only thing he recalls after kneeling down beside the panel is that he was “beside the [machine] getting shocked.” McCurdy Dep. at 18. He had touched an energized wire without wearing gloves, and could not pull his hand away. Two miners pulled him out of the current. He was hospitalized overnight. 39 FMSHRC at 841.

¹⁰ The standard states in relevant part:

[E]ach miner regularly employed in the active workings of an underground coal mine shall be required to wear the following protective clothing and devices:

...

(c) Protective gloves when handling materials or performing work which might cause injury to the hands; however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.

30 C.F.R. § 75.1720.

The operator speculates that McCurdy tripped or fell in the control panel when getting up from his kneeling position. Resp't's Resp. in Opp. to PDR at 8. Even assuming this to be the case, a miner who positions himself in such proximity to energized wires so that a loss of balance could result in an inadvertent contact should have foreseen the possibility of injury and the corresponding need to wear gloves.

This is so because any miner knows that working on energized electric equipment is the exception, not the rule, and as the Secretary notes, should be viewed as a "situation of last resort." S. Reply Br. at 5. Section 75.509 mandates that electric equipment be de-energized before work is performed, except when necessary for troubleshooting or testing. If this exception is invoked and the machinery is not de-energized, section 75.1720 then requires that protective gloves must be worn when performing work that might cause injury to the hands.¹¹ McCurdy himself acknowledged, in an interview with an MSHA inspector at the hospital after the accident, that he realized he should have left his gloves on. Inspector Bretzman's Declaration at 4.

Noting that the standard in question requires gloves to be worn only when "*performing work* that might cause injury to the hands" (emphasis added), M-Class seeks to avoid liability by contending that McCurdy's action of pausing and kneeling by the mining machine to consider what steps he needed to take to repair it cannot be considered "performing work."¹² However, in light of the undisputed facts in this case, the only reasonable inference that can be drawn is that McCurdy was performing work. It appears that our colleagues in the majority agree. Slip op. at 7. McCurdy was assigned a job—to repair the continuous miner—and took a variety of steps to complete it. He was engaged in an activity performed every day by miners—fixing machinery. His painstaking efforts to discover why the continuous miner was broken show that he was diligently trying to complete his assigned task.

When McCurdy knelt by the machine and paused to consider what steps he needed to take to repair it, he was still "performing work." As he stated: [I was] [t]rying to go through my head to figure out what else I could do to make this machine drop out." Dep. at 19. This type of intellectual deliberation occurring next to energized equipment counts as work as much as any physical labor McCurdy undertook in his attempt to repair the miner—in fact, it is an integral part of the repair process. Moreover, rather than considering each of his actions separately as he tried to figure out what was wrong with the continuous miner, we must take into account the totality of his conduct leading up to the moment he was shocked. Clearly, his numerous attempts to

¹¹ The Commission has acknowledged the importance of wearing protective gloves. In a case involving a violation of 30 C.F.R. § 75.509 (requiring that equipment be de-energized before work is done, except when necessary for troubleshooting or testing), we noted that although the miner wore gloves in performing repairs, when he used his bare hand to lift stray wires inside an energized electrical panel and out of the way, he "made a serious error in taking the gloves off prematurely." *American Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017).

¹² The operator claims that there is no violation of section 75.1720(c) if a miner accidentally falls into an energized control panel without wearing gloves, because "[t]hat is an accident, not 'handling materials or performing work.'" Resp't's Resp. in Opp. to PDR at 9.

discover why the machine was not properly operating—including his effort, just prior to being shocked, to think through the process and figure out his next steps—constitute “performing work.”

The Judge’s ruling that McCurdy was not “performing work” was erroneous. She stated that:

I find that the Secretary has failed to prove by a preponderance that McCurdy was engaging in work at the moment the accident occurred. It was a completely inadvertent and unforeseeable occurrence. I find, therefore, that the evidence is insufficient for the Secretary to prevail on this argument.

...

[t]he Secretary’s evidence is insufficient to establish exactly what [the miner] was doing at the time he was shocked or to rule out the possibility that his contact with the unidentified electrical component resulted from a loss of balance, a fall, or some other inadvertent motion that led him to accidentally contact the electrical panel. The regulation cannot have intended to punish him for accidentally contacting a live wire when the Secretary cannot prove he was taking the sort of foreseeable risk that would have obligated him to wear gloves.

39 FMSHRC at 846-7.

In so holding, the Judge improperly inserted an intent requirement into the Secretary’s burden of proof.¹³ As previously discussed, the Secretary did not need to prove that McCurdy deliberately touched the wire. The health and safety standards promulgated under the Mine Act protect miners from harm resulting from accidents and unintentional acts as well as from intentional conduct that is unsafe. Consequently, inadvertent contact with an energized panel is encompassed in the protection afforded by this safety standard.

Despite the Judge’s errors, we fail to see the need to remand this eight-year old case to the Judge for a hearing. The majority states that there are disputed facts that must be resolved before one can determine that a reasonably prudent miner would have worn gloves under the circumstances presented here. We disagree.

Let us examine the three factual areas that the majority suggests should be considered on remand:

First, our colleagues request information on “the proximity of the miner’s hands to the power source as he knelt before the controller box.” Slip op. at 7. As discussed above, it is undisputed that McCurdy was kneeling by an energized panel on the continuous miner, and this

¹³ We would submit that nobody intends to touch an energized wire.

alone, in our view, places his hands in a location where they might be injured (and thus gloves were required). Moreover, as a practical matter, we are hard-pressed to see how this evidence would be obtained on remand. As the majority recognizes, in his deposition (taken two and a half years ago), McCurdy stated that he remembered kneeling down beside the panel and looking at it. McCurdy Dep. at 19. When asked what happened next, he stated that “[s]omehow I touched the 110 wire or touched an energized wire.” McCurdy Dep. at 22. McCurdy testified that he had no explanation of how he went from kneeling in front of the machine to being caught by the power. McCurdy Dep. at 36. The majority nonetheless remands to determine the distance of his hands from the box as McCurdy considered his next step. Slip op. at 8. Given that he was kneeling by the machine, we consider this specific inquiry immaterial—and we would be surprised if McCurdy (the only witness to the event, prior to his rescue by his fellow miners) would be able to supplement his deposition testimony with more elaborate detail as to where exactly his hands were positioned. In fact, our colleagues appear to share this concern. *Id.*

Second, our colleagues remand for a determination of the electrical source of potential danger—that is, the danger of the electrical components in the control box. *Id.* They state that this evidence may be useful in deciding whether McCurdy was reasonable when he failed to wear the protective gloves.

Again, we do not consider this a material fact for the inquiry at hand. Here is what we already know: McCurdy touched a wire and tried to pull his hand away. He “screamed” and “tried to pull back.” Dep. at 22. Two hourly mine workers responded to his screams and pulled him out of the electrical current. Inspector Bretzman’s Declaration at 2. Clearly, whatever the magnitude of the electrical components in the box, they were strong enough to shock McCurdy and send him to the hospital. No further evidence is needed—and we suspect none can be developed, given McCurdy’s hazy memory of this long-ago event.

In addition to these concerns, we would be reluctant to remand this case for the remaining reasons set forth by the majority—so that the Judge may examine “the entire range of mine-specific circumstances that might affect the risk of danger in light of the source of danger and actions of the miner.” Slip op. at 7. The majority fails to explain why, given the fact that McCurdy received a severe shock, the Judge on remand should examine ground conditions at the site, the type of current on the machine, and the exact location of the wire that McCurdy touched. Given what we already know, this appears to be extraneous evidence that probably will be difficult, if not impossible to obtain. Indeed, in terms of pinpointing the location of the wire, the inspector’s notes indicate that McCurdy told him that he did “not remember what he touched, everything is a blur. . . . McCurdy was not able to provide evidence to conclude what he touched in [the] panel.” Inspector Bretzman’s notes on May 23, 2011 at 16-17.

In conclusion, in light of the undisputed facts, and as a matter of law, M-Class violated section 75.1720. Thus summary decision for the Secretary is appropriate. The Judge's ruling should be reversed, summary decision granted for the Secretary, and the case remanded for a determination regarding whether the violation was "significant and substantial," the level of negligence, unwarrantable failure, and the penalty.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 30, 2019

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

v.

SOLAR SOURCES MINING, LLC

Docket No. LAKE 2017-52

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY: Rajkovich, Chairman; Young and Althen, Commissioners

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”) comes before us on interlocutory review of the decision of an Administrative Law Judge denying the Secretary’s motion, with which the operator agreed, to approve settlement of three citations. 39 FMSHRC 2052 (Nov. 2017) (ALJ).

Two of the citations were regularly assessed and one was specially assessed. Each regularly assessed citation was for \$4,548. The special assessment on the third citation was for \$68,300, making the total assessment \$77,396 for all three citations. Under the terms of the proposed settlement, the operator, Solar Sources Mining, LLC (“Solar Sources”), would accept responsibility for all three violations as written, including negligence and gravity, and would pay a penalty of \$13,644, equivalent to the regular assessment total for all three violations. *Id.* at 2054-55.¹

The Judge concluded that the motion presented “no facts” in support of the settlement and that the Secretary’s refusal to provide copies of the inspector’s notes and photographs prevented him from being able to discern whether the proposed settlement was appropriate. 39 FMSHRC at 2059.

¹ The proposed reduction is exactly the difference between the regular and special assessments for the third citation. *See* 30 C.F.R. § 100; MSHA General Procedures of Special Assessments. The Commission is not bound by the Secretary’s proposed assessments and has a duty to assess penalties independently. *The American Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016) (“*AmCoal Special Assessments P*”).

The parties filed a joint motion to certify issues for interlocutory review and a motion to suspend the hearing pending Commission review. The Judge granted both motions, and the Commission granted review of the following issues:

- (1) Whether the Secretary of Labor possesses unreviewable discretion to withdraw a specially assessed proposed penalty;
- (2) Whether the Judge erred by requiring the Secretary to produce the inspector's notes and photographs during the settlement process and before a hearing on the merits; and
- (3) Whether the Judge abused his discretion in denying the settlement motion.

We conclude that the Judge abused his discretion in considering the settlement. Therefore, we reverse the Judge's decision and approve the settlement.

I.

Facts and Proceedings Below

A. Background

The three citations involved in this case were issued after an accident at Solar Sources' Antioch Mine, a surface coal mine located in Davies County, Indiana. On July 8, 2016, a miner was injured severely when he fell from a catwalk on a Euclid 3500 end dump truck due to an obstruction on the catwalk and the failure of a chain he relied upon for support.

A rope tied from the truck's cab to the rear-view mirror, extending along the length of the catwalk at a height of about 57 to 59 inches, made it awkward for the miner to exit from the cab. When the miner bent down to pass under the rope, he lost his hard hat. Then, when he bent down to retrieve the hard hat, he leaned onto a severely corroded handrail chain. The chain broke, and the miner fell nearly 14 feet to the ground below. 39 FMSHRC at 2054.

MSHA conducted an accident investigation on July 25, 2016, and issued the following citations to the operator:

- Citation No. 9102709 alleged a violation of 30 C.F.R. § 77.1606(c)² because the handrail chain with defects affecting safety was not corrected before the equipment was used.

² 30 C.F.R. § 77.1606(c) provides that "[e]quipment defects affecting safety shall be corrected before the equipment is used."

- Citation No. 9102711 alleged a violation of 30 C.F.R. § 77.1601(a)³ because the same equipment's safety defects were not recorded in the pre-op record book on the second shift on July 7, 2016.
- Citation No. 9102710 alleged a violation of 30 C.F.R. § 77.1101(c)⁴ because the operator's plans for escape and evacuation did not include proper maintenance of adequate means for the exit of all areas where persons are required to work or travel.⁵

The MSHA inspector designated each violation as "significant and substantial" and the result of the operator's moderate negligence. With regard to gravity for each violation, the inspector designated the injury as "occurred," reasonably expected to result in lost work days or restricted duty, and one miner affected. As stated, MSHA proposed regular penalty assessments of \$4,548 each for Citation Nos. 9102709 and 9102711 and proposed a special assessment of \$68,300 for Citation No. 9102710.

B. Motion to Approve Settlement

The operator contested three citations. As stated above, the motion to approve settlement provided that the operator agreed to accept all aspects of Citation Nos. 9102709 and 9102711 as written and pay the \$4,548 regular penalty assessments for each citation. Additionally, the operator agreed to accept all aspects of Citation No. 9102710 as written, including negligence and gravity, and to pay \$13,644, a total reflecting the regular assessment calculated for all three citations. In the settlement motion, the Secretary agreed to apply the regular penalty assessment under 30 C.F.R. Part 100. Consequently, Solar Sources would accept the violation in its entirety and pay the regular penalty for the violation.

Regarding Citation No. 9102710, the motion asserted that there were factual and legal issues in dispute. These included the operator's contentions that the cited standard at 30 C.F.R. § 77.1101(c) related to emergency escapes and evacuations in case of fire, and thus arguably was

³ 30 C.F.R. § 77.1606(a) provides that "[m]obile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation" and that "[e]quipment defects affecting safety shall be recorded and reported to the mine operator."

⁴ 30 C.F.R. § 77.1101(a) requires operators to establish and keep current a specific escape and evacuation plan to be followed in case of a fire. In turn, the cited standard, 30 C.F.R. § 1101(c), provides that "[p]lans for escape and evacuation shall include the designation and proper maintenance of adequate means for exit from all areas where persons are required to work or travel including buildings and equipment and in areas where persons normally congregate during the work shift." There was no fire from which escape or evacuation was necessary.

⁵ The citation was abated by posting an evacuation plan for the truck, which instructed the driver to leave the cab by one of two doors, use the walkway outside the cab, and walk to the front of the truck to climb down the ladder to the ground. This was the only means of exit. SS Br. at 2-3.

not applicable to the cab of mobile equipment or to the circumstances of the violation, and that, in any event, a heightened special assessment was not justified. The Secretary asserted that the citation was valid as written, but agreed that the facts did not support the special assessment. Noting his interest in “maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement was not appropriate,” the Secretary maintained that the settlement was “reasonable” and served “to effect the intent and purpose of the Mine Act.”

On November 6, 2017, the Judge requested via email that the Secretary submit a copy of the MSHA inspector’s notes and photographs. The Secretary responded the same day declining the Judge’s request. On November 13, the Judge advised the parties that he could not properly review the settlement without the requested evidence and informed the parties that if the Secretary continued to withhold them, he would issue a denial of the proposed settlement. On November 15, the Secretary responded that he had reconsidered the Judge’s request and still declined to provide the demanded information, resting on his settlement motion.

C. The Judge’s Decision

In denying the motion to approve the settlement, the Judge stated that the parties provided “*no facts*” to support the settlement. 39 FMSHRC at 2052 (emphasis in original). The Judge held that “it is within the Court’s prerogative to require the Secretary to submit the [MSHA] inspector’s notes and photos, if the Court believes that such information is necessary in determining if a compromise or mitigation in a settlement motion is appropriate.” 39 FMSHRC at 2057.

Given the Secretary’s failure to provide the specifically demanded documents, the Judge opined that he lacked the ability to perform his “Congressionally delegated responsibility under 30 U.S.C. § 820(k).” *Id.* The Judge rejected the Secretary’s willingness to settle by applying its regular penalty formula. *Id.* at 2058. The Judge invited the Secretary to submit a “properly supported” motion, along with the requested documents. Otherwise, the case would be set for hearing.

D. Motion for Reconsideration and Request for Interlocutory Review

On January 18, 2018, the parties filed a Joint Motion to Reconsider Decision Rejecting Proposed Settlement. The parties noted that in *AmCoal Special Assessments I*, 38 FMSHRC at 1991, the Commission held that MSHA had unreviewable discretion as to whether to propose a regular or special assessment. The parties argued that Commission decisions supported the conclusion that MSHA’s decision to withdraw the special assessment is wholly within the agency’s discretion. The parties also argued that the Judge’s demand for the inspector’s notes and photographs raised policy concerns involving compromise of the Secretary’s litigation position should the case go to hearing. They explained that such evidence may reveal potential weaknesses in the Secretary’s case and that such information could likewise be required of the

operator, thereby compromising its litigation position and tainting the Judge's view of the issues in the case prior to hearing.⁶

On April 3, 2018, the Judge issued an order denying the parties' motion for reconsideration. The Judge acknowledged the parties' argument that the settlement motion detailed several factors in support, including the citation's issuance for a non-fatal accident, the parties' disagreement as to the applicability of section 77.1101(c), and the propriety of a special assessment, but concluded that these factors did not constitute facts and thus did not support the settlement. The Judge rejected the parties' argument that MSHA has unreviewable discretion to withdraw a special assessment. The Judge also dismissed the Secretary's policy concerns regarding his demand for the inspector's notes and photos asserted that any matters discussed in settlement could not be considered in a hearing on the merits and, in any event, such evidence would be discoverable.

On April 16, 2018, the parties filed a joint motion to certify the case for interlocutory review and a joint motion to suspend proceedings pending interlocutory review. The Judge granted both motions. On May 16, the Commission directed review of the case.

The Commission also stayed briefing pending its consideration of *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal Settlement I*"). On September 10, 2018, the Commission issued a briefing order directing the parties to address the Commission's decision in *AmCoal Settlement II*.

II.

Disposition

A. Parties' Arguments on Appeal

The parties argue that the Secretary possesses unreviewable discretion to withdraw a specially assessed penalty. They also argue that the Judge erred by requiring the Secretary to produce the inspector's notes and photographs during the settlement process and before the case proceeded to a hearing on the merits. They contend that the Judge abused his discretion by denying the settlement motion because of the Secretary's refusal to provide the requested documents and because the Secretary allegedly presented no facts to support the settlement. They assert that the Judge also erred by failing to apply the appropriate standard articulated by the Commission in *The American Coal Co.*, 38 FMSHRC 1972 (Aug. 2016) ("*AmCoal Settlement I*") and that the Commission's decision in *AmCoal Settlement II* mandates approval of the

⁶ The Secretary's argument appears to have been based on principle rather than on prejudice in this case. *See* Oral Arg. Tr. at 11, 50-52 (acknowledgment that the requested documents had been provided to the defendant in discovery). We note that there are other considerations here, including the fact that the documents in question would be reviewed without explanation, exposition, or cross-examination. As discussed *infra* at slip op. at 9-10, we disapprove of what amounts to a general discovery request by the Judge.

settlement in this case. They ask the Commission to vacate and reverse the Judge’s decision and approve the settlement motion.⁷

B. Standard of Review

The Commission reviews a Judge’s denial of a proposed settlement under an abuse of discretion standard. *Sec’y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014); *see also Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 475 (3d Cir. 2003) (“If an agency ‘announces and follows — by rule or by settled course of adjudication — a general policy by which its exercise of discretion will be governed,’ that exercise may be reviewed for abuse.”). An abuse of discretion may be found where there is no evidence to support the Judge’s decision or if the decision is based on an improper understanding of the law. *Shemwell*, 36 FMSHRC at 1101. In reviewing settlements, “the Commission and its Judges consider whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest.” *AmCoal Settlement I*, 38 FMSHRC at 1976.

C. The Judge’s Denial of the Settlement Motion Constituted an Abuse of Discretion.

Section 110(k) of the Mine Act sets forth the Commission’s authority to approve settlements of the Secretary’s proposed assessments once contested and provides:

No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission.
No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court.

30 U.S.C. § 820(k).

The Commission has concluded that under the clear language of section 110(k), “the Commission has the exclusive responsibility for approving all proposed settlements of contested civil penalties.” *AmCoal Settlement I*, 38 FMSHRC at 1975. The Commission explained that “Congress authorized the Commission to approve the settlement of contested penalties . . . ‘to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest.’” *Id.* at 1976 (quoting *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1862 (Aug. 2012)). In “effectuating this Congressional mandate, the Commission and its Judges consider whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest” (38 FMSHRC at 1976) and “must have sufficient information to fulfill their duty” (*AmCoal Settlement II*, 40 FMSHRC at 987). The Commission has required parties to submit facts supporting a penalty amount agreed to in settlement. This requirement is not limited

⁷ In the alternative, the Secretary asks the Commission to vacate the Judge’s settlement denial and remand the case to him to evaluate the motion under the appropriate legal standard.

to facts affecting the factors contained in section 110(i) of the Mine Act, but may also embrace facts outside of the section 110(i) factors that support settlement. *AmCoal Settlement I*, 38 FMSHRC at 1981-82.⁸

The parties contend that the Judge abused his discretion in denying their settlement. We agree. There are three principal errors in the Judge's decision denying the settlement:⁹

- (1) He failed to apply the standard articulated by the Commission in the *AmCoal* settlement cases.
- (2) He erred in denying the settlement solely based on the Secretary's refusal to provide a copy of the inspector's notes and photos.
- (3) He erred in finding that the Secretary failed to provide any facts to support the settlement.

Because the Judge erred in his analysis of the parties' settlement motion, he abused his discretion in denying the settlement motion. Thus, we reverse his decision and approve the settlement.

1. The Judge Erred by Failing to Apply the Correct Standard for Reviewing Proposed Settlements.

The Judge failed to apply the standard articulated by the Commission in *AmCoal Settlement I*.¹⁰ Not only did the Judge not mention *AmCoal Settlement I* at all in his decision but

⁸ Commission Procedural Rule 31 requires that a motion to approve penalty assessment include for each violation the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties. 29 C.F.R. § 2700.31(b)(1). Rule 31 also requires "[a]ny order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record." 29 C.F.R. § 2700.31(g).

⁹ The parties requested that the Commission determine whether the Secretary possesses unreviewable discretion to withdraw a specially-assessed penalty, and the Commission granted review of this issue. However, we conclude that the issue is not ripe for consideration in this case. From the record and statements made by the Secretary's counsel during oral argument, it appears that the Secretary has not filed a motion for leave to amend his petition for assessment of penalty, and therefore has not revised the proposed special assessment or re-proposed a new assessment. Rather, the parties have submitted a proposed settlement, which they support with the rationale that the special assessment was not appropriate and that a penalty calculated under MSHA's regular assessment formula would be fair and appropriate. We need not address this issue to resolve the ultimate question of whether the Judge abused his discretion in denying the settlement in this case, and decline to do so.

¹⁰ The Judge in this case was also the Judge whose decision we reviewed in *AmCoal Settlement I*.

he also failed to state the applicable standard for review of settlements as articulated by the Commission in that case. Moreover, he did not substantively comply with the *AmCoal Settlement I* standard of review in his decision denying the settlement.

By failing to apply the correct legal standard, the Judge neglected to consider significant factors the Commission has highlighted as relevant to the consideration of a proposed settlement. As more fully discussed herein, the motion actually presented relevant facts and potential litigation concerns in support of the settlement. The Judge failed to consider these factors and erroneously concluded that the parties presented no facts to support the settlement. In reviewing the settlement, he failed to apply the *AmCoal* standard and consider whether the proposed settlement was “fair, reasonable, appropriate under the facts, and protects the public interest.” Accordingly, the Judge erred.

Our decision in *AmCoal Settlement I* addressed on interlocutory review whether the Judge abused his discretion in denying the Secretary’s motion for settlement between the Secretary and the operator because the parties allegedly did not provide factual support for an across-the-board 30% penalty reduction for each of the 32 citations issued to AmCoal by the Secretary. 38 FMSHRC at 1972. The Commission held that it and its Judges review a settlement motion to determine “whether the settlement of a proposed assessment is fair, reasonable, appropriate under the facts, and protects the public interest.” *Id.* at 1976.

Agreeing in that case that the Secretary provided no facts to support the proposed penalty reductions, we affirmed the Judge’s denial of the motion to approve the settlement. *Id.* at 1985. In remanding the case to the Judge for further proceedings, the Commission noted that section 110(i) of the Mine Act identifies the bases for such factual support. *Id.* at 1981. Additionally, we further held that the parties may submit facts supporting a settlement that fall outside of the section 110(i) factors. *Id.* at 1982.

In his decision in this case, the Judge failed to articulate the standard he was applying in reviewing the settlement. The Judge summarily denied the settlement motion, incorrectly asserting that the motion presented “*no facts.*” 39 FMSHRC at 2057 (emphasis in original). The motion, though, did set forth numerous facts, including those agreed upon by the parties and a summary of the operator’s arguments as related to those facts. The Secretary also made what amounts to a binding admission that there was no factual basis for the original special assessment.¹¹

While Judges have the duty to consider the sufficiency of facts submitted in support of a settlement, the proper exercise of their discretion in doing so requires them to articulate with

¹¹ We recognize that one might argue that the Secretary’s agreement with Solar Sources that the penalty should have been regularly assessed rather than specially assessed arose in the context of settlement. However, there is no indication in the Secretary’s pleadings before the Judge or the Commission that his agreement was “for purposes of settlement.” Rather the agreement that a regular assessment was appropriate is set forth as a straightforward statement of fact.

some particularity any deficiencies against the standard we set forth in *AmCoal Settlement I*. That was not done so here. In particular, the Judge did not explain what type of facts he deemed necessary in order to review the settlement properly. He simply stated that it was his “prerogative to require the Secretary to submit . . . such information [he deems] is necessary in determining if a compromise or mitigation in a settlement motion is appropriate.” *Id.* at 2057.

In requesting specific documents, the Judge did not explicitly identify any missing facts, explain why the documents he demanded were necessary under the *AmCoal Settlement I* standard, or otherwise provide a rational basis for his request. Not only did his order fail to apply the Commission’s *AmCoal* settlement decisions, those cases — the controlling precedent on this issue — were not mentioned at all in his order denying settlement.¹²

2. The Judge Erred by Denying the Proposed Settlement Based Solely on the Secretary’s Refusal to Produce the Inspector’s Notes and Photos.

The Commission has held that a Judge who properly determines that a settlement motion lacks sufficient information may permissibly request further facts from the parties. *See Black Beauty*, 34 FMSHRC at 1863. Ultimately, the facts presented must be sufficient to permit the Judge to determine if the penalty reduction protects the public interest. However, requesting additional facts is different from requesting specific documentary evidence, as the Judge did here. At the pre-hearing settlement stage of a Commission proceeding, no evidence has been adduced into the record and the Judge is not required to engage in fact finding. Rather, the Judge is expected to consider the facts as alleged by the parties in their settlement, evaluate such information under the applicable Commission standard for review, and determine whether the facts support the penalty agreed to by the parties. *See* Commission Procedural Rule 31, 29 C.F.R. § 2700.31.

Similar to the Judge’s error in concluding that the Secretary presented no facts, the Judge likewise erred by denying the settlement on the basis that he was not provided specific documents.

The Judge’s review of the settlement was overly stringent. The Secretary agreed to reduce the proposed assessment by withdrawing it from the special assessment procedure without changing any of the underlying findings of the citation, thereby causing the Judge to question the basis of the decision to withdraw the high dollar penalty. However, the Secretary’s decision was not devoid of reason as the Judge purported. Rather, the Secretary pointed to numerous factors that influenced and informed his settlement decision. We do not agree with the Judge’s characterization that the Secretary’s refusal to provide the documents amounted to a failure to provide any facts to support the proposed penalty reduction. As the Commission has identified, facts can be an agreement of the parties that they disagree about certain aspects of the violation or proposed penalty. *AmCoal Settlement II*, 40 FMSHRC at 991. The parties are not

¹² The Judge was obviously aware of the Commission’s decision in *AmCoal Settlement I* because the Commission’s initial decision setting forth the applicable standard was remanded to him more than a year before the motion and denial in the present case.

required to make concessions, as long as they “provide mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest.” *Id.* The Judge should have considered and addressed these facts in his decision.

While the Judge may identify gaps in the parties’ explanations or specific information he may need to review and approve the settlement, he erred here by directing the Secretary to submit specific documents and denying approval of the settlement based on the Secretary’s refusal to supply such documents.

3. The Judge Erred By Finding that the Motion Lacked Facts to Support the Settlement.

While we could remand the case to the Judge to apply the correct standard and correct his legal errors, as noted above, we conclude that remand is unnecessary because the parties presented sufficient facts to support that the settlement is fair, reasonable, appropriate, and serves the public interest. Thus, we reverse the Judge’s denial of the settlement and approve the settlement.

The Judge summarily stated that the settlement motion, which proposed the application of the regular assessment, was “without explanation,” providing “no new facts . . . while simultaneously not changing any of the underlying findings in the citation.” 39 FMSHRC at 2058. Review of the motion refutes this and makes clear that the Judge simply disregarded the facts and arguments set forth in support of the settlement motion.

During settlement negotiations, the parties disagreed as to the applicability of the cited standard, 30 C.F.R. § 77.1101(c). Section 77.1101(c) falls under Subpart L of MSHA’s regulations, entitled “Fire Protection,” a topic with no apparent connection to the defective chain that resulted in an injury in this incident.¹³ Subsection (a) of section 77.1101 provides that “each operator of a mine shall establish and keep current a specific escape and evacuation plan to be followed in the event of a fire.” Section 77.1101(c) is a further provision to assure the efficient implementation of escape and evacuation plans when necessary. The parties acknowledged a dispute over whether the regulation is aimed at (1) mobile vehicles — that is, preparing drivers how to get out of their trucks by going out one of only two doors — or (2) establishing general maintenance obligations for mobile vehicles.

Additionally, settlement focuses upon the fact that the violations all involved the same truck, and more specifically, maintenance of the truck in a condition free from safety defects. The other two citations involved in this proceeding arise from standards directly related to the standing duty to inspect mobile equipment and repair safety defects.

¹³ There was no fire, and we cannot perceive that training consisting of instruction to exit the cab and descend from the vehicle via the only feasible means of egress would have been helpful to the miner in this case.

Section 77.1606(a) provides, “Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator.” 30 C.F.R. § 77.1606(a).

Section 77.1606(c) provides, “Equipment defects affecting safety shall be corrected before the equipment is used.” 30 C.F.R. § 77.1606(c).

These sections under Subpart Q address “Loading and Haulage” and clearly are applicable to the mobile equipment that is the subject of the citations. They explicitly require the inspection of mobile equipment and the repair of any defects affecting safety before use. In addition to arguments over whether section 77.1101 is applicable in the first place, this commonality creates the possibility of an argument that the citations for violation of the directly applicable regulation are primary and a citation under section 77.1101(c) is duplicative or “piling on” of citations.¹⁴

While the Secretary asserts that the citation was proper but agrees the penalty should have been regular, he also concedes he would bear the burden of demonstrating the applicability of the fire protection standard for escape and evacuation in addition to the other directly-applicable standards. Further, he would need to establish the basis for a heightened penalty, and he would bear the burden of doing this in a context where he assessed the directly-applicable standards as regular assessments. Moreover, the Secretary highlighted the enforcement benefits from the operator accepting the citations as written, with no changes to the findings.

Even were the Secretary completely confident of success in sustaining the violation, therefore, the parties have stated a substantial reason for accepting the settlement. All penalty criteria of the three alleged violations are identical, including the negligence and gravity findings. The assessed penalties of the other two violations are regular penalties for alleged violations of sections that are directly applicable to the incident. The Secretary alleges “moderate” negligence for all three citations. Moreover, the incident involved in the citation did

¹⁴ Section 77.1101(c) requires the “designation and proper maintenance of adequate means for exit” in a fire evacuation plan. In essence, the operator is being cited for the same conduct or omission for this citation as for the failure to correct the defective handrail chain citation and failure to inspect mobile equipment citation. The only abatement taken for this evacuation plan citation was to instruct the truck driver to exit from the only means available and to post this exit plan. Hence, the operator was not required to take any further actions to either “designate” or “maintain” an adequate means of exit beyond what the operator was already doing as a general practice. Furthermore, the operator repaired the defective handrail chain in abating the failure to correct citation. Thus, there was no further action taken to “maintain” the means of exit. The Commission has found that when an operator is cited for both general and specific standards involving the same facts, the general citation is duplicative. *See Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1004-05 & n.12 (June 1997) (“Had MSHA put on evidence of additional deficiencies that violated the general regulation, instead of relying on the identical evidence . . . used to support the violation of the specific standard, we would not have found them duplicative.”).

not arise in the context of an escape or evacuation — the type of event that section 77.1101(c) addresses.

Abatement of the alleged violation of section 77.1101(c) did not involve repair, modification, or work on the end dump. Instead, the operator abated the violation by posting instructions regarding how to exit the cab. The abatement had nothing to do with the event that caused the injury and the failure to have an escape plan telling the operator to go through a door did not play any role in the accident or injury. Therefore, the Secretary has agreed that the alleged violation supports only a regular penalty — the same penalty the Secretary proposed for the alleged violations of directly applicable sections 77.6016(a) and (c).

Under these circumstances, it is entirely reasonable for the Secretary to settle for the penalty he deems appropriate,¹⁵ obtaining the same penalty he seeks for the directly applicable sections, while avoiding the risk of trial on an alleged violation that faces legal challenges, and securing a result valuable for future enforcement purposes. The Judge should have considered all these factors. In *AmCoal Settlement II*, the Commission explained that the Judge must “accord due consideration to the entirety of the proposed settlement package, including its monetary and non-monetary aspects.” 40 FMSHRC at 989 (quoting *Sec’y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC at 1103). The Commission recognized that significant non-monetary value flows from “accepting the citations as written.” *AmCoal Settlement II*, 40 FMSHRC at 989. Accordingly, the Judge erred by not taking into consideration the foregoing factors submitted by the parties in support of the settlement. His failure to do so led to the denial of a settlement in which the Secretary essentially would receive everything to which he now asserts entitlement.

In summary, in the proposed settlement the Secretary accepts a penalty he now agrees is appropriate and prevails for all three citations on the findings of violation, negligence, and gravity without a hearing, and obtains future enforcement benefits. We hold that the Secretary has demonstrated that the settlement is fair, reasonable, appropriate under the facts, and protective of the public interest. There is no logical reason to deny acceptance of the settlement, and we reverse the Judge’s decision and approve the settlement.

¹⁵ Essentially, the Secretary is stating that he is not making a concession on the penalty amount but rather is acknowledging that, especially in light of the other assessments, he is obtaining the appropriate penalty for an alleged violation that could have an uncertain fate at hearing.

III.

Conclusion

The Judge abused his discretion in denying the settlement as stated in this decision. For the foregoing reasons, we reverse the Judge's decision and approve the settlement.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

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

Commissioners Jordan and Traynor concurring, in part, and dissenting, in part:

We concur with our colleagues in concluding that the Judge abused his discretion when he failed to review the terms of the proposed settlement agreement according to the standard articulated in *AmCoal Settlement I*, 38 FMSHRC 1972, 1976 (Aug. 2016). We also concur with their finding that under the proceeding's current posture, we are not able to review whether the Secretary has the ability to withdraw a specially-assessed penalty.

Furthermore, we would find that the Judge's act of sending an email to the parties threatening denial of their settlement motion as a sanction for refusing to comply with his request for the inspector's relevant notes and photographs was an abuse of his discretion. 39 FMSHRC 2052, 2055 (Nov. 2017) (ALJ). While we believe that a Judge has the discretion to request information from the parties, a Judge must always review the parties' motion to approve settlement under the *AmCoal Settlement I* standard in good faith.

However, we write separately specifically because we disagree with our colleagues' ultimate conclusion: that the parties have demonstrated that their settlement "is fair, reasonable, appropriate under the facts, and protective of the public interest." Slip op. at 12-13.

The motion to settle the proposed penalty of \$68,300 for Citation No. 9102710 for a \$4,548 penalty contains minimal factual support beyond Solar Sources' agreement to accept the citation as written. In the motion, the Secretary makes the cursory assertion that "the facts do not support the special assessment and the citation should have been regularly assessed," but fails to identify any particular facts or circumstances explaining why the 93% penalty reduction comports with the *AmCoal Settlement I* standard. Mot. at 3.

The majority has surmised a variety of reasons as to why, nevertheless, the settlement *might be* fair, reasonable, appropriate, and protective of the public interest. For example, the majority suggests that Solar Sources may have argued to the Judge that the section 77.1101(c) citation is duplicative of another citation at issue. Slip op. at 11. Yet, the settlement motion is devoid of any reference to a duplicative argument.

Moreover, the motion does not contain the majority's nuanced analysis of whether the requirements of section 77.1101(c) apply to mobile vehicles. Instead, the motion only contains the generic representation, common among settlement agreements, that the operator does not believe that the safety standard applies to the equipment at issue.

Section 110(k) of the Mine Act provides that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). Congress vested this power within the Commission "[i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest" and to prevent the unwarranted penalty compromises that had previously occurred as a result of off-the-record settlement negotiations. *AmCoal Settlement I*, 38 FMSHRC at 1976. Section 110(k) and Commission Procedural Rule 31 (governing settlements) require that motions to approve settlement agreements are to be presented on the record with factual support of the penalty agreed to by the parties.

We dissent from the majority's disposition because we believe that the proper disposition for this proceeding is to vacate the Judge's decision and remand the proceeding so that he may properly consider a settlement motion, including both the monetary and non-monetary aspects of the parties' agreement. We would advise the parties to revise their motion so that it contains a reasoned explanation, commensurate with the reduction in penalty, as to why their proposed settlement complies with the *AmCoal Settlement I* standard.¹

On remand, the parties would be free to avail themselves of the assistance of one of the Commission's settlement counsels if they believe that disclosure of any specific information or argument would prejudice their case or would otherwise undermine the enforcement goals of the Mine Act.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

¹ For example, if the parties have agreed to reduce the penalty because this is the first time that the requirements of 30 C.F.R. § 77.1101(c) have been applied to a rock truck, as Solar Sources represents in its brief to the Commission, that is a fact that should be presented to the Judge in the settlement motion. R. Br. at 8-9.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 7, 2019

PETE TARTAGLIA, JR.

v.

FREEMPORT-MCMORAN BAGDAD, INC.

Docket No. WEST 2018-362-DM

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, 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 March 14, 2019, the Commission received a letter from Pete Tartaglia, Jr., a pro se complainant, essentially requesting review of the Judge’s decision approving the settlement in this discrimination proceeding. On October 9, 2019, Freeport-McMoRan Bagdad Inc. (“FMBI”) filed a motion for clarification from the Commission regarding Tartaglia’s filing and the status of this case.

On October 11, 2019, the Commission issued an order instructing Tartaglia to file a response to FMBI’s motion, if any, by October 22, 2019. On October 16, 2019, Tartaglia filed a response alleging that counsel for the operator had engaged in fraud. On October 22, 2019, counsel for FMBI filed an Amended Motion for Sanctions requesting that the Commission strike Tartaglia’s response from the record and impose sanctions on him.

At the conclusion of the hearing in this proceeding, the parties entered into an agreement in principle and put the terms of the agreement into the record under seal. 41 FMSHRC 47 (Feb. 2019) (ALJ). However, the record does not contain a written agreement. On January 14, 2019, after prompting from FMBI, the Judge issued an order directing Tartaglia to inform the Judge whether he intended to comply with the terms of the settlement or file a post-hearing brief so the Judge could render a decision on the merits. When no response was filed within the directed time frame, FMBI filed a motion to enforce the agreement and file the hearing transcript under seal. Tartaglia responded to FMBI’s motion to enforce indicating that he was not complying with the settlement agreement and alleging that FMBI was wrongfully taking money from his pay due to an alleged overpayment in order to satisfy the terms of the agreement in this case.

On February 11, 2019, the Judge issued a decision approving settlement, concluding that the parties had entered into an enforceable and binding settlement agreement, and rejecting Tartaglia’s claims of alleged fraud as irrelevant and unrelated to the terms of the settlement and his section 105(c)(3) complaint. The Judge directed Tartaglia to comply with the terms of the settlement agreement and dismissed the proceeding. *Id.*

We are guided here by the Commission's decision in *Transit Mixed Concrete Co.*, 13 FMSHRC 175 (Feb. 1991). In that case, the Secretary requested that the Commission amend the administrative law judge's decision approving settlement or issue a supplemental decision approving the parties' settlement of a citation that was omitted from the original decision approving settlement. *Id.* at 175. The Secretary had not filed a timely petition for discretionary review and the Judge's decision had become a final order. The Commission construed the Secretary's request as a request for relief from a final Commission order and incorporated by implication the Secretary's request as a late-filed petition for discretionary review. Relying on Fed. R. Civ. P. 60(b), the Commission reopened the matter and proceeded to consider the Secretary's substantive request for relief. *Id.* at 176.

Here, the Judge's jurisdiction over this case terminated when he issued his decision approving settlement on February 11, 2019. 29 C.F.R. § 2700.69(b). 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). Tartaglia's request was received by the Commission on March 14, 2019, after the time for filing a PDR had passed. The Judge's decision became a final order on March 25, 2019.

The Commission has ruled that relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b). 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *e.g.*, *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). The Commission has held that in appropriate circumstances, it may, in its discretion, reopen one of its proceedings pursuant to Fed. R. Civ. P. 60(b)(6) upon a proper showing that an underlying settlement agreement approved by the Commission has been materially breached or repudiated. *See Johnson v. Lamar Mining Co.*, 10 FMSHRC 506, 508 (Apr. 1988). We deem Tartaglia's submission as a request for relief from a final Commission order, in accord with our precedents.

The parties' submissions raise issues that are not directly or fully addressed in the current record, including the validity of the settlement and alleged misconduct. We are unable to evaluate the merits of these assertions and Tartaglia's request based on the current record. Without expressing any view regarding the merits of Tartaglia's claims, in the interest of justice, we reopen the proceeding and remand the matter to the Judge, who shall determine whether relief from the final order is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990). The Judge shall also address the question of whether sanctions against any party are appropriate.

For the foregoing reasons, this case is remanded to the Judge for appropriate proceedings.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004

September 4, 2019

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

v.

THE MONONGALIA COUNTY COAL
COMPANY, successor to
CONSOLIDATION COAL COMPANY,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. WEVA 2015-0074
A.C. No. 46-01968-361667

Docket No. WEVA 2015-0425
A.C. No. 46-01968-371547

Docket No. WEVA 2015-0473
A.C. No. 46-01968-373553

Mine: Monongalia County Mine

DECISION APPROVING SETTLEMENT

Before: Judge Feldman

The captioned civil penalty proceedings are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (“the Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006 (“Act,” “Mine Act,” or “New Miner Act”), 30 U.S.C. § 815(d), against the Respondent, Monongalia County Coal Company (“Monongalia”). The captioned proceedings concern citations/orders issued for alleged violations of the Secretary’s mandatory safety standard in 30 C.F.R. § 75.400 that prohibits mine operators from allowing combustible materials to accumulate in active workings. The Secretary had sought to rely on these alleged violations of section 75.400 as predicates to demonstrate a “repeated” flagrant violation under a “broad” analysis. These matters had been scheduled for hearing on September 10, 2019 in the vicinity of Morgantown, West Virginia. The Secretary has now filed a joint motion to approve settlement.

The flagrant provisions of section 110(b)(2) of the Mine Act provide:

Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000. For purposes of the preceding sentence, the term “flagrant” with respect to a violation means a reckless or *repeated failure* to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2) (emphasis added).

As previously explained by me in a related matter:

In *American Coal Company*, the Commission crafted two interpretations of the “repeated” language in section 110(b)(2), one “narrow” and one “broad.” *American Coal Co.*, 38 FMSHRC 2062 (Aug. 2016). Under the “narrow” interpretation, a violation can be designated as flagrant if the duration of the violation, without regard to a history of violations, is sufficient to warrant a “repeated” designation. *Id.* at 2065. Thus, the Commission's “narrow” interpretation of the flagrant provisions of the Act concerns a discrete ongoing violation. *Id.* In contrast, the Commission articulated that its “broad” approach involves a recurrent-type violation analysis, i.e., analysis of several discrete yet similar violations. *Id.* This approach allows for a “repeated” flagrant violation based on a relevant history of similar violations.

Secretary of Labor v. Monongalia County Coal Co., 40 FMSHRC 1234, 1235 (July 2018) (ALJ) (“*Monongalia*”).

As noted above, the captioned proceedings concern accumulation violations that the Secretary alleges are predicates under a “broad” analysis to support the Secretary’s alleged “repeated” flagrant” accumulation violation of section 75.400, cited in Order No. 8059209 in Docket No. WEVA 2015-0632. *Id.* The captioned matters were consolidated with *Monongalia* and stayed on May 12, 2016, pending a final decision in *Secretary of Labor v. Oak Grove Resources*, 38 FMSHRC 957 (May 2016) (ALJ) (“*Oak Grove*”). The repeated flagrant designation in *Oak Grove* was subsequently deleted by an interlocutory order on June 1, 2015. *See Oak Grove*, 38 FMSHRC 957, 960; Order Deleting Flagrant Designation, 37 FMSHRC 1312 (ALJ). When neither the interlocutory order nor the decision after hearing was appealed, *Oak Grove* became final. Consequently, the stay in *Monongalia* was lifted on June 14, 2016. Severance Order and Prehearing Order, 38 FMSHRC 1573 (ALJ). However, the stay of the captioned predicated proceedings remained in effect. *Id.*

A hearing in *Monongalia* was conducted in March 2017. The post-hearing decision found that the violation was “repeated,” based on a narrow analysis given the discrete nature of the accumulation violation with regard to its extensiveness and its repeated references in onshift examination books. However, the flagrant designation in *Monongalia* was deleted because the evidence failed to establish that the cited accumulations could be reasonably expected to proximately cause serious bodily injury or death as contemplated by the flagrant provisions of section 110(b)(2) of the Act. 40 FMSHRC at 1257. The Secretary’s appeal of *Monongalia* is currently before the Commission. Unpublished Direction for Review (Sept. 6 2018).

Following the initial decision on the merits in *Monongalia*, conference calls were conducted on October 2, and December 4, 2018 to determine if the stay of the captioned proceedings should be lifted. The parties expressed their desire to continue the stay pending the resolution of the *Monongalia* appeal. The Secretary filed a motion in support of the continuation of the stay on November 6, 2018, and a supplemental brief in support of the stay on January 16, 2019.

Given its unopposed nature, a ruling on the parties' request to continue the stay had been held in abeyance. However, on May 22, 2019, I denied the Secretary's Motion to Continue the Stay in the captioned proceedings, finding no basis for further delaying the disposition of the 104(d) orders that are the subjects of the captioned matters. The stay was lifted, as the finding of a "repeated" violation based on a "narrow" analysis mooted the Secretary's reliance on predicates to support a "broad" analysis.

Despite the fact that the cited accumulation violations in 104(d) citation/order Nos. 8052882, 8052909, and 8059200 are indicative of moderately low gravity in that the violations pose hazards that are reasonably expected to result in injuries requiring no more than lost workdays or restricted duty, the Secretary has alleged that the subject predicate violations satisfy the requirements for a flagrant violation. *Monongalia*, 40 FMSHRC at 1258 n.14. As noted below, the parties now agree to settlement terms that reduce the initial total civil penalty from \$120,100.00 to \$40,500.00. The reduction in civil penalty is based on modifying the type of action from 104(d) Order Nos. Nos. 8052910 and 8059203 to 104(a) citations to reflect that the cited inadequate belt examinations were not attributable to unwarrantable failures, and to reduce the penalties for all five alleged violations. The reduction in proposed penalty is further supported by the Secretary's apparent acknowledgment of the low to moderate gravity with respect to the accumulation violations specified in citation/order Nos. 8052882, 8052909, and 8059200. The settlement amounts are:

Citation/Order Number	Proposed Penalty	Settlement Amount
WEVA 2015-0074		
8052882	\$30,200.00	\$9,300.00
Subtotal:	\$30,200.00	\$9,300.00
WEVA 2015-0425		
8052909	\$35,500.00	\$10,400.00
8052910	\$12,900.00	\$5,200.00
Subtotal:	\$48,400.00	\$15,600.00
WEVA 2015-0473		
8059200	\$27,900.00	\$10,400.00
8059203	\$13,600.00	\$5,200.00
Subtotal:	\$41,500.00	\$15,600.00
TOTAL:	\$120,100.00	\$40,500.00

ORDER

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED. IT IS ORDERED** that Order Nos. 8052910 and 8059203 are modified to 104(a) citations. It is **FURTHER ORDERED** that the operator pay a penalty of \$40,500.00 within 30 days of this order.¹ This case **IS DISMISSED** upon timely receipt of the civil penalty. In view of the above, it is **ORDERED** that the previously scheduled hearing is cancelled.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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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. Please include the Docket No. and A.C. No. noted in the above Caption on the payment check. Pay online: www.pay.gov

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 10, 2019

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

v.

HOFFMAN CONSTRUCTION
COMPANY, INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2019-0180
A.C. No. 47-03717-483719

Mine: Highway 53

DECISION AND ORDER

Appearances: Suzanne F. Dunne, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner

Gary Kaas, Hoffman Construction Company, Inc., Black River Falls, Wisconsin, for the Respondent

Before: Judge Rae

I. INTRODUCTION

A. Statement of the Case

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor (“the Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d). At issue is one citation issued to mine operator Hoffman Construction Company, Inc. (“Hoffman”) under section 104(a) of the Mine Act.

A hearing was held in La Crosse, Wisconsin on August 6, 2019, at which time testimony was taken and documentary evidence was submitted. The parties made closing statements in lieu of filing post-hearing briefs. Tr. 61.¹ I have reviewed all of the evidence at length and have cited to the testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness.

¹ In this decision, the abbreviation “Tr.” refers to the transcript of the hearing. The Secretary’s exhibits are numbered Ex. S-1 to S-11. The Respondent’s exhibits are numbered Ex. R-1 to R-4.

After consideration of the evidence and observation of the witnesses and assessment of their credibility, I uphold the section 104(a) citation as written for the reasons set forth below.

B. Stipulations

The parties have stipulated to the following facts:

1. Hoffman is an “operator” as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the mine at which the citation at issue in these proceedings was issued.
2. Highway 53 mine, MSHA I.D. No. 47-03717, operated by Sand Products, WI, LLC, is subject to the jurisdiction of the Mine Act.
3. Hoffman is an operator at the Highway 53 mine, MSHA I.D. No. 47-03717.
4. At all relevant times, the products of the Highway 53 mine, MSHA I.D. No. 47-03717, entered commerce or are products that affect commerce, within the meaning of the Mine Act, 30 U.S.C. §§ 802(b), 803.
5. Hoffman is subject to the jurisdiction of the Mine Act, 30 U.S.C. § 801 et seq.
6. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815, 823.
7. 30 C.F.R. § 56.9300(a) is a mandatory health or safety standard as that term is defined in section 3(l) of the Mine Act, 30 U.S.C. § 802(l).
8. The assessed penalties, if affirmed, will not impair Hoffman’s ability to remain in business.
9. The individual whose signature appears in Block 22 of the citation at issue in these proceedings was acting in her official capacity and as an authorized representative of the Secretary when the citation was issued.
10. A duly authorized representative of the Secretary served the subject citation and any termination thereof upon the agent of the Respondent at the date and place stated therein, as required by the Mine Act, and the citation and termination may be admitted into evidence to establish its issuance.
11. The exhibits to be offered by Hoffman and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

12. The citation contained in Exhibit A attached to the Petition for Assessment of Penalty for this docket is an authentic copy of the citation at issue in this proceeding with all appropriate modifications and terminations, if any.

Jt. Ex. 1.

II. BACKGROUND

The citation at issue in this proceeding (No. 9380863) was written by MSHA inspector Mindy Meierbachtol² on September 26, 2018 during a spot inspection of the Highway 53 mine—a sand mine in Wisconsin where Hoffman is an operator. Tr. 9; Ex. S-1. Meierbachtol was accompanied on the inspection by Rufus Taylor,³ another MSHA inspector. Tr. 9. During the inspection, Meierbachtol observed a road without a berm and began taking photographs of the condition. Tr. 10-12; Ex. S-3, S-4, S-5, S-6. Meierbachtol noted that 75 feet of the road lacked a berm, and measured the drop off the side of the road as being between 7 and 10 feet in height. Tr. 13, 19, 36. Additionally, this drop-off contained a slope that Meierbachtol measured as having a 2-to-1 ratio—meaning that for every 2 feet of horizontal distance from the roadway, the slope would drop vertically by 1 foot. Tr. 13-14. Meierbachtol issued the citation to Hoffman shortly after taking measurements and photographs. Subsequently, a site foreman from Hoffman arranged for a bulldozer to build a berm so that the citation could be terminated. Tr. 55; Ex. S-7, S-8, R-2. The citation was terminated after approximately 30 to 40 minutes. Tr. 37.

III. LEGAL PRINCIPLES

A. Significant and Substantial

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

In *Mathies Coal Company*, the Commission set forth the following four-part test to determine whether a violation is properly designated significant and substantial:

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

² Meierbachtol has been a MSHA inspector for approximately seven years, and also serves as a special investigator with the agency. Tr. 8, 9. Before becoming an inspector, Meierbachtol had a detail in the safety division at MSHA headquarters. Tr. 9. Meierbachtol also holds a master’s degree in safety science, with an emphasis on occupational and aviation safety, and graduated from the National Mine Academy. Tr. 8.

³ Taylor has been a MSHA employee for approximately four years. Tr. 53.

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

6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988); *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1075 (D.C. Cir. 1987).

The Commission has stated that the focus of the *Mathies* analysis “centers on the interplay between the second and third steps.” *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). The second step “addresses the extent to which the violation contributes to a particular hazard” and “is primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed.” *Id.* Thus, the second step requires the judge to first identify the hazard, which the Commission defines “in terms of the prospective danger the cited safety standard is intended to prevent,” then determine whether the violation sufficiently contributed to this hazard by considering “whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard.” *Id.* at 2038. At the third step, the judge must determine whether the occurrence of the hazard would be reasonably likely to result in injury, assuming the hazard were to occur. *Id.*

The significant and substantial determination must be based on the particular facts surrounding the violation at issue. *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); *see also Wolf Run Mining Co.*, 36 FMSHRC 1951, 1957-59 (Aug. 2014). Evaluation of the reasonable likelihood of injury should be made assuming “continued normal mining operations,” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984), i.e., the evaluation should be made “in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff’d sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989). The inspector’s judgment is also an important element of the significant and substantial determination. *Wolf Run*, 36 FMSHRC at 1959; *Mathies*, 6 FMSHRC at 5.

B. Gravity

Although the gravity of a violation and the significant and substantial nature of a violation and are not synonymous, they are frequently based on the same or similar factual circumstances. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987) (citing 30 U.S.C. §§ 814(d), 820(i)). The Commission generally expresses gravity as the degree of seriousness of the violation. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The Commission has pointed out that the focus of the gravity inquiry “is not necessarily on the reasonable likelihood of serious injury, which is the focus of the [significant and substantial] inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation*, 18 FMSHRC at 1550; *cf. Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that some violations are serious notwithstanding the likelihood

of injury, such as a violation of an important safety standard, a violation demonstrating recidivism or defiance by the operator, or a violation that could compound the effects of other conditions).

C. Negligence

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Secretary's regulations, an operator is held to a high standard of care. 30 C.F.R. § 100.3(d). Operators must be wary of conditions and practices that could cause injuries, and are required to take the necessary precautions to prevent or correct those conditions or practices. *Id.* The Secretary defines moderate negligence as having occurred in connection with a violation when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* § 100.3(d), Table X. The Commission generally assesses negligence by considering what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the cited regulation would have taken under the circumstances. *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016); *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015) (explaining that Commission ALJs "may evaluate negligence from the starting point of a traditional negligence analysis" rather than adhering to the Secretary's Part 100 definitions); *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Fact of Violation

Citation No. 9380863 states that Hoffman's failure to provide a berm for approximately 75 feet of mine floor roadway constituted a violation of 30 C.F.R. § 56.9300(a).⁴ Ex. S-1, R-1. The fact of violation has been conceded by Respondent and is not at issue in this proceeding. Tr. 7-8, 59-60. The Secretary assessed the violation as significant and substantial, of moderate negligence, and reasonably likely to result in injuries to one person that cause lost workdays or restricted duty. Ex. S-1, R-1. The civil penalty proposed by the Secretary is \$319.00. Ex. S-11.

B. Significant and Substantial Designation⁵

Inspector Meierbachtol designated Respondent's failure to create a berm on the mine floor road as a significant and substantial violation. Respondent disputes the significant and substantial designation, yet fails to make any specific arguments negating the elements of the *Mathies* test. Tr. 7-8, 57-60, 64-65. I find that this violation meets the four elements of the

⁴ This regulation mandates that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a).

⁵ Hoffman raised concerns about the significant and substantial classification being considered a "willful and blatant disregard for the [safety] standard." Tr. 64. The Court wants to make clear that the significant and substantial classification does not denote reckless disregard, which is instead attributable to an unwarrantable failure to comply with a mandatory standard.

Mathies test and therefore, I uphold the Secretary's characterization of the violation as significant and substantial.

First, Hoffman violated section 56.9300(a), a mandatory safety standard, when it failed to build a berm on the 75-foot section of road at issue. The parties have stipulated that section 56.9300(a) is a mandatory safety standard. Jt. Ex. 1.

Second, this violation created a measure of danger to safety. Section 56.9300(a) is intended to prevent vehicles from over-traveling the roadway, overturning, and the resultant injuries to operators. *See Black Beauty Coal Co.*, 34 FMSHRC at 1741; *see also Lakeview Rock Prods.*, 33 FMSHRC 2985, 2988-89 (Dec. 2011).

Here, the lack of berm contributes substantially to the over-traveling and overturning hazard. The large articulating haul trucks⁶—which tend to be unstable due to their separate cab and dump-end components—were using the unprotected roadway many times in the days preceding the inspection.⁷ Tr. 17, 21, 23, 34. These haul trucks were driving close to the edge of the roadway, as evidenced by the number of tire tracks Meierbachtol photographed mere feet from the unprotected drop-off. Tr. 14-16, 33; Ex. S-3, S-6. Further, 75 feet of the roadway lacked a berm, and the drop-off was between 7 and 10 feet in height with a steep 2-to-1 ratio. Given these facts, I find the Secretary has shown that the berm violation contributed to the identified hazard.

With respect to the third and fourth steps of *Mathies*, there is a reasonable likelihood that—assuming continued normal mining operations—a serious injury to a haul truck operator would result if a haul truck over-traveled the roadway. As Meierbachtol noted in her testimony, the 7 to 10-foot drop-off could reasonably cause a haul truck operator that over-traveled the roadway to be thrown about the cabin of the truck and receive injuries, including broken bones. Tr. 20; *cf. Black Beauty Coal Co.*, 34 FMSHRC at 1743 (“[S]ubstantial evidence supports the judge’s conclusion that if a vehicle veered off the road, it is reasonably likely to result in injury.”). In sum, I find that the hazard contributed to by the lack of berm was reasonably likely to result in a reasonably serious injury to haul truck operators.

In conclusion, after considering all the facts presented by the Secretary, including the height and grade of the drop-off, frequency of use of the unprotected roadway for active mining, and the size and nature of the articulating haul trucks, I find that the violation satisfies the *Mathies* test and was properly designated as significant and substantial.

⁶ Meierbachtol noted that these trucks could haul approximately 40 tons of material and had a mid-axle height of 36 inches. Tr. 21, 36-37.

⁷ Despite Hoffman’s argument that trucks using the roadway were only involved in construction of the roadway itself, the facts make clear that road construction had finished and that the haul trucks were using the road in furtherance of active mining operations. Tr. 18, 24, 32-33, 40-41, 44.

C. Negligence / Gravity

The roadway Meierbachtol cited is part of a circular route used by haul trucks at the mine. Tr. 54. Empty haul trucks travel via the cited roadway to reach the active mining area, where the trucks are loaded with material. Tr. 19, 32, 40, 54. After being loaded, the haul trucks then take another road to the wash plant, where the trucks dump the material. Tr. 19, 32, 38.

Hoffman argued that the road was still under construction and therefore, the berms had not yet been built. Tr. 24, 39, 44, 48, 50-51. Hoffman raised this—not for the purpose of contesting the violation—but to underscore its belief that it is a safe company and did not recklessly endanger its miners. Tr. 23-24, 57-60, 64-65. However, Hoffman also admitted that active mining had been underway in the days preceding the inspection, and that empty haul trucks traveled on the roadway at issue multiple times per day up until Meierbachtol issued the citation. Tr. 17-18, 23, 34, 41-42, 44, 54.

At one point during the hearing, Hoffman stated that the haul trucks using the road during Meierbachtol's inspection were actually constructing the berm by bringing in material. Tr. 24, 44-46, 48-51. However, this argument is specious, as both Meierbachtol and Taylor testified that the trucks were empty and were not carrying material to be used for construction. Tr. 17, 38, 54. In addition, the bulldozer that was called in by Hoffman's foreman to build the berm and terminate the citation was brought in from another location. Tr. 54-56. Hoffman did not bring material in from another part of the mine to build the berm; instead, the bulldozer pushed material up from the bottom of the pit to the edge of the roadway. Tr. 55-56; Ex. R-2.

Meierbachtol assessed the violation as involving moderate negligence because there was significant rainfall in the days preceding the inspection. Tr. 18-19, 22, 34; Ex. S-1. In Meierbachtol's opinion, the rain could have made the slope of the drop-off steeper due to the loose material the road was constructed from. Tr. 18-19. Other mitigating factors are that the road in question was recently constructed, and that the significant rainfall could have delayed Hoffman's efforts towards erecting a berm. Tr. 18, 50-51. These mitigating factors are offset by Hoffman's frequent use of the road for active mining purposes over a period of multiple days when the road did not have a berm. Here, the weight of the mitigating factors is less than the offset. Accordingly, I find Hoffman's negligence to be moderate.

With respect to the gravity of the violation, I concur with the Secretary's assessment and find that the gravity of this violation is reasonably serious, as the injuries to the vehicle operator are likely to be contusions, abrasions, and possibly broken bones.

V. PENALTY

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided for by the Act. *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763 (Aug. 2012) (citing 30 U.S.C. § 820(i)). In determining penalty amounts, section 110(i) directs the Commission to consider:

[T]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Id.

The Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA's Part 100 regulations, although ALJ penalty assessments "must reflect proper consideration" of the section 110(i) criteria. *Am. Coal Co.*, 38 FMSHRC 1987, 1992-93 (Aug. 2016); *see also Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247, 265-66 (May 2006) (citing *Sellersburg*, 5 FMSHRC at 292-93). My analysis of the section 110(i) factors is set forth below.

A. Violation History; Size of Operator; Ability to Continue in Business

The parties have stipulated that the proposed penalties will not affect Hoffman's ability to continue in business. Jt. Ex. 1. I find that Hoffman is a medium-sized operator and has a minimal history of violations (including no previous violations of section 56.9330(a)). Ex. S-10, S-11.

B. Negligence and Gravity

My analysis of the negligence and gravity of the violation is set forth in section IV.C.

C. Good Faith

The Secretary credited Hoffman with good faith in abating the violation at issue in this case. Ex. S-11. Good faith is also reflected in the portion of the citation that describes the actions taken to abate the berm violation and in the testimony regarding the operator's abatement efforts. Tr. 37, 55; Ex. S-1.

D. Conclusion

After considering the six statutory penalty criteria, I assess a penalty of \$319.00 for the violation at issue in this case.

ORDER

Hoffman Construction Company, Inc. is hereby **ORDERED** to pay a total penalty of \$319.00 for the violation at issue in this docket within thirty (30) days of the date of this Decision and Order.⁸

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

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/smp

⁸ 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

1331 PENNSYLVANIA AVENUE N. W., SUITE 520N
WASHINGTON, D.C. 20004-1710
TELEPHONE NO.: 202-434-9933
TELECOPIER NO.: 202-434-9949

October 11, 2019

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

v.

CONSOL PENNSYLVANIA COAL
COMPANY LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. PENN 2018-0169
A.C. No. 36-10045-459561

Mine: Harvey Mine

DECISION AND ORDER

Appearances: Brian P. Krier, Esq., U.S. Department of Labor, Office of the Regional Solicitor
Philadelphia, Pennsylvania for the Petitioner

James P. McHugh, Esq., Hardy Pence PLLC, Charleston, West Virginia for the
Respondent

Kenneth Polka, CLR, U.S. Department of Labor, MSHA, Mount Pleasant,
Pennsylvania

Before: Judge William B. Moran

Introduction and preliminary matters

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”), 30 U.S.C. § 815(d). This docket involves 11 (eleven) section 104(a) citations, three of which were marked as “significant and substantial,” and all were designated as involving “moderate negligence.” No unwarrantable failure claims were made. A hearing was held in Pittsburgh, Pennsylvania on February 19-20, 2019. The Secretary proposed a total penalty assessment of \$4,941.00. For the reasons which follow, with some modifications, all of the citations are affirmed, and a penalty of \$3,688.00 is assessed.

Principles of Law

Significant and Substantial

In order to prove a violation is significant and substantial, the Secretary must prove by a preponderance of the relevant evidence that there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). A determination that a violation is significant and substantial requires consideration of the particular facts surrounding the violation. *Texasgulf Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). The Commission established a four prong test for significant and substantial violations in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). There, the Commission said that the Secretary of Labor must prove:

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

Mathies, 6 FMSHRC at 3-4; *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria); *see also Consol Pennsylvania Coal Co.*, 39 FMSHRC 1893, 1899 (Oct. 2017). With regard to the second element of the *Mathies* test, the Commission has elaborated that “the second step requires a determination of 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) (“Newtown”).

With respect to the third element of the *Mathies* test, the Commission has stated that “[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742-43 n.13 (Aug. 2012). Finally, the Commission has stated that the evaluation of a significant and substantial violation should assume continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

The Court notes and agrees with the Secretary’s comments regarding S&S that he “does not need to prove a reasonable likelihood that the violation itself will cause injury, but rather that there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984); *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). That “[t]he determination of “significant and substantial” must be based on the facts existing at the time of issuance and assuming continued normal mining operations absent abatement. *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574 (July 1984) [and that] [t]he Court cannot infer that the violative condition will cease. *Gatliff Coal Company*, 14 FMSHRC 1982, 1986 (Dec. 1992) [and that] the Court cannot assume that miners would exercise caution: ‘While miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act,

to prevent unsafe work conditions. *Eagle Nest, Inc.*, 14 FMSRHC 1119, 1123 (July 1992). Additionally, the presence of redundant safety measures does not militate against an S&S finding. *See Cumberland Coal Res., L.P. v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013) (‘Because redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry.’); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995); *Amax Coal Co.*, 19 FMSHRC 846, 850 (May 1997) (same); *Maple Creek Mining, Inc.*, 22 FMSHRC 742 (2000). Finally, the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995).” Sec. Br. at 4-5.

Penalty Assessments

In assessing civil monetary penalties, Section 110(i) of the Act requires that the Commission consider the six statutory penalty criteria:

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

30 U.S.C. § 820(i).

¹ The Secretary takes note of 29 C.F.R. § 100.3(d) for the proposition that moderate negligence is where “the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” Sec. Br. at 6. There is no dispute about the general test for negligence. Rather the dispute is whether there were mitigating circumstances.

That said, the Commission states that an operator is negligent if it fails to meet the requisite standard of care in adhering to the standards set forth in the Mine Act and its associated regulations. *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). Commission Judges, when determining negligence, are asked to consider “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Jim Walter Resources*, 36 FMSHRC 1972, 1975 (Aug. 2014). ... The Commission and its judges are not required to apply the 30 C.F.R. Part 100 regulations that govern the MSHA’s determinations. *Newtown*, 38 FMSHRC at 2048, citing *Brody* at 1701-03. Therefore, the Commission’s judges may consider the “totality of the circumstances” in assessing the operator’s negligence for a given violation. *Brody*, at 1702; *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir 2016).

The Commission has described ordinary negligence as “inadvertent,” “thoughtless,” or “inattentive” conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987), while high negligence is described by the Commission as “an aggravated lack of care that is more than ordinary negligence.” *Newtown*, at 2049, citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998), citing *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991).

Per the parties' stipulations, payment of the total proposed penalty of \$4,941.00 in this matter will not affect the Respondent's ability to continue in business. Tr. 10. Also, for proposed Stipulation No. 10, MSHA's data retrieval system, accurately assessed the size of the Respondent's production tons or hours worked per year, the size and production tons or hours worked per year of the mine, the total number of assessed violations for the time period listed and the total number of inspection days for the time periods listed therein. For proposed Stipulation No. 11, Exhibit A of the Secretary's petition for the assessment of civil penalty accurately sets forth the size of Respondent in production tons or hours worked per year; the size and productions tons or hours worked per year of the mine; the total number of assessed violations for the time period listed and the total number of inspection days for the time period listed therein. Tr. 10-11. However, Respondent's Counsel informed that regarding proposed stipulations 10 and 11, the parties only agreed that the R-17 is a certified version of that report and the Respondent wants that document admitted in lieu of Stipulations 10 and 11. Further, as to Stipulation No. 8, Respondent points out that for some of the citations in issue, it disputes their validity and therefore it seeks to have those vacated. Tr. 11-12.²

The Court considered each of the stipulations, together with the Respondent's issues limiting them, in factoring the operator's history of previous violations, and the appropriateness of such penalty to the size of the business of the operator charged. Consol did not address the proposed penalties in its brief since each of the Secretary's proposed penalties were consistent with the Penalty Conversion Table in 30 CFR § 100.3(g). Consol simply requests that the Court apply this table in determining the appropriate penalties. R's Response Brief at 23. The Court notes that the Penalty conversion table, Table XIV, found at 30 CFR § 100.3(g), provides that "[t]he penalty conversion table is used to convert the total penalty points to a dollar amount."

Among the parties' stipulations were the following: Payment of the total proposed penalty of \$4,941.00 in this matter will not affect the Respondent's ability to continue in business, Petitioner's Exhibit P-17, the assessed violation history report was admitted and was considered in the Court's penalty determinations. The Court concludes that the history of violations did not materially affect the ultimate penalty calculations in either direction: the mine's history of violations was not so egregious as to merit steeper penalties relative to MSHA's proposals, but also not so spotless as to merit decreased penalties relative to MSHA's proposals.

The size of the mine and its controller also supports the proposed assessment. This criterion must take into account not only the size of the operator, but the size and resources of any controlling company to ensure that a penalty has the financial impact to deter future violations. *See Thunder Basin*, 19 FMSHRC 1495, 1505 (1997). "Stiffer penalties against larger mines are necessary...to ensure that operators of mines with more complex management structures would notice and correct violations." *Coal Employ. Proj. v. Dole*, 889 F.2d 1127, 1135 (D.C. Cir. 1989), citing 42 Fed. Reg. 23,515 (May 30, 1978) ("penalties must be such as to encourage management at all levels to respond positively to health and safety concerns"). The penalties must be significant enough to ensure that Respondent's management responds positively to the safety concerns posed by the violations." Gravity and negligence are among the

² The Court pointed out, whether upheld or vacated, the *issuance* of the citations is the subject addressed by the stipulation. Tr. 12.

most important factors to be considered in the penalty criteria. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001). Sec. Br. at 7.

As the Commission has noted, “Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act.” *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). A Commission Judge’s penalty assessment is reviewed under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000); *see also Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373 (Sept. 2016).

That said, the Court recognizes that there are two important considerations that must be evaluated; the Secretary’s burden to provide sufficient evidence to support the proposed assessment; and the Court’s obligation to explain the basis for any substantial divergence from the proposed amount. Thus, the Commission has noted that:

[The] Secretary [] does bear the ‘burden’ before the Commission of providing evidence sufficient in the Judge’s discretionary opinion to support the proposed assessment under the penalty criteria [and that] [w]hen a violation is specially assessed that obligation may be considerable. [On the other hand] the Secretary’s proposed penalty cannot be glided over, as the Commission also stated, ‘Judges must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. ... If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

The American Coal Co., 38 FMSHRC 1987, 1993-94 (Aug. 2016), citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984).

The Court agrees with the Secretary’s observation about penalties that “[d]epending on the circumstances of the violation, some of the six criteria may be weighed more heavily than the other criteria. Sec. Br. at 6, citing *Musser Engineering & PBS Coals*, 32 FMSHRC 1257, 1289 (2010); *Spartan Mining*, 30 FMSHRC 699, 725 (2008).

Alleged Violations

As the citations in this matter were issued for violations under a number of different safety standards with a number of different elements the Secretary is required to prove, the Court’s decision is organized by citation.

Citation No. 9076610

Citation No. 9076610 alleges a violation of 30 C.F.R. § 75.220(a)(1), for the absence of reflectorized warning devices placed immediately outby unsupported roof. The Respondent admits the violation but seeks to have the citation listed as non-S&S, unlikely and low negligence.

MSHA inspector James Baker was the first witness for the Secretary. Tr. 14. He has some 20 years of coal mining experience and has been an inspector for about five years. Tr. 15-16. In January 2018 he was at the Respondent's mine to perform an E02 spot inspection.³ Baker identified Citation No. 9076610, Ex. P-1, as the citation he issued on January 4, 2018 for an alleged violation of 30 C.F.R. § 75.220(a)(1), the mine's roof control plan.⁴ In the No. 2 entry, the inspector noted there were no reflectorized signs to warn of unsupported roof. Tr. 18-19. This entry was about 16 feet wide with an 8½ to 9 foot roof height. Tr. 19. While there was no mining equipment in the entry, no reflective signs were present. The inspector added that

[t]he top was in [] very poor shape, lots of large rock ... [had fallen, which he estimated to be] the size of large garbage cans that fell all the way to the last roof support, the last strap, that fell there. And they meshed their top of the plastic screen called Tensar,⁵ but it was rolled up into a one-foot diameter ... that day.

Id.

Later, the inspector described [the fallen rock] size as two to three feet in height and width. Tr. 19-20. The material which had fallen was a mix of slate, coal and rock. Tr. 21. This material was inby unsupported roof. Tr. 22. There was plastic mesh on the roof which was rolled up to the last roof strap. He informed that the mesh material is rolled out as they install roof bolts and straps. The inspector's notes included a sketch of the rolled up material.

³ Because the mine liberates more than one million cubic feet of methane in a 24 hour period, MSHA does a spot inspection every five days. Tr. 17.

⁴ The Respondent stated that it was not contesting the fact of violation. The Court advised that by conceding the fact of violation, it understood that the Respondent was contending "that the injury/illness, the likelihood would be something ... less than reasonably likely because of these other indicia given that the reflectors were not there. People would have been alerted and, therefore, reduced the likelihood, and the same would be true as to the S&S element." Tr. 52-53. Respondent did not disagree with the Court's characterization.

⁵ The Tensar material is made out of plastic and it is part of the roof support. Tr. 40. It is analogous to the plastic orange silt fences one sees at construction sites. Tr. 41. As such, it does not provide the primary support. That primary support comes from the straps and the roof bolts. *Id.*

The standard cited by the inspector, under the mine's roof control plan, requires reflectorized signs in all entries to the face for unsupported roof. Tr. 24. The purpose of the reflectorized signs is keep miners from going under the unsupported roof. *Id.* Thus, the signs provide a warning to the miners. A sign is required on each side of the entry. Based on the material he saw on the ground, if a miner were in the unsupported area and something were to fall, any injury "could be real bad." Tr. 26-28. Characterizing the potential injury as "serious," the inspector stated that it could result in a broken neck or a broken back. Tr. 28. In addition to miners, a mine examiner would also be exposed to this risk during the onshift and preshift exams. *Id.*

As for the roll of material that was hanging down from the roof, the inspector did not believe that would serve to warn miners in the manner of the reflective sign. Tr. 29. The mesh does not have a reflective quality to it and, the mesh was two to three feet above his head. In contrast, the reflectorized signs reflect brightly off a miner's cap lamp. *Id.* The inspector also observed a "DTI," which refers to date, time, and initials, in this area. The DTI revealed that the area had been onshifted some 47 minutes before the inspector found the problem. Tr. 30. He marked the negligence as moderate, informing that he reserved "high" negligence for instances when the foreman knew of the condition but took no action. Not finding such a situation, he did not find a basis for designating high negligence in this instance.

Upon cross-examination, the inspector informed that a number of people might have the task of hanging the reflectors and this would include the roof bolters. The Tensar mesh material is continuously unrolled as mining progresses, in that one puts up a strap,⁶ then roof bolting follows, then four feet or so of the mesh is unrolled. Tr. 32. The inspector acknowledged that, using his cap lamp, he was able to see where the wedge cut⁷ started, and where the ventilation curtain ended, with the latter ending at the last strap. Tr. 33. In terms of the debris he saw, the inspector stated that [i]t fell all the way to the last supported strap, and therefore it could be seen. From the last row of supported bolts and from the last strap, the material fell all the way to that point and to the wedge cut." Tr. 34. He observed those conditions when he got to the last strap, as he got through the curtain. *Id.* He agreed that in order to proceed further, that is, beyond the last strap, one would have to walk over the pile of coal and rock. Tr. 35. As some pieces were two to three feet in height, one would have to go over that pile. *Id.* The inspector did not agree with the Respondent's assertion that the Tensar material was hanging down some two to three feet, asserting instead that it was hanging down about one foot from the roof. Tr. 36. For the mesh itself to have acted as a barrier, he stated, it would need to hang down to chest level, which it was not. *Id.* Had it been that low, he allowed that it would have changed his S&S designation to non-S&S. *Id.*

⁶ The straps are made of steel. They are about 11 feet in length and are installed with roof jacks when the roof bolting is being done. The roof bolts go through the straps, holding them up, so the two work in tandem. Tr. 42-44.

⁷ A wedge cut is made from the last row of bolts and it gradually decreases down to the floor. Tr. 38. Typically, such a cut will be from 12 to 14 feet, from the last strap to the toe of the wedge. *Id.*

The inspector agreed that, speaking for himself, as *he* was cognizant of the location where the Tensar material stopped, where the ventilation curtain was, and since he realized that upon walking through that curtain, he was never *personally* in any danger of walking under unsupported top. Tr. 39. The inspector could not recall if the debris he observed extended *beyond* the last permanent support, where the Tensar was rolled up, but he could recall that it was to the last strap. Tr. 45.

On redirect, it was brought out that the roof control plan does not allow the mine to use mesh in place of the reflectorized signs, nor that the curtain may serve as an alternative to signal where the last row of supported roof is located. Tr. 46. It was also noted that in the inspector's significant experience with roof bolting and with roof support, that there is no way to predict when a roof may fall. Tr. 48. In this particular instance, based on the timing of his discovery of the debris, the hazard was then limited to *additional* rock falling, though the particular hazard would be that such material would roll down and strike a miner. Tr. 49. As the inspector noted, though *he* saw the issue, a miner, less experienced, working in the cited area might not pick up on the hazard, because of the lack of the signs. Tr. 49-50.

In its defense to this citation, the Respondent called Albert Stein. Mr. Stein is a safety inspector for the Respondent. He has been employed with the mine for seven years, with six of those in the safety department. Tr. 391-92. Directed to the subject Citation, No. 9076610, Ex. P-1, involving the absence of a reflective sign, he affirmed that he was with the inspector when this citation was issued, along with Mr. Roman, Stein's boss. Tr. 393-95. Admitting that when they approached they saw there was no reflective sign at the face of the No. 2 entry, he added that there was a pile of rock and coal from the last strap and there was mesh hanging down. Tr. 394; Ex. R-1. Thus, two points were being asserted by the witness: the mesh was hanging some two to three down from the roof and there was a pile of material on the mine floor at that location. As for the mesh, Stein stated that its presence was obvious. Tr. 398. The shear on the continuous miner can only go ten feet past the last strap. *Id.* The ATRS system at the last strap holds the strap up against the roof, allowing the bolter to drill his hole and bolt. From that point the mesh will drop. Tr. 399. Stein's point was that there was no trouble seeing the location of the last row of supported top. Tr. 400. According to him, the roof height was about eight feet with the mesh hanging down from the roof some two to three feet. *Id.* As noted, combined with that was a pile of rock or coal on the floor, which Stein also described as two to three feet in height, characterizing it as "a little hump." Tr. 401. There was also the ventilation curtain, which went up to the last strap. Tr. 402. Stein did not believe that the gravity should be designated as "reasonably likely" given the strap and the pile on the floor, and as such they would not have walked past the last row. Tr. 401.

Stein did not agree that only a reflective sign meets the standard, as a barrier also suffices. Tr. 403. However he conceded that mesh is not used to protect miners from roof falls or debris, nor is it used to protect miners from going into unsupported areas. Tr. 403. The same is true for ventilation curtains – they are not used to prevent miners from entering unsupported areas. Further, he agreed that the pile on the floor came from material that had fallen from the roof. Tr. 403. As for the witness' assertion that the mesh came down some two to three feet from the roof, he agreed this was not measured. Tr. 404. Stein made notes about the condition, but he admitted that those notes made no mention of the pile of debris from the roof. Also, the diagram

in Ex. R-2 was not drawn by him, but rather by the engineering department. Yet that person from engineering was not underground with the inspector at the time of the citation's issuance. Tr. 405. Additionally, Stein agreed that the pile of debris was under unsupported roof. *Id.* Further, Stein conceded that *more debris could fall* on the pile and that such material could roll off the pile and strike a miner. Tr. 406.

Parties' Arguments as to Citation No. 9076610

Respondent, while admitting the violation, contends that this citation, No. 9076610, should be reduced to non-significant and substantial (non-S&S) and low negligence. R's Br. at 1. Its non-S&S argument is direct – asserting that “the physical barrier indicating the location of the last row of permanent roof support was present thereby making it unlikely an injury would result from the cited condition.” *Id.* at 1-2.⁸

Respondent admits that 30 C.F.R. § 75.220(a)(1) requires a mine operator to develop and follow a roof control plan approved by the District Manager and that roof control plan provisions are enforceable as mandatory standards. However, Respondent contends that when affirming an S&S designation for failure to hang reflective warning signs, judges typically find that the absence of reflectors would cause a miner to think it's safe to proceed under unsupported roof and, being so lulled, the second S&S factor under *Mathies* would be met. Citing *Independence Coal Co.*, 26 FMSHRC 520, 531 (Jun. 2004) (ALJ); *Remington, LLC.*, 36 FMSHRC 491, 502 (Feb. 2014) (ALJ); and *Prospect Mining & Development Co., Inc.*, 39 FMSHRC 49, 56-57 (Jan. 2017) (ALJ), Respondent maintains that in those cases, unlike in this matter, each judge found that the miners were trained to rely solely on the presence of reflectors to indicate the location of the unsupported roof. It asserts that those judges reasoned that, without the reflectors, or any other warning devices being present to identify the location of unsupported roof, it was likely that a miner would believe that it was safe to travel underneath an unsupported area.

Accordingly, Respondent contends that “the Secretary has failed to meet his burden of showing that the absence of reflectors would cause a miner to think it was safe to travel inby unsupported roof under normal mining conditions or that an injury was reasonably likely to occur,” and that these are necessary elements to show that the violation was S&S. R's Br. at 29. In support of this, Respondent notes that it is undisputed that the “mesh was hanging down from the last row of permanent roof support,” and from that Respondent contends the mesh indicated the location of unsupported roof inby that mesh. *Id.* Respondent claims the mesh “also served as a physical barrier to prevent miners from traveling inby that location,” adding that the inspector also conceded the mesh would serve as a physical barrier. *Id.* Further, as the hanging of roof mesh is part of Consol's regular mining practice, the miners know its presence signals the start of unsupported roof inby that point. *Id.* Coupled with those contentions, Consol adds that the mesh was “clearly visible” so that it was “extremely unlikely” a miner would proceed inby the mesh. *Id.* at 29-30.

⁸ In its Response Brief, Consol argues that the Secretary has misinterpreted the test for determining if a violation is significant and substantial. R's Response at 1-3. The Court addresses the S&S issue both generally, *infra*, as well as particularly, later, in its discussion for this admitted violation.

Consol separately contends that the negligence level should be “low” due to considerable mitigating circumstances. First, Inspector Baker admitted that he did not know when the area was last mined or how long the condition had existed and as such the condition could have happened since the last examination of the area and the Secretary has failed to prove otherwise. Second, consistent with its normal mining practices, Consol did hang down roof mesh to serve as both an indication of the location of unsupported roof and a physical barrier to traveling inby that location. Tr. 225. Therefore, the evidence of considerable mitigating circumstances should reduce the negligence designation to “Low.” *Id.* at 31.

The Secretary notes that the Respondent does not contest the fact of violation. Tr. 52, 402. Regarding the two disputed issues, regarding the S&S designation, the Secretary observes that:

[t]his violation is reasonably likely to result in a reasonably serious injury associated with additional pieces of the rock and coal from the roof falling and striking a miner who was not alerted to the serious hazard of unsupported mine roof due to the lack of reflectorized signs in the entry. This violation would affect one person. Reflectorized signs are used as a visual signal to alert miners of unsupported mine roof and prevent them from traveling underneath it. (R. at 24-25). A miner’s helmet lamp reflects brightly off the reflectorized signs. (R. at 29). Given the pile of roof pieces laying across the entry, additional pieces of mine roof could fall and hit the pile, striking a nearby miner. (R. at 26-27, 37, 49-50). An examiner would be near this hazard twice per shift during the pre-shift and on-shift examinations. (R. at 28).

Sec. Br. at 5.

Addressing the degree of negligence, the Secretary comments:

Inspector Baker observed section foreman Craig Williamson’s dates-times-initials (“DTIs”) indicating that he had performed his on-shift examination of the area 47 minutes earlier. ... Due to the section foreman on-shifting the area 47 minutes prior, the operator either knew or should have known that there were no reflectorized signs indicating unsupported mine roof. Although Respondent will likely argue that the roof mesh would be a physical barrier preventing a miner from wandering inby the last roof support and the ventilation curtains would act as substitute, neither are designed or used for the same purpose as the reflectorized signs, and neither meet the requirements of the roof control plan. ... Further, the roll measured only one foot from the mine roof, which is at least eight-feet high. Respondent has been cited at Harvey Mine for violating the roof control plan six times in the two years preceding the issuance of this citation. (Exhibit P-1). Therefore, Respondent was moderately negligent.

Sec. Br.. at 6. On the basis of its foregoing contentions, the Secretary asserts that the proposed penalty of \$638.00 should be imposed.

Analysis of Citation No. 9076610

The essential problem with the Respondent's assertion that the admitted violation was not significant and substantial and that the negligence should be deemed less than moderate is that the facts do not support those claims.

Regarding the S&S issue, as noted, the violation was conceded, thereby meeting the first *Mathies* element. The measure of danger to safety, contributed to by the violation, that is, 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 was also established. This determination is supported by a number of findings.

First, the mesh is not the equivalent of the reflectorized sign, and therefore did not serve the same purpose as such a sign. Additionally, the Court finds that the mesh did not extend as far down as Respondent's witness asserted and while one cannot be precise about how far it did extend down from the roof, as it was not measured, it still did not serve as a warning.⁹ That is not the purpose of the mesh in any event – it is instead part of the roof control plan, with the amount hanging down to be extended and employed later together with the roof bolting. Nor does the roof control plan provide that hanging mesh is an alternative to the reflective signs. Further, there certainly was no testimony that the mine had instructed its employees that mesh extending down from the roof was to alert them that unsupported roof was beyond that point. The other ALJ decisions cited by Respondent for this proposition are not precedential but may be relied upon in circumstances where the underlying logic is persuasive to another court. However, this Court does not subscribe to the idea that a violation is S&S only where miners are trained to rely solely upon the presence of warning devices.

The Court has a different take on the pile of rock and coal that had fallen from the roof, just beyond the hanging mesh. Rather than construing that rubble and the mesh as warning barriers, the Court views the former as demonstrating the importance of the reflective sign and the material which had fallen as a real life demonstration that roof did fall, thus underscoring the importance of the sign. The condition of fallen material graphically illustrates the danger involved. In this case, the roof in fact fell and so it is with some pluck that the Respondent should point to that as diminishing the S&S determination. Mesh is not an alternative to reflectors. The particular hazard would be that such material would roll down and strike a mine. The Court does not agree with Respondent Stein's view that a barrier meets the standard. Viewing the violation in the context of continued normal mining operations, there was no testimony that reflectors were routinely installed, nor were other areas identified in the mine that had such reflectors and thereby there could be no suggestion that the admitted violation was an

⁹ Though it would not alter the outcome, the Court does not accept the Respondent's contention that the mesh extended some two to three feet down from the mine roof. The Court finds credible the inspector's testimony that the mesh would have to hang down much further to pose any putative warning to entry in areas with unsupported roofs. Tr. 36. An exact determination of the extent to which the mesh extended down cannot be made on this record, but that is not a critical fact in any event. That is, short of the mesh creating a virtual mesh wall, the mesh would not be a factor in any S&S analysis. Restated, absent a mesh of such a wall-like extent, mesh does not operate as a factor in the S&S determination.

aberration. Finally, even if the Court were inclined to conclude that the mesh was some sort of alternative warning sign to miners that unsupported roof was present, such a system constitutes a redundant safety measure, as it is not proscribed in the roof control plan for purposes of warning miners of supported roof locations. The D.C. Circuit has rejected the notion that other conditions, such as the presence of the mesh and the roof material which had fallen, should be weighed in making the S&S evaluation. As the D.C. Circuit explained:

[T]his court again interpreted the statutory text [of 30 U.S.C. § 814(d)(1)] to focus on the ‘nature’ of ‘the violation’ rather than any surrounding circumstances. More to the point, the court held that ‘consideration of redundant safety measures,’ — that is, ‘preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely’—‘is inconsistent with language of [section] 814(d)(1).’

Sec’y of Labor, Mine Safety & Health Admin. v. Consolidation Coal Co, 895 F.3d 113, 118-19 (D.C. Cir. 2018), citing *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Com’n*, 717 F.3d 1020 (D.C. Cir. 2013):

As we have explained, the focus of the significant and substantial inquiry is the nature of the violation. By focusing the decisionmaker’s attention on ‘such violation’ and its ‘nature,’ Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards. Because redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry.

Id. at 1028-29.

Thus, the Court concludes that the absence of the reflectors presented a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation, by the absence of a genuine warning that unsupported roof was ahead.

As for the third element, whether the hazard identified under element two is reasonably likely to cause injury, there are two observations to be made. One, across the board, it can be said that roof falls are a continuing threat in underground mining. The other is that in this instance the roof did indeed fall. A roof fall, it can be said without qualification, is reasonably likely to cause injury.

Similarly, speaking to the fourth element, it is a given that any roof fall presents a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Accordingly, the Court finds that the violation was S&S.

Turning to the issue of negligence and the Respondent's claim that there were considerable mitigating circumstances, the Court does not find such circumstances. Essentially Consol relies upon the same considerations it marshalled for its non-S&S contention by applying them to its "low negligence" argument. The Court does not consider either the mesh or the material which fell to be mitigating factors. Neither was employed to mitigate the hazard. The mesh stopped where it was located because the mine roof support process stopped there. The material which fell from the roof, fell, which is to say that event, a roof fall, can hardly be considered mitigating. Further, the DTI for the on-shift, occurring less than an hour earlier, and not noting the condition does not advance the Respondent's diminished negligence contention. Certainly, the mesh hanging down, which was in that condition only because it was awaiting its implementation once the process of supporting the roof began, cannot constitute mitigation. That rock had fallen, creating an impediment, but not a barrier, to proceeding under the unsupported roof cannot be deemed to be mitigation. The mine did not cause the roof to fall in order to act as a barrier. It simply fell, the very hazard that brought about the requirement for reflectorized signs to be installed by effectively announcing – "Caution unsupported roof ahead."

While it is true that the inspector could not state how long the condition had existed, it is uncontested that the area was onshifted less than an hour before the violation was discovered. Accordingly, the Court finds no mitigation and upholds the determination of moderate negligence, with the Court finding that the Operator either knew or should have known of the dangerous condition.¹⁰

As noted, this citation was marked as S&S, with the gravity as "reasonably likely," resulting lost workdays and the negligence denominated as moderate, each of which determinations by the inspector, the Court upholds. The other penalty factors have been factored into the penalty determination for this violation, and upon considering all of them and not finding any mitigating circumstances as to the gravity and negligence of the violation, the Court concludes that the proposed penalty of \$638.00 should be and is imposed.

Citation No. 9077085

Citation No. 9077085 alleged a violation of 30 C.F.R. § 75.1725(a); the citation states that the winch cable on the Caterpillar duckbill battery scoop was severely damaged. The Respondent seeks to have the citation listed as non-S&S, unlikely and low negligence.

MSHA underground coal mine inspector Bryan Yates performed an E01 (i.e. regular) underground inspection at Consol Penn's Harvey Mine on January 6, 2018. Tr. 60-61. He issued Citation No. 9077085 that day, which alleges a violation of 30 C.F.R. § 75.1725(a). Tr. 62, Ex. P-2. That standard requires that mobile 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.

¹⁰ 30 C.F.R. § 100.3(d).

Involved was a Caterpillar 630 duck bill battery operated scoop with a defective winch cable. Tr. 63. The cable is also referred to as a “rope.”¹¹ Tr. 66. The steel cable was “in the front middle beside the operator and behind the scoop bucket” and it is on a spool. Tr. 64. The winch for the cable, or “rope,” faces outward towards the front of the scoop.” Tr. 65. “The cable is used to pull — to move longwall equipment components. It's used to move shields, which shields weigh around ... — common shields weigh around 22 tons, ... [a]t the time, they were installing longwall equipment across from where the scoop was located.” Tr. 65.

The inspector found the cable to “be broken and frayed ...[and he saw] that it was in pretty bad condition.” *Id.* The cable itself had “a whole broken strand on it,[with] several kinks and frays in [it]. ... [t]he broken strands were frayed out on the ends ... making it stick out.” *Id.*

The cited cable was wrapped around the reel, or “spool,” when Yates observed it. The cable attachment point, that is, where the cable is supposed to be attached to the spool, was broken. Tr. 67-68 and photographs of the broken strand on the cable, Exhibits P-3A-G. The scoop was not out of service when the condition was cited. Tr. 69. In addition to the broken strand, there was evidence of other breaks and kinks and where the cable was “bird caged.”¹² There, the cable gets twisted and spewed out. Tr. 69-70. Per Exhibit P-3D, the inspector noted the termination end for the cable where it should be welded on the spool and he also called attention to a grooved out area on the spool. Tr. 72. Ex. P-3E, another photo, shows the cable before any corrective action was taken. Per photo 3G, the termination point was not attached to the scoop. Ex. P-3G. Tr. 73.

The cable was used in this defective condition, as the inspector noted that the lines on the housing are “indications that that cable has come on and off several times with those broken frays, that it's rubbed the bucket, so you can tell it has been used in this condition.” Tr. 74. As the frayed area comes off or is reeled up, those frayed areas rub on the inside of the bucket, creating the lines. *Id.* Again, the hazard is that the cable can break and injure people if that occurs. Tr. 75. A broken cable, being used to pull heavy components puts tension on the cable and if the cable breaks a whiplash effect can occur. Tr. 76.

¹¹ Inspector Yates has had experience in his career working with cables. In making a visual inspection of such a cable, one looks at a lay of it. A lay of the cable is one complete revolution of the strand. Tr. 66. Yates also knew of an accident involving a cable which broke and struck a miner, rendering him unconscious and causing fractures in his face. Tr. 67.

¹² Just as it sounds, by “bird caging” the inspector meant the strands appeared like a bird cage. Tr. 70. Bird caging, the inspector later explained, is

so bad because it takes the layout of cable, the strength, and it exposes the inner to squeezing or pinching. So if the inside of that cable is bird caged and is sticking up and you start putting tension on it, it's going damage the wires and stuff that's inside the core of the cable.

Tr. 93. The inspector stated that in the photograph, Ex. P-3C, one can see the cable “starting to bird cage some and come open. You can see the inner inside of the cable, some of the inner layers.” Tr. 95.

The inspector believed that if the cable were to break, injuries could range from broken bones to a fatality in the worst case scenario. *Id.* In explaining why he marked it as S&S, he stated that “in an event that an accident occurs, it is reasonably likely that the injury will result in permanently disabling conditions.” Tr. 77. On the other aspect of S&S, the issue of likelihood of the event occurring, he expressed that it would be likely as

[w]ith one broken strand already, frayed, other bird cages, ... other things in the photographs [] indicate that the cable was mistreated. There's kinks. There's evidence of abrasion on the cable. Putting the pressure on this cable that is required to move some of this equipment around corners, around other equipment is highly – it is likely -- reasonably likely that someone would get damaged -- would get hit, if not by the cable, then by the moving loads that you're trying to pull.

Id. In terms of exposure to the hazard, the inspector stated that he knew there were “three miners working around this area at the time.” Tr. 78. He evaluated negligence as moderate, “[b]ecause [the operator] didn't have really mitigating circumstances why that cable was left on in that condition.” Tr. 79. Nor, had they taken other action such as taking the cable off, and tagged it out. Had they done such things, he would have listed the negligence as lower than moderate.

In terms of evaluating how long the condition had existed, the inspector stated it had been “at least one shift.” Tr. 80. That conclusion was based upon “[t]he amount of damage that was done.” This was not speculation since he was up in that area and observed that they were working as they were setting up a new longwall face there. Tr. 80. In further support of his conclusion, the inspector stated that it could not have occurred in one shift because it would take several times for a cable to be pulled on and off before it would be in the condition he observed. Tr. 81-82. The inspector added his view that this did not develop over one shift, as the frays rubbing against the inside of the scoop bucket indicated that the cable had been reeled on and off multiple times. Tr. 82.

The Court then asked some questions to clarify the circumstances involved with the cable. The inspector agreed with the Court’s analogy of the cable to a garden hose with a hose reel, and also that the cable here had a hook or some device at its end in order for it to pull some piece of equipment. Tr. 85. The inspector informed that indeed the cable had a hook at its end. *Id.* Thus, the inspector confirmed that the cable was available for use and, by his testimony, had been used. *Id.*

On cross-examination, the inspector described the scoop as a “duck bill scoop,” and that it is primarily used to pull or move shields around. In Exhibit P-3C, he identified the edge of the bucket in that photo, while adding that his focus was on the cable, not the bucket. He estimated the bucket’s depth to be six to eight feet. Tr. 87-88. The winch itself is set back about another foot from the bucket. Tr. 88. Though he did not measure it, the inspector thought the cable was a maximum length of 20 feet. *Id.* He confirmed that the anchor piece, which is normally on the spool, was completely off. Tr. 89. When attaching the cable to a piece of equipment, chains are used to make the attachment. In other words, it is not simply a matter of having the cable directly attach to the equipment. Instead, chains are used in concert with the cable hook.

When Respondent's Counsel suggested that if the cable were completely unwound, it would simply turn on the spool, as it was not attached, the inspector countered that the indication was that the cable, stretched out too far, broke and luckily no one was hit when that occurred. Tr. 91. Respondent's argument was that if the cable were simply let out 20 feet, the spool would simply spin freely. To that hypothetical, the inspector agreed, but only if there was no binding effect on the cable. *Id.* For such a binding effect to occur, the inspector stated there would need to be two to three wraps around the spool. *Id.* The Court sought clarification on this. The inspector agreed that the cable wrapping two to three times around the spool can act as an anchor point and that it is designed that way, as the anchor point itself is not designed for tension to be placed on it. Tr. 92. Thus the inspector agreed with the Court's understanding that "the cable serves part of the anchoring itself if it's wrapped around enough times." *Id.*

The inspector was also asked about the "red zone," as that term is applied where winches are used. He informed that it refers to the "stay clear zone," and he agreed that Consol provides training on that subject. Tr. 97-98. However, the inspector did not agree that the scratches he observed could have developed simply in the normal rolling up of the cable, because there were too many of them and such marks don't occur in the normal process of rolling up the cable.¹³ Tr. 98-99.

Chase Shaffer testified for the Respondent. He is employed by Consol as a safety inspector. Directing him to Citation No. 9077085, he acknowledged that he was with Inspector Yates on January 6, 2018. Addressing Ex. R-4, he identified the exhibit as his notes and that he made them soon after the inspection. Tr. 479. He then spoke to the duck bill battery scoop, which was on the 4A working section at the number 2 track entry. He asserted that it was not being used when they viewed it. Tr. 480. He described it as a "tractor of the coal mine. ... basically a tractor/forklift-type of piece of equipment used, [a] utility piece of equipment for supplies and other equipment." Tr. 480. Yates, Shaffer stated, wanted to check various pieces of equipment as part of his E01 inspection for their overall safety features, and this included examining the steel cable. Tr. 481.

Essentially, Shaffer's description of the use of the cable on the scoop comported with the other testimony of record. However, he added that the person operating the reel is "inside an enclosed steel cage, operator's compartment fully surrounded 360 degrees by a protective cage." Tr. 483. Shaffer described the length of the scoop bucket as eight by four and a half feet. Tr. 484. The spool of wire rope's location is recessed about three feet from the front of the scoop. *Id.* Shaffer asserted that the spool was not useable, that is, "[i]t would not be functionally useable for its intended purpose, what you would need to use it for. It was not in a condition where it would be useable." *Id.* He added that "the grommet, the connection point where it attaches onto the reel itself was off. It wasn't attached. So when you would go to use it, for lack of a better term, it would free spin, so you would never be able to properly secure your item that you want to load. It would just sit there and free spin." Tr. 485. Shaffer spoke to the most recent time the duck bill was examined, informing it occurred on January 15, 2018, per Ex. P-2, at the

¹³ The Court felt compelled to comment to Respondent's Counsel that the evidence seemed "fairly compelling," up to that point. The Court emphasized that it was not prejudging the matter, but it had an issue whether the number of scratches on the reel was a winning argument. Tr. 99.

next to the last page of that exhibit, and referencing the No. 14 Cat 636 battery scoop. “4A” also appears on that line identifying that it was on the 4A working section. Tr. 486. According to that exhibit, the examiner found no defects. Shaffer explained that the discrepancy, with the model numbers, with the citation identifying it as a CAT 630 but the report listing it as a CAT 636, as a mistake, and neither he nor Yates are certified mechanics and one of them was simply in error. Tr. 487-88.

Shaffer informed that he is experienced in operating wire ropes and winches. Tr. 488. Reviewing Ex. P-3, he agreed that it shows damaged and fraying wire braids and strands. This included in one photo that “it’s to a point where the rope was completely severed into two parts because of the broken strands. ... [and he saw] a broken grommet,¹⁴ anchor point so to speak, a snub that would secure the rope into the reel. Tr. 489-90. In sum, Shaffer stated that from operational standpoint in this condition, you would not be able to accomplish your task. Plainly speaking, it was not useable. Tr. 490. Shaffer also offered that the “person operating rope can’t see the spool [and that] person is in the machine inside that fully enclosed cage. Tr. 492. Further, Shaffer did not believe that, given the Consol requirement for a pre-op before using the equipment, any would try to use the equipment in that condition. Tr. 493. Directed to some scratching on the empty spool, per the third photo in that exhibit, Shaffer believed the grommet created that. *Id.*

On cross-examination, Shaffer was directed to his notes, per Ex. R-4. He agreed that the reel was not connected to the anchor point. Tr. 495. Asked if it was possible that if there’s a load on that cable, even without an anchor point connection, whether there could be enough force on that cable to bite onto the reel, Shaffer responded, no, because it was a shortened rope, that is to say, “the amount of rope you would have pulled off to load something would not leave you enough cable on that reel to accomplish [a task].” However, in general terms he conceded that it was possible. Tr. 496. The Court interpreted Shaffer’s answer as a qualified no, in that if one did not need the full length of the wire rope unwound, it would be possible for the cable to bite on the reel. Further, Shaffer conceded that he did not know how many times the cable would need to wrap for a bite to be created. *Id.* He also agreed that the equipment was not locked or tagged out and therefore it was available for service. Tr. 497. As he was not present when the most recent weekly exam was performed, Shaffer could not speak to whether that exam was thorough, but he responded that Consol’s employees are qualified and certified to perform such work. *Id.*

While bantering over questions posed by the Secretary’s counsel over whether the cable was in a safe condition, he preferred to answer instead that it was not usable.¹⁵ Tr. 498. He then allowed that one could injure oneself if attempting to handle it. So too, he preferred to state that the cable was damaged, avoiding a response as to whether the condition was a violation of the standard. *Id.*

¹⁴ Shaffer stated that the grommet anchors the rope to the reel. Tr. 492.

¹⁵ To make it usable, Shaffer stated it would need to be attached to the reel and all the strands repaired, as for example where it was “completely severed” and it would need to be restored to its full length. Tr. 498. As a practical matter, Shaffer informed on redirect that the ‘fix’ would actually be replacement of the cable. Tr. 499.

For this matter, Citation No. 9077085, the Respondent asserts in its post-hearing brief that as the “cable was no longer attached to the winch reel [] any tension put on the cable would simply cause the winch reel to free spin. Thus, the cable could not be used for pulling equipment.” R’s Br. at 2. The Court finds that the Respondent’s contentions regarding the S&S designation are conclusory in nature, merely asserting that “[i]t was not reasonably likely that this condition created a hazard or that any miner would be injured by this condition” *Id.* As for negligence, its argument is that “no agent of the operator was aware the condition existed and the condition could have developed since the last exam.” None of these contentions have merit.

Here, the Respondent contends that the Secretary has failed to meet his burden by showing that the winch cable contributed to a discrete safety hazard warranting an S&S designation and has also failed to show that the winch cable was reasonably likely to cause an injury. The cited winch cable is used primarily for loading heavy equipment or supplies onto the duckbill scoop. The cable is extended toward the equipment that is being loaded and secured with a large stabilizing hook to stabilize the equipment as it is being loaded. The person operating the winch is inside a fully enclosed steel cage. The winch cable was severely damaged in several areas and was functionally unusable, making it extremely unlikely that it would be used for pulling or loading equipment. The anchor point connecting and securing the cable to the reel was no longer attached. The result of the anchor point being disconnected from the reel is that it would cause the wheel to free spin when attempting to pull anything with the winch cable and not allow the winch cable to tighten or secure itself to the reel.

Shaffer analogized attempting to use the cable for pulling equipment in this damaged condition with trying to load a vehicle onto a tow truck under the same conditions. He offered that if there is no fixed point to secure the tow cable onto the reel attached to the truck, the tow cable would just keep “spinning and spinning and doesn’t have the ability to secure [the vehicle] onto the truck.” Further, Respondent asserts that Mr. Shaffer credibly testified that the cable was not long enough to wrap around the reel enough times to serve as an anchor point and still maintain enough length to pull equipment.

Consol states that, in an attempt to support the allegation that the winch cable had been previously used in its damaged condition, the inspector testified that lines and grooves in the scoop bucket indicated prior use, attributable to the frayed cable rubbing against the scoop bucket. However, the Respondent asserts that Yates presented no evidence that the winch cable actually caused the lines and grooves in the scoop bucket or that the grooves could not have been created by an undamaged cable. Consol adds that a scoop is used for numerous applications in a coal mine, including scooping up piles of sharp, rigid loose coal and rock and loading heavy equipment and supplies, thereby creating countless potential sources of lines and grooves inside the bucket. Thus, it contends that the scratches and grooves in the scoop bucket have little evidentiary value to show prior use and they could have been caused by any number of different types of material inside the bucket. Accordingly, it argues the Secretary has failed to prove that they were caused by use of the damaged winch cable. Therefore, because it was not reasonably likely that this condition contributed to a discrete safety hazard or that any miner would be injured by this condition, the citation, No. 9077085, should be reduced to non-S&S and unlikely. R’s Br. at 32.

Consol further contends that the negligence level should be “low” due to considerable mitigating circumstances. First, the scoop was parked with no miner around it at the time of the inspection. Tr. 497. Second, the condition of the cable was not reported to Consol and could have happened since the last examination of the scoop and the Secretary has failed to prove otherwise. Third, the damages condition of the cable negated any ability to use the cable for pulling equipment. Tr. 492. Therefore, the evidence of considerable mitigating circumstances should reduce the negligence designation to “low.” R’s Br. at 33.

In its Response brief, Consol repeats its view that the violation should not be deemed S&S, contending that the Secretary’s reliance on *Eagle Nest*, 14 FMSHRC 1119, 1123 (1992), is misplaced because it conflates assuming miners will be cautious with looking at the surrounding facts to determine if it is likely a miner will be exposed to a hazard. Consol agrees that one may not presume that a miner will be cautious but that the likelihood that a miner will be exposed to a hazard is a very different consideration. It offers, as an example, evidence that miners would not be expected to be injured by an outby rib at the precise time it falls, because they rarely go there. In a similar fashion it contends that the likelihood is nil because the winch is operated from inside the operator’s cage. Thus, it contends that the contention that the cable could break and strike a nearby miner is unsupported. R’s Response at 5-6.

Continuing its somewhat unusual defense – that the cable’s condition was so bad that it could not hold a load by being wrapped around the spool – and that the inspector’s notion that the cable could so wrap on itself, was mere speculation, Consol points to Shaffer’s assertion that the cable would be too short to pull a load if it had to wrap around itself. *Id.* at 6.

The Secretary asserts that both Yates “detailed testimony and photographs prove that the Operator failed to maintain the cited winch cable in safe operating condition, and failed to remove the scoop or the winch from service.” The Court agrees that the Respondent did not present any evidence to contradict this. As for gravity, the Secretary notes that the winch cable was not in safe operating condition, was not locked or tagged out, and was available for service. The Secretary points to the scratch marks, as photographed by the inspector, to show that the winch had in fact been used without the cable being properly anchored to the reel.

While conceding that the scoop operator sits in a protected compartment, that person often works together with another miner outside the scoop in the mine entry or crosscut to direct travel in the low-visibility conditions and around corners. Accordingly, the Respondent cannot simply rely upon miners’ training about red zones to discount their exposure to the hazard. As for the negligence involved, again the Secretary looks to the inspector’s testimony and photographic evidence to support a moderate negligence finding. The number of damaged areas to the cable, including the broken anchor point, frayed threads, severed threads, and “bird-caged wires” all indicate that these conditions developed over time and after repeated use of the cable in an unsafe condition. For that reason, a conclusion that the operator either knew or should have known of the dangerous condition is appropriate. Last, there was no evidence from the Respondent that the cable had only been damaged during the same shift. Given this state of affairs the Secretary urges that, applying the six statutory criteria, the proposed civil penalty of \$953.00 remains appropriate.

Analysis of Citation No. 9077085

Upon consideration of the credible evidence, the Court finds that the violation was S&S and that the negligence was moderate. An unusual defense, the Respondent contends that the cable was so bad it was not useable. However, the cable had not been removed and the equipment was not tagged out. Consequently, the equipment was available for service. The inspector's testimony as to the cable being the source of the scratches and marks in the bucket was also credible, establishing use, especially given the undisputed condition of the cable.

The Respondent's challenge does not dispute the fact of violation, but rather that it was deemed S&S with moderate negligence. Regarding S&S, the Court finds that there was a reasonable likelihood of the occurrence of the hazard against which the standard is directed. The duck bill scoop was not maintained in safe operating condition, nor was it removed from service, and it was being used in that defective condition. The cable's condition of disrepair presented a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation, which was at least somewhat likely to result in harm.

The obvious hazard is that a cable in this undisputed condition can break and an injury could result in such an event. Use of such a damaged cable, being used to pull heavy components puts tension on the cable and, if the cable breaks, a whiplash effect can occur. Though the equipment's operator was protected from a whiplash event, the Court finds that, per the inspector's testimony, others could be at risk should a cable failure occur. Even if such other person(s) were not struck by a cable failure, there could be associated injury with the load attempting to be moved. Under these circumstances and findings, in the Court's estimation of the credible evidence, this situation was an accident waiting to happen. Accordingly, with a cable in such disrepair, on these facts, the occurrence of the hazard would be reasonably likely to result in an injury. And, rather obviously, such an injury would be of a reasonably serious nature.

As for the inspector's view that moderate negligence was involved, the Court concurs that the operator did not present any mitigation to explain why, given the cable condition, the machine was not tagged out or taken out of use. Moderate negligence was a more than fair designation under these circumstances.

Given this state of affairs the Secretary urges that, applying the six statutory criteria, the proposed civil penalty of \$953.00 remains appropriate. From its independent application of the 110(i) penalty criteria, particularly with regard to the gravity and negligence of the violation as described above, the Court assesses a \$953.00 penalty.

Citation No. 9077083

Citation No. 9077083 alleges a violation of 30 C.F.R. § 75.517, involving holes in the 480 volt power cable for a scoop charger. The Respondent seeks to have the citation modified to list the expected injury as no lost workdays and low negligence.

Inspector Yates testified regarding Citation No. 9077083, Ex. P-4, which he issued on January 6, 2018, pertaining to a 480 volt power cable to the No. 12 groundhog scoop charger,

citing 30 C.F.R. § 75.517. Tr. 100. That standard, a statutory provision, titled, “Power wires and cables; insulation and protection,” provides “Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected.” While the inspector was checking the battery charger to make sure there was adequate ventilation, he observed that “the cable looked like it was possibly damaged,” in that it appeared to be deformed. Tr. 101-02. After making sure that the high voltage cable was disengaged from the power source, and then locking it out, he began checking the power cable by hand. In that process, he found at the area of his initial concern, that the inner conductors of the cable were damaged. There, he found a hole of about one inch in the outer jacket and he could see the copper wire inside the cable. The inner conductors were exposed for almost the entire one inch opening. The problematic cable was hanging on the rib loops. Tr. 102-04. Also, where that cable connects to the charger he found another cut. Tr. 104-05. Clarifying the locations of conditions he observed, the inspector stated that the first cable, which had three conductors, came from the power center supplying the 480 volts to the groundhog scoop charger. That cable was coming out by the load center and going to the charger. Separate from that charger cable, there was a cable that turns the AC into DC, which cable was also damaged. Tr. 105.

The bottom line was that the inspector found a problem area in two cables and his citation recorded this. Tr. 105-106. He took photographs of both conditions. Tr. 106-07; Ex. P-5A-B. As noted, the inspector stated that he could see the copper wire. Tr. 107. Ex. P-5C, another photo, shows the other cut, involving the second cable, which was in the outer jacket of the cable that leads from the charger to the scoop batteries. *Id.* Yates stated that exposure to that condition would occur anytime a miner was putting the scoop on a charge and that miners were exposed to the damage from both cables. This would involve examiners as well as helpers walking in those areas. Helpers for the scoops assist the operators who are charging batteries. Tr. 107-08. At those times, the cable would be energized. Tr. 108. The 480 volt cable would also be energized when the scoop batteries were charging. As for the second cable, from the charger to the scoop battery, a miner would be exposed any time he's taking the scoop off the charge. Tr. 108.

As for the type of injury, the inspector marked that as “fatal.” Though it was unlikely to happen in this instance, he felt that if it did occur, the result would definitely be fatal. Tr. 109. He marked the negligence as moderate because he found no mitigating circumstances to warrant lowering that designation, and he noted that he easily detected the problem just passing by it. He added that a good examiner, that is, one who’s trained to do proper examinations, should also check those cables as they're walking, to ensure that their miners are safe, so that they won't come in contact with any damaged cables. Tr. 110-11. Further, he believed the condition had been present for more than one shift because of “[t]he amount of dust present and the condition of the cable. The amount of dust inside the hole indicates that that condition has been there more than one shift.” Tr. 111.

On cross-examination, the inspector agreed that the second cable he cited is similar to a jumper cable from the charger to the batteries. Given that, the inspector agreed that hooking up such a cable is never done under power. Tr. 114. In both cited instances, the condition was abated by re-insulating the outer jacket, not by splicing the cables. Tr. 115. Splicing involves connecting two cables together. *Id.* While the inspector’s notes for this do not expressly state that he saw copper wires, he stated that he did see copper and that is what he meant by writing

“damaged.” Tr. 116. The inspector agreed that both cables are moved as mining continues. For the charger cable, he agreed that it should be locked and tagged out before it is moved. Tr. 116. As for the other cable, which was hung and had slack in it, he agreed it was on the rib, not located on the floor. Tr. 117. He admitted that in taking his photos, he bent the charger cable a little so that he could have a good photo to reflect the condition he cited. Tr. 119. He added that he could not damage the inner cable by bending it and, if that were possible, the cable would need to be removed from service. As for the other cable, the one on the rib, he stated that he did not manipulate it all. Tr. 119. To the suggestion that the inner cable was rugged, he responded that current and abrasiveness are separate considerations. Tr. 120. *Id.* The inspector agreed that the 480 volt cable had ground protection. Tr. 121.

On re-direct, the inspector affirmed that the inner conductors are covered only by a thin membrane, to wit, the black insulation he described in earlier testimony. Beneath that membrane is copper. Tr. 122. Referring to the photos in Exhibits P-5A and P-5B, the inspector stated that he did not manipulate or bend the cable prior to taking those photos. He only had to wipe the dust off. Tr. 122-23. While the cables are, during normal mining, designed to be bent and moved around, that does not include getting run over or squeezed against a rib. Tr. 123. On further cross-examination, the inspector maintained that, though it was difficult to see and though the photo was not great, the copper wire is visible in Photo 5A. Tr. 123-24.

This equipment was on the same working section as discussed in Citation No. 9077085; it is the area that charges all the batteries. Inspector Yates was in the process of performing a full inspection of the No. 12 groundhog scoop charger when he found the damaged cable on the scoop charger. Tr. 501. Respondent’s witness Shaffer noted that the citation itself recounts that the damage to the cable was to the outer jacket exposing the damaged black inner conductor. The damaged section of the cable was alongside the rib on what he described as “Christmas tree hangers,” that is to say, insulated cable hangers, and that the damaged area was located at the fifth loop back, meaning the furthest loop back against the rib in that section of cable. Tr. 502. Given that location, Shaffer expressed that the damage could not be easily seen. The scoop charger is typically moved every eight to ten days. When that occurs the power is off. *Id.* According to Shaffer, the inspector had to bend or twist the cable to show him the damaged section. Tr. 503. Upon doing that, Shaffer did see the inner cable but saw no damage to those inner leads. *Id.* Shaffer then directed that a certified electrician examine the cable to ensure that there was no more damage beyond what they could visualize. Tr. 504. A splice was then made to fix the cable. Tr. 504. A second issue was identified with the charger, which Shaffer described as “a small hole on the outer jacket of . . . the charger jumper cable.” *Id.* The jumper cables go from the charger to the scoop. *Id.* Shaffer stated that in the mining environment it is not difficult for holes such as this to occur. Tr. 505. The Secretary elected not to conduct cross-examination for this citation.

For this matter, Citation No. 9077083, Consol accepts the inspector’s likelihood of the injury or illness designation, which was marked as “unlikely,” but it does challenge the claim that the injury from this condition would reasonably be expected to be fatal. It contends that it was unlikely that a miner would contact the hung section of the cable while the scoop charger was energized and that the Secretary did not prove that a fatal injury would result from the condition. R’s Br. at 2. It adds that the Secretary failed to prove that the cited condition was

present at the time of the last electrical exam and that, since the condition was not obvious, the negligence should be reduced to “low.” *Id.* In support of its position that the gravity should be reduced from “Fatal” to “Lost Workdays or Restricted Duty” and that the negligence should be low, the Respondent looks to MSHA’s Citation and Order Writing Handbook. R’s Br. at 35–37.

While the Respondent concedes that there were two cables at the scoop charger which were damaged, the damage to the power supply cable was located at the area closest to the rib, and therefore less obvious. For the other cable, the charger jumper cable, Respondent contends that neither cable is handled by miners or moved while it energized. Respondent notes that the inspector admitted that it would be unlikely that a miner would contact the cable.

Notwithstanding the inspector’s relating of an incident wherein a miner was allegedly electrocuted from a pinhole in a cable, Respondent, noting that the inspector is not an electrician, asserts that the cable’s voltage, in and of itself, is not sufficient to show that a fatal injury would be reasonably expected to occur. It adds that the Secretary introduced no evidence of the cable’s amperage. Further, the inspector admitted that cables had ground fault protection. The Respondent also asserts that the Secretary’s case was deficient in its failure to consider how the environmental conditions may affect the type of injury to be expected. For instance, there is no evidence in the record setting forth how an injury would be affected if a miner’s clothing came into contact with the cable as opposed to his bare skin and there was no evidence considering whether conditions were wet or dry and how such conditions can affect the type of injury to be expected. Without such information, the Respondent concludes, the fatal designation cannot be sustained.

Speaking to negligence, Respondent contends that there was no evidence that the cables were in the cited condition during the previous electrical examination, nor evidence that the operator was aware of the condition, and it discounts the inspector’s claim that the dust he observed supports his view that the condition had existed for more than a shift.¹⁶ R’s Br. at 37.

Apart from the above, the Respondent also objects to the Secretary’s eleventh hour attempt to amend the citation’s likelihood/S&S designations, as the Respondent did not challenge the inspector’s determination of the likelihood of the event’s occurrence. R’s Response at 7-9. It notes that this apparent change was not litigated at the hearing and the Secretary never moved the Court to amend the citation. In this regard, the Respondent opposes any attempt by the Secretary to amend his pleadings post-hearing without any motion, citing *Jim Walter Resources, Inc.*, 35 FMSHRC 1709, 1714-15 (2013) (ALJ).

¹⁶ The Respondent adds that there was no evidence as to the cable condition at the last exam, no evidence as to the conditions the cables were subjected to since the last exam, and no evidence as to whether the load center, charger and cables had been moved since the last exam. But, if the Respondent is suggesting that somehow the Secretary should have provided this information, and without offering just how the Secretary would have made those determinations, it is the Court’s view that such information was the Respondent’s burden to provide, not the Secretary’s.

From the Secretary's perspective, the evidence supports a finding that the violation was reasonably likely and that it was S&S. In that regard, the Secretary notes that the scoop charger was not locked or tagged out of service, and was available for use. In support of that view, the Secretary notes that the cable leading from the power center to the charger was hanging on the rib in loops near the charger, and contends that a miner connecting scoop batteries to the charger would be exposed to this damaged area of cable. Mine examiners would also be exposed while performing their duties, such as when checking to make sure that the charging station properly ventilates into the return. Further, the cables would be energized whenever a miner puts the scoop batteries on charge, including when they are getting out of the scoop operator's compartment, and when the batteries were charging. Coming into contact with the damaged areas of the energized 480-volt cable could cause fatal injuries from electrocution, and this is true even if the inner copper power leads were not exposed or damaged. Sec. Br. at 11. Furthermore, the Secretary notes that he is not required to establish that there were exposed copper leads, as the danger of electric shock is present even where only small holes in the insulation are present as they pose a risk of serious injury. *Id.*, citing *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1286 (Dec. 1998). At a minimum, the Secretary concludes that the evidence supports the inspector's generous designation of the violation as non-S&S.

As for the degree of negligence, the Secretary submits that the dust and the damage to the cables, establish that the conditions had existed for more than one shift and therefore moderate negligence is appropriate as the operator either knew or should have known of the damaged cables.

Accordingly, the Secretary asserts that the Court should affirm MSHA's proposed civil penalty of \$429.00 using the six statutory criteria and the Part 100 regulations. Sec. Br. at 12.

Analysis of Citation No. 9077083

The inspector found two cable defects: a 480 volt power cable to the No. 12 groundhog scoop charger, described as the charger cable; and a separate cable from the charger to the scoop battery. The inspector agreed that the second cable was analogous to jumper cables and that when employed that cable is not under power. Though his notes did not record that he saw the copper wires, the inspector stated that he did observe them and the Court finds that the inspector's testimony was credible on that issue. The inspector marked the violation as non-S&S, but the injury as fatal and the negligence as moderate, as he found no mitigating circumstances. The inspector also considered that the problem was easily detected, simply by walking by the cable. Thus he considered the condition to be obvious, as a diligent mine examiner would have seen the problem. Dust in the hole informed the inspector that the condition had not just occurred and thus had existed for more than one shift. For the charger cable, he agreed that it should be locked and tagged out before it is moved.

In this instance, as noted, the Respondent challenged the claim that the injury would be fatal and it seeks to have the negligence denominated as "low."

The Court finds that the Respondent, in its analysis, has merged the likelihood of the injury or illness designation, which was marked as "unlikely," with the claim that the injury from

this condition, though unlikely, would reasonably be expected to be fatal, but the two concerns should be evaluated separately. The Court finds that the credible evidence is that, though not S&S, and unlikely, should an unfortunate miner come in contact with the charger cable at least, a fatality could result and more so for the power cable than for the jumper cable, as the latter is never hooked up under power. With the inspector's non-S&S determination being upheld, the Court therefore rejects as unsupported by the evidence, the Secretary's afterthoughts that an S&S designation could be entertained.

Regarding negligence, the Court does agree with the Respondent's contentions that it should be deemed low. Only one of the cables, the 480 volt cable, presented a plausible risk of shock, but given the location of the defect for that cable with the 1 inch hole in the outer jacket and accepting that cable had to be bent or twisted to reveal the defect, low negligence is the proper characterization of this violation. It is noteworthy to the Court that the Secretary elected not to conduct cross-examination of the Respondent's witness for this citation.

Accordingly, based upon all the evidence of record and the Court's findings as to the challenged issues of negligence and whether a fatal designation was warranted, the Court finds the former should be characterized as low but that the fatal designation remains appropriate. That latter determination is distinct from the inspector's determination that the event was unlikely to occur, a finding that the Court agrees is consistent with the evidence adduced.

The Secretary proposed a penalty of \$429.00. However, the 110(i) penalty factors strongly suggest a reduction in the penalty amount in light of the lower negligence finding. For the above stated findings and reasons, the Court finds that, applying the six statutory criteria, a civil penalty in the amount of \$100.00 is imposed. Further the Citation is to be modified to reflect "low" negligence.

Citation No. 9077086

Citation No. 9077086 alleges a violation of 30 C.F.R. § 75.508, which requires all stationary electric apparatuses to be shown on a mine map. The Respondent seeks to have the citation vacated.

Citation No. 9077086 was issued on January 7, 2018. Ex. P-6. Inspector Yates described it as “a citation that an electrical component of the electrical system was not listed on the outside electrical map. Tr. 126. The cited standard provides:

The location and the electrical rating of **all stationary electric apparatus** in connection with the mine electric system, including permanent cables, switchgear, rectifying substations, transformers, permanent pumps, and trolley wires and trolley feeder wires, and settings of all direct-current circuit breakers protecting underground trolley circuits, **shall be shown on a mine map**. Any changes made in a location, electric rating, or setting shall be promptly shown on the map when the change is made. Such map shall be available to an authorized representative of the Secretary and to the miners in such mine.

30 C.F.R. § 75.508 (emphasis added). The cited standard requires that the mine map be updated with all the main electrical equipment, such as the main electrical, 12,400 volt cables, load centers, switch houses, in short, anything that is not going to be moved. Tr. 128. In this instance, the load center was at the three cross-cut, on the 4A new longwall section face. Tr. 128-129. There was another load center in by the one cited. Tr. 129.

The essential charge is that the *cited* load center was not advancing – instead it was stationary. The Secretary contends that this is a violation because, while *moving* load centers do not need to be listed on the map, *high voltage cables that take energy to those load centers must be so listed on the map*. Such maps are kept outside and they are to list the location of the high voltage cables. Tr. 127. In this instance, the citation was for a “load center that had moved with the section at one time, [in the past] but [the mine was] then jumping off of it to power another load center that was actually moving on that section.” *Id.* The inspector had been in that area the day before, so he knew where the mining was going and he knew that the load center was not on the map. *Id.* A moving load center will advance as mining continues. In contrast, at the time of the citation, the *cited* load center was not advancing, instead it was stationary. *Id.*

The purpose behind the standard’s map listing requirement is if an “emergency” occurs, it is known where power is located and how to direct people underground in the event that there is a rescue situation, so that rescuers or mine personnel will be able to energize equipment as needed. Tr. 129. The inspector marked “no likelihood” on his citation and one person affected, because he considered it to be a paperwork violation. Tr. 130. He viewed it as a failure by the mine to keep their maps up-to-date. However, he marked the negligence as moderate because he found no mitigation. *Id.*

On cross-examination, the inspector did not agree that if the load center was servicing a working section, it would not be considered stationary equipment. Tr. 132. While he agreed that it was on *the section*, he deemed it stationary because the cited load center did not advance as the section advanced. *Id.* Thus, for the inspector, the key determinant was if the load center advanced as the section advanced. He determined that the load center was not advancing and therefor it was stationary. He knew this to be the case because:

they have to have powered equipment to run the other equipment that's running up and down the face, so if they move this load center up there, they don't have enough power for that shuttle car -- or cable because we limit it to 900 foot at that mine to reach where the coal is going to dump to the feeder.

Tr. 133. He conceded that although at *some* point the load center would be moved, it would not be for the 4A working section.¹⁷ *Id.* The Court notes that those assertions by the inspector were not contradicted.

The inspector's position was plain – if equipment is not being moved with the section, then it is stationary. Tr. 134. The working face, he informed, is the section – thus, the working face is not somewhere outby that location. *Id.* In asserting that the load center was *servicing* the 4A working section, the inspector explained “the load center was being used to run power through that load center and take it onto the next load center.” Tr. 136.

Reading from his notes in connection with this citation, the inspector stated, “[t]he load center on 4A working section ... MMU-081 is not shown on the map.” Tr. 137. His notes do not state that this is a pass-through load center. The inspector was *not* of the view that any load center on the section had to be on the map when he issued the citation. Tr. 137-38.

The Respondent contends that the 4A Section load center is not ‘stationary electrical equipment’ required to be identified on the electrical map because its location changes as the section advances. R’s Br. at 2-3. As before, Shaffer was with the inspector when this matter arose. The citation involved a problem on the surface in that the inspector was on the surface examining the mine’s electrical map. That map has to show all permanent underground electrical installations, and the inspector was determining if the underground equipment was properly marked on that map for its location. Tr. 507. Under his interpretation of the standard, Respondent’s Shaffer did not consider the equipment to be stationary. Tr. 509. The Secretary’s counsel asked no questions for cross-examination.

¹⁷ Asked how the load center is connected to the power system, the inspector demonstrated that he was knowledgeable on that issue, advising that there is a “[h]igh voltage cable 12,470 running from ... outby the front end [i.e. the beginning] of the panel, [and there is] a switch house ... with VCBs run-throughs, and [they take the 12,470] and run it all the way up through to that load center. Tr. 133-134. The load center is connected to that power. The other load center on the 4A is connected from that load center by running the 12,470 through that.” Tr. 134.

Respondent adds that the load center's "location is provided on the current working maps at the Patterson Creek Portal [and] [a] mine electrical schematic sheet was posted next to the map that had the location and load rating of the 4A Load Center posted on it." R's Br. at 3. Also, the Respondent asserts that there were several copies of the mine electrical schematic sheet which was available for all electricians to take underground and use.

On those grounds, the Respondent asserts that the citation should be vacated and, if not, the negligence should be low. However, the Respondent does not explicitly explain the basis for its low negligence contention, but the basis for this position is apparent from its contentions, as described above and in its post-hearing brief. *Id.* at 3.

Respondent points to MSHA's Program Policy Manual, Volume V, at pg. 52, (2003), for the proposition that only the circuit supplying power to the working section must be identified on the map. *Id.* at 6-7. Here, Inspector Yates admitted that in his notes he identified the cited load center which he believed must appear on the electrical map as the load center on the 4A working section MMU-081. When asked whether that load center was on the section, Mr. Yates conceded that it was on the section. Mr. Yates also admitted that the load center was used to help power the 4A working section due to the very big distance between the main power supply and the working section. Respondent points to the testimony of witness Shaffer in support of its claim that it was in compliance with standard 75.508 by identifying the circuit supplying power to the working section on the electrical map. Thus, Respondent contends that since the load center *serviced* the working section it was not a stationary electrical installation and therefore it was not required to appear on the mine electrical map. *Id.* at 7.

Alternatively, the Respondent asserts that if a violation is upheld, the negligence should be deemed as low, on the basis that there were considerable mitigating circumstances. In this regard it notes that there was a mine electrical schematic sheet posted on the wall next to the map showing the location of the 4A load center that was cited for failing to appear on the map. Exs. R-8, R-10. Second, there were numerous copies of the electrical schematic available for miners to take underground to perform their duties. Ex. R-10. Third, the section load center is marked with its current location on the working maps in the foreman's assembly room and is updated regularly as the location of the section load centers changes. Ex. R-8. Finally, Consol did what it believed it was obligated to do under the standard by identifying the circuit supplying power to the working section on the electrical map. R's Br. at 8.¹⁸

For its part, the Secretary contends that Citation 9077086 should be sustained, reasoning that one of the two load centers for the 4A Section should be deemed to be "stationary" and a part of the mine's permanent electrical system because "[r]espondent was using it as a "pass-through" load center." Sec. Br. at 12. A review of the Citation indicates that the Inspector cited the "*the load center located on the 4A working section.*" Exhibit P-6 (emphasis added). There is no mention of two "load centers." The Inspector's notes similarly state that the Inspector intended to cite the "load center on the 4A working section MMU-081" Ex. P-6, at 3 (emphasis added).

¹⁸ In its Response Brief, Respondent again urges that the citation be vacated, but without offering any new justifications. R's Response Br. at 9-11.

At the hearing, the Inspector claimed that this “load center” was a “pass-through” load center but the Respondent contends that using a load center as a “pass-through” does not make it “permanent” or “stationary.” If that were true, every component of a longwall mule train that is not at the end of a circuit, and which allows current through, would be deemed “stationary.” Rather, the test MSHA has imposed on itself in the Program Policy Manual (PPM) is that “equipment being used *on the working section* is not considered to be stationary equipment” Ex. R-9 (emphasis added). While the Inspector attempted to avoid the implications of the PPM at the hearing, his own words in the citation and his notes that he intended to cite the load center *on the working section*.

Further, the language of the standard makes it clear that it was intended to refer to truly stationary equipment such as “permanent cables, switchgear, substations, transformers, permanent pumps and trolley wires.” All of these items are installed permanently for an obvious long duration and do not move with a section.

Although every “load center” may not advance often, it does move with the mining. While the testimony was imprecise on the issue, the Respondent maintains that when two load centers were used for a section, and one load center reached its capacity as the Section 4A panel advanced, a second load center may be moved in to take the place of the first one, which was then moved forward. With the use of two load centers, the mine is then able to complete the panel. Only later, when the panel was complete, will the mine move the equipment to a new section and at that time both load centers move with the mining.

Clearly, the load center cited by the inspector was described by him as being “on the working section” and whether “pass-through” or not, the “load center” is moved from time to time and is not stationary. It will go from one section to the next as the mining advances. Based on these facts, the Respondent concludes that the citation should be vacated. R’s Br. at 10.

Analysis of Citation No. 9077086

Plainly, the question is whether a stationary electrical apparatus was involved here. It is undisputed that the Operator failed to list the location and electrical rating of the cited power center on the electrical map. Thus, the essential charge is that the cited load center was not advancing – instead it was stationary. The term “stationary” is not defined and MSHA points to no authority for its position as applied to this set of facts.¹⁹ Therefore, the term must be applied in a practical manner in this instance. Although the Court views it as a close call, based on the inspector’s explanation, the cited load center must be considered as stationary. Did the load center move? The answer, based on the credible evidence, is not really. While the inspector conceded that although at some point the load center would be moved, it would not move while performing its function for the 4A working section.

Still, the inspector described the matter as a paperwork violation and as such he designated the gravity as no likelihood of injury, non-S&S, no lost workdays, and affecting one

¹⁹ Nor was the Court able to find any Commission case law or MSHA policy papers, defining “stationary equipment.”

person – an examiner or miner. The Secretary maintains that because the General Maintenance Supervisor maintains the electrical map outside his office, an agent of the operator either knew or should have known of the condition, and accordingly moderate negligence is appropriate. Under such assumptions, the Secretary contends that using the six statutory criteria the proposed civil penalty of \$118.00 is warranted.

Given the legitimate differing views of whether the cited load center should be deemed stationary, the Court accepts as valid, the Respondent’s considerable mitigating factors, as described above. That leaves only one statutory criterion in dispute – the appropriate negligence designation. In this instance, the proper designation, taken together with the mitigating circumstances identified by the Respondent, is no negligence was involved. The Respondent had a reasonable, though incorrect, understanding of the stationary equipment requirement as it applied to this load center.

Considering the factors above and the other statutory criteria, the Court finds that a \$29.00 (twenty-nine dollars) is appropriate and is so imposed. The negligence finding is to be modified to reflect no negligence.

Citation No. 9077087

Citation No. 9077087 alleged a violation of 30 C.F.R. § 75.209(f), involving a lack of ATRS certification for multiple roof bolters. The Respondent seeks to have the citation vacated.

Inspector Yates also testified about this Citation, No. 9077087, Exhibit P-7, which he issued on January 7, 2018, citing 30 C.F.R. §75.209(f).²⁰ Tr. 138. That standard, titled, “Automated Temporary Roof Support (ATRS) systems,” provides at subsection (f) that “[t]he support capacity of each ATRS system and the structural capacity of each compartment shall be certified by a registered engineer as meeting the applicable requirements of paragraphs (e)(1) and (e)(2) of this section. The certifications shall be made available to an authorized representative of the Secretary and representative of the miners.” The citation asserted that the operator “failed to keep or to supply the Secretary with the ATRS²¹ certifications for several roof bolters in the coal mine and the roof bolters on the continuous miners that's located inside of Harvey Mine.” Tr. 139. This information has to be made available to the inspector, as the Secretary’s representative. *Id.* Specifically, the ATRS certifications were missing for “[t]he Company No. 3, 1B 35, 34, 32 and 11 Fletcher roof bolters, and the Company No. 1, No. 3 joy; 14 ED 25 continuous miners, nor the Company No. 42 Sandvik 450 continuous miner had certifications for their ATRSs on the surface.” Tr. 140-41. Absent a re-build, this is a one-time, not an annual, certification. Tr. 141.

²⁰ The inspector informed that the cited standard “requires that the operator must maintain copies of the professional engineer who certified that ATRS, that it will meet the standards that -- whether it's 1,800 or 11,800 or 18,000 pounds of pressure to hold up.” Tr. 139.

²¹ The ATRS is a bar that hydraulically it lifts the jack up and lifts that bar, and it pushes against the roof and the bottom, and it holds that roof up as it is being bolted. This is to protect the miners who are installing roof support. Tr. 139-40.

The inspector requested copies of the certifications for the named equipment from Mr. Shaffer, who was the safety escort that day and is also the mine's safety representative. The mine did provide the inspector with certifications for some equipment, but not for the equipment he cited, as the operator's representative could not find them. **Eventually, the paper showing certification was provided, but it took nearly a week to do that.** Tr. 143 (emphasis added). Plaques on the equipment do not constitute certifications and no one made such a claim at that time. Tr. 144. The standard requires certification from an engineer and the plaques do not contain such information. *Id.*

The inspector marked the negligence as "moderate," as he did not find any mitigating circumstances such as, for example, if they had presented the records in the past but now could not locate them. Tr. 145. In any event, ultimately, the records were located. *Id.* As it was deemed strictly a paperwork violation, the inspector marked the citation as non-S&S. On the same basis, he marked it as no lost workdays. Tr. 147. Upon cross-examination, the inspector stated that, because he was a roof bolter for ten years and he has examined many pieces of equipment at this mine, he knows the plaques do not state that they are engineer certified and therefore such plaques are not a substitute. Tr. 148.

Nevertheless, Respondent's Brief asserts that,

[a]ll the cited equipment is marked with an ATRS certification tag which can be inspected by the operator, miners, and inspector at any time. Each tag certifies that the ATRS system has been tested, approved, and verified by a certified professional engineer to withstand the required 18,000 lbs. of pressure. Furthermore, the ATRS certifications for the equipment were eventually provided to the inspector indicating that the ATRS systems had been properly certified. For this reason, this Citation should be vacated.

R's Br. at 3.

In its Response Brief, the Respondent adds "30 CFR § 75.209(f) requires two things. First, each ATRS system must be certified. Second, the operator must make the certifications available to an authorized representative." R's Br. at 11. The Secretary contends that Consol "violated this standard because it was unable to produce to the Secretary's representative the engineering certifications..." Sec. Br. at 14. However, the testimony of the Inspector indicates that Consol did produce the certifications, just not immediately upon request.

There is no question that Consol was eventually able to produce all certifications. The Respondent observes that 30 C.F.R. § 75.209(f) does not use the term "immediately," and from that claims that to the extent that the Secretary seeks to write this word into the standard, this should be accomplished through "notice and comment" rulemaking, a suggestion the Court cannot take seriously. As an example, Consol, citing 30 C.F.R. § 75.363(b), looks to the record of pre-shift/on-shift examinations which must be kept "on the surface at the mine."

Other regulations, it notes, simply state that the records must be available "upon request," offering the example of 30 C.F.R. § 46.9(h). It notes that MSHA has interpreted the "upon

request” language to allow 24 hours for the mine to produce the records, citing *QMAX Company*, 2006 WL 2927266 (Sept. 29, 2006) (ALJ). In *QMAX*, the ALJ vacated a citation where the mine produced records on the grounds that “[t]here is no specific requirement that the records be kept at the mine site, or that they be produced within a specific time after a request is made.” *Id.* at *21. Here, 75.209(f) contains no requirement for immediate production and on that basis, the Respondent argues that the Secretary failed to prove a violation of the standard and accordingly the citation should be vacated. Response Br. at 10-11.

At its heart, Consol’s argument is that, at most, this was a technical violation since the certifications were produced, albeit it was not able to locate the records immediately. R’s Br. at 9. Effectively, the inspector agreed that Consol had misplaced them and did not suggest that there was any chicanery involved. Thus, there was no suggestion of falsified or forged documents. Respondent notes that the standard “is silent as to when the certifications must be provided, rather, it simply requires that the ATRS systems be “certified by a registered engineer” and “made available” to an authorized representative of the Secretary. Therefore, because Consol complied with both requirements, Citation No. 9077087 should be vacated because the Secretary has failed to prove a violation of the standard by a preponderance of the evidence. *Id.*

In the alternative, should the citation be upheld, Consol believes any negligence should be found to be “low” for two reasons. First, the certifications were produced and second, “Mr. Shaffer testified that the metal plaques or tags on each piece of equipment do[] certify that the ATRS system complies with the requirements of the standard and can be inspected at any time.” *Id.* at 10.

The Secretary contends:

Respondent violated this standard because it was unable to produce to the Secretary’s representative the engineering certifications for six roof bolters and three continuous miners. Although Respondent’s witness testified that these pieces of equipment have plaques describing the manufacturer, approval number, and serial number (R. at 558-559), Respondent did not offer any credible evidence or photographs that these plaques have the certifications required by § 75.209. Based on his extensive mining experience, Inspector Yates confirmed that the plaques do not have the required engineering certifications.

Sec. Br. at 14. According to the Secretary, this is fatal to the Respondent’s claim. It has already been noted that, as a paperwork violation, the inspector designated the gravity of this citation as no likelihood of injury, non-S&S, no lost workdays, and affecting one person: an examiner or miner.

Analysis of Citation No. 9077087

The Secretary seeks a \$118.00 civil penalty for this violation. The operator's stance that the citation should be vacated is without merit. In response to the Respondent's argument that the records were ultimately provided, the Court observes that there has to be an implied reasonable time to provide these documents. This means that the Respondent's contention can't be upheld other than for delays of short duration in producing the documents, meaning hours and not many at that. If the mine is unable to produce the documents by the time the day's inspection has concluded, there is a problem. Whether more time will be afforded needs to be left to the inspector's discretion, which will in turn depend upon the reason advanced by the mine operator to warrant additional time. But here, no such dilemma was faced. The delay was not short, taking nearly a week to furnish them. Therefore, the certifications were not "made available" in the common sense meaning of the term, and the fact of violation was established.

However, the Court finds that the Respondent's negligence was low, not moderate. There was some negligence here; the Respondent failed to meet the standard of care by being unable to produce the records within a reasonable time after the request to supply them. In examining whether the operator knew or should have known of the violative condition, it can only be said that the operator was unaware of the misplaced records until asked to produce them and that it should have maintained better recordkeeping. The operator failed to meet the standard of care by being unable to produce the records within a reasonable time after requested to supply them. Accordingly, this situation fits as no more than low negligence, under the circumstances.

As with the Court's analysis for the stationary electrical equipment citation, discussed above, given in this instance that the negligence was low and upon consideration of the remaining statutory penalty factors, a \$59.00 (fifty-nine dollar) penalty is appropriate.

Citation No. 9077091

Citation No. 9077091 alleges a violation of 30 C.F.R. § 75.1725(a), alleging a lifting device on the Operator's #55 Brookeville jeep was not maintained in a safe working condition. The Respondent seeks to have the citation listed as non-S&S, unlikely risk of injury, and low negligence.

Inspector Yates also testified about Citation No. 9077091, Ex. P-8, which he issued on January 19, 2018, citing 75.1725(a) for a material lifting device mounted on the 55 Brookville jeep. The standard, titled, "Machinery and equipment; operation and maintenance," provides at subsection (a) that "[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 inspector observed that the hoisting cable on the lifting device on a longwall maintenance "Jeep" mantrip was attached to a hook in an improper manner. Tr. 150. The lifting device was a small crane, [the venture lifting device] akin to a winch, located on the back of the mantrip. The cable is a wrapped stainless steel variety. *Id.*

The safety issue was that “about two or three feet of the original cable was broken off and still attached to the hook, and [he added] someone had run the other cable from the winch back through and tried to braid it back in and make a connection point for the hook.” Tr. 151. Photographs of this hoisting cable were admitted in the record. Tr. 151-52, Ex P- 9A-E. The cable was frayed with broken and loose strands, and these had been wrapped with black tape. This condition of the cable presented a hazard because it had not been terminated in a proper fashion, with the risk that someone could get smacked in the face or get cut. Tr. 154. The Jeep mantrip is used on the longwall for lifting very heavy components, such as motors, jacks and pumps. Tr. 155-56. The mine tried to fix the improper termination by braiding it back into itself. *Id.* Instead of properly terminating the cable, such as by using an eyelet, the mine just had the cable running through the hook. The end result was that upon pulling and applying pressure, the improper termination could fail. The inspector observed that the cable had already creased and started to pinch, evidencing that tension had been applied to it and therefore that it had been used to lift equipment. Tr. 157.

At its core, the inspector concluded that the cable broke when used improperly or when lifting something that was too heavy. Instead of performing a proper repair, which would’ve necessitated taking the cable out of service, this unsafe fix was attempted. A proper fix would have required a new cable or properly terminating it on the hook. Tr. 159. The Jeep was not tagged out and consequently it was available for service. Tr. 160. The inspector characterized the negligence as moderate because the attempted, inadequate, fix took some time to perform, and therefore evidences that the operator knew about the issue. Following up on that point, he inspector stated that it was possible for him to have considered the negligence to have been high because to make an inadequate repair reflects that the operator knew they would need to be using the cable. Tr. 161. In fact, the inspector believed that the cable had been used with the inadequate attempt at repair, because of evidence as to the manner in which it was connected to the hook. *Id.*

The inspector emphasized the hazards – the hook could fly off and one could drop a load. Further, the cable could break, especially given the way the hook was attached to it. If that happened, the cable could come back and contact the person operating the equipment or one who was helping to load the Jeep. Tr. 162. Thus, the inspector agreed that two hazards were presented: the cable snapping and hitting someone and a load falling. *Id.* The potential injuries could be quite serious, ranging from “[c]uts, broken bones, contusions, and considering what loads you have, the motors, it could easily crush your legs. You know, it could crush your feet, maybe even amputation if it hits right.” Tr. 163. Although he marked the injury as lost work days or restricted duty, he stated that he could have marked it as permanently disabling with one person affected. *Id.*

On cross-examination, the inspector agreed that this equipment is to be examined weekly and there is to be a pre-operation inspection each time before the equipment is to be put in service. Tr. 169. Pertinent to that point, he noted that he found the condition at the end of the shift, so it had been used on that shift. *Id.* The inspector’s emphasis was upon the condition of the cable, not the condition of the hook; the fact that the cable was shiny around the hook showed that it had been used on the hook. Tr. 170. The inspector agreed that there could be “red zone considerations” in the use of the winch, meaning that, if followed, a person would be a safe

distance from the cable in the event of a mishap. Tr. 171. At bottom, the concern of the inspector was that if the improperly terminated end were to fail, the whiplash effect could injure a miner. Tr. 180. Further, lifting straight up is not the only function involved, as the cable may be used to drag loads before attempting a lift. *Id.*

The inspector agreed with the Court's summary of the two hazards associated with this citation: "One is that the cable itself, this jury-rigged cable, could just come undone and perhaps whip and hit someone possibly" and the other is that if it collapses, due to this poor way to secure the hook, it could also result in whatever this hook was intending to lift, that item could drop. Tr. 184. On re-cross examination, the inspector agreed that miners are supposed to operate this machinery from a distance. Tr. 187.

Respondent's Mr. Stein was with Inspector Yates for this citation as well. The jeep was parked in an area between entries where rides not in use are parked. Stein described this area as the "track shoot." Tr. 409. Ex. R-12 reflects Stein's notes regarding this citation. Stein related that the inspector came to the jeep and "saw on the crane there was tape on the cable, and he pulled the tape off the cable to see what was underneath it, and the hook had been broken off. They looped it back on and stuck it there, so the cable I believe wouldn't roll back up into the spool." Tr. 410. Essentially, Stein's description was in accord with the inspector's. Ex. R-13, a photo, shows the jeep and its boom on the back end. *Id.* Stein, referring to page 3 of the exhibit, stated that there is metal shield on top of the boom. Tr. 411. As indicated in earlier testimony, the boom is used to pick up broken equipment, such as a longwall motor and bring it to the track. Tr. 412. Also, consistent with earlier testimony, Stein explained that there is a cable on the spool and a hook which was used to pick up the piece of defective equipment. Once picked up, the boom would deposit the item on the duck bill. Tr. 413. He also agreed about the red zone, adding that the miners were trained "to be two times the length of the cable that they're working with out of the way, and they would also have the piece of equipment itself, the Jeep, between them and what they were picking up." Tr. 413. This training included demonstrating to the miners "how far the cables would fly. After it was over, they would go look and see how far down the entry it went and to show them, you know, you got to be out of the line of fire, out of the red zone, and everybody in our mine went through that [training]." Tr. 414.²²

²² Respondent attempted to introduce a record of the weekly exam for this equipment, but which record had not been disclosed to the Secretary. The exam record purported to show that the equipment had been examined on the day prior to the citation. Tr. 416. Yet, Respondent's Counsel stated that he "would represent to the Court that the examination records are not consistent with that date." Tr. 417. The Court denied the request for the record to be introduced. Tr. 418-419.

Referring to Ex. R-8, the citation in issue, Stein believed that an injury was unlikely, offering as his reasoning that

it was metal on metal. ... if it was used, it would slip right out. And there's a safety latch on the hook, so if the cable [were to] come off, it's going straight up in the air because they use it to pick things up. They don't use it to pull, and it would be lucky if it held five pounds. It was held on by tape.

Tr. 419-20.

Upon cross-examination by the Secretary, Stein admitted he had never operated this crane and that it was not locked or tagged out and accordingly it was available for service. Tr. 420. He also did not take issue with the inspector's description of the cable, agreeing that the damaged area was held on by tape and looped back through itself. Tr. 421. He also agreed that only the area where the spool is located was completely covered by metal. Tr. 422. Referencing R-13, the manual, and the diagram of the crane within that, Stein agreed that towards the end of the boom is an exposed area and also that "any area underneath where the cable runs through the pulley down to ... the hook" is also exposed. Tr. 423. Additionally, Stein agreed that "[i]f the the cable snapped ... where the area was damaged, it was above where the hook was [located] [and] if someone was attempting to use this crane to lift a piece of equipment in that condition, it would have snapped at that point." *Id.* Respondent's counsel tried to diminish Stein's adverse testimony, asking what would occur if the cable were to snap while lifting a piece of equipment, to which Stein responded that the cable would have gone up in the air or backtracked into the spool. Tr. 423.

Respondent's Brief remarks that:

[t]here is no indication that the winch was used or could have been used in this condition and the Inspector did not observe it being used in this condition. There was no evidence that an agent of the operator was aware of this condition. On those bases, it argues that the Citation should have been marked non-S&S and low negligence.

R's Br. at 3-4. The Respondent also asserts that the Secretary failed to meet his burden of establishing that the cited condition contributed to a discrete safety hazard warranting an S&S designation and also failed to show that the winch cable was reasonably likely to cause an injury. The Respondent asserts that the lifting device is used primarily for lifting equipment and components onto and off the track mounted Jeep. However, at the time the citation was issued, the machine was found at the bottom, was not in use, and the winch controller was disconnected from the power source. Supporting these observations, the inspector conceded that the controller must be connected to the power source to operate the boom and lift an object with the machine. Respondent contends that Yates further conceded that he was only guessing that the cable had been in that condition for at least a shift and had no proof to support that allegation. Thus, Respondent asserts that there is no indication that the winch could have been used in the condition that it was found and that Yates conceded that he did not see it used in this condition.

Speaking to the twin hazards identified by the inspector, whiplash and an item being dropped upon attempting to perform a lift, the inspector conceded that use of the controller would allow the machine operator to stand 20 feet away from the device and the object being lifted while in use and that the purpose of the controller is to allow the machine operator to stand away from both the machine and the object that is being lifted. Consol trains its employees to stay out of red-zones and to use the controller when operating the lifting device. Thus, Consol asserts that use of the controller would negate both potential sources of injury identified by the inspector. R's Br. at 33-34.

Respondent maintains that, in order to be injured by the cable, the machine operator must either be standing directly underneath or beside the object being lifted or have greater than 20 feet of cable off the spool to be in reach of the cable in the event of a whiplash. However, it asserts that both scenarios are extremely unlikely to occur because the machine is designed to vertically lift very heavy objects for short distances. Thus, it is unlikely that greater than 20 feet of cable would ever be utilized for any lifting application that would place a miner in danger of being struck by a whiplash. Respondent also contends that Mr. Stein explained that a whiplash is very unlikely to occur because if the cable snapped, it would most likely backlash into the spool and away from any miner. Further, given the large size and nature of the components that are typically lifted with the device, it is very unlikely the cable could be used for lifting such objects in the damaged condition it was found. After all, Stein testified that because the hook was merely taped on, he believed that it would be difficult to lift as little as five pounds with the machine. Therefore, because it was not reasonably likely that this condition contributed to a discrete safety hazard or that any miner would be injured by this condition, Citation No. 9077091 should be reduced to non-S&S and unlikely. R's Br. at 34.

Consol further contends that the negligence level should be "low" because there were considerable mitigating circumstances. It notes that the controller to energize and use the winch was not plugged in on the #55 Brookeville jeep at the time the citation was issued and that the machine was located at the bottom and was not in use at the time the citation was issued. Moreover, there were no reports of the cited condition and the operator was unaware that the condition existed. Contrary to the inspector's assertion that the cable was looped back into itself and covered with tape for continued use, Respondent asserts that the cable appeared to be taped *to prevent* the loss of the hook and to prevent the broken cable from being pulled up into the boom. Consol also submits that the condition could have developed since the time of last examination and that the Secretary failed to prove otherwise. For those reasons, it believes that the negligence designation is more reasonably identified as low. R's Br. at 35.

In its Response Brief, Consol disputes the Secretary's claim that the exhibit photos show that the cable on the Venturo lifting device had been used in its damaged condition. Consol counters that this is simply speculation and that the photos only show that the cable on the lifting device was broken and the piece with the hook had been tied on, with electrical tape added. Consol contends that S&S requires a more detailed analysis of the surrounding facts and that a judge must determine if the specific circumstances present at the time of the violation make a hazard and injury of a reasonably serious nature reasonably likely. R's Response Br. at 12.

Consol suggests that “[i]n this case, it is more likely that the cable was tied and taped up simply to avoid losing the hook and to keep the cable from being pulled back into the boom,” adding that “[e]lectrical tape and the modest tie job were not going to allow the cable to be used to lift a load [and that] [c]ommon sense dictates that if the lifting device was used in this condition, the taped/tied area would come apart.” *Id.*

Consol submits that inspector Yates was speculating when he suggested the cable had been used in this condition, maintaining that the hazard identified by Yates, that the cable would snap with the load dropping on a miner, “strains logic.” Given the way the lifting device is used with a remote controller and the location of the broken cable, Inspector Yates’ account strains logic and should be rejected. The citation should be Non-S&S. On the issue of negligence, Inspector Yates failed to present any evidence that an agent of the operator was aware of this condition. This equipment is examined weekly. There is no evidence that the condition existed at the time of the last exam, so the Secretary presented no evidence that the operator knew of this condition.” *Id.* at 12-13.

The Secretary’s brief simply asserts that because the lifting device cable was not maintained in safe operating condition and had not been taken out of service, the standard was violated, noting that the Respondent’s witnesses did not present any evidence or testimony contradicting the fact of violation of this standard. As for gravity, the Secretary observes that the Jeep was neither locked nor tagged as out of service, and was available for use. He contends that, relying on the inspector’s testimony, a miner attempting to use the lifting device in that condition would be exposed to two discrete safety hazards: the cable snapping under the weight of a load and striking a nearby miner due to a “whiplash” effect of the tension on the cable; and the load itself dropping and striking a miner. Either hazard could reasonably be expected to cause cuts, broken bones, contusions, and even amputations, in the event of a falling load. One person would be exposed to this hazard: the miner operating the crane with the remote. Again, under *Eagle Nest*, a respondent cannot abdicate its duty to minimize and eliminate safety hazards by shifting that responsibility onto its employees, nor can a respondent attempt to claim mitigation regarding S&S when it rests upon the assumption that miners would stay out of red zones or otherwise exercise caution. Sec. Br. at 16. As for negligence, the Secretary notes that the inspector designated the violation as moderate negligence because it appeared to have existed for at least one shift. The evidence is compelling – “[r]ather than locking and tagging the lifting device out of service, someone had attempted to loop the broken cable back into itself and cover it with tape.” Sec. Br. at 17. Given these circumstances, the Secretary submits that, using the six statutory criteria, MSHA’s proposed civil penalty of \$638.00 is appropriate.

Analysis of Citation No. 9077091

To the Court, though intended to show the hazard associated with a cable whiplash which hazard the mine wanted to impress upon the miners, Stein's testimony demonstrated how real the hazard was. It is hardly sufficient to depend upon miners' adhering to their safety training, especially when a cable, as in this case, was insufficiently jury-rigged. Thus, it is no answer to deal with a hazard by hoping that miners will adhere to their training about risks from a cable failure.²³

On the day in issue, Stein asserted that the controller was unplugged. Tr. 414. He agreed that Consol has a policy requiring that equipment be pre-operationally checked before it is used. Tr. 414-15. Here too, that is no answer to the hazard presented by the condition, since the method used to secure the cable was insufficient and an intentional act, contrary to that policy. The tape served to hide the inadequate fix.

There is no dispute about the condition found by the inspector; the cable was broken and attached to the hook improperly. The Court accepts the inspector's credible testimony that the cable had been used in its improper condition, as he discovered the defect at the end of a shift. It is important to note that the Jeep was not locked or tagged out and was available for use. Moderate negligence was a generous finding by the inspector, as the improper fix took some time to accomplish. There were two hazards presented by this condition: the cable could snap back and a load could be dropped. The Court rejects the Respondent's claims that there were mitigating circumstances and finds that moderate negligence was involved. This violation was clearly S&S. The twin discrete safety hazards were identified by the inspector, presenting a clear measure of danger to safety. Thus, there was a discrete safety hazard, a measure of danger to safety, contributed to by the violation, and such hazard was at least somewhat likely to result in harm. The seriousness of the expected harm was also established by the inspector's testimony that such harm was reasonably likely to result in lost workdays/restricted duty-type injuries affecting one person.

The Court finds that, applying the six statutory criteria under section 110(i) for this S&S violation, which also involved moderate negligence, an assessment of \$638.00 is appropriate.

Citation No. 9077089

This matter alleged a violation of 30 C.F.R. § 75.517, for a power cable with two holes in its outer jacket. Ex. P 10 The citation was issued on January 19, 2018 and involved a 480-volt cable supplying power to the 6B shuttle car on the 7 north mains, which car was in an active working section. Tr. 189-190. The Respondent seeks to have the citation vacated.

²³ Though the Court does not factor into its analysis for the determination of violation for this citation, nor for the penalty imposed for this citation, No. 9077091, it is still noted that less than two weeks earlier, there was another dangerous cable situation found at this mine as reflected in Citation No. 9077085, which was issued by the same inspector, as discussed earlier in this decision.

The standard requires that all cables will be protected from damage and properly insulated. Specifically, the text of the standard, which is a statutory provision, is titled “Power wires and cables; insulation and protection,” and provides “[p]ower wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected.”

While inspecting the cable, the inspector found two holes in the outer jacket but there were no damaged leads inside. However, the cable’s inner power leads were exposed. Tr. 193. Consequently the inspector determined that the issue could be fixed with a boot wrap. Tr. 191. At the time he checked the cable, it was connected to the shuttle car and the power was on. *Id.* He checked the entire length of the cable, which was about 1,000 feet. Exposure to this condition would occur when moving the cable, where, for example, it was in the way or there was slack around the power center. The damaged area of the cable was not on the working section. The cable does run on the mine floor. If the damaged area is not corrected, over time it could increase the chance of a shock and this could occur even if the copper leads were not exposed. The cable can run up against equipment, such as load centers. Tr. 194-95. Also, cable gets run over in the mining environment. With its 480 volts, that presents a fatal current. Tr. 195. By comparison, on the surface, people can be killed by 110 volts. Tr. 198. Exposure to the risk would occur when an examiner is checking the cable or when one is moving it. Tr. 198. Again, the cable was energized and the shuttle car was not locked out at the time the inspector found the condition. Tr. 198. However, the inspector marked the injury as unlikely to occur as coming into contact with the affected section was not likely and the inner conductors were undamaged too. Tr. 199.

The inspector marked the negligence as moderate since the mine told him they had just checked the cable and it was good, yet he then found the two holes. Tr. 196. The mine is required to visually check the cable completely once each production shift. Tr. 197. The holes he found were a good distance from the snub.²⁴

Upon cross-examination, the inspector informed that the holes were less than an inch. Tr. 200. When asked why he did not take a picture of the condition, the inspector responded that he tries to avoid taking pictures inby because of methane. Tr. 200. Even if he wanted to take pictures inby the last open crosscut, he would have to receive permission from his District Manager. Tr. 202. The inspector does not factor in any “preop,” when assessing a broken jacket. Instead, the inspector evaluates based on the condition he finds. Tr. 203. The inspector did acknowledge that there was a mechanic who was fixing a splice. Tr. 204. The operator’s duty regarding a cable’s condition is to visually inspect it; the operator is not required to examine a cable hand over hand, as the inspector did. *Id.* When challenged about his claim that the power to the cable was on, the inspector reasserted that it was on, adding that he included that in his notes. Tr. 206. Because the inner leads were not damaged, he did not mark the violation as S&S. Tr.

²⁴ A “snub” pulley is an idler pulley mounted as to increase the arc of contact between a belt and a drive pulley. When used in a wrap drive, it has the added function of changing the direction of the return belt travel. It is related to a requirement that the mine not have more cable than what is needed to reach the face. This means that slack has to be kept outby that area. It is on a reel so that it unfurls and also reels back hydraulically in order to keep tension on the cable. It gets reeled back onto the shuttle car. Tr. 195-96.

208. Further, even if the inner cables were exposed, that would not trip the ground cable. That would occur only if one of the inner cables were to cross with the other or with the ground. Tr. 209.

Referring to Ex. R-15, the inspector agreed that exhibit is an onshift report and that it reflected that maintenance was performed on that cable. Tr. 210. Ex. R-16 reflected a weekly exam on the equipment in issue, which was performed the day before the citation, on January 18. *Id.* The inspector agreed that such cables are subjected to fairly extreme conditions and that a defect or cut in a cable's outer jacket can occur rapidly. Tr. 211. However, the inspector rejected the assertion that the condition he found developed since the last exam, responding, "Not the day prior, absolutely not. I believe he missed them -- on his exam." Tr. 215. He reiterated his view that the problem developed since the last exam because it was outby and they didn't move the power. Tr. 217. He did not believe that the cable had been moved because "[y]ou're only supposed to run with enough cable from that loading point to your miner. [] As you advance, you move more cable into your reel and through your snub." Tr. 218.

On redirect, the inspector affirmed that a pinhole sized hole in a 480 volt cable can cause a shock. The inner leads do not provide protection against mining conditions, nor do they protect against wear and tear in normal mining conditions. Tr. 219. The inspector informed that even with a pinhole defect one can get shocked, as the electricity could go to ground through the miner contacting it. Tr. 220. The Secretary then made a motion to amend the citation to S&S, reasonably likely. It was then immediately pointed out that on the day the inspector issued the citation he did not mark it as S&S. *Id.*

The Respondent's witness Stein was directed to Ex. R-14 and the issue of the 6B shuttle car. He stated that the shuttle car operator was having a splice done on the car's cable. As the cable was unreeled, the operator offered for the inspector to check it. The inspector began doing just that. The shuttle car was not under power at that time. Tr. 426. Stein admitted that the inspector found a defect with the outer jacket on the cable between the snub and the machine. Tr. 427. He described that there were two holes, the size of a BB gun shot. The holes were corrected by being wrapped with tape. Tr. 428. Stein believed that the inspector's use of a screwdriver could cause damage to the inner leads, though he saw no damage to those leads. *Id.* Regarding the likelihood of injury, Stein expressed that it wasn't likely since no internal leads were exposed. *Id.* The Court then noted that the inspector marked it as unlikely as well. *Id.* Similarly, Stein believed that a fatality would not occur because no leads were exposed. Tr. 429. Because the holes were so small, Stein believed that the negligence should be considered low. Further, based on his mining experience, he expressed that such a condition could occur rapidly. *Id.*

On cross-examination, Stein reiterated that the shuttle car was not powered up, and further, if the inspector said otherwise that would not be true. Tr. 430. Stein felt his recollection was better based on his notes, Ex. R-14. Tr. 430-31. It was also his view that inner power leads on a trailing cable would need to be exposed for it to be S&S. Tr. 432. He allowed that, if left uncorrected, the holes could get larger and eventually there could be damage to the inner leads. Tr. 432. He did not agree that if one could still get shocked upon touching a power lead that was not damaged. The Court sought clarification, asking, Stein "[i]f the inner lead is not broken,

[and] there's no copper exposed,” if he was asserting one cannot get a shock. He affirmed that was his view, informing “[u]nless you touch the copper, you're not getting shocked.” *Id.* Stein agreed that the cables would be handled weekly during permissibility. Tr. 434.

On re-direct, Stein informed that when the weekly permissibility exam is being performed, the power is off. Tr. 435. He also opined that miners would locate conditions, like the holes cited in this instance, during permissibility exams or pre-operational checks. *Id.* In response to the Court’s question, Stein stated that a pre-operational check had not just been done; instead they had just completed a splice. *Id.* However, he then stepped back from that claim, stating that he did not know if the shuttle car operator had done his pre-op at that time. Tr. 437. In performing the pre-op, the shuttle operator is not required to do a hand over hand exam. Tr. 438. Stein agreed that his description of the holes as BB size was his description, not that used by the inspector. Tr. 437.

Respondent contends that this citation should be vacated. Its brief notes that “[a]t the time the citation was issued, the shuttle car was not in use and had been de-energized to repair the cable by making a cable splice. Prior to the issuance of the citation, the operator had not yet had the opportunity to walk the cable to check its condition prior to placing the shuttle car back into service. Because work on the cited cable was in progress, including checking the cable for any additional areas that needed repair, Citation No. 0977089 [sic] should be vacated.” R’s Br. at 4.

In the alternative, Consol argues that “if the violation is upheld, the reasonably expected injury would not be fatal and the negligence designation should be “low,” as the “inner leads in the two cited areas of the cable were not exposed and the condition would have been discovered in the pre-operational check before the shuttle car was placed back into service. It asserts that the shuttle car was de-energized, negating any potential for a miner to receive a fatal electrical shock from handling the cable. Consol also asserts that the “condition was not apparent to any agent of the operator” and the Secretary “failed to prove that the condition was present at the time of the last exam.” *Id.*

Again, Consol advances a twin argument – that the citation should be vacated or alternatively, the negligence should be found to be “low.” R’s Br. at 10, citing *Ziegler Coal Company*, 7 FMSHRC 452 (Mar. 1985). Additionally, Respondent argues that “[p]rior to the issuance of a citation, an operator should have the opportunity to check equipment for violations while repairs to the equipment are ongoing.” R’s Br. at 10. Consol contends that its situation is analogous. It also looks to *Beaver Creek Coal Company*, 12 FMSHRC 868, 871-73 (Apr. 1990) for support, asserting that the circumstances involved “ambiguous communications between the operator and the inspector while repairs to equipment were ongoing.” R’s Br. at 10. However, Consol acknowledges that in *Beaver Creek*, the continuous miner involved in that citation was locked and tagged out for repairs. *Id.* The judge in that case vacated the citation prematurely because *Beaver Creek* had not yet completed all the repairs and made its in-house permissibility check. *Id.* at 11, citing *Beaver Creek*, 12 FMSHRC at 873.

Consol challenges MSHA's claim that the shuttle car was energized prior to the inspector's inspection of the cable and that he instructed an escort to disconnect the energized cable from the power center so that he could place his lock and tag on the cable. R's Br. at 11-12. Since the inspector agreed that a splice was being performed on the shuttle car cable, it is difficult to ascribe credibility to the inspector's claim that the work was being done on an energized cable, especially since Consol was not cited for that.

In any event, Consol emphasizes that "clearly [it] had not yet completed all the intended repairs while the shuttle car was de-energized, including performing a required pre-operational permissibility check of the entire shuttle car." *Id.* at 12. In that regard it notes that Consol's employees are required "to perform a pre-operational permissibility check on all equipment prior to the equipment being energized and placed into service." *Id.* Consol urges that in fairness "while repairs to equipment are ongoing, the operator should have the opportunity to check the entire machine for violations in accordance with its in-house pre-operational policy prior to the issuance of a citation." *Id.* It adds that "[t]he cited area of the cable would likely have been discovered during the pre-operational check of the cable had Consol had the opportunity to do so prior to the issuance of the citation." On that basis, it contends that the Secretary did not establish the violation by a preponderance of the evidence. *Id.* at 13.

Again, presenting its alternative position, Consol argues that if the citation is upheld, low negligence is the appropriate characterization. It notes that it is undisputed that repairs to the shuttle car were going on, that the cable defects were quite small and the inner leads themselves, which were not bare, were not damaged. *Id.*

The Secretary notes that the cable is on a hydraulic reel, nicknamed a "snub" that keeps tension on the cable as it is reeled back up from the shuttle car and that miners move the snub whenever the section moves during mining. The cables are energized when the snubs are moved. The damaged areas of the cable were located in between the snub and the shuttle car, and the Secretary observes that it is undisputed that the cited cable was damaged. Therefore it was not insulated adequately or fully protected. Sec. Br. at 17.

The Secretary also urges that the Court should grant the Secretary's motion to amend the citation to reasonably likely, and significant and substantial. The motion was made following the testimony of Inspector Yates. The Secretary notes that, in line with the Federal Rules of Civil Procedure, the Commission procedural rules have been interpreted to allow liberal amendment of pleadings and citations in advance of a hearing, during a hearing, and even after a hearing, so that the pleadings conform to the evidence adduced at trial, citing *Faith Coal Co.*, 19 FMSHRC 1357, 1361-62 (Aug. 1997) (allowing post-hearing amendment of citation); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289-90 (Aug. 1992); *Portable Inc.*, 36 FMSHRC 279 (Jan. 2014) (ALJ Moran) (granting motion to plead in the alternative). It adds that the Respondent did not object to Petitioner's oral motion to amend during the hearing, nor has Respondent asserted any bad faith, dilatory conduct, undue delay, or prejudice caused by the Secretary's motion to amend the gravity of Citation No. 9077089 and that the underlying facts and evidence are unchanged. Therefore, the Court should grant the Secretary's motion, consistent with Commission case law

and the spirit of liberal amendment of pleadings “when justice so requires.” Fed. R. Civ. P. 15(a).²⁵ Sec. Br. at 18.

In support of its contention that the violation was reasonably likely to result in a reasonably serious injury, the Secretary notes that at the time of issuance, the damaged cable was energized from the load center and connected to the shuttle car and that the shuttle car was available for service. It adds that the Inspector locked it out of service with his own lock after the operator knocked power and unplugged the shuttle car. The Secretary contends that one miner would be exposed to fatal electrocution hazards when handling the cable to move it out of the way. Additional exposure to the cable occurs when an examiner is checking the cable during weekly examinations or pre-operation. Although the Secretary concedes that the inner conductors were undamaged at the time of issuance, over time, the two holes would continue to deteriorate and become impacted with coal or moisture, or become wet, which would increase the shocking hazard. On those grounds it submits that this Citation should be affirmed as S&S. As for negligence, the Secretary maintains that the operator knew or should have known of the damaged cable and accordingly moderate negligence is appropriate. Given these considerations, the Secretary believes that MSHA’s proposed civil penalty of \$638.00 using the six statutory criteria is fully warranted but beyond that because the evidence supports modifying this citation to S&S, reasonably likely, the Court should assess a higher civil penalty reflecting those more serious considerations. Sec. Br. at 19.

Analysis of Citation No. 9077089

Respondent seeks to have this citation vacated. The inner power leads were exposed but not damaged. The two holes found by the inspector were small, being less than an inch. Exposure to the risk would occur when an examiner is checking the cable or when one is moving it. The inspector marked the injury as unlikely to occur, as coming into contact with the affected section was not likely and the inner conductors were undamaged too. It was not S&S, nor did the inspector mark it as such. Thus, the Court does not subscribe to the Secretary’s motion to amend the citation, asserting that it was S&S. The Court also finds that the power to the cable was not on and that the inspector’s recollection was inaccurate on that issue.

The negligence issue is more difficult to evaluate. The inspector marked the negligence as moderate, since the mine told him they had just checked the cable and that it was good, yet the inspector then found the two holes. Tr. 196. Given the circumstances of the discovery of this condition, that repairs were being made on a different section of the cable, it is unreasonable to find that the negligence was moderate. Low negligence is the more appropriate designation. Given these findings a penalty of \$319.00 is more appropriate.

²⁵ The Court observes here that, under Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b), the Federal Rules of Civil Procedure govern Commission proceedings where the Commission’s own procedural rules are silent.

Citation No. 9077092

Citation No. 9077092 alleges a violation of 30 C.F.R. § 75.1504(d), for a “missing signature” violation. The standard cited is titled, “Mine emergency evacuation training and drills. The Respondent seeks to have the citation vacated. The citation was issued on January 22, 2018. Ex. P-11. It came about when the inspector was checking records and discovered that the operator failed to certify by signatures that the training and drill had been conducted. .” There is no claim that such training or drills were not conducted. Rather, at issue is subsection (d) from that standard, which provides under “[c]ertification of training and drills,” that “[a]t the completion of each training or drill required in this section, the operator shall certify by *signature* and date that the training or drill was held in accordance with the requirements of this section.” (emphasis added).

Thus, a recordkeeping violation was involved, which is not to suggest that it is unimportant. The inspector marked it as non-S&S and no likelihood. Tr. 221-22. The inspector noted that the mine had already done the required quarterly training and drills, but that they were not certified by the person who conducted the drills nor did the certification list the dates that the drills were conducted. Tr. 222. Without knowing who conducted the training, the inspector cannot know for sure if the miners were actually properly trained. Tr. 223. The period cited was for the fourth quarter of 2017. At the time the inspector issued this citation it was the beginning of the second quarter. The citation was related to the previous year’s fourth quarter, which ended in August 2017. Tr. 224.

In support of this citation, the inspector gathered training records which reflected the absence of a signature for the person who conducted the training. Tr. 225. In total, seven signatures were missing. Tr. 226. Though no signature was present, the inspector agreed with Respondent’s counsel that the person who conducted the training did list his name and his identification number but the inspector noted that a signature is required. Tr. 229-30. The inspector stated that he had cited the Respondent for this standard on a prior occasion. Tr. 231.

For this citation, Consol contends that since the “training verification documents included the names and employee numbers of all employees who participated in the training, including the foreman who conducted the training,” Citation No. 9077092 should be vacated. While Consol contests the violation, if the violation is upheld, the negligence should be “low” because the identity of the person who conducted the training was included on the form. R’s Br. at 4.

Consol argues that the standard is silent as to the *type of form* that an operator may utilize to certify that the training has been conducted and that the standard does not provide a definition of the term “signature.” *Id.* at 13-14. Consol does admit that the standard requires that the operator shall certify by signature and date that the training or drill was held in accordance with the requirements of this section. *Id.*

Consol notes that it is undisputed that the date the training was conducted and the *printed name and unique employee number* of the persons who conducted and received the training appeared on all forms to certify that the training was held in accordance with the standard. *Id.* at 14.

Trying too hard, Consol maintains that while no *cursive* signature was on the form, all the required information was present. *Id.* Consol argues that a printed name is equal to a printed name as both serve to identify the person who conducted the training. *Id.* Besides, Consol urges, “employees are often also identified by their own unique employee number.” *Id.*

Failing to persuade that the citation should be vacated, Consol believes that the negligence should be listed as “low” because the forms did have the date of the training and the names and employee numbers of the persons who conducted and received the training, and beyond that, the only missing information on the form was the name of the person who conducted the training.

As with other citations, Mr. Shaffer was accompanying Inspector Yates for this matter. Directed to Ex. R-17, Shaffer identified it as his notes. He affirmed that he challenged the inspector about this citation. Tr. 511. His objection was that “the documents that he was referencing that he was citing in the citation did have the employee's name on it and an identification number specific for that employee, the individualized personalized number that is identified to that employee.” Tr. 511. Shaffer affirmed that upon his review of the training records, the person who conducted the training was listed on the form. *Id.*

Upon cross-examination, Shaffer agreed that on Ex. P-11, there are no signatures of the person conducting the drill on those pages. Stein acknowledged there were names, but no signatures. Tr. 512. On redirect, Shaffer informed that it is easier to identify a name by a number than by a signature. Tr. 513. Upon re-cross examination Shaffer was asked if the standard requires a signature and, upon being shown the standard, he conceded the point and agreed that anyone can write down a number. Tr. 514-15.

The Secretary’s arguments were succinct. He noted that the standard does not permit miner identification numbers as a substitute. The Secretary acknowledged that, given this was identified as a paperwork violation, the inspector designated the gravity of this citation as no likelihood of injury, non-S&S, no lost workdays, and affecting one person: an examiner or miner. As for negligence, the Secretary notes that the inspector issued the citation in January 2018 – the second quarter of 2018 and that the training drills in question took place two quarters prior. Therefore, the Secretary maintains that due to the length of time this violative condition existed, the operator either knew or should have known that the records were not properly certified. On that reasoning, it contends that moderate negligence remains appropriate. Accordingly, the Secretary asserts that the MSHA proposed a civil penalty of \$118.00 using the six statutory criteria should be imposed. Sec. Br. at 20.

Analysis of Citation No. 9077092

As noted above, Citation No. 9077092, cites a violation of 75.1504(d) and it was issued due to “missing signatures” in connection with conducting training and drills. The Respondent seeks to have the citation vacated. This citation was marked non-S&S and the gravity as no likelihood and no lost workdays. Apart from the Respondent’s view that the citation should be vacated, the only remaining dispute is the degree of negligence involved. Importantly, there is no claim by the Secretary that the training or drills were not conducted. Also, at the end of the day, the Respondent acknowledged that the required signatures were not present. Although the person who did the training did have his name and identification number listed on the records, no signatures were present. That means that the standard was established as having been violated. A signature is required and the Respondent must take care to comply with that provision of the standard.

Addressing the other issue, the proper negligence designation,²⁶ given the other attendant facts, and taking the signature absence in context, the Court concludes that the negligence should be deemed to be low. On that basis and upon consideration of the other penalty criteria, the Court imposes a penalty of \$39.00.

Citation No. 9077095

Citation No. 9077095, issued on January 23, 2018, alleges a violation of 30 C.F.R. § 75.514, for a defective splice of a welder power cable. Ex. P-12. The Respondent seeks to have the citation vacated.

The cited standard requires a splice made on a cable be insulated to the same or greater protection than on the cable prior to the splice.²⁷ Tr. 232. The inspector discovered the condition while checking the welder cable that was wrapped up on the load center. He found that one of the splices was torn open, exposing the inner conductors leads. A splice is used where an outer jacket has been damaged, and the operator has tried to re-insulate that outer jacket back to its original protection or better. The inspector took pictures of the cable, however none of the photos were of the alleged defective splice. Tr. 233; Ex. P-13A-E. The hole was an inch or possibly more. The welder was available for use and plugged in, although the inspector believed that the welder power had tripped and thus it was not powered.

The inspector did not believe the condition was a recent development because there was dirt and dust in the opening and because of that it was his view that the condition had existed for more than one shift. Tr. 238. The inspector informed that the cable was in a confined area with a

²⁶ Although the inspector stated he had cited the mine for a violation of this standard on an earlier occasion, he did not identify any particulars about the nature of that deficiency.

²⁷ 30 C.F.R. § 75.514, a statutory provision, is titled, “Electrical connections or splices; suitability,” and provides “[a]ll electrical connections or splices in conductors shall be mechanically and electrically efficient, and suitable connectors shall be used. All electrical connections or splices in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire.”

lot of personnel traffic. If one were to come into contact with the inner lead, the result could be a fatality. Tr. 244. He marked the negligence as “moderate” because he saw no evidence that it was a recent development. Tr. 246.

On cross-examination, the inspector agreed that the cited cable is essentially an extension cord. Tr. 248. He also admitted that he has not issued many splice citations and none at the Harvey mine. Tr. 249. Further, as noted, he agreed that the power was off the welder and thus it was not hooked up and the breaker was tripped as well. Tr. 250. Stating that he did not cite the mine for a splice issue and that the issue was the condition of the cables, he offered that he should have cited the mine for a “517,” referencing 30 C.F.R. § 75.517, which provides “[p]ower wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected.” Tr. 249. The inspector also agreed that, more than volts, amperage presents the real electrical hazard. However, the inspector was adamant that the cord was on the power center, not on a rib some distance from the power center. Tr. 251. Though Respondent’s counsel asserted and the inspector agreed that the place where the miners are plugging things in and activating switches and breakers was not the location where the cord was stored, he added that miners travel by it, if they go inby from the back of the load center. Tr. 252. The inspector advised that miners run the cord to the welder and then energize it and that it could be on hanging on the load center energized. Further, he did not accept the idea that “one bad drag around the corner with enough force could cause the tape to come off,” adding that if that were true they would not use such ineffectual splice material. Tr. 252-53. Respondent’s counsel suggested that, in the mining environment, dust and dirt would inevitably get into the cut, but the inspector maintained that the dirty condition “took a while” to develop. Tr. 253.

Mr. Stein was accompanying the inspector for this matter too. Stein conceded that they found an area where the outer jacket was damaged. He described the cable as akin to an extension cord for the welder. Tr. 439. The welder was loaded just inby the load center. Although the cord was not plugged into the extension cord, the cord itself was plugged in, but Stein believed it was in the neutral position, meaning it had tripped and the power had to be reset on it. *Id.* Stein agreed that technically, until reset, it was not under power and he maintained that the inspector did not pull the plug out nor lock it out. Tr. 440.

Stein described the procedure for using the welder the point of which was unclear. To use the extension cord with the welder, one drags it to the device. When a task is completed, the cord is wound back on the reel. Tr. 441. Though unsure of the cord’s length, Stein stated it was long: some 100 to 150 feet. *Id.* Stein maintained that the person using the cord would check it prior to its use. Tr. 442. Stein also suggested that the cord could be damaged when dragging it around, by hitting debris. As for the damaged area, Stein conceded that there was damage, noting that it was “previously nicked” and it had been repaired with MSHA tape and resealed. *Id.* Stein therefore agreed with the Court’s inquiry that this was the second fix of the damaged area. *Id.* On cross-examination, he conceded that the cable was visibly damaged, at least on the outer jacket. Tr. 445. He also agreed that, unlike the other cable citation, the damage was not “BB” size and therefore not tiny, and he admitted that the inspector did not need to employ a screwdriver to visualize the problem. *Id.* Further he allowed that one could see the inner leads, while adding that the insulation was on those leads. Tr. 446. He also conceded that there was dust and dirt inside

the affected area and that on the day the citation was issued, the MSHA tape, used to make the first repair, was damaged. Tr. 446-47.

On re-direct, Stein affirmed that new damage could occur in the process of reeling the cord back to the load center. *Id.* Asked about the notation remarking “no conditions. No actions taken” reflected on Ex. R-20, Stein agreed that could have happened subsequent to the last exam. Tr. 448.

The Court inquired of Stein whether, looking at Ex. P-13D, he would agree that the cable presented a “pretty severe condition which need[ed] immediate attention to correct that.” Stein did not agree with that characterization. Tr. 448-49. Stein reasoned that as no copper was exposed there was little concern and also that the pre-operation exam would have found the problem. He added that the cable looked so bad because there were so many layers of tape wrapped around it. Tr. 449. As to whether it needed immediate attention, Stein answered “[t]hey should fix it. If they know it’s there, sure, 100 percent fix it. Yes.” *Id.*

Beyond the contentions described above, Consol argues that the inspector cited the wrong standard because the condition found was not a splice. Instead, there was a small puncture in the outer jacket of the cable and therefore there was no violation of 30 C.F.R. § 75.514. R’s Br. at 5. In the alternative, if the citation is upheld, Consol contends that since

the welder was not energized or in use at the time the citation was issued and as there were no bare leads exposed on the cable and the broken outer jacket on the cable was not reported to the operator [t]he condition would have been discovered during the pre-operational check and corrected prior to energizing and using the welder.

Id. Under these conditions, the Respondent concludes the expected injury would not be fatal and the negligence should be low.

Consol points to MSHA’s program policy manual definition and its definition that a splice is “the mechanical joining of one or more conductors that have been severed.” *Id.* at 14, citing 30 C.F.R. § 75.603; MSHA Program Policy Manual, Volume V (2003). Splices are “made with an MSHA accepted and approved splice kit which includes large insulating pads, insulating strips, MSHA printed electrical tape, abrasive sand paper, and solvent wipe.” R’s Br. at 14.

Elaborating, Consol argues that the condition on the welder cable was not a splice because the conductors inside the cable had never been severed and all the components of an approved splice kit had not been used. Consol’s safety inspector testified that the area had been previously taped over and it was terminated by being taped again. Yates’ testimony was offered in support of Consol’s position, because he stated that “a splice is where the outer jacket has been damaged, and the operator has tried to re-insulate that outer jacket back to the original protection or better.” *Id.* at 15. Recognizing the error, the inspector acknowledged that he cited the wrong standard. Consol asserts that it is now too late for the Secretary to amend the citation to name a different safety standard violation. *Id.* at 16.

The Secretary contends that the Respondent violated the standard because the cited cable splice was damaged, exposing the inner conductors. Speaking to gravity, the Secretary states that “[d]epending on how far a miner would have to extend this ‘extension cord’ cable from the power center to the area being welded, the miner would handle and unravel the wound-up cable off the supply rack, exposing himself to the damaged and unsafely spliced area. He also notes that safety Inspector Stein explained that a miner would “just drag it up there.” Sec. Br. at 22. Additionally, the Secretary states that “miners frequently travel through the confined, cluttered space around power center, which increases the likelihood that miners may brush up against the exposed inner power conductors.” *Id.* Given these considerations, the Secretary views the inspector’s evaluation of the gravity as non-S&S and unlikely as generous and that the evidence actually supports a finding of significant and substantial, and reasonably likely. Therefore, at a minimum, the Court should affirm the gravity of this violation as issued, namely, non-S&S and unlikely to result in fatal electrocution injuries to one person.

As for negligence, the Secretary contends that the physical evidence observed and photographed by the inspector supports a finding of moderate negligence. This is the case, given the visible wear and tear on the spliced area and the presence of dirt and dust on the insulated inner leads, and for those reasons the condition likely existed for more than one shift and accordingly, the mine operator knew or should have known of this condition. The Secretary concludes that, applying the six statutory criteria, the proposed civil penalty of \$429.00 is the minimum amount to assess. Sec. Br. at 22-23.

Analysis of Citation No. 9077095

The standard cited, 30 C.F.R. § 75.514, addresses electrical connections or splices by requiring that they are to be mechanically and electrically efficient, and that suitable connectors are to be used. It also requires that, for both connections and splices in insulated wire, they are to be reinsulated at least to the same degree of protection as the remainder of the wire. By contrast, 30 C.F.R. § 75.517, the standard the inspector stated that he believed that he should have cited, requires that power wires are to be insulated adequately and fully protected. The citation itself, borrowing from the language of 75.514, asserts that a splice in the cable was not being reinsulated to the same degree of protection. The Secretary did not move to amend the citation by citing 75.517.

The Court takes the view that the correct standard was cited but that either standard would apply. This is because, applying 75.514, in requiring that splices be reinsulated at least to the same degree of protection, there is an implied requirement that such splices be maintained to that level of protection. Here that maintenance level was not kept up, as the splice was torn open.

The parties agreed that the cited cable was akin to an extension cord. Based on the credible testimony, the Court does not buy into the claim that the condition was a recent development. Nor does the Court accept Stein’s view that this was not a pretty severe condition. Even Stein admitted that it looked bad, though he offered that was due to so many layers being wrapped around it. The Court would also note that many of the Respondent’s contentions were directed at the gravity associated, such as whether the power was on at the time the condition was found, but notes that the citation already listed it as unlikely. Though unlikely, a fatality was the correct injury or illness that could result.

Therefore, the only remaining determination is the degree of negligence. For this, the Secretary contends that it should be found to be moderate, seeking a civil penalty of \$429.00. Given the obviousness of the condition and the Court's finding that the inspector's testimony that this was not a recently developed condition, it is found that the negligence was moderate. As such, upon independently applying the statutory penalty criteria, the Court imposes a penalty of \$429.00.

Citation No. 9077096

Citation No. 9077096 alleges a violation of 30 C.F.R. § 62.130(a) for a noise violation on a longwall. The Respondent seeks to have the citation vacated. As the parties spent considerable time on this matter, both at hearing and in their post-hearing submissions, the Court takes a commensurate approach in its decision.

Citation No. 9077096, issued on January 24, 2018 by Inspector Yates, invoked 30 C.F.R. § 62.130(a). Tr. 264, 283; Ex. P-14.²⁸ That standard, titled, "Permissible exposure level," provides:

The mine operator must assure that no miner is exposed during any work shift to noise that exceeds the permissible exposure level. If during any work shift a miner's noise exposure exceeds the permissible exposure level, the mine operator must use all feasible engineering and administrative controls to reduce the miner's noise exposure to the permissible exposure level, and enroll the miner in a hearing conservation program that complies with § 62.150 of this part. When a mine operator uses administrative controls to reduce a miner's exposure, the mine operator must post the procedures for such controls on the mine bulletin board and provide a copy to the affected miner.

The standard requires that miners not be exposed to noise levels over the 90 percent, permissible exposure level ("PEL"). If a miner's exposure level is over 100 percent—a number which allows for an error level of 32 percent—then the operator is required to begin administrative or engineering controls.²⁹ *Id.* Where noise levels are over 85, that represents an action level; the miner needs to be identified and a hearing conservation plan put in place. *Id.* Prior to this citation, the mine had not been on a "P code," meaning it had not previously been required to any controls installed to reduce noise. Tr. 278. If the PEL shows that it is greater than 132 percent, a citation will be issued. In this case the inspector, finding such a level, issued a citation that day, as the miner was exposed to 0.3 percent over that amount. Tr. 272.

²⁸ The transcript mistakenly referred to the standard cited as 30 C.F.R. § 62.138. Tr. 264. The cited standard was 30 C.F.R. § 62.130(a).

²⁹ If, for example, a noise level is more than 132, the operator may introduce administrative controls by altering the miner's work schedule so that the exposure to those levels is not for an extended period. Engineering controls, on the other hand, involves "anything feasible from the operator to help silence or muff[le] the sounds of the equipment." Tr. 265. By feasible, it is meant methods that are cost-wise feasible. *Id.*

The context for this citation was that the inspector was conducting a noise survey on the 3A longwall. That day, when still at his MSHA office, he calibrated the dosimeters to be used, and then brought them to the mine. There, he then informed the mine that he would be conducting a noise survey and thereafter he affixed the dosimeters on the miners he was testing that day. Tr. 266. The idea is to have the dosimeters as close to a miner's ear as possible, in order to as closely approximate the noise he was experiencing. Tr. 267. Two calibrations were made before testing; once in the office and then again when the survey is being conducted. *Id.* None of the devices were out of calibration. Tr. 268. The devices were calibrated at 114 dBAs and then attached on six miners, each of whom were on the 3A longwall. *Id.*

Notably, after the testing, the dosimeters calibrations were checked yet again, making a total of three calibration checks. Tr. 275. The inspector was carrying a handheld dosimeter that day as well. *Id.* He rode with the miners and, once at the face, took readings at the locations he anticipated finding the loudest amount of noise, checking levels with his dosimeter. He then continued with his E01 inspection, so as not to interfere with a normal recording of the conditions as the miners worked. Tr. 269. His measurement was as close as possible to a full shift, which was in the neighborhood of nine to ten hours' time.³⁰

Speaking to the citation, Ex. P-14, the inspector noted that it reflected that the mine had not previously been over the noise limit. Tr. 274. In this instance, per Ex. P-14, in Column No. 6, survey sample No. 6, it was regarding that sample that caused the inspector to issue his citation. It pertained to the miner identified as "Jodon A," who, the inspector believed was the shear operator on the longwall, which was running during that shift. Tr. 275. The exposure level is derived as an average, referred to as "a dose average" for the entire shift. Tr. 276. The citation was issued after the inspector was again on the surface and after he performed the check to make sure the device was still in calibration. *Id.*

When the inspector advised the mine's Mr. Shaffer and Mr. Hellen of the noise results they challenged his finding, asserting, among other grounds, that he had not performed a correct survey or had failed to follow the program policy. Tr. 278. The mine was not conducting their own survey that day. Tr. 279. Neither of those gentlemen were with the inspector that day; instead Stein accompanied him. Notably, Stein did not raise any issues with the inspector about the way he conducted his noise testing. Tr. 280. The inspector designated the violation as "permanently disabling" on the basis that high noise levels will result in hearing loss. Tr. 281. One person was marked as affected by the violation, as the lone miner was the only individual the inspector found to have been exposed to noise levels above the limit. Tr. 281-82. Negligence was marked as moderate because the operator had no administrative controls in place and didn't offer any noteworthy mitigating circumstances to support a low negligence designation. He believed there was some mitigation on the basis that the operator didn't know there was an exceedance. Tr. 282.

³⁰ This did not include travel to and from the portal but rather from the elevator to the section and back. Tr. 270. Thus, the inspector maintained that his noise measurement recorded a full shift of exposure. *Id.*

Terminating the citation was complicated by the fact that the mine had started to move their longwall and therefore replicating a normal shift could not be done. Instead, the mine advised that they were going to try some administrative or engineering controls. Tr. 283. The inspector ultimately gave them several weeks to try those remedies. Tr. 283-84. However, for a citation to be terminated, MSHA had to do a follow-up survey to assure that the noise was no longer above the violative level. Tr. 284. Such a follow-up survey was conducted and the result was that the noise was then “quite a bit less” than the 132 percent. *Id.* In fact, the same miner was tested for the follow-up.³¹ *Id.*

On cross-examination, the inspector agreed that, on the day in issue, the miners were being tested both for dust and noise. Tr. 287. The noise dosimeter was clipped on their shirt collar and lapel while the dust pump was on their belt. Tr. 288. The inspector did not agree that the dosimeter was located on the miner’s chest. Tr. 290. Nor did the inspector agree that, even if they were placed on the chest, the sample would be invalid. Tr. 290-91. While testing, the inspector does not hover near the miners being tested because the concept is to mimic a normal work routine. Tr. 291.

Challenging his experience in conducting noise tests, the inspector informed that he had performed at least ten prior tests. Tr. 294. Although, when checking the calibrations of the dosimeters he did not write down the results, this was because each one he tested was within the acceptable calibration limits, namely between 113 and 115 dBA. Tr. 294, 296. In the case of the cited miner’s dosimeter, it tested at 114 dBA. Tr. 298. The inspector then stated that, in fact, all seven dosimeters did test at 114 dBA, although his hand-held dosimeter device did not. Tr. 297, 299.

While seemingly equivocal at first, the inspector stated that he was sure that he did tell his escort that the TWA³² was 132.3 percent. Tr. 300. The inspector was also sure that the dosimeter for which he found the exceedance was tested at 114 decibels, so there was no issue with that one at all. Tr. 304. The inspector informed that this was the first time he had issued a citation for a mine being out of noise,³³ that is, over the maximum exposure level. Tr. 307. The inspector confirmed that he checked some potential sources for the excess noise level. Asked if he checked the “conveyor,” he responded that “[o]ne of those was the headgate/crusher,” adding that “the headgate dumps over onto the tail piece, so that, ... is a

³¹ There was a small kerfuffle over the terms of the follow-up testing. The mine insisted that only the miner who was over the noise limit had to be tested, while the inspector believed that all six miners required re-testing. Ultimately only the one miner was retested. Tr. 285.

³² “TWA” refers to “Time-weighted average-8 hour (TWA₈)” and is defined as “[t]he sound level which, if constant over 8 hours, would result in the same noise dose as is measured.” 30 C.F.R. § 62.101, Definitions.

³³ The Court took issue with Respondent’s suggestion that, because the result was unusual, in the sense that it was the first time the inspector had such a result, the result was inherently suspect. As the Court pointed out, under such reasoning one could never have a violation under this standard, because it would always be the first time such a result occurred. Tr. 308-310.

conveyer.” Tr. 312. These sources were tested with his “Edge” dosimeter. *Id.* He also tested the longwall chain at the shear as it was running, finding that it was at 101 decibels. Tr. 313. The inspector acknowledged that on the day he issued his citation there were two miners in the same occupation. Both had the occupation code of 064, which represents that both miners were shear operators. Tr. 313.

During the course of the noise testing that day, the inspector informed that there were spikes in the noise, though he could not tell when, during the shift, such spikes occurred. One such spike lasted nine minutes when there was a 90 PEL, a level, the inspector informed, to which no one should be exposed.³⁴ Tr. 315.

The inspector also stated that the 132 time weighted PEL is a level which exceeds the standard because it accounts for an error factor. When the level exceeds 132, a citation is issued.³⁵ Tr. 320. For a very practical reason, the inspector explained why he did not try to determine the source of the elevated noise – he didn’t know there was an excess level until he was outside. Tr. 323. The inspector also denied that the mine’s Mr. Stein approached him, protesting that the miner was already above 120 percent and had not even been operating the shear yet.³⁶ *Id.*

In another point of clarification, the inspector informed that no one from the mine requested that he allow them to install the mine’s own dosimeters on the miners. Tr. 328. Though

³⁴ Subsequently, the inspector learned that the mine had software that could inform the time when that noise exceedance occurred, although it was his understanding that this was not acquired until after the citation was issued and MSHA does not retain its noise records.

This practice is so that there is no confusion or conflict with other noise sample records in the dosimeter. Tr. 318-19. Nor, the inspector clarified, did any mine employee ask for the dosimeter records so that they could apply the software to determine the time when the exceedances occurred. Tr. 319-20.

³⁵ The only exception to issuing a citation is when the mine has a “P-Code.” A “P-Code” involves a circumstance where a mine is out of compliance by having a 132. In such an event, the mine performs a reevaluation, implementing administrative or engineering controls and MSHA then performs another sample. If the mine is still above the allowable limit, ultimately administrative controls have to be applied. Tr. 321. Explaining further, the inspector stated that a P-Code means the mine is unable to meet the noise maximum of 132 or less. Tr. 322. He did not know what the “P” stands for. Tr. 322. Delving further, use of the P-Code is an exception of sorts, as it prevents MSHA, for a time, from issuing a “b” order. Tr. 322.

³⁶ It must be said that many of Respondent’s questions were inconsequential or beside the point. One such instance involved survey sample No. 1 where, on the line expressing “calibration check” there appears a “slash” symbol before and after that. On that same line, the Court remarked, and the inspector agreed, that it looks like all of the other marks for sample Nos. 2 through 6 all represent X’s and that the only slashes that appear on the Form 2084 relates to survey sample No. 1. Tr. 325-326. The “X” employed by the inspector was his way of marking that he calibrated the device both before and after testing. Tr. 326.

the mine had no authorized administrative controls, the inspector did allow that the mine's use of two shear operators would be akin to an administrative control. Tr. 329. He also agreed that the affected miner was wearing ear plugs. *Id.* The miner's plugs had a noise reduction rating of 30,³⁷ however the inspector advised that such plugs, per MSHA's standards, mean nothing, informing that MSHA does factor hearing protection. That is only considered if a mine is over the permissibility level. Tr. 330. The inspector did feel it was important to determine why one shear operator would have an 80 reading and the other a 132. To that end he did question the company. Tr. 333.

The inspector identified Ex. R-25 as Chapter Three of the MSHA health and safety handbook, acknowledging that he uses it as a guide for his inspection procedures. Tr. 335. Though he read from page 3-21 of the handbook,³⁸ the inspector did not agree that prior to issuing a citation a two-step process is required. In that regard he pointed out that a flowchart on the preceding page of that handbook sets forth when a citation should be issued. Tr. 337. Rejecting the R's claim that he skipped step two, the inspector stated that he tried to follow it, because he inquired if there were any administrative controls before performing any noise evaluation at the mine that day. Tr. 338. Further, he checked the mine's bulletin board where, if present, such controls are to be posted, but he observed there were none. *Id.*

On the subject of engineering controls, asked if he made a determination of any engineering controls that weren't being maintained, the inspector informed that he had not. However, the inspector provided a clear response to this challenge, stating that he inquired if the operator had any engineering controls being employed and he found that there were none on the bulletin board. Therefore, he had no engineering controls to consider. Tr. 339. Clarifying the issue, the Court re-inquired whether it was correct that the inspector determined that there were neither administrative nor engineering controls that were at work during that time. Tr. 340. The inspector reaffirmed that he determined that neither was present. *Id.*

³⁷ That number, 30, was derived by the inspector inquiring of the mine the type of ear plugs it uses. He was told it was a 3M brand. From that information he got the number. Tr. 330.

Consol has a policy requiring miners to wear hearing protection; in this instance, Consol required earplugs. Tr. 331.

³⁸ Per that reading, he stated: "Finding that a miner's full shift noise exposure is 132 percent or more, or 156 percent for dual hearing protection or greater, a dosimeter must be used for this finding, and finding that any one of the provisions of 62.130 or 62.140 have not been complied with, feasible engineering and administrative controls have not been installed or maintained, miners are not enrolled in a HCP, the hearing conversation program, operator provided hearing protections are not being worn, administrative controls are not posted on the mine bulletin boards, copies have not been provided to affected miners or are not being followed or any other element of the hearing conversation program is not followed." ... Determining whether a citation is warranted under 62.130 for exceeding the PEL or whether a citation is warranted under 62.140 for exceeding the dual hearing protection level is a two-step process." Tr. 336-37.

Because of all the questions posed by Respondent's counsel about the particulars of the inspector's actions during the testing, the Court inquired whether it correctly understood the inspector's protocol, expressing its understanding was that the results "are what they are." That is, after the inspector comes up with the testing results if someone were to claim that a particular miner went to another location for a period of time and then returned to his normal work location, that would not cause the inspector to discard the sampling and not issue a citation. The inspector answered, "[t]he numbers control, Your Honor." Tr. 346-347. Continuing, the Court then asked, "So if someone went into some other spot and was exposed to some higher noise levels, that wouldn't cause you to say this is no good. We've got to start again; is that correct?" *Id.* Again, the inspector responded, "[t]hat is correct, Your Honor." *Id.*

On re-direct, returning to Ex. R-25, the inspector noted that pages were missing from that exhibit, including an important flowchart. Tr. 352. He described the flowchart as setting forth the steps one follows upon reaching a noise level of 132. If one determines that there are no administrative or engineering controls, the chart directs that a citation is to be issued. The inspector affirmed that he followed that flowchart process in this instance. *Id.*

The Court considers it noteworthy that on the subject of the source of the excessive noise, the inspector informed that Consol later told him that they believed the source was the conveyor chain. Tr. 353. This occurred after the citation was issued, and not on that day, and it was revealed in the context of discussions about how to abate the violation. That chain was on the longwall face and therefore the shear operator would be in close proximity to that. Of significance to several of the Respondent's contentions, the inspector affirmed that he is not required to determine the noise source in order to issue a citation. Tr. 354. Simply put, that is, appropriately, the mine operator's responsibility.

Regarding the point that there were two different shear operators and that the noise exposure levels were not the same for them on that day, the inspector informed that there are always two longwall shear operators and that the different results can be attributable to "where they are located on the shear itself. Because as the mining process of the longwall goes, you have a headgate shear and you have a tailgate shear operator. One operates it coming up, and he has to stay within a certain distance of that shear, and the other one operates it back down." Tr. 355.

The inspector also reaffirmed that if the calibration checks show readings between 113 and 115, that means the dosimeter is properly calibrated and any measurements then taken are valid samples. Tr. 355. Seeking clarity, the Court asked as a practical matter if a reading of 132.3 is of concern, given that the inspector marked the citation as "non-S&S." The inspector informed that it was. Tr. 360.

When back on the surface, after the sampling, Yates showed Stein the dosimeter readings and informed that a citation would be issued, as longwall face operator miner Jodon was over the 132 noise level. Tr. 516-17. Stein asked of Yates what noise source caused the employee to go over the limit, especially because the longwall was not operating between 11 and 11:30, when the reading was over 120 percent. Yates could not identify the source. Tr. 517-18. Stein was shocked about the result, especially because the longwall did not operate for the full shift. Tr. 524. It began operating about midway through the shift. Tr. 528.

Under cross-examination, Stein acknowledged that his notes reflected “face chain maintenance and repairs,” which he half-heartedly agreed meant he had a hunch about the possible noise source, answering, “I knew mechanically what was going on up there, so I just wrote down, you know what I mean, things that -- things that were -- that I knew were going on during the time.” Tr. 529. Further, Stein’s notes reflect, “Chain tension. Chain broke two shifts after failed sample.” Ex. R-32. Emphasizing this point, he agreed that there were issues with the chain on the longwall shear. *Id.*

In its post-hearing submissions, Consol expended significant effort addressing this alleged violation and its stance that the citation should be vacated. R’s Br. at 16-26. The reasons advanced in support of that contention were that “the Inspector did not complete the multi-step MSHA prerequisites for issuing a Citation;³⁹ the Inspector did not follow the MSHA approved procedures for the noise sampling; the elevated sample was an aberration; the Inspector failed to consider the impact of the noise reduction rating of the miner’s hearing protection; MSHA can provide no basis for its 32% margin of error and cannot differentiate this from a 33% margin of error; the MSHA Form 2000-84 does consider decimals; the 132.3% reading, even if accurate, is within the calibration margin of error of plus or minus 1dB at 114dB; and MSHA’s recording over/destruction of the sample and calibration results and calibrating dosimeters outside of the presence of the operator violates Consol’s section 103 “walk-around” rights.” R’s Br. at 5. Alternatively, Consol contends that if the citation is upheld, the negligence should be found to be “low,” for two reasons: this was the first allegation of this type against Consol and all the other samples were well within the permissible range, indicating that excess noise was not generally present in the area.” *Id.*

Consol also advances a series of contentions alleging “several inconsistent, arbitrary and erroneous applications of this Standard,” in an attempt to show that the standard was not violated. Eight arguments are advanced in its brief, none of which impress the Court: that MSHA failed to take multiple steps to determine if the standard is exceeded and did not determine the source of the noise and whether engineering and administrative procedures were being properly utilized; that the inspector failed to follow proper noise sampling procedures; that the exceedance was 50% higher than all six miners on the crew, and therefore, effectively claiming that it had to be wrong; that it improperly rejected “the NRR, which effectively reduces exposure,” determining that it does not actually reduce the miner’s exposure; that, in a curious argument, it objects to the leniency of MSHA’s standard for determining when a violation has occurred, when a 100% TWA⁴⁰ should result in a citation, not a sample that exceeds 32%; that MSHA’s form doesn’t allow for decimals to be recorded and therefore the 132.3% finding cannot constitute a violation – the amount must reach 133% for a violation to be established; that a .3% alleged violation, referring to 132.3% figure, is material; and finally that “MSHA’s procedures of recording over sample and calibration results and calibrating dosimeters outside of the presence

³⁹ Consol challenged the inspector’s credibility but the Court wants to make it clear that it found the inspector credible in his testimony regarding this citation. The Court’s remarks to the inspector during the hearing were simply to guide the inspector as to the proper method to follow when responding to questions upon cross-examination. Accordingly, the Court rejects the various claims made by the Respondent, calling into question the inspector’s credibility. *See, e.g.,* R’s Br. at 17-18.

of the operator violates Consol's section 103 "walkaround" rights." R's Br. at 18-19. Each of these arguments are rejected as non-meritorious.

In support of its various challenges, Consol first points to what it describes as "[t]he leading case on noise exposure," *Highland Mining*, 35 FMSHRC 221 (Jan. 2013) (ALJ).⁴¹ However, it notes that the court reasoned that if the maximum amount is exceeded, there is a violation. *Id.* at 19. The Court notes that this is still the case, subject to any valid defenses. Consol attempts to distinguish this matter from that presented in *Highland* but, as explained, its arguments are insufficient. Consol asserts that once an exceedance has occurred, "MSHA must determine the source of the noise to determine if all feasible engineering controls were being used." *Id.* This is not the case; determining the source of the noise is upon the operator.

Consol also refers to the Compliance Guide to MSHA's Occupational Noise Exposure Standard, R-27, but that reference is in the context of determining if all feasible controls have been employed, not to determine if a violation occurred. Thus, the context in that situation is how to then deal with the problem, not whether one has occurred. Figuratively, Consol's argument has the cart before the horse, as it has made a fundamental misreading of the requirements and the Compliance Guide.

Some of Consol's other contentions barely deserve mention. For example, at hearing and in its brief, it notes this noise exceedance citation was a first at this mine. But, as noted earlier, if that were the test, no first violation would ever be a violation because it had not happened before.⁴² There is also some irony in Consol's pointing to *Highland* because a loose chain was involved in that case. In this matter it is likely that the culprit was also a loose chain, though Consol tries to distance itself from its "offered [] possible source." R's Br. at 22. To be clear, Consol's "offered possible source" was a loose chain.

Consol's assertions that the inspector improperly attached the microphones and that he tested over a period of 9-10 hours, instead of eight hours are rejected. The Court finds as fact that the microphones were properly attached and notes that a longer sampling time would assist, not hinder, the results, as it is a time weighted average. The remainder of Consol's contentions are unpersuasive. These include the argument that by allowing a 32% margin of error, MSHA effectively concedes its sampling is not reliable, that decimals don't count if one is above 132%, and being only .3% above calls into question the inspector's dosimeter calibrations.

⁴¹ As the Respondent describes the *Highland Mining* decision as the "leading case on noise exposure," and as *this* Court issued that decision, it is hard to find fault with the Respondent's keen characterization.

⁴² A variation on this theme, is Consol's "aberration" contention. It is similarly rejected. Consol's "But wait, the miner was wearing earplugs," argument also misses the mark, as noted in the Court's *Highland* decision and acknowledged by Consol. R's Br. at 23. *See also, Highland Mining*, 35 FMSHRC at 237-38.

Consol finishes with its contention that “MSHA’s practice of recording over the noise samples violates Consol’s right to have access to the evidence and violates Consol’s section 103 walk around rights,” is a misapplication of walk around rights.⁴³

Stein was with the issuing inspector on that day, January 24, 2018, the day Inspector Yates was doing noise sampling on the 3A longwall. Tr. 451. Stein stated that the dosimeters were attached “right at their collar ... below your chin at your chest.” Tr. 453. The microphone was “pointing towards [the miner’s] ear. *Id.* The placement was consistent with past practice in affixing the dosimeters. Tr. 454. Stein is not the mine’s noise coordinator. *Id.* Stein recalled that the inspector told the miners not to yell into the microphone but could not recall about other practices, such as whistling. Stein agreed that the miners also had on dust monitors that day and that they were placed on their belts. Tr. 456. The dust pump hose ended near the near the dosimeter location, about within three inches of it. *Id.* Stein could not recall if both devices were located on the same side of the miners’ vests. Tr. 457.

On that day, Stein informed that the longwall didn’t start running until 11:30 or 12:00, whereas their shift started at 8:00 a.m. Tr. 458. Before the longwall started, the miners were likely doing various tasks, such as changing hoses, and helping mechanics. Tr. 459. Stein could not recall if the inspector checked the miners’ dosimeters, but he did recall that Yates was checking his own readings on his device. Tr. 460. However, Stein recalled that miner Austin Jodon, aka “Skinny,” spoke to him informing that his dosimeter was already at 124. This was significant because they both knew one can only get to 132.2. Tr. 460. Stein did not mention the issue at that time, but after all the readings were done, that is, after the testing was done, and they had walked back out, he then spoke to Yates about it. Tr. 461. To be clear Stein was referring to the time just before the longwall started up, not the end of the shift. Tr. 462. In Stein’s estimation, though purely speculation on his part, the inspector did not grasp what he was being told and only Skinny, none of the other miners, had readings anywhere near that reading. Tr. 462, 463. Stein informed that the inspector did not invite him to come to his car when he calibrated the dosimeters, but he rejected the suggestion that he would feel uncomfortable about joining him during the calibration check, stating, “[y]eah. We get along with all of them pretty good.” Tr. 467.

On cross-examination, directing Stein to Ex. R-21, at paragraph 5, ostensibly his notes, Stein informed those were *not* his notes and he denied saying at the time of the inspection that they were his notes. Tr. 470. Stein allowed they could be notes from Shaffer or Helen, but he did not know the author. Tr. 471. Regardless, he agreed that the notes do not relate that Austin Jodon came to him or anyone else to raise the issue of the noise level. Tr. 471. Yet the notes for R-21 claim: “Employee that went out of compliance was 124 percent of dose of the 132 percent dosimeter at approximately 11:30 a.m. when checked by safety personnel.” Tr. 471. Nor, Stein agreed, do the notes reflect that Jodon came up to the inspector about this issue. Tr. 472. As for Stein, as he didn’t receive a citation that day, he had no recorded notes. Tr. 472.

⁴³ The Court is of the view that Consol’s citations to *Big Ridge, Inc.*, 36 FMSHRC 1677, 1730 (Jun. 2014) (ALJ), and *DJB Welding Corp.*, 32 FMSHRC 728, 733, 735 (June 2010) (ALJ) are neither persuasive nor useful authority, as they do not involve noise violations and, more fundamentally, the facts involved here do not translate to those cases.

Yet, he acknowledged that at some point on the day of the noise testing he knew that one of his miners was at 124%. *Id.* Further, he agreed that he didn't remove the miner from the mine, nor did he notify the longwall boss. *Id.* All of this occurred, Stein conceded, before the longwall had started up. *Id.* He did not notify the longwall boss that a miner was close to the PEL. And on the day of the testing Stein did not raise any issue with the readings taken. Tr. 473.

The Secretary's Brief asserts that all the dosimeters were properly calibrated. He notes that on the date of the testing, shearer operator Austin Jodon's dosimeter recorded a time-weighted average exposure for his shift of 132.3%, exceeding the PEL by 32.3%, and exceeding the standard by 0.3%. Sec's Br. at 23-26, citing Exhibit P-14. Inspector Yates issued the citation based on this time-weighted average for Mr. Jodon. Inspector Yates only issued Citation No. 9077096 after he had checked the calibration of the dosimeters at the end of the sampling period.

The Secretary also notes that at the time of the impermissible exposure, Respondent did not have any administrative controls in place for noise exposure, nor any engineering controls. He further observes that on February 5, 2018, after performing his own investigation, Respondent's witness, respirable dust coordinator and noise coordinator Troy Hellen, wrote a letter to Mr. Jodon explaining that he had been exposed to excessive noise and that he believed it "may have come from the face chain" due to excessive wear. *Id.*

The Secretary's Brief also contends that Inspector Yates' issuance of the citation was consistent with the Coal Mine Health Inspection Procedures Handbook because it is undisputed that Respondent had no engineering or administrative controls in place at the time of issuance. Respondent did not present any evidence to the contrary. Although Respondent conveniently omitted the proceeding pages' flowchart, this flowchart is publicly available and illustrates that Inspector Yates properly issued Citation No. 9077096.⁴⁴

Respondent omitted this flowchart from Exhibit R-25. Further, Respondent's tortured quizzing of Inspector Yates on various MSHA manuals, and Respondent's unsuccessful attempts to shift the blame for their violation onto Inspector Yates are red herrings: Respondent violated 30 C.F.R. § 62.130(a). Indeed, this very Court has affirmed a violation of § 62.130(a) based on a miner's exposure to time-weighted average noise above 132% of the PEL. *Highland Mining Co. LLC*, 35 FMSHRC 221, 241 (Jan. 2013) (ALJ Moran). At least one other Commission ALJ has done the same. *Tripple H Coal, LLC*, 35 FMSHRC 165, 169 (Jan. 2013) (ALJ).

Regarding the penalty to be imposed, speaking to gravity, the Secretary notes that the expected injury from excessive noise exposure is permanently disabling hearing loss, with one person being affected by the violation – the over-exposed miner, Mr. Jodon. As for negligence, the Secretary notes that the Respondent's witness Hellen testified that the likely source of the excessive noise was excessive wear on the headgate conveyor chain and that the issue is not

⁴⁴ The Court takes official notice of the flowchart, which originates from the same exhibit offered by the Respondent but was not included in that exhibit. It is attached in the appendix to this decision. The flowchart is, as the Secretary notes, publicly available. *See*, U.S. DEP'T OF LABOR, PH89-V-1 (15), COAL MINE HEALTH INSPECTION PROCEDURES HANDBOOK, CHAPTER 3 – NOISE 3-20 (2008). Inspector Yates correctly followed this flowchart when deciding whether to issue the citation.

unusual, as the mine changes damaged chain flights every shift. From this, the Secretary contends that not all feasible engineering controls were applied. Sec Br. at 28.

The Secretary then asserts that “several members of the Harvey Mine safety department were aware that Mr. Jodon was at risk of possible excessive noise exposure during the full-shift sampling that day, but took no action to address the miner’s noise exposure.” *Id.* Supporting its charge that the mine knew there was an issue but did nothing, the Secretary points to Hellen’s testimony that Jodon’s dosimeter was already at 128% of the PEL by 11:00 a.m., a fact he had learned from another member of the safety department.

The Secretary also observes that the mines’ safety inspector, Stein, testified that Mr. Jodon brought it to his attention that he was at 124 percent already at approximately 11:30 a.m. And the Secretary adds that this is not simply the Secretary’s construction of the testimony, as the operator’s knowledge is also reflected in Mr. Hellen’s handwritten notes from January 24, 2018, per Ex. R-33. Mr. Hellen’s typewritten notes about the subsequent citation, Ex. R-21, and safety inspector Chase Shaffer’s handwritten notes from the same evening, Ex. R-32, each state that Mr. Jodon was at either 124% or 128% of the PEL between 11:00 and 11:30 a.m. during the shift in question. *Id.*

Respondent also did not have, much less follow, any administrative controls. Inspector Yates gave as examples of administrative controls changing a miner’s schedule or assignment to reduce or prevent their exposure to excessive noise. Despite the safety department’s knowledge that Mr. Jodon was fast approaching 132% of the PEL before he even replaced the shearer operator around 1:00 p.m., the operator remarkably did not remove him from the section or alert the foreman, but instead continued to expose him to excessive noise as he operated the longwall shearer with damaged conveyor chains. Therefore the Secretary contends that the Respondent’s negligence was at least moderate. Sec. Br. at 29.

Analysis of Citation No. 9077096

Much of the discussion was incorporated in the foregoing, which included many aspects of the Respondent’s contentions regarding this citation. Pursuant to that prior discussion, this citation is affirmed, leaving the determination of the appropriate penalty. To recap, the citation was marked as non S&S, the injury or illness, as unlikely, but if it occurred, as permanently disabling, and the negligence listed as moderate. Although the Respondent alternatively sought to have the negligence listed as “low,” this cannot be justified, as the Respondent was not at a loss about the potential source for the excess noise. Based on the credible evidence, each of these evaluations by the inspector is affirmed. The Secretary seeks to have the proposed penalty of \$191.00 affirmed and the Court agrees that amount is appropriate and it is so imposed.

Citation No. 9077098

Citation No. 9077098, Exhibit P-15, alleges a violation of 30 C.F.R. § 75.333(h), concerning a ventilation return & intake issue. The Respondent seeks to have the citation listed as not affecting 10 miners.⁴⁵

The cited standard⁴⁶ requires that ventilation controls, including seals, shall be maintained. Noting that the provision requires that the operator maintain such controls for the purpose that they were built, the inspector explained that such controls include “[v]entilation controls... [and these involve] stoppings, bradishes, walls.” Tr. 363. Their purpose is to “separate [] airways and keep [] them in a sealed location, so no two airways are intermixing or mingling. If it's either return air coming out or intake air coming in, neither one [is to] have an opportunity to mix.” *Id.*

The inspector described the condition he found as follows: “the stopping located on 7 north main's primary escapeway at 28 wall and 26 wall were not being maintained to serve the purpose for which they were built. The stopping at 28 wall had a hole measuring three inches by seven inches. The stopping at 26 wall had a ten-inch pipe left open, which allowed air from the intake to bypass into the return in this area.” Tr. 364. The violation was the result of the stoppings not being maintained in that the airways between them were not sealed. The design is to prevent air from the primary escapeway going over to the return. *Id.* These stoppings were in cross-cuts between two separate, parallel, entries. Tr. 363-64. The inspector noted that an escapeway's use may represent miners last hope to get outside and it is for that reason that MSHA enforces the requirements rigorously. Tr. 365. In this case the escapeway was for the 7 north mains, a working section and the escapeway must be located at least at the loading point to the return shaft, or to the intake shaft. *Id.* As it relates to a working section, all of the miners in that area would be located there, and typically that means ten miners. *Id.*

The inspector took photographs of the conditions he observed. Ex. P-16. By the inspector's description, Ex. P-16A, a photograph, shows that the stopping has eroded allowing the intake air into the course of the return. Tr. 366. He confirmed that the damaged area of the stopping is in the middle of that photo, where one can see rock or coal beyond. In the photo, the top area on the rib is the darker black; above that, it is white and this is due to rock dust. Tr. 367. The inspector took the photo while standing in the primary escapeway with the hole going towards the return. Tr. 368. Properly maintained, there would be no hole present. Tr. 369. The hole created noise from the air coming through it and the inspector described the noise as similar to an airplane motor, such as a jet. *Id.* Accordingly, the inspector confirmed that the noise was quite loud. *Id.* The air was traveling from the primary, through the hole, and then to the

⁴⁵ The Respondent in its posthearing brief did not specify an alternative number of miners that would suffer an injury due to the violation, mainly that the Secretary failed to prove that ten miners would be affected. R's Brief at 39.

⁴⁶ 30 C.F.R. § 75.333(h), addressing ventilation controls, provides at subsection (h) that “[a]ll ventilation controls, including seals, shall be maintained to serve the purpose for which they were built.”

return. *Id.* Directed to Ex. P-16B, another photograph, the inspector informed that the black area, in the top third of the photo and extending out in a V shape is the hole he cited. Tr. 370-71.

Ex. P-16D, another photo, pertains to a different area on the same escapeway, two cross cuts away from the first photograph. It shows a ten-inch metal pipe that allowed air to bypass into the return entry. Tr. 373. The air at that location was leaving the intake and entering into the return. Although it was noticeable and one could hear the air moving, according to the inspector, it was not as loud as the other location. Tr. 374. The inspector marked the violation as moderate negligence. His reasoning was his belief that any examiner should have been able to notice that this pipe was open, as one could see that during a visual exam. The area is walked weekly. He learned from Mr. Shaffer that the load center that this pipe was ventilating was removed over the Christmas shutdown, and the citation was issued in January. There was confirmation of this later, when he was on the outside of the mine and noticed while reviewing the weekly exams that the exam had been conducted at least two more times since the load center has been removed. Once the mine removed the load center, the operator sealed the entrance from the adjacent entry into the intake, but the cited area had been left open. Tr. 375-76.

For the earlier ventilation issue he testified about and for which he also designated the negligence as moderate, he believed that was appropriate because one could definitely hear the sound from the air. Tr. 376. The inspector believed that the hole in the stopping at the 28 wall had been there for an extended time “due to the fact of how long it would take to deteriorate that rock and that rib. It is rock. It is not coal. It just doesn't want to peel out as easily as coal or deteriorate as fast. I believe the air helped cut that rock away.” While he could not be precise about the time it had existed, its size informed him that the time was an extended period. Tr. 377-78; Exs. P-16A–C.

Nevertheless, and though a different topic, he marked the citation as non-S&S and unlikely. He explained that it was “[b]ecause it is intake air going into the return, so the likelihood of your two returns, your return coming back over, would only happen in the event that the fan went down or a major mining disaster, which we have to consider when we look at lifelines and escapeways ...” Tr. 378. Though unlikely to occur, if it were to happen, he considered it as “permanently disabling,” because of traveling in smoke and the attendant smoke inhalation. In such a circumstance, whatever was in the smoke or fire would be traveling down the return, whether that was carbon monoxide, coal or hydraulic fluid. Tr. 379. Ten miners were listed as affected for a simple reason – that is the number that go out the intake to escape. Tr. 380. Both the intake and the secondary escapeway are to have clean or neutral air. *Id.*

On cross-examination, the inspector informed that the photographs he took were not zoomed in. Tr. 381. He acknowledged that it was possible that the condition could have occurred fairly recently. Tr. 382. He also agreed that the mine examiner, in performing his weekly exam, has a lot of ground to cover during that time, and that the two conditions he found were in a cross-cut. *Id.* The pipe issue was abated by having it covered and capped.⁴⁷ Tr. 383. The inspector believed that the nearest working section from the cited conditions would be about 100 breaks. Tr. 386.

For this matter, the Respondent remarks that only two small voids were involved in the stoppings at the 26 and 28 wall located along the 7 north mains primary escapeway.

Further, Respondent notes,

[t]he air was moving from the intake air course to the return air course [and] [t]he miners working in the primary escapeway were never exposed to contaminated air, nor did air travel from the return to the intake. Under these circumstances, there is no adverse condition that would develop and could be expected to affect ten (10) miners.

R's Br. at 6. Under these circumstances, Respondent contends that any injury should be described as lost workdays or restricted duty. *Id.* at 6. A primary contention by the Respondent is that the intake air was traveling along that course and then to the return, as it should be. Thus, there was no claim that return air was making its way into the intake course. Yet, it was the inspector's concern that such return air could enter the intake air course. R's Br. at 38. Consol asserts that the inspector admitted that contamination of the primary escapeway was unlikely and that only one person, not ten, works in the cited area, which area itself was some 100 breaks outby the working section. *Id.*

The Secretary contends that "in the unlikely event of a mine emergency and the air changing direction, smoke and toxic fumes leaking from the return into the primary escapeway could cause permanently disabling injuries to up to ten miners." Sec. Br. at 31. At the time of the citation, the mine was idle, Tr. 548, and the Inspector failed to identify the 10 miners who were affected. Tr. 380. Rather, the Secretary seems to assert that certain miners affected might be working downwind at some point in the future. Tr. 548. However, since the mine was idle at the time of the citation, the number of miners who were affected should not include these persons. The Secretary did not present evidence that this citation would affect any such miners. Of course, because the number of miners is easy to manipulate, it is important that such an assertion be

⁴⁷ Asked about the air quantity in the 7 north mains and the quantity of air that was coursing through the primary escapeway when the weekly exam was being conducted, the inspector answered, 179,200. Tr. 385, citing Ex. R-31, at 1.12-13. The Court sought clarification about this inquiry, asking if that reflected the quantity of air in the return. The inspector responded that it reflected the quantity in the last open cross-cut to the 7 north mains. Tr. 384-385. With that, the Court asked what that meant. The inspector informed that it reflected that the mine took an air reading in the last open cross-cut, which showed how much air is traveling through the face on each side. It reflected air quantities of 120,300 and 36,564. Tr. 385. Though the quantity was much higher in the intake, that figure takes into account the track air. *Id.*

supported by facts. *See, e.g. Marfork Coal Co.*, 35 FMSHRC 738, 740 (2013) (ALJ) (“Given that the number of persons affected is a way to easily manipulate the penalty, it is important that relevant facts accompany such reduction.”). Normally, the number of persons affected is the number affected at the time of the citation. *See, e.g. River View Coal, LLC*, 38 FMSHRC 1771, 1779 (2016) (ALJ) (“At the time of the citation, there were four miners working downwind from the machine.”). In this case, the number affected should be an examiner (one) who might be downwind during this idle shift checking air and methane.

For its part the Secretary contends that the cited seals at 26 and 28 wall were built for the purpose of keeping the clean, intake air in the primary escapeway separate from the parallel entry return air course with air that has ventilated the face. Therefore, the seals were not serving their purpose. Sec. Br. at 30. The Secretary also notes that the citation was appropriately designated as non-S&S and unlikely because the clean intake air from the primary escapeway was leaking through the damaged seals into the return air course, and not vice versa. However, in the unlikely event of a mine emergency and the air changing direction, smoke and toxic fumes leaking from the return into the primary escapeway could cause permanently disabling injuries to up to ten miners inby. *Id.* at 31.

Speaking to negligence, the Secretary notes that examiners travel these areas weekly and that Inspector Yates, after observing the conditions, returned to the surface and reviewed the weekly exams, which reflected that examiners had walked the area at least twice since the load center was moved. The hole at 28-wall also appeared to have developed over an extended period of time and was loud enough to be heard from at least 50 feet away and thus there is an issue of its obviousness. The Secretary further notes that the Respondent’s witness, safety inspector Shaffer, admitted that the exposure of the coal rib to the mine air likely caused the coal around the stopping to deteriorate over an extended period time, and not overnight. Therefore, the Secretary contends that moderate negligence is appropriate because the Operator either knew or should have known of the deteriorated ventilation controls. *Id.*

Based on those considerations, the Secretary maintains that, using the six statutory criteria, MSHA’s proposed civil penalty of \$880.00 remains appropriate. Sec. Br. at 31.

Analysis of Citation No. 9077098

In this section 104(a) citation, the fact of violation is not contested. The gravity was listed as unlikely, and non-S&S, but permanently disabling, with ten persons affected, while the negligence was marked as moderate. Based on the foregoing recounting of the credible evidence, the Court concludes that each of those designations are appropriate, with some qualifications. The Court has considered the Respondent’s contention that one person, not ten would be affected, but in the context of continued normal mining operations, the testimony was unrefuted that ten miners would go out the intake to escape.

However, these conclusions do not translate into a finding that it is appropriate to impose the same penalty as was proposed under Part 100. The Commission and its judges make such determinations based on the statutory criteria and the attendant facts found for a given violation. The chief reason for this is that the air was traveling from the intake into the return, not the

opposite of that. While the Secretary speaks of the unlikely event of a mine emergency and *the air changing direction* with smoke and toxic fumes leaking from the return into the primary escapeway, there was no testimony explaining how that could occur nor how likely such an event could occur. Further, the two voids were quite small, not gaping breaches, and there was no testimony establishing that they could have such a profound impact. Given these considerations the Court concludes that under these particular circumstances, the appropriate civil penalty is \$293.00.

Summary of penalties imposed

Because of the large number of citations at issue in this matter, the Court summarizes the following modifications and penalties described in detail above:

Citation No. 9077610, involves the absence of reflectors outside unsupported roof, for which Respondent admits the violation but seeks to have the citation listed as non-S&S, unlikely and low negligence. For the reasons discussed, *supra*, the inspector's findings are affirmed and the proposed penalty imposed by Secretary of \$638.00 is independently determined by the Court to be appropriate.

Citation No. 9077085 is the winch cable issue on the Caterpillar duckbill battery scoop, for which Respondent seeks to have the citation listed as non-S&S, unlikely and low negligence. For the reasons discussed, *supra*, the inspector's findings are affirmed and the proposed penalty imposed by Secretary of \$953.00 is independently determined by the Court to be appropriate.

Citation No. 9077083, involving holes in a 480 volt power cable for a scoop charger, the Court finds that, applying the six statutory criteria, a penalty in the amount of \$100.00 is imposed. The Citation is to be modified to reflect "low" negligence.

Citation No. 9077086 involves the requirement for all stationary electric apparatus to be shown on a mine map. The Court finds that, applying the six statutory criteria, a penalty in the amount of \$29.00 is imposed. The Citation is also to be modified to reflect "none" for negligence.

Citation No. 9077087 involves a lack of ATRS certification. The Court finds that, applying the six statutory criteria, a penalty in the amount of \$59.00 is imposed. The Citation is also to be modified to reflect "low" negligence.

Citation No. 9077091, involving the Jeep "cable" issue, cites 75.1725(a). The Court finds that, applying the six statutory criteria for this S&S violation involving moderate negligence, it is properly assessed at \$638.00.

Citation No. 9077089, involving a cable with two holes in its outer jacket, cites 75.517. The Court finds that, the six statutory criteria for this non-S&S violation involving low negligence, it is properly assessed the amount proposed by MSHA of \$319.00.

Citation No. 9077092 is the missing signature violation regarding certifying training and drills. The Court finds that, applying the six statutory criteria for this non-S&S violation involving low negligence, it is properly assessed at \$39.00.

Citation No. 9077095, citing 30 C.F.R. § 75.514, involves a defective splice. The Secretary sought a civil penalty of \$429.00 and the Court imposes the same amount.

Citation No. 9077096 cited a noise exposure violation. The Secretary sought a civil penalty of \$191.00 and the Court imposes the same amount.

Citation No. 9077098 pertains to ventilation return and intake breaches. Taking into account the particular facts, the Court has imposed a civil penalty of \$293.00 for this violation.

ORDER

It is hereby **ORDERED** that Respondent is **ORDERED** to pay a civil penalty in the total amount \$3,688.00 within 30 days of this decision.⁴⁸

It is **FURTHER ORDERED** that the citations be **MODIFIED** in accordance with the terms contained herein.

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

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⁴⁸ Payment is to 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

OFFICE OF ADMINISTRATIVE LAW JUDGES
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TELEPHONE: 202-434-9900 / FAX: 202-434-9949

November 4, 2019

STAR QUARRIES LLC,
Contestant

v.

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

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

v.

STAR QUARRIES LLC,
Respondent

CONTEST PROCEEDINGS

Docket No. SE 2019-0063-RM
Order No. 9425093; 12/19/2018

Docket No. SE 2019-0064-RM
Order No. 9425094; 12/19/2018

Docket No. SE 2019-0065-RM
Order No. 9425096; 12/20/2018

Mine: Star Quarries
Mine ID: 08-01103

CIVIL PENALTY PROCEEDING

Docket No. SE 2019-0091
A.C. No. 08-01103-483379

Mine: Star Quarries

DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge McCarthy

This case is before the undersigned upon Notices of Contest and a Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Solicitor has filed a motion to approve settlement proposing a reduction in the penalties from \$1,791.00 to \$789.00. The Solicitor states that Citation No. 9425093 has been vacated. The Secretary’s discretion to vacate a citation or order is not subject to review. *E.g., RBK Constr. Inc.*, 15 FMSHRC 2099 (Oct. 1993). The Solicitor also requests that:

Citation No. 9425094 be modified to reduce the likelihood of injury or illness from reasonably likely to unlikely and to remove the designation of significant and substantial; and

Citation No. 9425096 be modified to reduce the level of negligence from moderate to low and the likelihood of injury or illness from reasonably likely to unlikely and to remove the designation of significant and substantial.

In the settlement motion, the Solicitor contends that the Secretary has the “unreviewable discretion to withdraw” a designation of significant and substantial. Settlement Mot. at 3 (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879 (June 1996)). However, the Solicitor presents an overbroad reading of *Mechanicsville*. In *Mechanicsville*, The Commission addressed whether a Commission administrative law judge could *sua sponte* designate a violation as significant and substantial when the Secretary had not designated a violation as significant and substantial. The Commission ruled that there is “no material difference between the Secretary’s discretion . . . on the one hand to vacate a citation and his discretion on the other hand not to issue a citation in the first instance or not to designate a citation as [significant and substantial].” *Mechanicsville Concrete, Inc.*, 18 FMSHRC at 879. The Commission iterated that the designation of a violation as significant and substantial “in the first instance” is a prosecutorial decision akin to the decision to vacate a citation. *Id.* at 880.

However, *Mechanicsville* does *not* address situations—such as here—where the Secretary has *already* exercised his discretion to designate a violation as significant and substantial and now the parties come before a Commission judge to approve a settlement. This situation fits squarely within the plain language of section 110(k) of the Mine Act. Section 110(k) states that “[n]o proposed penalty which has been [contested before the Commission under section 105(a)] shall be compromised, mitigated, or settled except with the approval of the Commission.” The matter before the undersigned involves the parties’ request for “the approval of the Commission” to “compromise[], mitigate[], or settle[]” a violation already designated as significant and substantial. That’s a far cry from supplanting the Secretary’s discretion through an authorized representative to designate a violation as significant and substantial in the first instance. Accordingly, the undersigned rejects the Solicitor’s contention that the Secretary has the unreviewable discretion to remove a designation of significant and substantial.

The Secretary also argues that “[t]he Secretary’s use of [the 30 C.F.R. § 100.3] regular assessment tables in settlement is a *prima facie* indication that the penalty reduction is fair, reasonable, and adequate under the facts, and protects the public interest.” Settlement Mot. at 4-5. However, not only is the Commission not bound by 30 C.F.R. § 100.3, but it is the purview of the Commission—not the Secretary or regulations issued by the Secretary—to determine whether a settlement is appropriate under the criteria set forth in section 110(i) of the Act. *Sellersburg Stone Co., v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) (“[N]either the ALJ nor the Commission is bound by the Secretary’s proposed penalties. . . . [W]e find no basis upon which to conclude that these MSHA [penalty] regulations also govern the Commission.”); *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3101 (Dec. 2014) (“The Secretary’s regulations at 30 C.F.R. Part 100 apply only to the Secretary’s penalty proposals, while the Commission exercises independent ‘authority to assess all civil penalties provided [under the Act]’ by applying the six criteria set forth in section 110(i).” (quoting 30 U.S.C. § 820(i))).

In order to overcome its burden the Secretary must present evidence to a judge—exercising his or her independent authority—to satisfy the six criteria set forth in section 110(i).

Simply pointing to its own regulations does not overcome this burden. Therefore, the undersigned rejects the Solicitor's contention that the application of § 100.3 establishes a *prima facie* case for a reasonable settlement.

Consequently, the undersigned evaluated the settlement agreement absent the arguments rejected above.

The undersigned considered the representations and documentation submitted in this case. Despite the fallacy of the Secretary's legal arguments noted and rejected above, the undersigned concludes that the proffered settlement is fair, reasonable, appropriate under the facts, and protects the public interest under *The American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016), and is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amounts are as follows:

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement</u>
9425093	\$181.00	\$0.00
9425094	\$902.00	\$631.00
9425096	\$708.00	\$158.00
	<u>\$1,791.00</u>	<u>\$789.00</u>

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

It is **ORDERED** that Citation No. 9425094 be **MODIFIED** to reduce the likelihood of injury or illness from reasonably likely to unlikely and to remove the designation of significant and substantial.

It is **ORDERED** that Citation No. 9425096 be **MODIFIED** to reduce the level of negligence from moderate to low and the likelihood of injury or illness from reasonably likely to unlikely and to remove the designation of significant and substantial.

It is further **ORDERED** that the operator pay a total penalty of \$789.00 within thirty days of this order.¹

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

¹ Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGE
721 19th ST. SUITE 443
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November 5, 2019

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of ANTHONY VEGA
Complainant,

v.

SYAR INDUSTRIES, INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2018-0223 - DM
MSHA Case No. WE MD 18-02

Mine: Napa Quarry
Mine ID: 04-00023

DECISION AND ORDER

Appearances: Abigail G. Daquiz, Esq., Verónica Meléndez, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, CA, for Complainant

Bradley B. Johnson, Esq., Harrison, Temblador, Hungerford, and Johnson, LLP, Sacramento, CA, for Respondent

Michael D. Corrigan, Esq., Syar Industries, Inc., Napa, CA, for Respondent

Before: Judge L. Zane Gill

I. STATEMENT OF THE CASE

This proceeding arises from section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. § 815(c)(3). The Secretary of Labor (MSHA) on behalf of Anthony Vega, and Anthony Vega himself, allege here that Syar Industries terminated his employment as a heavy equipment mechanic at Syar Industries’ Napa, California quarry and shop because he engaged in protected activity. Respondent argues that Vega has failed to meet his burden to establish a prima facie case because no adverse employment action was taken against him and, even if Vega’s termination were deemed adverse employment action, there is no causal nexus between the adverse action and the protected activity.

For the reasons that follow, I find that Vega engaged in section 105(c) protected activities and that his termination was an adverse action. However, I find that there is insufficient evidence to infer a causal nexus between Vega’s protected activities and his termination. For this reason, I find that Vega has failed to state a prima facie case for a section 105(c)(3) discrimination claim. Even if Vega were to have met his prima facie burden, ultimately, I also find that Respondent has provided evidence sufficient to rebut the prima facie case and affirmatively defend its claim that Vega’s termination was motivated by unprotected activity.

II. STIPULATIONS

The parties' joint prehearing statement dated October 18, 2018, included the following stipulations:¹

1. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, found at 30 U.S.C. § 801, et seq.
2. Jurisdiction exists because Respondent is, and was at all times relevant to this proceeding, an operator of a mine, as defined in Section 3(b) of the Mine Act, found at 30 C.F.R. Section 803(b), and the products of the subject mine entered into the stream of commerce or the operations thereof affected commerce within the meaning and scope of Section 4 of the Act, found at 30 U.S.C. § 803.
3. The Federal Mine Safety and Health Review Commission and this administrative law judge have jurisdiction over this proceeding, pursuant to Section 105 of the Mine Act.
4. Respondent is and was, at all times relevant to this proceeding, engaged in mining activities at the Napa quarry, including the Napa shop, located in or near Napa, California, Mine ID Number 04-00023.
5. This proceeding was initiated by a timely complaint submitted by Anthony J. Vega under Section 105(c) of the Mine Act, known as "the Vega complaint," which complaint may be admitted into evidence for the purpose of establishing its issuance.
6. The penalties proposed by the Secretary in this proceeding will not affect Respondent's ability to continue in business.
7. Mr. Vega began working for Respondent Syar in 1995.
8. Mr. Vega served as the miners' representative for Respondent Syar at the Napa shop from at least January 1, 2017, through the day his employment was terminated.
9. Mr. Vega served as the union steward for Operating Engineers Local from at least January 1, 2017, through the day his employment was terminated.
10. In July, August, and September of 2017, Mr. Vega wrote on the outside of some envelopes containing pay stubs and paychecks located on the reception counter of the Napa quarry offices where employees from both the Napa quarry and Napa shop sign in and out on a daily basis. Mr. Vega wrote the following messages on envelopes of his coworkers: "Thanks for all your good work - RT"; "I know I don't say this often enough, I am glad you are on board with us. Keep up the good work. - RT"; "There is nothing more pleasing than hearing the sound of your voice over the radio in the

¹ A fourteenth stipulation noting Vega's hourly rate, fringe benefits, and missed workdays has been excluded for relevance.

morning - RT”; “I see greatness in your future here at Syar - RT”; “Doing a great job Jose - RT”; “if it wasn’t for you and Tyler, I don’t know how I would run this show! - RT.”

11. Respondent Syar terminated Mr. Vega’s employment with the company on September 11, 2017. Respondent Syar cites the following reasons for terminating Mr. Vega’s employment: Mr. Vega’s employment was terminated because it was Respondent’s determination that Mr. Vega falsely impersonated a company manager by writing messages on employee pay envelopes and signing those messages using the manager’s initials. In addition to falsely impersonating a manager, Vega’s employment was terminated because he repeatedly forged a manager’s initials, repeatedly tampered with other employees’ property, harassed at least one employee through inappropriate messages on the employee’s paycheck envelope, and made employment promises by signing a manager’s name to comments that provided feedback on employment performance, all in violation of the law and/or written company policy.
12. Respondent disputes the Vega complaint.
13. Pursuant to a decision by this administrative law judge, after a temporary reinstatement hearing on January 4, 2018, Anthony J. Vega was reinstated to his position as a heavy-duty mechanic at Respondent’s Napa shop on January 15th, 2018, and remains in that position as of the date of this stipulation.

III. FACTUAL AND PROCEDURAL BACKGROUND

Respondent, Syar Industries, operates quarries, sand and gravel operations, asphalt paving plants, redi-mix concrete plants, and recycling facilities in the North San Francisco Bay area of California. The quarry where these events transpired is located in Napa, California. (Ex. C-1, p.v)² At the time of his termination, Anthony Vega had worked for Syar Industries as a heavy equipment mechanic for twenty-two years. (Tr.12:10–13; 208:22–209:1; St. 7) In addition to his mechanic duties (Tr.145:16–19), Vega served as a union steward and miners’ representative. (Tr.44:3–5; 74:8–16; 210:17–211:1; St. 8; St. 9) As part of his union duties, Vega was expected to bring safety issues to management’s attention. (Tr.21:14–20; 211:2–9) Vega reported to Ken Calvin, who in turn reported to James Irvine, the purchasing manager, Napa shop supervisor and equipment rolling stock manager. (Tr.170:7–10; 209:5–9)

Vega alleges that he was fired for raising two safety-related issues, the first involving a haul road in a quarry area, the second involving a hose cutting blade that generated smoke in the hose shop. Respondent maintains that the people involved in firing Vega knew nothing about his

² For the sake of clarity, the following abbreviations will be used in referencing evidence in the record: “Ex. C” will refer to Complainant Vega’s exhibits; “Ex. R” will refer to Respondent Syar Industry’s exhibits; “Tr.” will refer to the hearing transcript; “St.” will refer to the stipulations included in the parties’ joint prehearing statement dated October 18, 2018; “AR” will refer to any document in the Administrative Record that is not part of Complainant’s exhibits, Respondent’s exhibits, or part of the hearing transcript.

involvement in either safety issue and that their sole reason for terminating Vega was his repeated and admitted writing on other workers' pay envelopes, which the Respondent regarded as forgery, intentional impersonation of a manager, harassment of a fellow worker, and likely to create unjustified employee expectations.

Vega was terminated on September 11, 2017. A grievance hearing held on November 1, 2017, deadlocked on the issue of reinstatement, triggering a subsequent arbitration hearing on January 15, 2018, at which Vega was reinstated to his prior position.³ (Tr.110:14–17; 193:8–9; 240:19–241:1) Vega and the Secretary filed this discrimination action on November 6, five days after the November 1 grievance hearing. (Tr.193:17–194:2) Vega and the Secretary initiated a temporary reinstatement action (WEST 2018-0135) with this agency after the union grievance process was completed. I conducted a temporary reinstatement hearing on January 4, 2018, and issued a decision on January 11, 2018, preserving Mr. Vega's employment and related status quo issues.⁴ (St. 13) Vega returned to work on January 15, 2018. (Tr.229:23–24)

This merits action was filed on February 12, 2018.⁵ In it, Mr. Vega seeks restoration of lost wages, and the Secretary asks for statutory remedies, items either not awarded or unavailable through the union grievance process. I have determined that neither the restoration of lost wages nor the requested statutory remedies will be awarded. The penalties requested by the Secretary will not be ordered.

IV. SUMMARY OF THE FACTS⁶

The court made a record of the parties' testamentary and documentary evidence at a hearing held in Vacaville, California on October 25–26, 2018. The parties filed post-hearing briefs.

³ Vega was reinstated to his position prior to the issuance of this decision. Vega's reinstatement was the result of a union grievance process conducted independently of the hearings for this case and my decision has no effect on Vega's reinstatement as an employee of Syar Industries.

⁴ The Board of Adjustment hearing was postponed four times. (Tr.244:4-7)

⁵ The Secretary filed an Amended Complaint on July 16, 2018.

⁶ The findings of fact are based on the record as a whole and my careful observation of the witnesses as they testified. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, all consistencies or inconsistencies in their testimony, and their demeanor. Any failure to analyze each witness's testimony is not a failure to have fully considered it. The fact that some evidence is not discussed does not mean that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence, and failure to cite specific evidence does not mean it was not considered).

A. Protected Activity

Vega claims the Respondent fired him because of two safety-related issues he raised in his capacity as a miners' representative and union steward. (Ex. R-2) The safety issues involved smoke from a chop saw in the hose room and concerns about the quarry haul road. Vega raised these issues about the same time he began writing on the envelopes. (Tr.236:16-24) He claims that the actions he took to bring attention to these safety issues constituted protected activity, and that Respondent retaliated against him by firing him under the pretext of his writing notes on the pay envelopes.⁷ (Ex. R-2)

1. **Smoke In The Hose Room**

The first safety issue Vega claims to have raised with management involved smoke from a chop saw located in a special hose room at the Napa shop where Vega and his co-workers fabricated and repaired hydraulic hoses. (Tr.49:20-22; 50:7-19) The chop saw used to cut these hoses would frequently generate smoke that concerned Vega and Robert Hayes, a fellow heavy equipment mechanic. (Tr.50:21-51:13; 53:4-54:12; 132:14-18; 216:6-217:2; 220:19-25) Vega and Hayes believed that the company should replace the chop saw blade to eliminate this excess smoke, which they worried was dangerous to breathe.⁸ Vega spoke to safety and environmental technician James Kerr about the smoke in the hose shop in January, 2017.⁹ (Tr.126:3-5; 233:6-9) Vega told Kerr he was worried that the hose smoke might be toxic. (Tr.216:6-17; 221:1-7) Kerr researched the issue on the internet to see if he could determine whether the smoke was toxic and found no answer.¹⁰ (Tr.216:18-22) Vega did not speak to management about the smoke issue for several months. (Tr.233:16-19) In the interim, however, he personally conducted research and found a new blade that he thought the company should buy.

Out of concern that management would intentionally ignore his recommendation, Vega requested that Hayes ask for the new blade.¹¹ (Tr.217:11-22) Although Hayes testified that he

⁷ "I believe [Respondent] [. . .] used this excuse to terminate me rather than fix the safety concerns that I thought I had protections under section 105(c) of the Federal Mine and Safety Act." (Ex. R-2)

⁸ Although there had been a hose saw smoke issue for ten years (Tr.220:19-2), January 2017 was the first time Vega saw hose particles released when cutting. (Tr.221:1-7)

⁹ Kerr was formerly a parts runner until 2012. (Tr.126:6-11) Kerr did safety inspections and miner training. He also conducted weekly safety meetings. (Tr.126:13-20)

¹⁰ Vega testified that he believed his conversation with Kerr would remain anonymous. (Tr.237:3-17) However, Vega did not specifically ask Kerr to keep the conversation private. (Tr.237:18-20)

¹¹ Kerr stated that Vega had requested saw blades in his own name before, and Irvine had never objected to nor expressed any disfavor of Vega's requests. (Tr.239:5-20) Kerr never sensed that management would be displeased to learn that the request for a new blade came from Vega. (Tr.137:14-138:4)

considered the purchase of better blades an efficiency issue rather than a safety issue (Tr.61:18–63:2; 66:14–68:10), he agreed that management might ignore or delay responding to a parts request for the blade if it came from Vega. (Tr.51:22–53:3; 64:10–65:9) According to his testimony, Irvine was unaware of Vega’s involvement with this safety complaint. (Tr.198:19–199:4) Hayes submitted the blade request in July 2017. Vega followed up with parts runner Randy Novak about a week later to ask if and when a new blade would be installed. (Tr.217:23–218:7) According to Vega’s testimony, Novak told him that Irvine directed him to research what blades other companies were using to cut their hoses. While Irvine and Novak began to research the issue (Tr. 132:24–133:8; 197:12–198:18), Irvine promptly dealt with the smoke issue by posting a warning sign directing workers to wear a respirator when cutting hoses. (Tr. 65:11–19; 199:5–9)

Vega followed up with Novak again in another week. According to Vega’s testimony, Novak informed him that Irvine put the blade issue on indefinite hold. (Tr.218:24–219:7) Vega assumed that the reported delay in buying the new blade was because of Irvine’s dislike of Vega. (Tr.221:18–24) Vega responded by telling Novak that if Irvine blocked the blade request, he would approach MSHA with a safety complaint. (Tr.219:8–13) Vega surmised that Irvine could have overheard this statement since his conversation with Novak occurred just a few feet outside Irvine’s office door. (Tr.219:14–25)

Vega broached the subject of the new blade once more on August 23, 2017, when he recommended to Kerr that the company should invest in a diamond hose saw blade or improve the ventilation system in the hose room. Kerr then spoke to Irvine about the blade and ventilation information. (Tr.130:15–20; 133:9–134:10) Irvine ultimately purchased the blade Hayes had requested (Tr.62:10–63:2), but the issue had a broader ultimate resolution. Within six months, the entire ventilation system was revamped and replaced. (Tr.55:24–56:4)

2. The Haul Road

In July 2017, a miner approached Vega about a near miss incident on the haul road at the Napa quarry. (Tr.211:10–14) In his capacity as a miners’ representative, Vega spoke to Kerr about the incident. (Tr.126:3–5; 128:23–129:10; 136:13–25; 211:10–212:2) Vega asked Kerr about the applicable regulations for road width and proper signage. (Tr.129:5–10; 211:15–212:6) Kerr checked on his computer, but was unable to find answers for Vega. (Tr.129:11–13; 212:3–6) Kerr then spoke to Irvine about the issue. (Tr.129:2–18; 196:16–20) Irvine testified that he did not know Vega had anything to do with the issue at the time. (Tr.196:16–20) Irvine instructed Kerr to inform Rick Tranchina and Jamal Grayson, the Napa Quarry Safety Director, about the haul road issue. (Tr.129:14–130:4; 196:24–197:2) Kerr immediately contacted Greyson to notify him. (Tr.129:19–23; 145:20–146:4)

Vega followed up with Kerr about a week later. (Tr.212:7–11) Kerr told Vega he had spoken to Irvine. Vega claimed that Kerr told him, “James Irvine wanted to know why it was any of [Vega’s] business performing mining duties in the quarry when [he is] the Napa shop’s miners’ rep.” *Id.* Vega testified that he asked Kerr “why he narked [him] out to

[Irvine], because he knows [Irvine] doesn't like [Vega]."¹² (Tr.212:25–213:6) According to Vega, Kerr said nothing more and walked away. (Tr.213:3–6) Kerr testified that he does not recall following up with Vega about the road. (Tr.130:5–15) Tranchina testified that he was alerted to the haul road safety issue on August 10, 2017, from Grayson. (Tr.145:20–22; 159:10–23; 165:12–166:7) Tranchina told Grayson to look into it the same day. (Tr.165:12–22) Grayson learned that operations had ceased in the area of the quarry served by the haul road before this issue was raised and the haul road had already been shut down, except for police traffic. The road was also in compliance with applicable MSHA regulations. (Tr.165:23–166:7)

B. Writing Notes on Pay Envelopes

Pay envelopes were routinely laid out in the Napa quarry shop office for distribution. In the summer of 2017, Vega noticed that some of the pay envelopes lying on the counter waiting to be picked up by other miners had smiley faces and positive notes written on them. (Tr.146:12–147:1; 223:8–18; 236:12–15) These writings inspired him to write his own notes on some of the envelopes as a prank. (Tr. 26:12–22; 223:19–21; 224:1–12)

Tranchina supervised the Napa shop employees whose pay envelopes were involved in Vega's prank. (Tr.144:13–18; 172:3–10; 223:22–25)¹³ At first, Vega's messages did not indicate who they were from, but eventually he started adding Tranchina's initials, "RT", to the envelopes. (Tr.223:22–25) At least one employee initially believed the notes were from Tranchina. (Tr.45:17–46:1; 57:19–58:17) Some employees thought the notes were funny and out of character for Tranchina. (Tr.46:13–20) Some workers asked Tranchina if the notes were really from him. (Tr.153:18–24) Vega told some of his co-workers that it was he, not Tranchina, who had left notes on the envelopes. One co-worker, going along with the joke, asked Vega why he had not received a note from Tranchina. Vega put a note on his envelope the next day. (Tr.224:13–25)

Tranchina was upset when he became aware of the notes on the pay envelopes. (Tr.160:14–161:1) Particularly, he was concerned that the as yet unidentified japer had attributed the comments to him by using his initials. (Tr.161:2–22) Tranchina hoped that the notes might stop without his intervention (Tr.169:2–4), but this was not the case. When the prank continued, he called a meeting to tell the employees that the notes were inappropriate and had to stop. (Tr.151:10–153:3; 162:1–6; 164:11–19) One of the employees told Tranchina it was Vega who was writing the notes. (Tr.46:21–47:8) According to Tranchina, the miners he spoke with felt that the prank was out of the ordinary. (Tr.153:25–154:5) Although Vega's stunt caused no real

¹² Vega testified that he believed his conversation with Kerr about the haul road issue would remain anonymous. (Tr.138:5-8; 237:3-17) However, Vega did not specifically ask Kerr to keep the conversation private. (Tr.237:18-20) Kerr stated that Vega had requested saw blades in his own name before, and Irvine had never objected to nor expressed any disfavor of Vega's requests. (Tr.239:5-20) Kerr never sensed that management would be displeased to learn that the request for a new blade came from Vega. (Tr.137:14-138:4)

¹³ Tranchina did not have authority to supervise or discipline Vega. (Tr.164:20165:4)

problems for the Respondent (Tr.162:7–13), in management’s estimation it created a risk of confusion and dissent among the miners. (Tr.163:15–164:5) Tranchina testified that at least one miner whom he supervised was not deserving of the prank praise he was receiving. (Tr.162:14–163:4)

Tranchina met with Ann Pearson, the personnel manager, on August 4, 2017, to discuss the writing on the pay envelopes. (Tr.82:18–25; 89:7–13; 118:1–14; 154:12–20; 160:7–13; 169:5–8) Tranchina testified that he neither liked nor disliked Vega. (Tr.167:15–18) He had never had an unpleasant interaction with Vega prior to the firing and (Tr.167:19–21) he did not speak with Vega or Tom Vella, a witness to the prank, about the envelope writing. (Tr.154:21–155:2) Pearson decided to install a surveillance camera in the office to catch the culprit in the act. (Tr.167:3–7) She authorized Tranchina to buy and install the camera and alerted Irvine of her decision. (Tr.147:9–15; 150:6–15; 176:7–13) Pearson testified, and Irvine confirmed, that she did not tell him what had prompted the installation of the camera. (Tr.176:14–17) Nor did Pearson alert Vega of the installation, hoping to develop proof of his prank to make sure she had correctly identified the culprit. (Tr. 97:6–18; 103:22–104:13) Tranchina spoke to Irvine about the writing incident when the camera was installed, but there is no evidence that he communicated to Irvine that Vega had raised a safety complaint. (Tr.155:11–13; 166:24–167:2)

The camera was functional within two weeks, and more altered envelopes were discovered.¹⁴ (Tr.94:16–19; 150:19–151:2) Vega did not stop writing on the envelopes until early September, 2017, when he heard about the installation of the surveillance camera from a co-worker. (Tr.225:16–226:8; 234:13–235:14) Vega testified that when he realized that management regarded his prank as a serious offense, he regretted that he had not stopped before getting caught. (Tr.226:9–14) Vega also testified that he felt he was treated unfairly by management because he had not received a warning not to write on the envelopes prior to his dismissal. (Tr.226:15–19) He reinforced this sense of unfairness at the hearing when he testified that he brought this discrimination action to send Syar Industries a message to be more circumspect in its dealings with miners’ representatives in the future. (Tr.243:1–4)

C. The Decision to Fire Vega

Pearson determined it was appropriate to fire Vega as early as August 4, 2017, the day she and Tranchina discussed the note writing for the first time. (Tr.89:7–13; 98:2–5) She considered the note writing a matter of dishonesty. As she saw it, Vega had impersonated a manager. (Tr.110:7–13) Tranchina and Pearson did not discuss any option for Vega other than firing because the violation was so severe in their estimation. (Tr.148:21–149:9) Pearson spoke to Respondent’s CEO, James Syar, to secure his consent. (Tr.75:5–15)¹⁵ CEO Syar testified that

¹⁴ For example, Tranchina discovered two more envelopes on September 5, 2017, and exchanged them with unmarked replacements. (Tr.151:6-9; 161:23-25)

¹⁵ Neither Tranchina nor Irvine advised Pearson or CEO Syar to fire Vega. (Tr.165:5-11; 199:13-23)

he considered what Vega had done an act of forgery.¹⁶ (Tr.77:3–12) To him, it was of significant importance that Vega was handling other people’s paychecks. (Tr.78:25–79:3) He believed it had the potential to mislead the processing banks. (Tr.77:8–12) CEO Syar also spoke with Irvine about terminating Vega. (Tr.76:2–11)

The surveillance camera captured two video clips that identified Vega and Vella in the Napa quarry shop office at the time when Vega wrote on the pay envelopes. (Tr. 95:21–96:11; 100:23–25; 102:9–11; 104:20–105:1; 109:14–18) To bolster the video evidence, Pearson asked Irvine to gather handwriting samples from Vega and Vella. Later, in response to a request by Pearson, Irvine identified a sample of Vega’s writing based on his personal knowledge, having seen Vega’s writing on many occasions over the 10–15 past years. (Tr. 91:2–17; 177:3–19) Pearson conferred with company attorneys and CEO Syar and got approval to hire a handwriting expert to develop evidence to support whatever disciplinary action might be taken. (Tr.78:12–79:3; 92:13–15; 93:21–23; 96:4–11; 104:14–19) The expert was hired in early September, 2017 (Tr.96:7–11), and confirmed Vega’s writing from two anonymous writing samples. (Tr.97:20–98:1; 105:2–9) When Pearson confronted Vega with copies of the pay envelopes, Vega admitted to writing on them. (Tr.227:12–17) Pearson told Vega about the camera and the handwriting expert. (Tr.227:18–25)

Vega was terminated on September 11, 2017, (St. 11) and Vella was disciplined with one day off without pay and a written warning for witnessing and failing to report Vega’s prank. (Tr. 87:14–18; 102:6–15; 108:20–109:1–13) According to the parties’ joint stipulations, Respondent terminated Vega because: (1) it determined that he falsely impersonated a company manager by writing messages on employee pay envelopes and signing the messages using the manager’s initials; and, (2) because Vega repeatedly forged a manager’s initials, repeatedly tampered with other employees’ property, harassed at least one employee through inappropriate messages on the employee’s paycheck envelope, and made employment promises by signing a manager’s name to comments that provided feedback on employment performance, all in violation of written company policy. (St. 11) The stated reason for Vega’s termination was for “falsely impersonating a company manager by writing messages.”¹ (Tr.100:1–5; 114:22–115:13)

D. The Grievance Process

The labor agreement between Respondent and the Operating Engineers’ Local Union, No. 3 (of which Vega was a member) provided a grievance and arbitration framework to resolve disputes between the Respondent and its union employees. (Ex. C–3, p.33) The Union invoked the labor agreement to challenge Vega’s termination. (Tr.41:22–42:2) The first step in the grievance resolution process was a Board of Adjustment (BoA) hearing, which was held on November 1, 2017. (Tr.34:8–12; 240:19–241:6) At the hearing, Vega stated he thought the termination was ridiculously harsh for such a minor offense. (Tr.228:1–7) The BoA deadlocked on the issue of whether Vega had been terminated in violation of the labor agreement. (Tr. 35:1–5; 111:4–7; 179:14–20; 180:2–19) No mention of safety issues or protected activity was made in the November 1, 2017 BoA hearing. (Tr.193:10–16)

¹⁶ The termination notice did not mention forgery. (Tr.99:11-25)

The labor agreement stipulated that Vega’s case proceed to arbitration to resolve the deadlock. (Tr.180:23–181:1) The arbitration was conducted on January 15, 2018, (Tr.229:19–230:2), after the temporary reinstatement hearing of January 4, 2018. It resulted in Vega’s reinstatement to his former position (Tr.229:25–230:2), but it did not restore his lost wages and benefits. (Tr.42:9–13; 229:25–230:2; 250:19–25; St. 13) Vega filed this discrimination complaint five days after the BoA hearing failed to reinstate him. (Tr.111:4–7) This was the first time Vega formally raised the issue of his protected activity. (Tr.241:12–17)

V. ANALYSIS OF THE ISSUES

Although the basic factual backgrounds of both protected events are outlined above to establish a storyline, the following includes contested factual details along with analysis and findings. It is fundamental that the ALJ, as trier-of-fact, assess the credibility of all witnesses and determine the weight their testimony deserves. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992) (“[A] Judge's credibility resolutions cannot be overturned lightly.”).

A. Prima Facie Case

Under section 105(c)(1) of the Mine Act, 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 Chapter, including a complaint notifying the operator [...] of an alleged danger or safety or health violation.” 30 U.S.C. § 815(c). To establish a prima facie case of discrimination under section 105(c)(1), Vega is required to show: (1) that he engaged in a protected activity; and, (2) that the adverse action he complains of was motivated, at least in part, by that activity.¹⁷ *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec’y of Labor on behalf of Robinette v. United Castle Coal, Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d. Cir. 1981).

¹⁷ The legitimacy of the *Pasula-Robinette* framework was challenged in *Sec’y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914 (Aug. 2016). In *Riordan*, the respondent mine operator argued that the *Pasula-Robinette* test was no longer appropriate because the Supreme Court invalidated the burden shifting framework in the ADEA and Title VII contexts. *Id.* at 1919. The Commission, citing the legislative history and intent of the Mine Act, found that the burden shifting framework of the *Pasula-Robinette* test is still applicable and appropriate. “Congress envisioned such a burden shifting framework when drafting the discrimination protections of section 105(c)(1) [...] Given the distinct history and legislative intent of the Mine Act, we do not find *Gross* and *Nassar* to be controlling for discrimination proceedings under the Mine Act. The Commission’s reasoning in *Pasula* was sound, and we decline to overturn it.” *Id.* at 1921.

B. Protected Activity

To satisfy the first prong of the *Pasula-Robinette* test for a prima facie case of discrimination, Vega must show that he engaged in protected activity.¹⁸ *Driessen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC at 803; *Pasula*, 2 FMSHRC at 2786. Protected activity under the Act has been found to include making a complaint to an operator or its agent of “an alleged danger or safety or health violation,” see *Sec’y of Labor on behalf of Davis v. Smasal Aggregates, LLC*, 28 FMSHRC 172, 175 (Mar. 2006) (ALJ), and reporting potential safety or health hazards to MSHA or an MSHA inspector, see *Sec’y of Labor on behalf of Chaparro v. Comunidad Agricola Bianchi, Inc.*, 32 FMSHRC 206 (Feb. 2010) (ALJ). I must determine whether the evidence in total, including the inferential evidence, has sufficient circumstantial weight to satisfy his prima facie burden to show discrimination.

I find that Vega engaged in two instances of protected activity in relative temporal proximity to his termination on September 11, 2017. Respondent does not dispute that Vega’s actions regarding the quarry road and the hose room issues can be seen as protected activity under Section 105(c) of the Mine Act. Even if Respondent did dispute this, the fact that Vega was involved in the hose room and haul road issues either in his capacity as a miner’s representative or shop steward – or merely as an employee – is sufficient to bring the issues under the umbra of protected activity under section 105(c)(3). The evidence supports the conclusion that the hose room and quarry road issues are properly considered safety concerns and that Vega played a role in both events. As such, the requirement for the protected activity portion of the prima facie analysis is satisfied.

C. Motivation of Adverse Action

The second prong of the *Pasula-Robinette* test for a prima facie case of discrimination requires a showing that Respondent took adverse action against Vega that was motivated, at least in part, by Vega’s protected activity. *Driessen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800, *rev’d on other grounds sub nom. Consolidation Coal Co.*, 663 F.2d 1211 (3d. Cir. 1981). This second prong of the *Pasula-Robinette* test may be alternatively framed as two sub-questions: (1) was there was an adverse employment action; and,

¹⁸ When a complainant asserts that he engaged in a protected activity that is not expressly enumerated under the Mine Act, the activity may still be protected if it furthers the purpose of the legislation. *Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317, 1323 (June 2016) (citing *Pasula*, 2 FMSHRC at 2789). In determining whether an activity is to be considered protected activity, the legislative history makes clear that Congress intended for courts to liberally construe the Act. Congress stated that “[t]he Committee intends that the scope of the protected activities be broadly interpreted by the Secretary” and that “[t]he listing of protected rights contained in section 10[5](c) is intended to be illustrative and not exclusive.” S. Rep. No. 181, 95th Cong., 1st Sess. 35-36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-24 (1978). It further stated that section 105(c) was to be construed “expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.” *Id.* at 36.

if so, (2) was there was a motivational nexus, at least in part, between the adverse action and the Complainant's protected activity? See *United Mine Workers of America (UMWA), on behalf of Mark A Franks and Ronald M. Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2096 (Aug. 2014) (Cohen and Young) (decisions where Commission first held that a miner engaged in protected activity, then determined that the complained of action, a termination, was an adverse employment action, before addressing the nexus).

1. Adverse Employment Action

The Complainant must first establish that an adverse employment action occurred before the issue of nexus is reached. Complainant has satisfied this requirement. Termination is the ultimate adverse employment action. This is consistent with the legislative history of the Mine Act. In keeping with the Congressional intent, the term "adverse action" has been broadly defined as "an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Pendley v. Fed. Mine Safety & Health Rev. Commn.*, 601 F.3d 417, 428 (6th Cir. 2010).

2. Motivation

The Secretary and Vega must next prove that the adverse action was motivated, at least in part, by the protected activity. *Driessen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800, *rev'd on other grounds sub nom. Consolidation Coal Co.*, 663 F.2d 1211 (3d. Cir.1981). The Commission has noted that "direct evidence of motivation [for termination] is rarely encountered; more typically, the only available evidence is indirect." *Chacon*, 3 FMSHRC at 2510. Such indirect, circumstantial evidence may include: (1) coincidence in time between the protected activity and the adverse action; (2) knowledge of the protected activity; (3) hostility or animus toward the protected activity; and, (4) disparate treatment. *Id.* The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.* at 2511.

In analyzing a mine operator's asserted justification for taking adverse action under the *Pasula-Robinette* framework, the inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. The ALJ may not impose his own business judgment as to an operator's actions. *Chacon*, 3 FMSHRC at 2516–17. Additionally, the ALJ may not substitute his own justification for disciplining a miner over that offered by the operator. *Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 989 (Sept. 2001).

In *Bradley v. Belva Coal Company*, with regard to the issue of motivation, the Commission found that “circumstantial evidence [...] and reasonable inferences drawn therefrom may be used to sustain a prima facie case.” 4 FMSHRC 982, 992 (June 1982) (citing *Chacon*, 3 FMSHRC at 2510–12). Furthermore, the Commission has held that “inferences drawn by judges are ‘permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.’” *Colo. Lava, Inc.*, 24 FMSHRC 350, 354 (Apr. 2002) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)).

a. Coincidence in Time

The Commission has stated that “[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the legality of the employer’s motive [...]” *Chacon*, 3 FMSHRC at 2511. Also, “[W]e ‘appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.’” *Hyles*, 21 FMSHRC at 132 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)).

Vega’s protected activity occurred at roughly the same time as his writing notes on the pay envelopes in the Napa quarry shop office. (Tr.223:10–21; 225:16–17; 232:19–22; and 236:12–20) Vega’s involvement in the quarry haul road issue occurred in July 2017, and although he first became involved in the hose room ventilation issue in early 2017, he did not return to the topic until August 2017. (Tr.211:10–21; 216:6–217:6; 236:6–11, 236:21–24) Vega learned that Respondent had installed a surveillance camera in August or September 2017 and believed that management suspected he had been writing on the pay envelopes. (Tr.225:16–226:2) Syar management, specifically Tranchina and Pearson, discovered Vega was the individual who was writing on pay envelopes in August 2017 (Tr.89:7–13; 118:1–14), and terminated his employment on September 11, 2017. (Tr.226:24–227:3)

I find that Vega’s claim of nexus between his protected activity and termination is implausible. Instead of buttressing the notion that Respondent’s decision to fire Vega was retaliatory, the close proximity in time between Vega’s discovery that management suspected he was carrying out the prank, his involvement with the two incidents of protected activity, and his termination suggest that the claim of nexus between the protected activity and the termination was a calculated response intended to defend Vega from Respondent’s decision to fire him for writing on the envelopes. At a minimum, the temporal proximity of these events does not bolster the claim that Vega’s termination was retaliatory or motivated by his protected activity.

b. Management Had No Knowledge of the Protected Activity

The Commission has held that “an operator’s knowledge of the miner’s protected activity is probably the single most important aspect of a circumstantial case.” *Baier*, 21 FMSHRC at 957 (citing *Chacon*, 3 FMSHRC at 2510). Whether the operator had knowledge of the protected activity may be “proved by circumstantial evidence and reasonable inferences.” *Id.* The commission has also held that “discrimination based upon a suspicion or belief that a miner has

engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1).” *Moses*, 4 FMSHRC at 1480. Additionally, the Commission has held that “a supervisor’s knowledge of the protected activity may be imputed to the operator where knowledgeable supervisors are consulted regarding the miner’s employment.” *Sec’y of Labor on behalf of Pappas v. Calportland Co.*, 38 FMSHRC 137, 146 (Feb. 2016); *see also Turner*, 33 FMSHRC at 1067–68 (imputing knowledge and animus of miner’s direct supervisors to official making disciplinary decision); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) (stating that “[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions.”).

The issue of whether Respondent’s management had knowledge of Vega’s protected activity at the time of his termination can be resolved by evaluating the weight of the evidence and considering the compelling force of each side’s arguments. When the evidence in the record is considered and weighed, it is apparent that the evidence supporting the Respondent’s claim that its management knew nothing about Vega’s involvement in protected activity when the decision was made to terminate him is significantly better supported, more cohesive, and has more convincing force than the evidence the Secretary and Vega brought to the record. I am not convinced that Respondent’s management knew of Vega’s involvement with the protected activity at the time of his termination.

Vega testified that he was not on good terms with his supervisors in general and Irvine in particular because: (1) he had once notified management in his capacity as a union representative that untrained laborers had operated skip loaders without being qualified; and, (2) he had initiated a grievance after a shoulder injury. (Tr.52:8–19; 64:10–25; 213:7–215:22; 173:8–174:8; 213:17–215:22, 237:3–14; 244:1–23)¹⁹ The Secretary and Vega ask me to find that management had to know about Vega’s involvement in the hose room and quarry haul road issues because: (1) Tranchina and Irvine met regularly to discuss work issues (primarily purchase issues) (Tr.83:15–21; 84:1–7; 144:19–24; 154:3–6; 172:3–10); (2) CEO Syar met periodically with supervisors, including Tranchina and Irvine (Tr.72:25–73:15; 181:20–182:2); and, (3) Pearson had met with Irvine from time-to-time to discuss common work issues.^{20 21} (Tr.83:15–21) In broader context, Irvine testified that he did not meet regularly

¹⁹ Vega had a shoulder injury. He was on part time work for a while. He had made plans for three days off, but they released him to full duty in the middle of the week. He asked if he could go ahead with his three-day plans. He went ahead, but the company treated it as AWOL. He grieved the decision to give him two days off. (Tr.213:22-214:19)

²⁰ In regard to the haul road issue, there is conflicting evidence regarding whether Vega wanted his involvement kept confidential. Vega claimed that he told Kerr that he wanted his role in the issue kept quiet (Tr.138:5-8), but, he also testified that he did not tell Kerr to keep his name confidential. (Tr.223:3-7) Vega testified further that he assumed and believed that his comments to Kerr would be anonymous since during a safety meeting, management instructed miners to go to Vega or Kerr if they wanted to keep their complaint anonymous. (Tr.237:3-17) Kerr could have substantiated parts of Vega’s story, but his testimony left Vega’s version of the story uncorroborated.

with CEO Syar (Tr.181:20–182:2) and he only met with Tranchina when Tranchina “really need[ed]” to purchase an item. (Tr.172:3–10) He described his interactions with other managers as limited to the request and question at hand, i.e., purchasing a camera or providing his mechanics’ requisitions (Tr.176:3–178:2) — nothing else was discussed. *Id.* To underscore this, Irvine testified that he was not even consulted when human resources considered terminating one of his three skilled mechanics. (Tr.71:10–16; 112:23–113:2; 202:14–16)²²

The evidence that might show management’s knowledge of the protected activity relies solely on Vega’s testimony, lacks non-hearsay corroboration, is unreliable, and is not entitled to convincing probative weight. *REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (1998) (hearsay evidence is admissible but should be evaluated by the judge to determine whether it is reliable and entitled to any probative weight). Vega testified that he dealt with Kerr and Novak regarding the hose room smoke issue and with Kerr only regarding the haul road issue. Novak was not called as a witness, and although hearsay is admissible if material and relevant, nothing attributed to him can be corroborated. *Cf. Hayes v. Dept. of the Navy*, 727 F.2d 1535, 1538 (Fed.Cir.1984) (footnote omitted) (hearsay testimony may be treated as substantial evidence, even without corroboration, if, to a reasonable mind, the circumstances are such as to lend it credence).

On balance, the evidence does not support the argument that Respondent’s management knew Vega was involved in the protected activity prior to his termination. Vega testified that he raised the safety concern regarding the hose room with Kerr, but he did not offer anything to support the idea that Kerr told Irvine about his involvement. (Tr.238:25–239:4) Irvine testified that he heard from Novak about the blade purchase request in August 2017, and that he heard about the smoke issue from Kerr at the same time. (Tr.197:12–198:24) But, Kerr testified that he did not disclose Vega’s involvement in either protected activity to Irvine or any other member of management prior to Vega’s termination and stated that when people made safety complaints to him, he assumed they wanted to remain anonymous. (Tr.127:24–128:2; 142:8–12; 198:19–24) Consistent with this, Vega asked Kerr to keep his concerns about the hose room and the haul

²¹ The Secretary also argues that Irvine must have known about Vega’s involvement in the hose room smoke issue in August 2017 because a complaint could have only come from one of three mechanics making hoses (Tr.197:12-198:24) and/or that given Irvine’s open door policy for safety and stated care for safety, it was plausible that Novak told Irvine about Vega’s MSHA comments (Tr.192:3-5; 195:23-196:15), because Novak did talk to Irvine about the request for the diamond blade. (Tr.197:12-198:9; 218:14-16) This plausibility does not convince me that Respondent’s management in general, and Irvine in particular could have or did know about Vega’s protected activity prior to his termination.

²² The Secretary argues that I should infer Pearson and Irvine had knowledge of Vega’s protected activity and acted against Vega based on that knowledge because skilled mechanics were scarce and the Respondent would not act against its own interest and fire a person with Vega’s skills unless it had a retaliatory motive. (AR: Secretary’s Brief, p.16) However, it is equally if not more plausible that Respondent acted as it did (using the Secretary’s logic) because it felt keeping him on staff despite his forgery stunt was of even greater importance.

road confidential. (Tr. 129:14–18, 138:5–8; 142:8–17) Novak did not appear as a witness to confirm or deny any of the evidence attributed to him.

Irvine testified that prior to Vega's termination, he was not aware that Vega was involved in discussions about replacing the hose shop blade. (Tr.198:19–24) There is no evidence in the record showing that Hayes ever informed Irvine about Vega's involvement with the hose room issue. When Hayes submitted the saw blade request, it did not have Vega's name associated with it. (Tr.238:6–11) Pearson testified that she did not discuss Vega raising either safety concern with Mr. Irvine. (Tr.105:10–22, 110:1–6) Napa Quarry Manager Rick Tranchina testified that neither Grayson nor Irvine ever communicated to him that Vega had raised either the quarry haul road or hose room safety concern. (Tr.166:20–25, 167:1–2) Irvine also testified that at the time he obtained the writing samples, he did not know why they were requested and Pearson and Irvine did not discuss any safety issues when Irvine identified Vega's writing. (Tr.105:10–22; 178:14–20)

Vega, in his capacity as the Napa shop safety coordinator, first heard of the haul road issue from another miner and passed the information along to Kerr. (Ex. R–2) Vega asked Kerr to investigate and pass his findings on to Jamal Grayson. *Id.* Grayson never mentioned Vega's name in connection with the haul road complaint. (Tr.166:20–23) Kerr told Vega that he was unsuccessful in his search for haul road regulations and had spoken with Irvine about the issue. (Ex. R–2; Tr.129:2–18; 196:16–20) When Kerr reported the issue about the haul road to Irvine, he said it came from a miner and did not name Vega (Tr.129:14–18), again consistent with Vega's request for anonymity. Irvine credibly denied knowledge of Vega's involvement. (Tr.196:16–20) Although there is conflicting evidence about whether Vega wanted to remain anonymous during this process, Irvine's denial that he knew about Vega's role in this event is consistent with the preponderant evidence that Vega wanted to remain anonymous. Irvine testified that he had no conversation with anyone at Syar regarding the quarry haul road issue after it was initially raised in July 2017, and until November 6 or 7, 2017, when he received Vega's MSHA Discrimination Report. (Tr.197:3–8)

The evidence convincingly shows that Irvine had no role or responsibility in making the decision to terminate Vega in September 2017, nor did Irvine recommend that CEO Syar or Pearson take such action. (Tr.199:13–25, 105:10–22) Further, Respondent's agents who made the decision to terminate Vega also denied having knowledge that Vega had made complaints about safety issues that could be considered protected activity. Both CEO Syar and Pearson denied any knowledge of the two safety concerns listed in Vega's MSHA discrimination report when they made the decision to fire him. (Tr.80:6–13; 110:1–13) Pearson had only been at the job about nine months. (Tr.123:22–124:6) She testified that she was not aware of any animosity between Vega and management and (Tr.123:13–124:6) had no substantial contact with Vega prior to learning about the envelope writing incident. (Tr.105:23–25) The first time she heard Vega's name was in the context of this controversy when she saw Vega's MSHA complaint (Ex. R–2) on November 6, 2017, a week after the union grievance hearing, and almost two months after Vega's termination. (Tr.111:8–12; 122:20–123:2) This is consistent with Vega's testimony that the first time he formally raised a claim of protected activity was in his MSHA discrimination complaint. (Tr.241:12–17) CEO Syar spoke with Irvine about terminating Vega

after learning about the note writing situation and denied knowledge of either safety issue prior to Vega's termination. (Tr.76:2-11)

The Secretary essentially argues that Pearson, Irvine, and Tranchina (and presumably CEO Syar) lied under oath that they had no knowledge of Vega's protected activity until after his September 11, 2017 termination, indeed after the November 6, 2017 grievance hearing. To support this argument, the Secretary asks the court to find that Kerr lied when he testified that he never revealed Vega's involvement in the hose room and quarry haul road issues. (Tr.127:24-128:5; 142:8-17) I am urged to credit Vega's otherwise uncorroborated testimony over Kerr's because Kerr lived in a house belonging to Syar Industries (Tr.127:24-128:5; 135:2-23; 142:8-17;), which perforce would cause him to lie to contradict Vega's belief that management must have known about his involvement with the hose room and quarry haul road issues. Furthermore, Vega's testimony about management having knowledge of his protected activity is heavily dependent on corroboration from Novak, a person who was not called as a witness. Although I can admit and consider hearsay evidence for its reliability and probative value, nothing in this scenario prompts me to credit those portions of Vega's testimony that rely for corroboration on statements or conclusions attributed to Novak or rule on a finding that Kerr lied under oath. *See Sec'y v. REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (1998).

The Secretary's entire case on the issue of Respondent's knowledge of the protected activity is based on Vega's testimony. As a matter of simple credibility assessment, Vega's claims are less convincing than Pearson's, CEO Syar's, and Irvine's. I find that Respondent's managers and executive had no knowledge of Vega's protected activity until after he was terminated, two grievance hearings had taken place, and Vega had submitted his MSHA discrimination claim. Vega's speculation that Syar management knew he had engaged in the two cited instances of protected activity and fired him for that protected activity (which is different than Syar management allegedly suspecting that Vega was responsible for tampering with pay envelopes) does not amount to substantial evidence. The testimony of CEO Syar and Pearson, as well as that of each member of Syar management in this case, is credible and consistent. *See, e.g., Robinette, supra*, 3 FMSHRC at 813. As set out above, Syar management had no knowledge of Vega's protected activity when it terminated Vega for his repeated misconduct.

c. Hostility or Animus Toward the Protected Activity

Examples of operator animus or hostility related to protected activity run the gamut from the relatively minor (less desirable work schedules) to the flagrant and criminal (severe verbal harassment, physical assault). "The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Chacon, supra*, 3 FMSHRC at 2511 (finding that the operator's "angry remarks to Chacon about the MSHA complaints . . . display a specific hostility towards Chacon's protected activity").

Vega testified that Irvine had such a negative opinion of him that anything he might say or that was attributed to him would be rejected out-of-hand. (Tr.221:22-24) Vega's perception of hostility between himself and Irvine falls into two time periods, before the protected activity and after the termination. For his part, Irvine testified that he felt no hostility towards Vega during the eight years they worked together (Tr.230:3-10) excepting the event arising from the

grievance process after the termination. The record does not support the allegation that management acted with hostility toward Vega during the period of the protected activity. During Vega's termination meeting on September 11, 2017, Vega said nothing about a link between his protected activity and the firing. (Tr.226:24–227:25) There was no mention of protected activity at either the initial grievance hearing (BoA) on November 1, 2017, or the follow-up arbitration hearing. (Tr.33:10–34:25; 41:4–7; 110:14–111:3; 193:10–16; 224:7–11) The first time the alleged protected activity was mentioned was in the MSHA discrimination complaint. (Ex. R–2; Tr.241:12–17)

Any hostility between Vega and Irvine that Vega repeatedly mentioned seems more likely to relate to the prior grievance over Vega's shoulder injury, the related dispute about being able to take time off after being released back to unrestricted work, the dispute about whether other workers not covered by Vega's union's rules being allowed to do jobs that Vega thought he should be allowed to do, and the resulting grievance process. (Tr.52:8–53:3; 64:16–25; 138:9–139:20; 213:22–214:16; 215:9–22) However, Kerr testified that Vega had spoken about Irvine's animosity toward him, but that Kerr was not personally aware of any animosity between Vega and any member of management over issues relating to Vega's shoulder injury. (Tr.123:18–21) Hayes testified that although Vega talked about ill will between himself and Irvine, Hayes believed the animosity originated from a territory dispute with a rival union, not the shoulder injury episode or a disagreement over safety concerns. (Tr.64:16–65:9) If either of these testimonies is true, the ill will does not arise from or relate to the protected activity in this case. Moreover, this purported animosity seems to be a construct in Vega's mind. There is no evidence showing that it was shared by Irvine or other members of Respondent's management. (Tr.213:17–21; 214:17–215:2; 221:18–24) From Irvine's perspective, he testified that he had worked with Vega for eight years and had never been aggressive or threatening toward him. (Tr.230:3–10) Furthermore, Irvine had no input in the firing decision and denied knowing anything about Vega's alleged safety complaints.²³

As discussed above, there is no evidence showing that Irvine or any other member of Syar management displayed or expressed animus or hostility toward Vega for the protected activity he alleges in his MSHA Discrimination Report. (Tr.239:12–20) Vega asserted that because of their historical animosity, Irvine delayed dealing with the hose room issue. (Tr.218:24–219:7; 221:18–24) The evidence does not support this belief. Vega had requested saw blades in his own name before. Irvine never objected or expressed any disfavor. (Tr.239:5–20) Not only did Respondent purchase the requested new blade, (Tr.62:10–63:2) but Irvine directed Kerr to immediately post a warning sign in the hose room (Tr.65:11–19; 132:24–133:8; 204:3–11) when he learned about the smoke issue from Kerr and Novak. (Tr.54:13–55:2; 197:12–198:18) The process of learning about, researching solutions (Tr.197:12–198:5; 200:7–19), identifying the course of action, and remedying the hose room issue resulted in the installation of a new ventilation system as well as a better chop saw blade within six months. (Tr.54:13–56:4; 205:14–206:22) The timing of this series of events belies the claim that Irvine put an "indefinite hold" on anything related to it. Further, Irvine testified that it was not unusual

²³ Irvine played a part in developing the evidence that supported the termination (Tr. 91:2-17; 177:3-178:20), and appears to have become the focus of Vega's belief that management was aware of his protected activity.

for a parts request to take some time while research into options was done (Tr.200:7–19) and stated that a \$400 saw blade was insignificant compared to the hundreds of thousands of dollars Respondent spent for parts each month. (Tr.201:6–17)

As for the quarry haul road, Tranchina, Irvine, and Pearson all testified that they did not know Vega had raised a concern about the quarry road. In support of this, Kerr testified that he did not disclose Vega's identity when he passed the haul road information on to Grayson. (Tr.123:3–17; 142:1–7; 166:20–167:2; 196:16–23) The evidence of Irvine's purported hostile comment questioning what business it was of Vega's to be raising questions about the quarry haul road comes only from Vega and is otherwise uncorroborated. (Tr.212:25–213:6) It also appears that Vega's belief that there was ill will with Irvine stemming from the earlier grievance dispute prompted him to vacillate between wanting his involvement in the hose room and haul road issues kept confidential and at the same time claiming that he did not expect anonymity. (Tr.223:3–7; 233:24–234:10; 236:21–237:17) Vega also testified that he experienced no change in work schedule, reduction in wages or benefits, or denial of any training or advancement opportunity after raising the quarry haul road issue in July or August 2017, or the hose room issue in January 2017 or August 2017. (Tr.240:11–18)

The Secretary provided evidence of hostility from Irvine toward Vega after Vega's termination. Irvine testified that he became upset about the hostile and confrontational tone of the grievance hearings. (Tr.12:19–183:14; 192:6–9) He felt that he had been maligned by Vega in the process. (Tr.184:16–186:12; 192:3–5; 194:21–195:3) Then, when Vega filed his MSHA complaint in this matter, he accused Irvine of singling him out because of his involvement in the quarry haul road and the hose shop issues. (Tr. 191:4–192:2) In reaction to this, Irvine asked Pearson and the company attorney, Mike Corrigan, about getting a restraining order against Vega. Pearson and Corrigan advised Irvine against taking any action, and he did nothing further. (Tr.186:13–187:20)

I understand that the focus of both the grievance hearing and the follow-up arbitration hearing was whether the terms of the labor agreement had been violated by Vega's termination, and the precise issue of whether protected activity occurred was not essential to the outcome. However, the failure to even mention Vega's actions as being potentially protected under the Mine Act dovetails with Respondent's claim that its management decision makers had no knowledge of Vega's involvement in either the hose room or the quarry road incidents prior to his termination.

d. Disparate Treatment

When attempting to show disparate treatment as an indicator of the operator's discriminatory motive, "it is incumbent on the complainant to introduce evidence showing that another employee guilty of the same *or more serious* offenses escaped the disciplinary fate suffered by the complainant." *Driessen*, 20 FMSHRC 324 (citing *Chacon, supra*, 3 FMSHRC at 2512). Evidence of four other recent disciplinary actions was produced.

The evidence that Syar employee Birrell received a written warning for failing to correctly install a gas cylinder gauge cap (Tr.87:23–88:3) and the evidence that an employee

(Byron) received a written warning for disclosing confidential security vehicle information is not sufficiently similar to Vega's case to be persuasive of disparate treatment. (Ex. C-11, p.7; page 7; Tr.88:4-11) I also do not find evidence of Vella's actions and resulting punishment persuasive. Respondent disciplined Vella with one day off without pay and a written warning for witnessing Vega write on the envelopes and not reporting it. (Tr. 87:14-18; 102:6-15; 108:20-109:1-23) Prior to the paycheck envelope incident, Vella had been disciplined in January 2016 for damaging equipment. (Tr.87:2-6) While related to Vega's case, Vella's case is not sufficiently comparable. As Vella was punished for merely witnessing Vega's actions and failing to report them, it is consistent that he would receive a lesser punishment.

Perhaps most relevant to the case at hand is the example given of Javier Lopez, a long-time Syar employee with a history of receiving other discipline. (Tr.114:12-21) Lopez was fired in 2017 for dishonest acts, i.e., taking excessive work breaks and purposely taking too long to complete assignments in order to claim the extra time on his timecards. (Exhibit 8; Tr.106:25-107:176) As in this case, Pearson conducted an extensive investigation of Lopez prior to his termination, including GPS tracking. Also, Pearson did not talk to Lopez during her investigation. Her purpose was to gather information in order to catch him in the act and terminate his employment. (Tr.107:18-108:3)

To Pearson, the false statements Vega left on the envelopes had the potential of causing the company grief if they tried to fire someone. She speculated that the union might use the false positive statements on the envelopes as evidence of praise. (Tr.118:23-119:16) Pearson testified that she would have still recommended Vega's firing had she known about his safety concerns. (Tr.110:1-13) CEO Syar was aware that Vega was a union steward and a miners' representative. (Tr.73:16-20; 74:8-16) Nonetheless, he also stated that he would have authorized the firing even had he known about the safety complaints. (Tr.80:14-22)

Given the previous examples and testimony, the record of Respondent's prior disciplinary actions does not support the claim that Vega was singled out or treated with disproportionate severity. There is no circumstantial nexus between Vega's protected activity and the discipline he received in response to the note writing stunt. My task is not to second guess Respondent's business judgement. Other decision makers faced with the same circumstances may well have chosen to impose less severe discipline. What is relevant here is whether the chosen course was disproportionate when compared to other disciplinary actions taken by this employer. Respondent's disciplinary response to Vega's writing on the pay envelopes is reasonably proportional to prior disciplinary instances.

e. Vega's Belief That His Termination Was Motivated by Ill Will Toward His Protected Activity Is Not Credible

Vega's characterization of the nature of the hose room and haul road issues as safety concerns and his theory about Respondent's reaction to those issues is not convincing. Additionally, Vega's testimony is subject to question because it reveals little more than his belief that management was hostile to him. (Tr.221:18-24) Respondent's agents did nothing prior to the termination that supports Vega's belief that the ill will he perceived had anything to do with his protected activity. Indeed, a preponderance of evidence shows that Syar's management

reacted to the two event allegations promptly and appropriately, given their understanding of the circumstances.

Vega attributed to Kerr and Novak much of the evidence about his involvement in the protected activity and management's supposed knowledge of it. But, Kerr did not confirm Vega's claims sufficiently to render them convincing in the context suggested by Vega (Tr.123:18–21), and because Novak was not made available as a witness, statements attributed to him by Vega (Tr.219:8–25) carry little weight. What is left is Vega's belief that management harbored ill will toward him. However, even this suggestion is attenuated by the fact that it appears to refer to events arising from a grievance involving an injury to his shoulder years before and not the two incidents of protected activity in this case. (Tr.52:8–19; 64:19–25; 213:7–215:22; 173:8–174:8; 213:22–215:8) Given the lapse of years between Vega's shoulder injury and this controversy, it is at most unconvincing and borders on irrelevant. If there were evidence showing ill will, and the source of the ill will was something other than unrelated historical events, the ill will mentioned by Hayes, Vega, and Kerr might carry more weight. Without such a reshuffling of the factual deck, Vega's belief that ill will motivated his termination is simply not credible enough to have convincing weight.

To summarize, the Secretary has introduced no evidence showing (1) that Respondent or its management had knowledge of Vega's protected activity; (2) that management demonstrated hostility or animus towards Vega as a result of his protected activity; (3) that any reasonable inference of discriminatory motive can be drawn from the coincidence in time between Vega's protected activity and his terminated for misconduct; or (4) that management engaged in disparate treatment of Vega when it terminated him for his misconduct. The Secretary has thus failed to prove the prima facie case of discrimination by a preponderance of the evidence. *Pasula, supra*, 2 FMSHRC at 2799; *Turner v. National Cement Company of California*, 33 FMSHRC 1059, 1065–1066 (May 2011).

D. Respondent's Affirmative Defense and Pretext

A thorough review of the evidence as applied to relevant legal precepts leads me to conclude that Vega's claims fail. Vega engaged in section 105(c) protected activities, and his termination was an adverse action. However, there was insufficient evidence to infer or find a causal nexus between Vega's protected activities and his termination. I conclude that Vega and the Secretary have failed to prove a prima facie case of section 105(c)(3) discrimination. Even if Vega had met the prima facie burden, ultimately, I find that Respondent has provided sufficient evidence to rebut the prima facie case, or, alternatively, to prove the affirmative defense that Vega's termination was motivated by unprotected activity.

Under section 105(c), 30 U.S.C. § 815(c), the operator may rebut the miner's 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. *Pasula*, 2 FMSHRC at 2799–800. If an operator cannot rebut the prima facie case in these ways, it may still affirmatively defend its position by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800; *see also E. Assoc. Coal Corp.*, 813 F.2d at 642–43 (applying *Pasula*-

Robinette test). It is not enough under section 105(c) for the operator to show that the miner deserved to be fired for engaging in the unprotected activity. The operator must show that it did, in fact, consider the miner deserving of discipline for engaging in the unprotected activity alone and that it would have disciplined him in any event. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817–18; *See also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The Commission has explained that an operator’s business justification defense should not be “examined superficially or be approved automatically once offered.” *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). An asserted reason may be found to be pretextual “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 the context of other federal discrimination statutes, “[a] Plaintiff may establish that an employer’s explanation is not credible by demonstrating either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.” *Turner*, 33 FMSHRC at 1073 (emphasis in original) (citations omitted). While the intermediate steps of the *Pasula-Robinette* test include shifting burdens, the ultimate burden of persuasion on the question of discrimination remains with the complainant. *Robinette*, 3 FMSHRC at 818 n.20.

Here, the Secretary and Vega attack the credibility of the proffered explanation by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the employer. In other words, the plaintiff argues that the weight of the circumstantial evidence of discrimination proves that the employer’s explanation is a pretext. I find that Respondent’s reason for terminating Vega was plausible and not pretextual. First, Respondent’s witnesses’ testimony that no one in management knew anything about Vega’s protected activity until after his termination for writing the notes on the pay envelopes is coherent, plausibly supported by the evidence showing that Vega did not want his involvement in the hose room or haul road incidents disclosed, and is more convincing than the evidence to the contrary. Pearson, Irvine, and CEO Syar all testified believably that their first knowledge of Vega’s claim to have been involved in the two incidents of protected activity came in the form of his MSHA complaint, weeks after the termination and the subsequent (and multiple) union grievance hearings. The only evidence to the contrary is either from Vega himself, and lacking in convincing corroboration, or more plausibly related to the earlier shoulder injury incident and resulting grievance that Vega himself saw as the reason to keep his involvement unmentioned.

The credibility of Vega’s claim of retaliatory discharge is also undercut by the fact that, other than the initial mention of smoke in the hose room to a coworker months earlier, the substance of Vega’s alleged protected activity did not manifest itself until in and after July 2017, the same timeframe when Vega was writing on the pay envelopes. It is troublingly plausible that Vega decided to use the two protected activity incidents as a second line of defense against being fired in the event the union grievance process failed to bring the results he wanted.

I find that Respondent’s proffered reason for firing Vega had a basis in fact and was sufficient to motivate the termination. I also find that the proffered reason actually motivated the discharge. It is reasonable that an employer would terminate an employee who admitted to impersonating a supervisor. There is substantial evidence to support the plausibility of

Respondent's stated reason for discharging Vega. Accordingly, I find that Respondent's reason for terminating Vega is plausible and not pretextual.

VI. CONCLUSIONS OF LAW

The Secretary and Vega failed to establish a prima facie case of discrimination under section 105(c)(3) of the Mine Act. Respondent's stated reason for terminating Vega was plausible and not pretextual. Respondent affirmatively defended the termination. Based on a thorough review of the record, I conclude that the Secretary and Vega failed to prove, by a preponderance of the evidence, that Respondent discriminatorily terminated him in violation of section 105(c) of the Act.

Since there was no violation of the Act, Vega's claim for an award of lost wages during the time between his termination and his reinstatement through the union grievance process is denied.

VII. ORDER

Anthony Vega's complaint and this proceeding are **DISMISSED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 6, 2019

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of ANTHONY VEGA
Complainant,

v.

SYAR INDUSTRIES, INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2018-0223 - DM
MSHA Case No. WE MD 18-02

Mine: Napa Quarry
Mine ID: 04-00023

AMENDED DECISION AND ORDER

Appearances: Abigail G. Daquiz, Esq., Verónica Meléndez, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, CA, for Complainant

Bradley B. Johnson, Esq., Harrison, Temblador, Hungerford, and Johnson, LLP, Sacramento, CA, for Respondent

Michael D. Corrigan, Esq., Syar Industries, Inc., Napa, CA, for Respondent

Before: Judge L. Zane Gill

The decision that I issued November 5, 2019, is hereby amended pursuant to Commission Rule 69(c), 29 C.F.R. 2700.69(c) to read, as set forth below.

I. STATEMENT OF THE CASE

This proceeding arises from section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. § 815(c)(2). The Secretary of Labor (MSHA) on behalf of Anthony Vega alleges here that Syar Industries terminated Vega’s employment as a heavy equipment mechanic at Syar Industries’ Napa, California quarry and shop because he engaged in protected activity. Respondent argues that the Secretary has failed to meet his burden to establish a prima facie case because no adverse employment action was taken against Vega and, even if Vega’s termination were deemed adverse employment action, there is no causal nexus between the adverse action and the protected activity.

For the reasons that follow, I find that Vega engaged in section 105(c) protected activities and that his termination was an adverse action. However, I find that there is insufficient evidence to infer a causal nexus between Vega’s protected activities and his termination. For this reason, I find that the Secretary has failed to state a prima facie case for a section 105(c)(2) discrimination

claim. Even if the Secretary were to have met his prima facie burden, ultimately, I also find that Respondent has provided evidence sufficient to rebut the prima facie case and affirmatively defend its claim that Vega's termination was motivated by unprotected activity.

II. STIPULATIONS

The parties' joint prehearing statement dated October 18, 2018, included the following stipulations:¹

1. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, found at 30 U.S.C. § 801, et seq.
2. Jurisdiction exists because Respondent is, and was at all times relevant to this proceeding, an operator of a mine, as defined in Section 3(b) of the Mine Act, found at 30 C.F.R. Section 803(b), and the products of the subject mine entered into the stream of commerce or the operations thereof affected commerce within the meaning and scope of Section 4 of the Act, found at 30 U.S.C. § 803.
3. The Federal Mine Safety and Health Review Commission and this administrative law judge have jurisdiction over this proceeding, pursuant to Section 105 of the Mine Act.
4. Respondent is and was, at all times relevant to this proceeding, engaged in mining activities at the Napa quarry, including the Napa shop, located in or near Napa, California, Mine ID Number 04-00023.
5. This proceeding was initiated by a timely complaint submitted by Anthony J. Vega under section 105(c) of the Mine Act, known as "the Vega complaint," which complaint may be admitted into evidence for the purpose of establishing its issuance.
6. The penalties proposed by the Secretary in this proceeding will not affect Respondent's ability to continue in business.
7. Mr. Vega began working for Respondent Syar in 1995.
8. Mr. Vega served as the miners' representative for Respondent Syar at the Napa shop from at least January 1, 2017, through the day his employment was terminated.
9. Mr. Vega served as the union steward for Operating Engineers Local from at least January 1, 2017, through the day his employment was terminated.
10. In July, August, and September of 2017, Mr. Vega wrote on the outside of some envelopes containing pay stubs and paychecks located on the reception counter of the Napa quarry offices where employees from both the Napa quarry and Napa shop sign in

¹ A fourteenth stipulation noting Vega's hourly rate, fringe benefits, and missed workdays has been excluded for relevance.

and out on a daily basis. Mr. Vega wrote the following messages on envelopes of his coworkers: “Thanks for all your good work - RT”; “I know I don’t say this often enough, I am glad you are on board with us. Keep up the good work. - RT”; “There is nothing more pleasing than hearing the sound of your voice over the radio in the morning - RT”; “I see greatness in your future here at Syar - RT”; “Doing a great job Jose - RT”; “if it wasn’t for you and Tyler, I don’t know how I would run this show! - RT.”

11. Respondent Syar terminated Mr. Vega’s employment with the company on September 11, 2017. Respondent Syar cites the following reasons for terminating Mr. Vega’s employment: Mr. Vega’s employment was terminated because it was Respondent’s determination that Mr. Vega falsely impersonated a company manager by writing messages on employee pay envelopes and signing those messages using the manager’s initials. In addition to falsely impersonating a manager, Vega’s employment was terminated because he repeatedly forged a manager’s initials, repeatedly tampered with other employees’ property, harassed at least one employee through inappropriate messages on the employee’s paycheck envelope, and made employment promises by signing a manager’s name to comments that provided feedback on employment performance, all in violation of the law and/or written company policy.
12. Respondent disputes the Vega complaint.
13. Pursuant to a decision by this administrative law judge, after a temporary reinstatement hearing on January 4, 2018, Anthony J. Vega was reinstated to his position as a heavy-duty mechanic at Respondent’s Napa shop on January 15th, 2018, and remains in that position as of the date of this stipulation.

III. FACTUAL AND PROCEDURAL BACKGROUND

Respondent, Syar Industries, operates quarries, sand and gravel operations, asphalt paving plants, redi-mix concrete plants, and recycling facilities in the North San Francisco Bay area of California. The quarry where these events transpired is located in Napa, California. (Ex. C-1, p.v)² At the time of his termination, Anthony Vega had worked for Syar Industries as a heavy equipment mechanic for twenty-two years. (Tr.12:10–13; 208:22–209:1; St. 7) In addition to his mechanic duties (Tr.145:16–19), Vega served as a union steward and miners’ representative. (Tr.44:3–5; 74:8–16; 210:17–211:1; St. 8; St. 9) As part of his union duties, Vega was expected to bring safety issues to management’s attention. (Tr.21:14–20; 211:2–9) Vega reported to Ken Calvin, who in turn reported to James Irvine, the purchasing manager, Napa shop supervisor and equipment rolling stock manager. (Tr.170:7–10; 209:5–9)

² For the sake of clarity, the following abbreviations will be used in referencing evidence in the record: “Ex. C” will refer to Complainant Vega’s exhibits; “Ex. R” will refer to Respondent Syar Industry’s exhibits; “Tr.” will refer to the hearing transcript; “St.” will refer to the stipulations included in the parties’ joint prehearing statement dated October 18, 2018; “AR” will refer to any document in the Administrative Record that is not part of Complainant’s exhibits, Respondent’s exhibits, or part of the hearing transcript.

Vega alleges that he was fired for raising two safety-related issues, the first involving a haul road in a quarry area, the second involving a hose cutting blade that generated smoke in the hose shop. Respondent maintains that the people involved in firing Vega knew nothing about his involvement in either safety issue and that their sole reason for terminating Vega was his repeated and admitted writing on other workers' pay envelopes, which the Respondent regarded as forgery, intentional impersonation of a manager, harassment of a fellow worker, and likely to create unjustified employee expectations.

Vega was terminated on September 11, 2017. A grievance hearing held on November 1, 2017, deadlocked on the issue of reinstatement, triggering a subsequent arbitration hearing on January 15, 2018, at which Vega was reinstated to his prior position.³ (Tr.110:14-17; 193:8-9; 240:19-241:1) Vega and the Secretary filed this discrimination action on November 6, five days after the November 1 grievance hearing. (Tr.193:17-194:2) Vega and the Secretary initiated a temporary reinstatement action (WEST 2018-0135) with this agency after the union grievance process was completed. I conducted a temporary reinstatement hearing on January 4, 2018, and issued a decision on January 11, 2018, preserving Mr. Vega's employment and related status quo issues.⁴ (St. 13) Vega returned to work on January 15, 2018. (Tr.229:23-24)

This merits action was filed on February 12, 2018.⁵ In it, Mr. Vega seeks restoration of lost wages, and the Secretary asks for statutory remedies, items either not awarded or unavailable through the union grievance process. I have determined that neither the restoration of lost wages nor the requested statutory remedies will be awarded. The penalties requested by the Secretary will not be ordered.

³ Vega was reinstated to his position prior to the issuance of this decision. Vega's reinstatement was the result of a union grievance process conducted independently of the hearings for this case and my decision has no effect on Vega's reinstatement as an employee of Syar Industries.

⁴ The Board of Adjustment hearing was postponed four times. (Tr.244:4-7)

⁵ The Secretary filed an Amended Complaint on July 16, 2018.

IV. SUMMARY OF THE FACTS⁶

The court made a record of the parties' testamentary and documentary evidence at a hearing held in Vacaville, California on October 25–26, 2018. The parties filed post-hearing briefs.

A. Protected Activity

Vega claims the Respondent fired him because of two safety-related issues he raised in his capacity as a miners' representative and union steward. (Ex. R–2) The safety issues involved smoke from a chop saw in the hose room and concerns about the quarry haul road. Vega raised these issues about the same time he began writing on the envelopes. (Tr.236:16–24) He claims that the actions he took to bring attention to these safety issues constituted protected activity, and that Respondent retaliated against him by firing him under the pretext of his writing notes on the pay envelopes.⁷ (Ex. R–2)

1. **Smoke In The Hose Room**

The first safety issue Vega claims to have raised with management involved smoke from a chop saw located in a special hose room at the Napa shop where Vega and his co-workers fabricated and repaired hydraulic hoses. (Tr.49:20–22; 50:7–19) The chop saw used to cut these hoses would frequently generate smoke that concerned Vega and Robert Hayes, a fellow heavy equipment mechanic. (Tr.50:21–51:13; 53:4–54:12; 132:14–18; 216:6–217:2; 220:19–25) Vega and Hayes believed that the company should replace the chop saw blade to eliminate this excess smoke, which they worried was dangerous to breathe.⁸ Vega spoke to safety and environmental technician James Kerr about the smoke in the hose shop in January, 2017.⁹ (Tr.126:3–5; 233:6–9) Vega told Kerr he was worried that the hose smoke might be toxic. (Tr.216:6–17; 221:1–7)

⁶ The findings of fact are based on the record as a whole and my careful observation of the witnesses as they testified. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, all consistencies or inconsistencies in their testimony, and their demeanor. Any failure to analyze each witness's testimony is not a failure to have fully considered it. The fact that some evidence is not discussed does not mean that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence, and failure to cite specific evidence does not mean it was not considered).

⁷ "I believe [Respondent] [. . .] used this excuse to terminate me rather than fix the safety concerns that I thought I had protections under section 105(c) of the Federal Mine and Safety Act." (Ex. R–2)

⁸ Although there had been a hose saw smoke issue for ten years (Tr.220:19-2), January 2017 was the first time Vega saw hose particles released when cutting. (Tr.221:1-7)

⁹ Kerr was formerly a parts runner until 2012. (Tr.126:6-11) Kerr did safety inspections and miner training. He also conducted weekly safety meetings. (Tr.126:13-20)

Kerr researched the issue on the internet to see if he could determine whether the smoke was toxic and found no answer.¹⁰ (Tr.216:18–22) Vega did not speak to management about the smoke issue for several months. (Tr.233:16–19) In the interim, however, he personally conducted research and found a new blade that he thought the company should buy.

Out of concern that management would intentionally ignore his recommendation, Vega requested that Hayes ask for the new blade.¹¹ (Tr.217:11–22) Although Hayes testified that he considered the purchase of better blades an efficiency issue rather than a safety issue (Tr.61:18–63:2; 66:14–68:10), he agreed that management might ignore or delay responding to a parts request for the blade if it came from Vega. (Tr.51:22–53:3; 64:10–65:9) According to his testimony, Irvine was unaware of Vega’s involvement with this safety complaint. (Tr.198:19–199:4) Hayes submitted the blade request in July 2017. Vega followed up with parts runner Randy Novak about a week later to ask if and when a new blade would be installed. (Tr.217:23–218:7) According to Vega’s testimony, Novak told him that Irvine directed him to research what blades other companies were using to cut their hoses. While Irvine and Novak began to research the issue (Tr. 132:24–133:8; 197:12–198:18), Irvine promptly dealt with the smoke issue by posting a warning sign directing workers to wear a respirator when cutting hoses. (Tr. 65:11–19; 199:5–9)

Vega followed up with Novak again in another week. According to Vega’s testimony, Novak informed him that Irvine put the blade issue on indefinite hold. (Tr.218:24–219:7) Vega assumed that the reported delay in buying the new blade was because of Irvine’s dislike of Vega. (Tr.221:18–24) Vega responded by telling Novak that if Irvine blocked the blade request, he would approach MSHA with a safety complaint. (Tr.219:8–13) Vega surmised that Irvine could have overheard this statement since his conversation with Novak occurred just a few feet outside Irvine’s office door. (Tr.219:14–25)

Vega broached the subject of the new blade once more on August 23, 2017, when he recommended to Kerr that the company should invest in a diamond hose saw blade or improve the ventilation system in the hose room. Kerr then spoke to Irvine about the blade and ventilation information. (Tr.130:15–20; 133:9–134:10) Irvine ultimately purchased the blade Hayes had requested (Tr.62:10–63:2), but the issue had a broader ultimate resolution. Within six months, the entire ventilation system was revamped and replaced. (Tr.55:24–56:4)

¹⁰ Vega testified that he believed his conversation with Kerr would remain anonymous. (Tr.237:3-17) However, Vega did not specifically ask Kerr to keep the conversation private. (Tr.237:18-20)

¹¹ Kerr stated that Vega had requested saw blades in his own name before, and Irvine had never objected to nor expressed any disfavor of Vega’s requests. (Tr.239:5-20) Kerr never sensed that management would be displeased to learn that the request for a new blade came from Vega. (Tr.137:14-138:4)

2. The Haul Road

In July 2017, a miner approached Vega about a near miss incident on the haul road at the Napa quarry. (Tr.211:10–14) In his capacity as a miners’ representative, Vega spoke to Kerr about the incident. (Tr.126:3–5; 128:23–129:10; 136:13–25; 211:10–212:2) Vega asked Kerr about the applicable regulations for road width and proper signage. (Tr.129:5–10; 211:15–212:6) Kerr checked on his computer, but was unable to find answers for Vega. (Tr.129:11–13; 212:3–6) Kerr then spoke to Irvine about the issue. (Tr.129:2–18; 196:16–20) Irvine testified that he did not know Vega had anything to do with the issue at the time. (Tr.196:16–20) Irvine instructed Kerr to inform Rick Tranchina and Jamal Grayson, the Napa Quarry Safety Director, about the haul road issue. (Tr.129:14–130:4; 196:24–197:2) Kerr immediately contacted Greyson to notify him. (Tr.129:19–23; 145:20–146:4)

Vega followed up with Kerr about a week later. (Tr.212:7–11) Kerr told Vega he had spoken to Irvine. Vega claimed that Kerr told him, “James Irvine wanted to know why it was any of [Vega’s] business performing mining duties in the quarry when [he is] the Napa shop’s miners’ rep.” *Id.* Vega testified that he asked Kerr “why he narked [him] out to [Irvine], because he knows [Irvine] doesn’t like [Vega].”¹² (Tr.212:25–213:6) According to Vega, Kerr said nothing more and walked away. (Tr.213:3–6) Kerr testified that he does not recall following up with Vega about the road. (Tr.130:5–15) Tranchina testified that he was alerted to the haul road safety issue on August 10, 2017, from Grayson. (Tr.145:20–22; 159:10–23; 165:12–166:7) Tranchina told Grayson to look into it the same day. (Tr.165:12–22) Grayson learned that operations had ceased in the area of the quarry served by the haul road before this issue was raised and the haul road had already been shut down, except for police traffic. The road was also in compliance with applicable MSHA regulations. (Tr.165:23–166:7)

B. Writing Notes on Pay Envelopes

Pay envelopes were routinely laid out in the Napa quarry shop office for distribution. In the summer of 2017, Vega noticed that some of the pay envelopes lying on the counter waiting to be picked up by other miners had smiley faces and positive notes written on them. (Tr.146:12–147:1; 223:8–18; 236:12–15) These writings inspired him to write his own notes on some of the envelopes as a prank. (Tr. 26:12–22; 223:19–21; 224:1–12)

Tranchina supervised the Napa shop employees whose pay envelopes were involved in Vega’s prank. (Tr.144:13–18; 172:3–10; 223:22–25)¹³ At first, Vega’s messages did not indicate

¹² Vega testified that he believed his conversation with Kerr about the haul road issue would remain anonymous. (Tr.138:5-8; 237:3-17) However, Vega did not specifically ask Kerr to keep the conversation private. (Tr.237:18-20) Kerr stated that Vega had requested saw blades in his own name before, and Irvine had never objected to nor expressed any disfavor of Vega’s requests. (Tr.239:5-20) Kerr never sensed that management would be displeased to learn that the request for a new blade came from Vega. (Tr.137:14-138:4)

¹³ Tranchina did not have authority to supervise or discipline Vega. (Tr.164:20165:4)

who they were from, but eventually he started adding Tranchina's initials, "RT", to the envelopes. (Tr.223:22–25) At least one employee initially believed the notes were from Tranchina. (Tr.45:17–46:1; 57:19–58:17) Some employees thought the notes were funny and out of character for Tranchina. (Tr.46:13–20) Some workers asked Tranchina if the notes were really from him. (Tr.153:18–24) Vega told some of his co-workers that it was he, not Tranchina, who had left notes on the envelopes. One co-worker, going along with the joke, asked Vega why he had not received a note from Tranchina. Vega put a note on his envelope the next day. (Tr.224:13–25)

Tranchina was upset when he became aware of the notes on the pay envelopes. (Tr.160:14–161:1) Particularly, he was concerned that the as yet unidentified japer had attributed the comments to him by using his initials. (Tr.161:2–22) Tranchina hoped that the notes might stop without his intervention (Tr.169:2–4), but this was not the case. When the prank continued, he called a meeting to tell the employees that the notes were inappropriate and had to stop. (Tr.151:10–153:3; 162:1–6; 164:11–19) One of the employees told Tranchina it was Vega who was writing the notes. (Tr.46:21–47:8) According to Tranchina, the miners he spoke with felt that the prank was out of the ordinary. (Tr.153:25–154:5) Although Vega's stunt caused no real problems for the Respondent (Tr.162:7–13), in management's estimation it created a risk of confusion and dissent among the miners. (Tr.163:15–164:5) Tranchina testified that at least one miner whom he supervised was not deserving of the prank praise he was receiving. (Tr.162:14–163:4)

Tranchina met with Ann Pearson, the personnel manager, on August 4, 2017, to discuss the writing on the pay envelopes. (Tr.82:18–25; 89:7–13; 118:1–14; 154:12–20; 160:7–13; 169:5–8) Tranchina testified that he neither liked nor disliked Vega. (Tr.167:15–18) He had never had an unpleasant interaction with Vega prior to the firing and (Tr.167:19–21) he did not speak with Vega or Tom Vella, a witness to the prank, about the envelope writing. (Tr.154:21–155:2) Pearson decided to install a surveillance camera in the office to catch the culprit in the act. (Tr.167:3–7) She authorized Tranchina to buy and install the camera and alerted Irvine of her decision. (Tr.147:9–15; 150:6–15; 176:7–13) Pearson testified, and Irvine confirmed, that she did not tell him what had prompted the installation of the camera. (Tr.176:14–17) Nor did Pearson alert Vega of the installation, hoping to develop proof of his prank to make sure she had correctly identified the culprit. (Tr. 97:6–18; 103:22–104:13) Tranchina spoke to Irvine about the writing incident when the camera was installed, but there is no evidence that he communicated to Irvine that Vega had raised a safety complaint. (Tr.155:11–13; 166:24–167:2)

The camera was functional within two weeks, and more altered envelopes were discovered.¹⁴ (Tr.94:16–19; 150:19–151:2) Vega did not stop writing on the envelopes until early September, 2017, when he heard about the installation of the surveillance camera from a co-worker. (Tr.225:16–226:8; 234:13–235:14) Vega testified that when he realized that management regarded his prank as a serious offense, he regretted that he had not stopped before getting caught. (Tr.226:9–14) Vega also testified that he felt he was treated unfairly by management because he had not received a warning not to write on the envelopes prior to his

¹⁴ For example, Tranchina discovered two more envelopes on September 5, 2017, and exchanged them with unmarked replacements. (Tr.151:6-9; 161:23-25)

dismissal. (Tr.226:15–19) He reinforced this sense of unfairness at the hearing when he testified that he brought this discrimination action to send Syar Industries a message to be more circumspect in its dealings with miners’ representatives in the future. (Tr.243:1–4)

C. The Decision to Fire Vega

Pearson determined it was appropriate to fire Vega as early as August 4, 2017, the day she and Tranchina discussed the note writing for the first time. (Tr.89:7–13; 98:2–5) She considered the note writing a matter of dishonesty. As she saw it, Vega had impersonated a manager. (Tr.110:7–13) Tranchina and Pearson did not discuss any option for Vega other than firing because the violation was so severe in their estimation. (Tr.148:21–149:9) Pearson spoke to Respondent’s CEO, James Syar, to secure his consent. (Tr.75:5–15)¹⁵ CEO Syar testified that he considered what Vega had done an act of forgery.¹⁶ (Tr.77:3–12) To him, it was of significant importance that Vega was handling other people’s paychecks. (Tr.78:25–79:3) He believed it had the potential to mislead the processing banks. (Tr.77:8–12) CEO Syar also spoke with Irvine about terminating Vega. (Tr.76:2–11)

The surveillance camera captured two video clips that identified Vega and Vella in the Napa quarry shop office at the time when Vega wrote on the pay envelopes. (Tr. 95:21–96:11; 100:23–25; 102:9–11; 104:20–105:1; 109:14–18) To bolster the video evidence, Pearson asked Irvine to gather handwriting samples from Vega and Vella. Later, in response to a request by Pearson, Irvine identified a sample of Vega’s writing based on his personal knowledge, having seen Vega’s writing on many occasions over the 10–15 past years. (Tr. 91:2–17; 177:3–19) Pearson conferred with company attorneys and CEO Syar and got approval to hire a handwriting expert to develop evidence to support whatever disciplinary action might be taken. (Tr.78:12–79:3; 92:13–15; 93:21–23; 96:4–11; 104:14–19) The expert was hired in early September, 2017 (Tr.96:7–11), and confirmed Vega’s writing from two anonymous writing samples. (Tr.97:20–98:1; 105:2–9) When Pearson confronted Vega with copies of the pay envelopes, Vega admitted to writing on them. (Tr.227:12–17) Pearson told Vega about the camera and the handwriting expert. (Tr.227:18–25)

Vega was terminated on September 11, 2017, (St. 11) and Vella was disciplined with one day off without pay and a written warning for witnessing and failing to report Vega’s prank. (Tr. 87:14–18; 102:6–15; 108:20–109:1–13) According to the parties’ joint stipulations, Respondent terminated Vega because: (1) it determined that he falsely impersonated a company manager by writing messages on employee pay envelopes and signing the messages using the manager’s initials; and, (2) because Vega repeatedly forged a manager’s initials, repeatedly tampered with other employees’ property, harassed at least one employee through inappropriate messages on the employee’s paycheck envelope, and made employment promises by signing a manager’s name to comments that provided feedback on employment performance, all in violation of

¹⁵ Neither Tranchina nor Irvine advised Pearson or CEO Syar to fire Vega. (Tr.165:5-11; 199:13-23)

¹⁶ The termination notice did not mention forgery. (Tr.99:11-25)

written company policy. (St. 11) The stated reason for Vega’s termination was for “falsely impersonating a company manager by writing messages.”¹ (Tr.100:1–5; 114:22–115:13)

D. The Grievance Process

The labor agreement between Respondent and the Operating Engineers’ Local Union, No. 3 (of which Vega was a member) provided a grievance and arbitration framework to resolve disputes between the Respondent and its union employees. (Ex. C–3, p.33) The Union invoked the labor agreement to challenge Vega’s termination. (Tr.41:22–42:2) The first step in the grievance resolution process was a Board of Adjustment (BoA) hearing, which was held on November 1, 2017. (Tr.34:8–12; 240:19–241:6) At the hearing, Vega stated he thought the termination was ridiculously harsh for such a minor offense. (Tr.228:1–7) The BoA deadlocked on the issue of whether Vega had been terminated in violation of the labor agreement. (Tr. 35:1–5; 111:4–7; 179:14–20; 180:2–19) No mention of safety issues or protected activity was made in the November 1, 2017 BoA hearing. (Tr.193:10–16)

The labor agreement stipulated that Vega’s case proceed to arbitration to resolve the deadlock. (Tr.180:23–181:1) The arbitration was conducted on January 15, 2018, (Tr.229:19–230:2), after the temporary reinstatement hearing of January 4, 2018. It resulted in Vega’s reinstatement to his former position (Tr.229:25–230:2), but it did not restore his lost wages and benefits. (Tr.42:9–13; 229:25–230:2; 250:19–25; St. 13) Vega filed this discrimination complaint five days after the BoA hearing failed to reinstate him. (Tr.111:4–7) This was the first time Vega formally raised the issue of his protected activity. (Tr.241:12–17)

V. ANALYSIS OF THE ISSUES

Although the basic factual backgrounds of both protected events are outlined above to establish a storyline, the following includes contested factual details along with analysis and findings. It is fundamental that the ALJ, as trier-of-fact, assess the credibility of all witnesses and determine the weight their testimony deserves. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992) (“[A] Judge's credibility resolutions cannot be overturned lightly.”).

A. Prima Facie Case

Under section 105(c)(1) of the Mine Act, 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 Chapter, including a complaint notifying the operator [...] of an alleged danger or safety or health violation.” 30 U.S.C. § 815(c). To establish a prima facie case of discrimination under section 105(c)(1), Vega is required to show: (1) that he engaged in a protected activity; and, (2) that the adverse action he complains of was motivated, at least in part,

by that activity.¹⁷ *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec’y of Labor on behalf of Robinette v. United Castle Coal, Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d. Cir. 1981).

B. Protected Activity

To satisfy the first prong of the *Pasula-Robinette* test for a prima facie case of discrimination, Vega must show that he engaged in protected activity.¹⁸ *Driessen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC at 803; *Pasula*, 2 FMSHRC at 2786. Protected activity under the Act has been found to include making a complaint to an operator or its agent of “an alleged danger or safety or health violation,” *see Sec’y of Labor on behalf of Davis v. Smasal Aggregates, LLC*, 28 FMSHRC 172, 175 (Mar. 2006) (ALJ), and reporting potential safety or health hazards to MSHA or an MSHA inspector, *see Sec’y of Labor on behalf of Chaparro v. Comunidad Agricola Bianchi, Inc.*, 32 FMSHRC 206 (Feb. 2010) (ALJ). I must determine whether the evidence in total, including the inferential evidence, has sufficient circumstantial weight to satisfy his prima facie burden to show discrimination.

I find that Vega engaged in two instances of protected activity in relative temporal proximity to his termination on September 11, 2017. Respondent does not dispute that Vega’s

¹⁷ The legitimacy of the *Pasula-Robinette* framework was challenged in *Sec’y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914 (Aug. 2016). In *Riordan*, the respondent mine operator argued that the *Pasula-Robinette* test was no longer appropriate because the Supreme Court invalidated the burden shifting framework in the ADEA and Title VII contexts. *Id.* at 1919. The Commission, citing the legislative history and intent of the Mine Act, found that the burden shifting framework of the *Pasula-Robinette* test is still applicable and appropriate. “Congress envisioned such a burden shifting framework when drafting the discrimination protections of section 105(c)(1) [...] Given the distinct history and legislative intent of the Mine Act, we do not find *Gross* and *Nassar* to be controlling for discrimination proceedings under the Mine Act. The Commission’s reasoning in *Pasula* was sound, and we decline to overturn it.” *Id.* at 1921.

¹⁸ When a complainant asserts that he engaged in a protected activity that is not expressly enumerated under the Mine Act, the activity may still be protected if it furthers the purpose of the legislation. *Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317, 1323 (June 2016) (citing *Pasula*, 2 FMSHRC at 2789). In determining whether an activity is to be considered protected activity, the legislative history makes clear that Congress intended for courts to liberally construe the Act. Congress stated that “[t]he Committee intends that the scope of the protected activities be broadly interpreted by the Secretary” and that “[t]he listing of protected rights contained in section 10[5](c) is intended to be illustrative and not exclusive.” S. Rep. No. 181, 95th Cong., 1st Sess. 35-36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-24 (1978). It further stated that section 105(c) was to be construed “expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.” *Id.* at 36.

actions regarding the quarry road and the hose room issues can be seen as protected activity under Section 105(c) of the Mine Act. Even if Respondent did dispute this, the fact that Vega was involved in the hose room and haul road issues either in his capacity as a miner's representative or shop steward – or merely as an employee – is sufficient to bring the issues under the umbra of protected activity covered by section 105(c)(2). The evidence supports the conclusion that the hose room and quarry road issues are properly considered safety concerns and that Vega played a role in both events. As such, the requirement for the protected activity portion of the prima facie analysis is satisfied.

C. Motivation of Adverse Action

The second prong of the *Pasula-Robinette* test for a prima facie case of discrimination requires a showing that Respondent took adverse action against Vega that was motivated, at least in part, by Vega's protected activity. *Driessen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800, *rev'd on other grounds sub nom. Consolidation Coal Co.*, 663 F.2d 1211 (3d. Cir. 1981). This second prong of the *Pasula-Robinette* test may be alternatively framed as two sub-questions: (1) was there was an adverse employment action; and, if so, (2) was there was a motivational nexus, at least in part, between the adverse action and the Complainant's protected activity? *See United Mine Workers of America (UMWA), on behalf of Mark A Franks and Ronald M. Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2096 (Aug. 2014) (Cohen and Young) (decisions where Commission first held that a miner engaged in protected activity, then determined that the complained of action, a termination, was an adverse employment action, before addressing the nexus).

1. Adverse Employment Action

The Complainant must first establish that an adverse employment action occurred before the issue of nexus is reached. Complainant has satisfied this requirement. Termination is the ultimate adverse employment action. This is consistent with the legislative history of the Mine Act. In keeping with the Congressional intent, the term "adverse action" has been broadly defined as "an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Pendley v. Fed. Mine Safety & Health Rev. Commn.*, 601 F.3d 417, 428 (6th Cir. 2010).

2. Motivation

The Secretary and Vega must next prove that the adverse action was motivated, at least in part, by the protected activity. *Driessen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800, *rev'd on other grounds sub nom. Consolidation Coal Co.*, 663 F.2d 1211 (3d. Cir.1981). The Commission has noted that "direct evidence of motivation [for termination] is rarely encountered; more typically, the only available evidence is indirect." *Chacon*, 3 FMSHRC at 2510. Such indirect, circumstantial evidence may include: (1) coincidence in time between the protected activity and the adverse action; (2) knowledge of the protected activity; (3) hostility or animus toward the protected activity; and, (4) disparate treatment. *Id.* The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.* at 2511.

In analyzing a mine operator's asserted justification for taking adverse action under the *Pasula-Robinette* framework, the inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. The ALJ may not impose his own business judgment as to an operator's actions. *Chacon*, 3 FMSHRC at 2516–17. Additionally, the ALJ may not substitute his own justification for disciplining a miner over that offered by the operator. *Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 989 (Sept. 2001).

In *Bradley v. Belva Coal Company*, with regard to the issue of motivation, the Commission found that “circumstantial evidence [...] and reasonable inferences drawn therefrom may be used to sustain a prima facie case.” 4 FMSHRC 982, 992 (June 1982) (citing *Chacon*, 3 FMSHRC at 2510–12). Furthermore, the Commission has held that “inferences drawn by judges are ‘permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.’” *Colo. Lava, Inc.*, 24 FMSHRC 350, 354 (Apr. 2002) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)).

a. Coincidence in Time

The Commission has stated that “[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the legality of the employer's motive [...]” *Chacon*, 3 FMSHRC at 2511. Also, “[W]e ‘appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.’” *Hyles*, 21 FMSHRC at 132 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)).

Vega's protected activity occurred at roughly the same time as his writing notes on the pay envelopes in the Napa quarry shop office. (Tr.223:10–21; 225:16–17; 232:19–22; and 236:12–20) Vega's involvement in the quarry haul road issue occurred in July 2017, and although he first became involved in the hose room ventilation issue in early 2017, he did not return to the topic until August 2017. (Tr.211:10–21; 216:6–217:6; 236:6–11, 236:21–24) Vega learned that Respondent had installed a surveillance camera in August or September 2017 and believed that management suspected he had been writing on the pay envelopes. (Tr.225:16–226:2) Syar management, specifically Tranchina and Pearson, discovered Vega was the individual who was writing on pay envelopes in August 2017 (Tr.89:7–13; 118:1–14), and terminated his employment on September 11, 2017. (Tr.226:24–227:3)

I find that Vega's claim of nexus between his protected activity and termination is implausible. Instead of buttressing the notion that Respondent's decision to fire Vega was retaliatory, the close proximity in time between Vega's discovery that management suspected he was carrying out the prank, his involvement with the two incidents of protected activity, and his termination suggest that the claim of nexus between the protected activity and the termination was a calculated response intended to defend Vega from Respondent's decision to fire him for

writing on the envelopes. At a minimum, the temporal proximity of these events does not bolster the claim that Vega's termination was retaliatory or motivated by his protected activity.

b. Management Had No Knowledge of the Protected Activity

The Commission has held that "an operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case." *Baier*, 21 FMSHRC at 957 (citing *Chacon*, 3 FMSHRC at 2510). Whether the operator had knowledge of the protected activity may be "proved by circumstantial evidence and reasonable inferences." *Id.* The commission has also held that "discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)." *Moses*, 4 FMSHRC at 1480. Additionally, the Commission has held that "a supervisor's knowledge of the protected activity may be imputed to the operator where knowledgeable supervisors are consulted regarding the miner's employment." *Sec'y of Labor on behalf of Pappas v. Calportland Co.*, 38 FMSHRC 137, 146 (Feb. 2016); *see also Turner*, 33 FMSHRC at 1067-68 (imputing knowledge and animus of miner's direct supervisors to official making disciplinary decision); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) (stating that "[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions.").

The issue of whether Respondent's management had knowledge of Vega's protected activity at the time of his termination can be resolved by evaluating the weight of the evidence and considering the compelling force of each side's arguments. When the evidence in the record is considered and weighed, it is apparent that the evidence supporting the Respondent's claim that its management knew nothing about Vega's involvement in protected activity when the decision was made to terminate him is significantly better supported, more cohesive, and has more convincing force than the evidence the Secretary and Vega brought to the record. I am not convinced that Respondent's management knew of Vega's involvement with the protected activity at the time of his termination.

Vega testified that he was not on good terms with his supervisors in general and Irvine in particular because: (1) he had once notified management in his capacity as a union representative that untrained laborers had operated skip loaders without being qualified; and, (2) he had initiated a grievance after a shoulder injury. (Tr.52:8-19; 64:10-25; 213:7-215:22; 173:8-174:8; 213:17-215:22, 237:3-14; 244:1-23)¹⁹ The Secretary and Vega ask me to find that management had to know about Vega's involvement in the hose room and quarry haul road issues because: (1) Tranchina and Irvine met regularly to discuss work issues (primarily purchase issues) (Tr.83:15-21; 84:1-7; 144:19-24; 154:3-6; 172:3-10); (2) CEO Syar met periodically with supervisors, including Tranchina and Irvine (Tr.72:25-73:15; 181:20-182:2); and, (3) Pearson had met with Irvine from time-to-time to discuss common work

¹⁹ Vega had a shoulder injury. He was on part time work for a while. He had made plans for three days off, but they released him to full duty in the middle of the week. He asked if he could go ahead with his three-day plans. He went ahead, but the company treated it as AWOL. He grieved the decision to give him two days off. (Tr.213:22-214:19)

issues.^{20 21} (Tr.83:15–21) In broader context, Irvine testified that he did not meet regularly with CEO Syar (Tr.181:20–182:2) and he only met with Tranchina when Tranchina “really need[ed]” to purchase an item. (Tr.172:3–10) He described his interactions with other managers as limited to the request and question at hand, i.e., purchasing a camera or providing his mechanics’ requisitions (Tr.176:3–178:2) — nothing else was discussed. *Id.* To underscore this, Irvine testified that he was not even consulted when human resources considered terminating one of his three skilled mechanics. (Tr.71:10–16; 112:23–113:2; 202:14–16)²²

The evidence that might show management’s knowledge of the protected activity relies solely on Vega’s testimony, lacks non-hearsay corroboration, is unreliable, and is not entitled to convincing probative weight. *REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (1998) (hearsay evidence is admissible but should be evaluated by the judge to determine whether it is reliable and entitled to any probative weight). Vega testified that he dealt with Kerr and Novak regarding the hose room smoke issue and with Kerr only regarding the haul road issue. Novak was not called as a witness, and although hearsay is admissible if material and relevant, nothing attributed to him can be corroborated. *Cf. Hayes v. Dept. of the Navy*, 727 F.2d 1535, 1538 (Fed.Cir.1984) (footnote omitted) (hearsay testimony may be treated as substantial evidence, even without corroboration, if, to a reasonable mind, the circumstances are such as to lend it credence).

²⁰ In regard to the haul road issue, there is conflicting evidence regarding whether Vega wanted his involvement kept confidential. Vega claimed that he told Kerr that he wanted his role in the issue kept quiet (Tr.138:5-8), but, he also testified that he did not tell Kerr to keep his name confidential. (Tr.223:3-7) Vega testified further that he assumed and believed that his comments to Kerr would be anonymous since during a safety meeting, management instructed miners to go to Vega or Kerr if they wanted to keep their complaint anonymous. (Tr.237:3-17) Kerr could have substantiated parts of Vega’s story, but his testimony left Vega’s version of the story uncorroborated.

²¹ The Secretary also argues that Irvine must have known about Vega’s involvement in the hose room smoke issue in August 2017 because a complaint could have only come from one of three mechanics making hoses (Tr.197:12-198:24) and/or that given Irvine’s open door policy for safety and stated care for safety, it was plausible that Novak told Irvine about Vega’s MSHA comments (Tr.192:3-5; 195:23-196:15), because Novak did talk to Irvine about the request for the diamond blade. (Tr.197:12-198:9; 218:14-16) This plausibility does not convince me that Respondent’s management in general, and Irvine in particular could have or did know about Vega’s protected activity prior to his termination.

²² The Secretary argues that I should infer Pearson and Irvine had knowledge of Vega’s protected activity and acted against Vega based on that knowledge because skilled mechanics were scarce and the Respondent would not act against its own interest and fire a person with Vega’s skills unless it had a retaliatory motive. (AR: Secretary’s Brief, p.16) However, it is equally if not more plausible that Respondent acted as it did (using the Secretary’s logic) because it felt keeping him on staff despite his forgery stunt was of even greater importance.

On balance, the evidence does not support the argument that Respondent's management knew Vega was involved in the protected activity prior to his termination. Vega testified that he raised the safety concern regarding the hose room with Kerr, but he did not offer anything to support the idea that Kerr told Irvine about his involvement. (Tr.238:25–239:4) Irvine testified that he heard from Novak about the blade purchase request in August 2017, and that he heard about the smoke issue from Kerr at the same time. (Tr.197:12–198:24) But, Kerr testified that he did not disclose Vega's involvement in either protected activity to Irvine or any other member of management prior to Vega's termination and stated that when people made safety complaints to him, he assumed they wanted to remain anonymous. (Tr.127:24–128:2; 142:8–12; 198:19–24) Consistent with this, Vega asked Kerr to keep his concerns about the hose room and the haul road confidential. (Tr. 129:14–18, 138:5–8; 142:8–17) Novak did not appear as a witness to confirm or deny any of the evidence attributed to him.

Irvine testified that prior to Vega's termination, he was not aware that Vega was involved in discussions about replacing the hose shop blade. (Tr.198:19–24) There is no evidence in the record showing that Hayes ever informed Irvine about Vega's involvement with the hose room issue. When Hayes submitted the saw blade request, it did not have Vega's name associated with it. (Tr.238:6–11) Pearson testified that she did not discuss Vega raising either safety concern with Mr. Irvine. (Tr.105:10–22, 110:1–6) Napa Quarry Manager Rick Tranchina testified that neither Grayson nor Irvine ever communicated to him that Vega had raised either the quarry haul road or hose room safety concern. (Tr.166:20–25, 167:1–2) Irvine also testified that at the time he obtained the writing samples, he did not know why they were requested and Pearson and Irvine did not discuss any safety issues when Irvine identified Vega's writing. (Tr.105:10–22; 178:14–20)

Vega, in his capacity as the Napa shop safety coordinator, first heard of the haul road issue from another miner and passed the information along to Kerr. (Ex. R–2) Vega asked Kerr to investigate and pass his findings on to Jamal Grayson. *Id.* Grayson never mentioned Vega's name in connection with the haul road complaint. (Tr.166:20–23) Kerr told Vega that he was unsuccessful in his search for haul road regulations and had spoken with Irvine about the issue. (Ex. R–2; Tr.129:2–18; 196:16–20) When Kerr reported the issue about the haul road to Irvine, he said it came from a miner and did not name Vega (Tr.129:14–18), again consistent with Vega's request for anonymity. Irvine credibly denied knowledge of Vega's involvement. (Tr.196:16–20) Although there is conflicting evidence about whether Vega wanted to remain anonymous during this process, Irvine's denial that he knew about Vega's role in this event is consistent with the preponderant evidence that Vega wanted to remain anonymous. Irvine testified that he had no conversation with anyone at Syar regarding the quarry haul road issue after it was initially raised in July 2017, and until November 6 or 7, 2017, when he received Vega's MSHA Discrimination Report. (Tr.197:3–8)

The evidence convincingly shows that Irvine had no role or responsibility in making the decision to terminate Vega in September 2017, nor did Irvine recommend that CEO Syar or Pearson take such action. (Tr.199:13–25, 105:10–22) Further, Respondent's agents who made the decision to terminate Vega also denied having knowledge that Vega had made complaints about safety issues that could be considered protected activity. Both CEO Syar and Pearson denied any knowledge of the two safety concerns listed in Vega's MSHA discrimination report

when they made the decision to fire him. (Tr.80:6–13; 110:1–13) Pearson had only been at the job about nine months. (Tr.123:22–124:6) She testified that she was not aware of any animosity between Vega and management and (Tr.123:13–124:6) had no substantial contact with Vega prior to learning about the envelope writing incident. (Tr.105:23–25) The first time she heard Vega’s name was in the context of this controversy when she saw Vega’s MSHA complaint (Ex. R–2) on November 6, 2017, a week after the union grievance hearing, and almost two months after Vega’s termination. (Tr.111:8–12; 122:20–123:2) This is consistent with Vega’s testimony that the first time he formally raised a claim of protected activity was in his MSHA discrimination complaint. (Tr.241:12–17) CEO Syar spoke with Irvine about terminating Vega after learning about the note writing situation and denied knowledge of either safety issue prior to Vega’s termination. (Tr.76:2–11)

The Secretary essentially argues that Pearson, Irvine, and Tranchina (and presumably CEO Syar) lied under oath that they had no knowledge of Vega’s protected activity until after his September 11, 2017 termination, indeed after the November 6, 2017 grievance hearing. To support this argument, the Secretary asks the court to find that Kerr lied when he testified that he never revealed Vega’s involvement in the hose room and quarry haul road issues. (Tr.127:24–128:5; 142:8–17) I am urged to credit Vega’s otherwise uncorroborated testimony over Kerr’s because Kerr lived in a house belonging to Syar Industries (Tr.127:24–128:5; 135:2–23; 142:8–17;), which perforce would cause him to lie to contradict Vega’s belief that management must have known about his involvement with the hose room and quarry haul road issues. Furthermore, Vega’s testimony about management having knowledge of his protected activity is heavily dependent on corroboration from Novak, a person who was not called as a witness. Although I can admit and consider hearsay evidence for its reliability and probative value, nothing in this scenario prompts me to credit those portions of Vega’s testimony that rely for corroboration on statements or conclusions attributed to Novak or rule on a finding that Kerr lied under oath. *See Sec’y v. REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (1998).

The Secretary’s entire case on the issue of Respondent’s knowledge of the protected activity is based on Vega’s testimony. As a matter of simple credibility assessment, Vega’s claims are less convincing than Pearson’s, CEO Syar’s, and Irvine’s. I find that Respondent’s managers and executive had no knowledge of Vega’s protected activity until after he was terminated, two grievance hearings had taken place, and Vega had submitted his MSHA discrimination claim. Vega’s speculation that Syar management knew he had engaged in the two cited instances of protected activity and fired him for that protected activity (which is different than Syar management allegedly suspecting that Vega was responsible for tampering with pay envelopes) does not amount to substantial evidence. The testimony of CEO Syar and Pearson, as well as that of each member of Syar management in this case, is credible and consistent. *See, e.g., Robinette, supra*, 3 FMSHRC at 813. As set out above, Syar management had no knowledge of Vega’s protected activity when it terminated Vega for his repeated misconduct.

c. Hostility or Animus Toward the Protected Activity

Examples of operator animus or hostility related to protected activity run the gamut from the relatively minor (less desirable work schedules) to the flagrant and criminal (severe verbal harassment, physical assault). “The more such animus is specifically directed towards the alleged

discriminatee's protected activity, the more probative weight it carries." *Chacon, supra*, 3 FMSHRC at 2511 (finding that the operator's "angry remarks to Chacon about the MSHA complaints . . . display a specific hostility towards Chacon's protected activity").

Vega testified that Irvine had such a negative opinion of him that anything he might say or that was attributed to him would be rejected out-of-hand. (Tr.221:22–24) Vega's perception of hostility between himself and Irvine falls into two time periods, before the protected activity and after the termination. For his part, Irvine testified that he felt no hostility towards Vega during the eight years they worked together (Tr.230:3–10) excepting the event arising from the grievance process after the termination. The record does not support the allegation that management acted with hostility toward Vega during the period of the protected activity. During Vega's termination meeting on September 11, 2017, Vega said nothing about a link between his protected activity and the firing. (Tr.226:24–227:25) There was no mention of protected activity at either the initial grievance hearing (BoA) on November 1, 2017, or the follow-up arbitration hearing. (Tr.33:10–34:25; 41:4–7; 110:14–111:3; 193:10–16; 224:7–11) The first time the alleged protected activity was mentioned was in the MSHA discrimination complaint. (Ex. R–2; Tr.241:12–17)

Any hostility between Vega and Irvine that Vega repeatedly mentioned seems more likely to relate to the prior grievance over Vega's shoulder injury, the related dispute about being able to take time off after being released back to unrestricted work, the dispute about whether other workers not covered by Vega's union's rules being allowed to do jobs that Vega thought he should be allowed to do, and the resulting grievance process. (Tr.52:8–53:3; 64:16–25; 138:9–139:20; 213:22–214:16; 215:9–22) However, Kerr testified that Vega had spoken about Irvine's animosity toward him, but that Kerr was not personally aware of any animosity between Vega and any member of management over issues relating to Vega's shoulder injury. (Tr.123:18–21) Hayes testified that although Vega talked about ill will between himself and Irvine, Hayes believed the animosity originated from a territory dispute with a rival union, not the shoulder injury episode or a disagreement over safety concerns. (Tr.64:16–65:9) If either of these testimonies is true, the ill will does not arise from or relate to the protected activity in this case. Moreover, this purported animosity seems to be a construct in Vega's mind. There is no evidence showing that it was shared by Irvine or other members of Respondent's management. (Tr.213:17–21; 214:17–215:2; 221:18–24) From Irvine's perspective, he testified that he had worked with Vega for eight years and had never been aggressive or threatening toward him. (Tr.230:3–10) Furthermore, Irvine had no input in the firing decision and denied knowing anything about Vega's alleged safety complaints.²³

As discussed above, there is no evidence showing that Irvine or any other member of Syar management displayed or expressed animus or hostility toward Vega for the protected activity he alleges in his MSHA Discrimination Report. (Tr.239:12–20) Vega asserted that because of their historical animosity, Irvine delayed dealing with the hose room issue. (Tr.218:24–219:7; 221:18–24) The evidence does not support this belief. Vega had requested

²³ Irvine played a part in developing the evidence that supported the termination (Tr. 91:2-17; 177:3-178:20), and appears to have become the focus of Vega's belief that management was aware of his protected activity.

saw blades in his own name before. Irvine never objected or expressed any disfavor. (Tr.239:5–20) Not only did Respondent purchase the requested new blade, (Tr.62:10–63:2) but Irvine directed Kerr to immediately post a warning sign in the hose room (Tr.65:11–19; 132:24–133:8; 204:3–11) when he learned about the smoke issue from Kerr and Novak. (Tr.54:13–55:2; 197:12–198:18) The process of learning about, researching solutions (Tr.197:12–198:5; 200:7–19), identifying the course of action, and remedying the hose room issue resulted in the installation of a new ventilation system as well as a better chop saw blade within six months. (Tr.54:13–56:4; 205:14–206:22) The timing of this series of events belies the claim that Irvine put an “indefinite hold” on anything related to it. Further, Irvine testified that it was not unusual for a parts request to take some time while research into options was done (Tr.200:7–19) and stated that a \$400 saw blade was insignificant compared to the hundreds of thousands of dollars Respondent spent for parts each month. (Tr.201:6–17)

As for the quarry haul road, Tranchina, Irvine, and Pearson all testified that they did not know Vega had raised a concern about the quarry road. In support of this, Kerr testified that he did not disclose Vega’s identity when he passed the haul road information on to Grayson. (Tr.123:3–17; 142:1–7; 166:20–167:2; 196:16–23) The evidence of Irvine’s purported hostile comment questioning what business it was of Vega’s to be raising questions about the quarry haul road comes only from Vega and is otherwise uncorroborated. (Tr.212:25–213:6) It also appears that Vega’s belief that there was ill will with Irvine stemming from the earlier grievance dispute prompted him to vacillate between wanting his involvement in the hose room and haul road issues kept confidential and at the same time claiming that he did not expect anonymity. (Tr.223:3–7; 233:24–234:10; 236:21–237:17) Vega also testified that he experienced no change in work schedule, reduction in wages or benefits, or denial of any training or advancement opportunity after raising the quarry haul road issue in July or August 2017, or the hose room issue in January 2017 or August 2017. (Tr.240:11–18)

The Secretary provided evidence of hostility from Irvine toward Vega after Vega’s termination. Irvine testified that he became upset about the hostile and confrontational tone of the grievance hearings. (Tr.12:19–183:14; 192:6–9) He felt that he had been maligned by Vega in the process. (Tr.184:16–186:12; 192:3–5; 194:21–195:3) Then, when Vega filed his MSHA complaint in this matter, he accused Irvine of singling him out because of his involvement in the quarry haul road and the hose shop issues. (Tr. 191:4–192:2) In reaction to this, Irvine asked Pearson and the company attorney, Mike Corrigan, about getting a restraining order against Vega. Pearson and Corrigan advised Irvine against taking any action, and he did nothing further. (Tr.186:13–187:20)

I understand that the focus of both the grievance hearing and the follow-up arbitration hearing was whether the terms of the labor agreement had been violated by Vega’s termination, and the precise issue of whether protected activity occurred was not essential to the outcome. However, the failure to even mention Vega’s actions as being potentially protected under the Mine Act dovetails with Respondent’s claim that its management decision makers had no knowledge of Vega’s involvement in either the hose room or the quarry road incidents prior to his termination.

d. Disparate Treatment

When attempting to show disparate treatment as an indicator of the operator's discriminatory motive, "it is incumbent on the complainant to introduce evidence showing that another employee guilty of the same *or more serious* offenses escaped the disciplinary fate suffered by the complainant." *Driessen*, 20 FMSHRC 324 (citing *Chacon*, *supra*, 3 FMSHRC at 2512). Evidence of four other recent disciplinary actions was produced.

The evidence that Syar employee Birrell received a written warning for failing to correctly install a gas cylinder gauge cap (Tr.87:23–88:3) and the evidence that an employee (Byron) received a written warning for disclosing confidential security vehicle information is not sufficiently similar to Vega's case to be persuasive of disparate treatment. (Ex. C–11, p.7; page 7; Tr.88:4–11) I also do not find evidence of Vella's actions and resulting punishment persuasive. Respondent disciplined Vella with one day off without pay and a written warning for witnessing Vega write on the envelopes and not reporting it. (Tr. 87:14–18; 102:6–15; 108:20–109:1–23) Prior to the paycheck envelope incident, Vella had been disciplined in January 2016 for damaging equipment. (Tr.87:2–6) While related to Vega's case, Vella's case is not sufficiently comparable. As Vella was punished for merely witnessing Vega's actions and failing to report them, it is consistent that he would receive a lesser punishment.

Perhaps most relevant to the case at hand is the example given of Javier Lopez, a long-time Syar employee with a history of receiving other discipline. (Tr.114:12–21) Lopez was fired in 2017 for dishonest acts, i.e., taking excessive work breaks and purposely taking too long to complete assignments in order to claim the extra time on his timecards. (Exhibit 8; Tr.106:25–107:176) As in this case, Pearson conducted an extensive investigation of Lopez prior to his termination, including GPS tracking. Also, Pearson did not talk to Lopez during her investigation. Her purpose was to gather information in order to catch him in the act and terminate his employment. (Tr.107:18–108:3)

To Pearson, the false statements Vega left on the envelopes had the potential of causing the company grief if they tried to fire someone. She speculated that the union might use the false positive statements on the envelopes as evidence of praise. (Tr.118:23–119:16) Pearson testified that she would have still recommended Vega's firing had she known about his safety concerns. (Tr.110:1–13) CEO Syar was aware that Vega was a union steward and a miners' representative. (Tr.73:16–20; 74:8–16) Nonetheless, he also stated that he would have authorized the firing even had he known about the safety complaints. (Tr.80:14–22)

Given the previous examples and testimony, the record of Respondent's prior disciplinary actions does not support the claim that Vega was singled out or treated with disproportionate severity. There is no circumstantial nexus between Vega's protected activity and the discipline he received in response to the note writing stunt. My task is not to second guess Respondent's business judgement. Other decision makers faced with the same circumstances may well have chosen to impose less severe discipline. What is relevant here is whether the chosen course was disproportionate when compared to other disciplinary actions taken by this employer. Respondent's disciplinary response to Vega's writing on the pay envelopes is reasonably proportional to prior disciplinary instances.

e. Vega's Belief That His Termination Was Motivated by Ill Will Toward His Protected Activity Is Not Credible

Vega's characterization of the nature of the hose room and haul road issues as safety concerns and his theory about Respondent's reaction to those issues is not convincing. Additionally, Vega's testimony is subject to question because it reveals little more than his belief that management was hostile to him. (Tr.221:18–24) Respondent's agents did nothing prior to the termination that supports Vega's belief that the ill will he perceived had anything to do with his protected activity. Indeed, a preponderance of evidence shows that Syar's management reacted to the two event allegations promptly and appropriately, given their understanding of the circumstances.

Vega attributed to Kerr and Novak much of the evidence about his involvement in the protected activity and management's supposed knowledge of it. But, Kerr did not confirm Vega's claims sufficiently to render them convincing in the context suggested by Vega (Tr.123:18–21), and because Novak was not made available as a witness, statements attributed to him by Vega (Tr.219:8–25) carry little weight. What is left is Vega's belief that management harbored ill will toward him. However, even this suggestion is attenuated by the fact that it appears to refer to events arising from a grievance involving an injury to his shoulder years before and not the two incidents of protected activity in this case. (Tr.52:8–19; 64:19–25; 213:7–215:22; 173:8–174:8; 213:22–215:8) Given the lapse of years between Vega's shoulder injury and this controversy, it is at most unconvincing and borders on irrelevant. If there were evidence showing ill will, and the source of the ill will was something other than unrelated historical events, the ill will mentioned by Hayes, Vega, and Kerr might carry more weight. Without such a reshuffling of the factual deck, Vega's belief that ill will motivated his termination is simply not credible enough to have convincing weight.

To summarize, the Secretary has introduced no evidence showing (1) that Respondent or its management had knowledge of Vega's protected activity; (2) that management demonstrated hostility or animus towards Vega as a result of his protected activity; (3) that any reasonable inference of discriminatory motive can be drawn from the coincidence in time between Vega's protected activity and his terminated for misconduct; or (4) that management engaged in disparate treatment of Vega when it terminated him for his misconduct. The Secretary has thus failed to prove the prima facie case of discrimination by a preponderance of the evidence. *Pasula, supra*, 2 FMSHRC at 2799; *Turner v. National Cement Company of California*, 33 FMSHRC 1059, 1065–1066 (May 2011).

D. Respondent's Affirmative Defense and Pretext

A thorough review of the evidence as applied to relevant legal precepts leads me to conclude that Vega's claims fail. Vega engaged in section 105(c) protected activities, and his termination was an adverse action. However, there was insufficient evidence to infer or find a causal nexus between Vega's protected activities and his termination. I conclude that Vega and the Secretary have failed to prove a prima facie case of section 105(c)(2) discrimination. Even if Vega had met the prima facie burden, ultimately, I find that Respondent has provided sufficient

evidence to rebut the prima facie case, or, alternatively, to prove the affirmative defense that Vega's termination was motivated by unprotected activity.

Under section 105(c), 30 U.S.C. § 815(c), the operator may rebut the miner's 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. *Pasula*, 2 FMSHRC at 2799–800. If an operator cannot rebut the prima facie case in these ways, it may still affirmatively defend its position by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800; *see also E. Assoc. Coal Corp.*, 813 F.2d at 642–43 (applying *Pasula-Robinette* test). It is not enough under section 105(c) for the operator to show that the miner deserved to be fired for engaging in the unprotected activity. The operator must show that it did, in fact, consider the miner deserving of discipline for engaging in the unprotected activity alone and that it would have disciplined him in any event. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817–18; *See also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The Commission has explained that an operator's business justification defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). An asserted reason may be found to be pretextual "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 the context of other federal discrimination statutes, "[a] Plaintiff may establish that an employer's explanation is not credible by demonstrating either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge." *Turner*, 33 FMSHRC at 1073 (emphasis in original) (citations omitted). While the intermediate steps of the *Pasula-Robinette* test include shifting burdens, the ultimate burden of persuasion on the question of discrimination remains with the complainant. *Robinette*, 3 FMSHRC at 818 n.20.

Here, the Secretary and Vega attack the credibility of the proffered explanation by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the employer. In other words, the plaintiff argues that the weight of the circumstantial evidence of discrimination proves that the employer's explanation is a pretext. I find that Respondent's reason for terminating Vega was plausible and not pretextual. First, Respondent's witnesses' testimony that no one in management knew anything about Vega's protected activity until after his termination for writing the notes on the pay envelopes is coherent, plausibly supported by the evidence showing that Vega did not want his involvement in the hose room or haul road incidents disclosed, and is more convincing than the evidence to the contrary. Pearson, Irvine, and CEO Syar all testified believably that their first knowledge of Vega's claim to have been involved in the two incidents of protected activity came in the form of his MSHA complaint, weeks after the termination and the subsequent (and multiple) union grievance hearings. The only evidence to the contrary is either from Vega himself, and lacking in convincing corroboration, or more plausibly related to the earlier shoulder injury incident and resulting grievance that Vega himself saw as the reason to keep his involvement unmentioned.

The credibility of Vega's claim of retaliatory discharge is also undercut by the fact that, other than the initial mention of smoke in the hose room to a coworker months earlier, the substance of Vega's alleged protected activity did not manifest itself until in and after July 2017, the same timeframe when Vega was writing on the pay envelopes. It is troublingly plausible that Vega decided to use the two protected activity incidents as a second line of defense against being fired in the event the union grievance process failed to bring the results he wanted.

I find that Respondent's proffered reason for firing Vega had a basis in fact and was sufficient to motivate the termination. I also find that the proffered reason actually motivated the discharge. It is reasonable that an employer would terminate an employee who admitted to impersonating a supervisor. There is substantial evidence to support the plausibility of Respondent's stated reason for discharging Vega. Accordingly, I find that Respondent's reason for terminating Vega is plausible and not pretextual.

VI. CONCLUSIONS OF LAW

The Secretary and Vega failed to establish a prima facie case of discrimination under section 105(c)(2) of the Mine Act. Respondent's stated reason for terminating Vega was plausible and not pretextual. Respondent affirmatively defended the termination. Based on a thorough review of the record, I conclude that the Secretary and Vega failed to prove, by a preponderance of the evidence, that Respondent discriminatorily terminated him in violation of section 105(c) of the Act.

Since there was no violation of the Act, Vega's claim for an award of lost wages during the time between his termination and his reinstatement through the union grievance process is denied.

VII. ORDER

Anthony Vega's complaint and this proceeding are **DISMISSED**.

/s/ L. Zane Gill

L. Zane Gill

U. S. Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 6, 2019

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on behalf
of KEVIN R. SHAFFER,
Complainant

v.

THE MARION COUNTY COAL
COMPANY,
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEVA 2018-423-D
MSHA Case No. MORG-CD-2018-01

Mine: Marion County Mine
Mine I.D. 46-01433

DECISION AND ORDER

Appearances: Jennifer Bluer, Esq., U.S. Department of Labor, Philadelphia,
Pennsylvania for Complainant

Jennifer Betts, Esq., & Corey Ridenour, Esq., Ogletree, Deakins, Nash,
Smoak & Stewart, P.C., Pittsburgh, Pennsylvania for Respondent

Before: Judge Bulluck

This case is before me upon a Discrimination Complaint brought by the Secretary of Labor (“Secretary”) on behalf of Kevin Shaffer (“Shaffer”) against the Marion County Coal Company (“Marion County”) pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 815(c). The Secretary alleges that Marion County unlawfully discharged Shaffer on or about October 23, 2017 after Shaffer engaged in protected activity under the Act. Marion County denies that it discriminated against Shaffer, and contends that he was discharged for threatening his supervisor.

Shaffer filed a 105(c)(2) complaint with MSHA on November 1, 2017. MSHA Special Investigator Clarence W. Moore conducted an investigation, and determined that there was “reasonable cause to believe” that Marion County unlawfully discharged Shaffer in violation of section 105(c). On December 4, 2017, the Secretary filed an Application for Temporary Reinstatement of behalf of Shaffer (WEVA 2018-117-D) alleging that Shaffer was terminated because he had made safety complaints to management about mobile equipment that he had been operating, and requested alternative work due to its unsafe condition. Marion County elected to waive its right to a hearing, and briefs were filed on January 9, 2018. The Secretary’s Application was granted on January 16, 2018, temporarily reinstating Shaffer to duty, effective December 31, 2017. *Secretary of Labor on behalf of Shaffer v. Marion Cty. Coal Co.*, 40 FMSHRC 238 (Jan. 2018) (ALJ). Marion County appealed the Order Granting Temporary Reinstatement on January 22, 2018, and on February 8, 2018, the Commission affirmed the

Order. *Sec'y of Labor on behalf of Shaffer v. Marion Cty. Coal Co.*, 40 FMSHRC 39 (Feb. 2018).

The Secretary filed a Complaint of Discrimination on behalf of Shaffer on April 20, 2018. A hearing was held in Morgantown, West Virginia, and the parties filed Post-hearing Briefs. For the reasons set forth below, I conclude that the Secretary has established a *prima facie* case of discrimination, that Marion County has successfully rebutted the Secretary's *prima facie* case and that, ultimately, the Secretary has failed to prove that Shaffer was terminated, in any part, because of his protected activity.

I. Stipulations

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this case under section 105(c) of the Mine Act.
2. For the purposes of this case, Marion County is an operator as defined in the Federal Mine Safety and Health Act, 30 U.S.C. § 802(d).
3. For the purposes of this case, Marion County Mine is a coal or other mine as defined by the Federal Mine Safety and Health Act, 30 U.S.C. § 802(h).
4. Marion County is a Delaware corporation with a principal place of business located in St. Clairsville, Ohio.
5. Marion County operates the Marion County Mine, an underground coal mine located in Marion County, West Virginia, and Monongalia County, West Virginia.
6. Marion County has products that enter commerce and its operations affect commerce.
7. Non-supervisory employees at Marion County Mine are represented by the United Mine Workers of America.
8. For the purposes of this case, Complainant, Kevin Shaffer, is a miner as defined by the Federal Mine Safety and Health Act, 30 U.S.C. § 802(g).
9. Complainant was employed from June 2010 to December 2013, at what is now known as Marion County Mine by CONSOL Energy, Inc., at what was then known as the Loveridge Mine.
10. Complainant Kevin Shaffer began working at what is known now as the Marion County Mine as a mobile equipment operator on June 21, 2010.
11. Marion County employs Complainant as a mobile equipment operator, and did so at all times relevant to the Complaint at issue in this matter.
12. On October 18, 2017, Foreman Bond and Complainant had a conversation about whether Complainant had driven his truck downhill without his headlights on.

13. On October 19, 2017, Foreman Bond emailed Marion County's human resources department concerning Complainant's conduct on October 18, 2017.
14. On October 23, 2017, Marion County suspended Complainant with intent to discharge him.
15. Complainant filed a Discrimination Complaint with the Mine Safety and Health Administration on November 1, 2017.
16. Complainant filed an Application for Temporary Reinstatement on December 4, 2017.
17. On January 16, 2018, Complainant's Application for Temporary Reinstatement was granted, effective December 31, 2017, and Complainant returned to work pending final adjudication of his Complaint.
18. Respondent produced 46,004,683 tons of coal in 2016, including 4,341,072 tons at the Marion County Mine.
19. During litigation regarding the merits of Kevin Shaffer's 105(c) Complaint, the parties have filed some pleadings and exchanged some written discovery using the docket number from the Temporary Reinstatement proceeding, WEVA 2018-117-D. The parties stipulate that all pleadings filed and documents exchanged by the parties during the litigation of the Shaffer 105(c) merits case are part of Docket No. WEVA 2018-423-D.
20. Neither Kevin Shaffer nor the UMWA received [documentation of] a verbal warning regarding the August 14, 2017 incident.
21. If called, C.W. Moore, MSHA special investigator, would testify that the data listed on the Exhibit B to the Amended Complaint, regarding Respondent's history of violations and history of 105(c) violations, is an accurate reflection of the information stored in the mine data retrieval system and MSHA's records.

Ex. J-1; see also Tr. 345-46.

II. Factual Background

The Marion County Coal Company operates the Marion County Mine ("mine"), an underground bituminous coal mine in Marion and Monongalia Counties, West Virginia.¹ The mine runs three shifts, six days a week: a day shift from 8:00 a.m. to 4:00 p.m.; an afternoon shift from 4:00 p.m. to 12:00 a.m.; and a night shift from 12:00 a.m. to 8:00 a.m. Tr. 37-38. Marion County has four haulage trucks in its fleet, each with an approximate 40-ton capacity, and one 30-ton capacity rented from Forquer for additional support. Tr. 34, 46, 92, 502, 514; Ex. C-9 at 5. Maintenance of the haulage trucks is contracted out to Wheeling Diesel and, given the constant wear and tear on the equipment, mechanics are regularly on-site making repairs. Tr. 38-42, 222, 298, 502, 515. During each shift, the mine generally operates two trucks, hauling refuse

¹ Prior to December 2013, Marion County Mine was known as Loveridge Mine, and was owned and operated by CONSOL Energy, Incorporated. Stip. 9.

slate from the processing plant up a quarter-mile road to the Harvey Run Impoundment (“impoundment”). Tr. 34, 512. Because the road is too narrow and steep for haulage trucks to easily pass each other, after mobile equipment operators (“MEO”) dump refuse at the impoundment, they wait at the top of the hill to exchange places, and it is customary for waiting MEOs to turn off their headlights so as not to blind their partners. Tr. 35-37, 60-63, 267.

Kevin Shaffer, also known at the mine as “Cowboy,” began employment as an MEO at the mine in June 2010, and has held that position at all times relevant to this proceeding. Stips. 10, 11; Tr. 141. On October 18, 2017, Shaffer was assigned to haul refuse slate during the afternoon shift. Tr. 38-40. Shaffer operated the No. 4 truck and Geoff Phillips, his partner during that shift, operated the No. 1 truck. Tr. 513.

During Shaffer’s pre-operation examination of the No. 4 truck, he noted several issues, including non-functional interior lights and oil leaks. Ex. C-4. While operating the truck, when Shaffer set the parking brake, the transmission would intermittently jump out of neutral into reverse. Ex. C-4; Tr. 49. Shaffer reported the transmission problem to plant foreman Adam Bond over the plant-wide CB radio system. Tr. 52, 365, 514; Ex. C-9 at 5. After hearing Shaffer’s complaints, Bond went to the mine office and talked to plant maintenance foreman Doug Sanders about the maintenance issues and availability of other trucks. Tr. 365-73, 514-15. Sanders, who, among others, had heard Shaffer’s complaints over the radio, called Wheeling Diesel mechanic Paul Dixon to come to the mine that evening to service the No. 4 truck. Tr. 298-300, 514-15, 520; Ex. C-9 at 5. While it is uncertain what exactly Shaffer and Bond said to each other over the radio or how much was actually heard, it is undisputed that during the next hour or so, Shaffer made numerous vulgarity-laced complaints about his truck, as well as lack of air conditioning and a non-functioning radio in Phillips’ truck. Tr. 52-53, 374, 514. Shortly thereafter, Bond went up to the impoundment in his pick-up truck to deliver a replacement radio to Phillips, and to talk to Shaffer about the maintenance issues with his truck. Tr. 374-77.

An animated conversation ensued between Bond and Shaffer in which Shaffer aggressively repeated his complaints regarding the equipment and management’s failure to timely address safety issues. Tr. 55-56, 384-88, 391. There is disagreement as to whether Bond had told Shaffer to park the No. 4 truck and drive Forquer’s truck during the earlier radio communications; Shaffer denies having heard this. Tr. 55-56, 171, 365-73. In any case, the face-to-face exchange was emotionally charged, and involved posturing and profanity. Tr. 178-80, 385-87, 391, 396-99. Bond repeatedly directed Shaffer to park the No. 4 truck and, throughout the verbal confrontation, Shaffer “invoked . . . [his] safety rights,” and threatened to call in the “Feds . . . to shut every piece of equipment down on this job.” Tr. 180, 387-88, 390, 392. To defuse the situation, Bond suggested that he drive Shaffer down to the plant for his meal break and, en route, the two had routine conversation and an uneventful ride. Tr. 56, 183, 390, 396-99.

After his meal break, Shaffer switched to Forquer’s truck, and returned to his hauling duties. Tr. 59-60. Between 8:00 and 8:30 p.m., mechanic Paul Dixon arrived at the mine to repair the No. 4 truck. Tr. 302-03. Shortly before 9:45 p.m., Bond made a second trip up to the impoundment to check on Dixon’s progress with the repairs. Tr. 403-04. Upon Bond’s arrival, Dixon reported to him that Shaffer had been driving down from the impoundment without his

headlights on and had almost run the mechanics' truck off the road, and asked Bond to "make sure [that Shaffer] has his lights on." Tr. 303, 406.

Bond tried to contact Shaffer twice on the CB radio to ask him to turn on his lights, but received no response. Tr. 409-11. Bond then observed Shaffer, driving Forquer's truck, pull off to the side of the road at the top of the hill to wait for Phillips' truck to pass; Bond claims that Shaffer did not have his headlights on as he was pulling off-road. Tr. 185, 410-11, 414-15. Bond hollered up to Shaffer in his truck about driving without his headlights and Dixon's allegation. Tr. 60-63. Shaffer stepped down from the cab, fervently denying driving without his headlights, and advanced toward Bond at ground level. Tr. 64-66, 189-90, 191-95, 419-23; Ex. C-9 at 8. By both accounts, the ensuing conversation was extremely volatile. Tr. 191-95, 420-24. Throughout the exchange, Bond repeatedly instructed Shaffer to turn on his headlights and resume work. Tr. 420, 422, 423. Shaffer continued aggressive denial of driving without his headlights, and made multiple threats to report Bond to human resources and call in the "Feds." Tr. 64-66, 422-23. Shaffer alleges that Bond became angry and put his finger in Shaffer's face, shouting, "I'm tired of this fucking shit on this fucking equipment." Tr. 64-65. Bond denies making that statement, and contends that Shaffer got in his face and threatened to "take [him] to the gate and whip [his] ass." Tr. 422-23, 426-28; Ex. C-9 at 8.

Around 11:30 or 11:45 p.m., Dixon radioed Shaffer to test drive the No. 4 truck. Tr. 67, 313. As he was getting into the cab, Shaffer asked Dixon why he had reported him to Bond for driving without his headlights, and Dixon replied that Shaffer had almost run his truck off the road when he was driving up the hill. Tr. 67, 313-14; C-9 at 6. The exchange grew heated, and Dixon told Shaffer that if he came closer, he would "bust [Shaffer] in [his] fucking mouth." Tr. 67-69, 199-200, 313-15; Ex. C-9 at 6. At this point, the hostility deescalated, and they proceeded to discuss the repairs on the No. 4 truck, after which Shaffer test drove the truck and found it to be operating properly. Tr. 67-69, 199-200, 314-15. Thereafter, Shaffer finished his shift running the No. 4 truck. Tr. 68-69.

On October 19, Bond sent an email to human resources manager Pam Layton and plant manager Rocky Cianfrocca recounting the previous night's events. Tr. 431; Ex. C-9 at 7. Thereafter, without further explanation, Layton advised Shaffer not to report to work because management was investigating an incident that had occurred on October 18. Tr. 71-72. The next day, on October 20, general manager Scott Neitzelt held a meeting with Cianfrocca, Layton, and human resources representative Dave Wilkinson to discuss the incident and review Shaffer's disciplinary record. Tr. 473-74, 488. Neitzelt also launched an internal investigation, which included statements from Doug Sanders, Paul Dixon and hourly employee Marty Miller. Tr. 475-76; see generally Ex. C-9. In accordance with company policy, Shaffer was not interviewed. Tr. 78-79, 286, 495-96, 556.

Shaffer was called in to the Mine on October 23 for a meeting with Neitzelt, Layton, Wilkinson, and local union president Jason Todd. Tr. 72. During the meeting, Shaffer was informed that he was being suspended with intent to discharge because he had violated Marion County's employee conduct rules when he threatened Bond. Tr. 75-76. Todd requested additional details about the investigation, which management declined, and a grievance meeting ("24/48 meeting") on Shaffer's behalf. Tr. 262.

By agreement, Shaffer's 24/48 meeting took place on October 27, with Shaffer, Neitzelt, Layton, human resources representatives Wilkinson and Tim Baum, Todd, and several other union representatives. Tr. 80, 264, 270. Two prior incidents, in which Shaffer was formally disciplined, were discussed. The first incident had occurred in 2011, when Shaffer was suspended for six days for sleeping on the job. Tr. 282; Ex. R-32. The other had occurred in 2014, when Shaffer was suspended-without-pay and removed from the Mine Rescue Team for vandalizing a hotel room and verbally assaulting the hotel manager with hostile language laced with racial slurs. Tr. 197, 282, 544; Ex. R-34. A third incident, occurring in August 2017, was also discussed, where Shaffer threatened to lay down on the job in response to Bond assigning him to work mandatory overtime, resulting in a verbal warning from Bond, but no formal discipline. Tr. 268, 353-56; Ex. C-9 at 9-10; see Stip. 20. The union argued that mitigating factors should be considered, including Shaffer's long-term employment with the company and his lack of issues with foremen other than Bond. Tr. 283. At the conclusion of the meeting, Neitzelt reiterated his decision to terminate Shaffer. Tr. 550. Consequently, the union elected to take the matter to arbitration. Tr. 271.

The arbitration hearing was held on November 17, 2017, and the Arbitration Report was issued on December 11, 2017, finding that Marion County had just cause to terminate Shaffer because he had threatened Bond.² Marion County Coal Co. and UMWA, Dist. 31, Local Union 9909, Arb. No. 16-31-17-037, at 18-19 (2017) (Colflesh, Arb.). Thereafter, Shaffer filed his Discrimination Complaint with MSHA.

III. Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complainant must prove by a preponderance of the evidence "(1) that he engaged in a protected activity, and (2) that the adverse action [complained of] was motivated in any part by the protected activity."³ *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The Commission has noted that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y*

² Administrative notice is taken of the Arbitration Transcript ("Arb. Tr."), filed in support of the Secretary's Application for Temporary Reinstatement, in conjunction with the hearing record, for the purpose of establishing facts and assessing witness credibility.

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

No person shall discharge or in any manner discriminate . . . against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter . . . or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this chapter.

of Labor on behalf of *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev. on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). Circumstantial evidence may include: 1) coincidence in time between the protected activity and the adverse action; 2) knowledge of the protected activity; 3) hostility or animus toward the protected activity; and 4) disparate treatment. The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.* at 2510.

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

At this stage, the complainant has the opportunity to demonstrate that the operator’s non-discriminatory reason for its actions is a mere pretext for discrimination. *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). The Commission has explained that “pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator’s normal business practices.” *Id.* However, the Commission has also stated that “[its] judges should not substitute for the operator’s business judgement [their] views on ‘good’ business practice.” *Chacon*, 3 FMSHRC at 2516. Finally, the Commission has noted that the ultimate burden of proving discrimination always remains with the complainant. *Robinette*, 3 FMSHRC at 818 n.20.

A. Summary of Testimony

1. Kevin Shaffer

Mobile equipment operator Shaffer testified extensively about the sequence of events on October 18, 2017. He believed that Bond had trouble hearing his safety complaints over the radio, and he did not remember Bond telling him to drive Forquer’s truck, but thought that Bond might have mentioned that he needed to check with Sanders about truck availability. Tr. 51-52, 170-72. Shaffer stated that Sanders was the first manager to respond to his safety complaints by broadcasting to the mine that mechanics had been called in. Tr. 54-55. According to Shaffer, he continued operating the No. 4 truck until Bond arrived at the impoundment and asked him why he was still running it, where upon Shaffer “invoked . . . [his] safety rights,” and detailed his

concerns about the condition of the equipment and management's failure to timely address safety issues. Tr. 55-58, 136. Shaffer stated that Bond did not respond to his complaints, but offered to drive him "off the hill" for his lunch. Tr. 56. He also stated that in the past management had gotten upset with him for downing a vehicle without approval, but that he had not been formally disciplined for doing so, and he noted that management would often respond to complaints with, "Walmart is hiring." Tr. 55, 106, 137-38, 160-61.

By Shaffer's account, he drove Forquer's truck after his lunch break, and Phillips went back to driving the No. 1 Truck, which had cooled off sufficiently. Tr. 59-60. While he was waiting at the top of the impoundment for Phillips to pass, without his lights, Bond approached by foot, and accused him of nearly hitting Dixon while he was driving without his lights. Tr. 60, 63-64. Shaffer alleged that Bond became angry, put his finger in Shaffer's face, and told him, "I'm tired of this fucking shit on this fucking equipment." Tr. 64-66. Shaffer stated that he told Bond that he could not talk to him in that manner on mine property and that he could report it to management or human resources, and that Bond walked away without responding. Tr. 65-66. Shaffer contended that both were upset during this exchange, and he admitted that he was "talking heatedly," but denied losing his temper. Tr. 103, 195. He also denied pointing at the gate or threatening to fight Bond, and stated that he has never threatened Bond or anyone else while at work. Tr. 70, 196-98. Shaffer also testified that later, Dixon radioed him to test drive the No. 4 truck and, as he was climbing into the truck, he and Dixon discussed Shaffer's headlights, things became heated, and Dixon threatened to "fucking bust [Shaffer]." Tr. 67-69. According to Shaffer, he perceived this comment as a threat, and he thought that he could defuse the tension by laughing at Dixon; ultimately, he did not report the incident. Tr. 68, 200-01.

2. Adam Bond

While the finer details vary substantially, plant foreman Bond's testimony largely confirms Shaffer's account of events. After hearing Shaffer's complaints over the radio, Bond contended, he went to the mine office immediately and discussed maintenance issues and availability of trucks with Sanders, then radioed Shaffer to park the No. 4 truck and drive Forquer's truck, explaining to him that the brakes were working on Forquer's truck. Tr. 365-73. Bond stated that later in the shift, he drove up to the impoundment and spoke to Shaffer about his truck. Tr. 374-75. According to Bond, he told Shaffer to park the No. 4 truck again, and Shaffer became angry, "invok[ing] his safety rights," and threatening to call the "Feds." Tr. 385-88, 390, 392. Bond testified that he believed that the situation was getting out of control and, in an effort to cool it down, suggested that he drive Shaffer down to the plant for his meal break, during which time Shaffer calmed down. Tr. 390, 396-99.

By Bond's account, shortly after hearing from Dixon about Shaffer driving without his headlights, he observed Shaffer, in Forquer's truck, pull off to the side of the road at the top of the hill with his headlights off. Tr. 410-11, 414-15. Bond testified that when he approached the truck and asked Shaffer about his headlights, Shaffer stepped down from the cab and denied the allegation, before advancing toward him. Tr. 417-19. Bond contended that he instructed Shaffer to turn on his headlights and resume work, and that Shaffer continued to deny driving without his headlights and threatened to report Bond to human resources and the "Feds." Tr. 420, 422-23. As the exchange escalated, Shaffer became hostile and approached within a foot of Bond shouting,

“Fuck this shit. I put up with this shit every fucking day.” Tr. 420-23. Bond testified that at this point, he thought that Shaffer was going to strike him, so he put his finger in Shaffer’s face to create some space between them. Tr. 421, 425-26. According to Bond, Shaffer then got in his face and threatened to “take [him] to the gate and whip [his] ass,” all the while pointing toward the mine gate. Tr. 422-23, 426.

Bond also testified about an incident with Shaffer in August 2017. Tr. 353-56. According to Bond, after he had assigned mandatory overtime work to Shaffer and Moran, Shaffer began shouting “fuck you,” and stated that he would “fuck [Bond’s] eyeballs out.” Tr. 353-56. Bond stated that he understood Shaffer’s outburst to be a work refusal rather than a threat of physical harm, and that he took Shaffer to Rocky Cianfrocca’s office in order to issue a written warning. Tr. 356, 436.⁴ Bond recounted that upon reaching Cianfrocca’s office and finding him occupied, he reconsidered his options and decided that he would only give Shaffer a verbal warning. Tr. 355-56. He testified that Shaffer then asked, “[w]hy don’t you just fire me,” to which Bond responded, “I don’t want to do that . . . I want to start from square one.” Tr. 355-56.

3. Paul Dixon

Wheeling Diesel mechanic Dixon testified that when Sanders called him about coming in to repair the No. 4 truck, between 6:30 and 7:00 p.m., he was in a hospital emergency room receiving medication for an illness that he did not disclose. Tr. 301-03. He stated that on his way up to the impoundment, Shaffer, coming down the road without his headlights on, nearly ran the mechanic’s truck off the road, and that he asked Bond to “make sure [Shaffer] has his lights on.” Tr. 303-04, 331-32. He testified that later that evening, situated 20 to 30 feet from Shaffer and Bond, he heard Shaffer shout repeatedly, “I had my fucking lights on,” and “no one puts a fucking finger in my face;” he also heard Shaffer say the word “gate,” while pointing in the direction of the mine gate. Tr. 305-7, 309, 312. Dixon noted that Shaffer was louder than Bond throughout the confrontation. Tr. 307, 333. He also testified that as Shaffer was climbing into the No. 4 truck, he paused, turned, and said to him, “[Bond] said you said I didn’t have my lights on,” and that he told Shaffer that he had made the statement. Tr. 314. Dixon contended that Shaffer came closer to him and aggressively told him, “I had my fucking lights on,” to which, in an effort to meet Shaffer at his level, Dixon responded, “back off, or I’m gonna bust you in the mouth - - your fucking mouth.” Tr. 314-15. Dixon also testified that he had received a verbal warning, but was not suspended, for threatening to hit Shaffer. Tr. 328-29.

4. Doug Sanders

Plant maintenance foreman Sanders testified that employees are required to make pre-operation reports before running any equipment, that items are prioritized for repair based on the severity of issues identified, and that when issues are nonessential, equipment may be kept in service until it can be addressed. Tr. 504-06. He testified that mine management would never force an employee to continue operating unsafe equipment because “no one [at the mine] would accept the liability,” and he added that operating unsafe equipment is a violation of Marion County’s employee conduct rules. Tr. 506. He stated that after he had heard Shaffer’s complaints

⁴ See Ex. C-9 at 10 (Marty Miller’s account of the lunchroom incident, including hearing Shaffer shouting “fuck you,” and “I’m going to fuck your eyeballs out” at Bond).

about the No. 4 truck over the radio, he immediately called Dixon to come in, then broadcast over the radio that mechanics were coming in to work on the trucks, and spoke to Bond about the brakes and availability of Forquer's truck. Tr. 514-17. In Sanders' opinion, Shaffer had "lost his temper" and was "worked up;" he was "screaming, [and] cussing" over the radio at Bond and any other member of mine management who could hear him all evening, and he viewed Shaffer's behavior as upsetting and unprofessional. Tr. 522-25. Sanders testified that he was impressed by Bond's composure in dealing with Shaffer, noting that he had never seen Bond swear at any employee. Tr. 521-22, 525.

5. Rocky Cianfrocca

Plant manager Cianfrocca testified that he only became aware of Shaffer allegedly threatening Bond after he had received an email from Bond about the previous night's events. Tr. 471-72. Additionally, he testified that when employees find maintenance issues during pre-operation examinations, there is no discipline for reporting them and downing equipment. Tr. 459. He noted that there had been no complaints about Bond cursing at employees, that employees liked working on Bond's shift, and that Bond is "pretty quiet," easy to get along with, and well-liked. Tr. 493-94.

6. Jonathan Moran

Mobile equipment operator Moran testified that he heard Shaffer's initial safety complaints and Sanders' response over the radio, but that he did not hear Bond's response to Shaffer. Tr. 229-31, 241. He also testified that vehicles are downed if issues are identified during pre-operation examinations, and that there is no discipline for reporting issues. Tr. 235, 240. Finally, Moran said that he had heard management comment that "Walmart is hiring" and, although he could not recall a specific instance when that had been said to him, he characterized the statement as a general response to complaints at the mine. Tr. 245 He also noted that he had a good relationship with Bond, and that Bond had never threatened him. Tr. 248.

7. Scott Neitzelt

General manager Neitzelt explained how the mine's disciplinary process works, and stated that while the mine usually employs progressive discipline, severe conduct can result in immediate termination. Tr. 537, 545-51, 561-63. He testified that his decision to discharge Shaffer was based on the October threat and in no part Shaffer's safety complaints, and that he would have discharged any employee who had threatened another employee, irrespective of whether the employees involved were hourly or management. Tr. 552, 558. He also testified that Shaffer's prior disciplinary infractions "showed somewhat of a pattern," establishing Shaffer as "a hothead," and contributed to his decision to terminate Shaffer. Tr. 543-44, 552-54. Neitzelt explained that he elected to notify Dixon's supervisor that he had threatened Shaffer, rather than ban him from the mine, because Dixon worked for a contractor. Tr. 540-41, 565. Finally, Neitzelt noted that Bond had told him that since the incident, he has been afraid of Shaffer. Tr. 554.

8. Jason Todd

Todd, prep plant electrician and president of the local UMWA chapter, accompanied Shaffer to the disciplinary proceedings associated with Shaffer allegedly threatening Bond. Tr. 256, 260. He identified Adam Fry as Shaffer's union representative at the 24/48 meeting. Tr. 263. Todd testified that Shaffer admitted to him that Bond had responded to his initial safety complaints by instructing him to drive a different truck. Tr. 290-91. In response to a question about whether Bond had ever been confrontational with him, he recounted an incident where he was speaking with union miners in the lunchroom and Bond approached him, commenting on Todd's work schedule and union activities. According to Todd, both of them became angry, and there were a "few back and forth words" before Bond left the lunchroom. Tr. 274-77.

B. Shaffer's *Prima Facie* Case

It is undisputed that Shaffer's complaints regarding the No. 4 and No. 1 trucks on October 18, 2017, constitute protected activity under the Act, and it is clear that Shaffer's termination is an adverse action. Sec'y Br. at 17-19. As is often the case, the circumstantial evidence involved in Shaffer's discharge must be examined in order to determine whether Marion County was motivated, in any part, by Shaffer's protected activity.

The Commission has found that a discharge occurring approximately two weeks after protected activity is sufficiently coincidental in time to support a finding of discriminatory motive. *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 959 (Sept. 1999). In this case, the temporal nexus is even stronger, since Marion County initiated Shaffer's discharge approximately five days after Shaffer's safety complaints.

Marion County management had knowledge of Shaffer's protected activity. Clearly, Bond and Sanders had heard the complaints about the trucks over the plant-wide radio. Sec'y Br. at 19; Tr. 173, 365-73, 514-17. Layton and Cianfrocca were made aware of Shaffer's safety complaints the next day by Bond's email describing the prior evening's kerfuffle and, if not sooner, Neitzelt was put on notice of Shaffer's safety complaints by the information gleaned from the ensuing internal investigation. Accordingly, I find that the Secretary has established a *prima facie* case of discrimination based on the temporal nexus between Shaffer's safety complaints and termination, in conjunction with management's knowledge of Shaffer's protected activity.

C. Marion County's Rebuttal

Marion County contends that it terminated Shaffer because he threatened his supervisor, Bond, in violation of its employee conduct rules, and in no part because of his protected activity. Resp't Br. at 17-24. In relevant part, Marion County's employee conduct rules state as follows:

In order to minimize the occasions for discipline or discharge, each employee should avoid conduct which violates reasonable standards of an employer-employee relationship including . . .

4. Insubordination (refusal or failure to perform work assigned or to comply with supervisory direction) or use of profane, obscene,

abusive, or threatening language or conduct toward subordinates, fellow employees, or officials of the company.

Ex. C-8 (emphasis added). Marion County alleges that Shaffer threatened to “take [Bond] to the gate and whip [his] ass.” Resp’t Br. at 11. Marion County asserts that it does not tolerate threats, and that Shaffer’s unprotected conduct was its sole motivation for his termination. Resp’t Br. at 17, 24; Tr. 552-53.

The alleged threat occurred during Bond’s second trip up to the impoundment. It is clear from the record that Shaffer’s agitation had escalated as the shift progressed, and Dixon’s accusation about his headlights took Shaffer’s disgruntlement up a notch when Bond approached him about the matter. By both accounts, their exchange quickly became confrontational. Shaffer got in Bond’s personal space, Bond pointed his finger at Shaffer, and it is at this point that Bond alleges that Shaffer threatened to fight him at the gate. Bond’s rendition is largely corroborated by Dixon, who, standing 30 feet away at most, observed Shaffer pointing in the direction of the gate as he was referencing it verbally.

The next day, based on Bond’s email to Layton and Cianfrocca, management began an internal investigation, and Shaffer was advised not to report to work. As a part of the investigation, Neitzelt reviewed employee statements and Shaffer’s personnel file, and found Shaffer’s behavior toward Bond in August 2017 and the incident at the hotel in 2014 particularly troubling. Shaffer was called to the mine on October 23 for a meeting, and was informed that he was being suspended with intent to discharge because of threatening Bond.

Shaffer’s 24/48 meeting was held on October 27, and the union’s arguments, that Shaffer was a long-term employee of the company and had no issues with foremen other than Bond, did not persuade Neitzelt to reverse his decision to terminate Shaffer. Tr. 549-52. In fact, Neitzelt testified credibly that even with a clean disciplinary record, he would have discharged any employee, hourly or management, for threatening another employee. Tr. 558, 563. I find that Neitzelt offered credible testimony, that his account of his motives was supported by the record and, therefore, that Marion County has established that Shaffer was discharged for legitimate, non-discriminatory reasons, entirely unrelated to his safety complaints.

D. Pretext

The Secretary argues that Marion County’s articulated justification for terminating Shaffer is merely a pretext for unlawful discrimination. In support of this argument, the Secretary maintains that Shaffer never threatened Bond, that management displayed animus toward Shaffer’s protected activity, and that Shaffer was disparately treated with respect to discipline. Sec’y Br. at 10-11, 20-25. For the following reasons, I conclude that the Secretary’s arguments are not supported by the record.

1. The Threat

The Secretary contends that it was Bond who became agitated that evening, that he put his finger in Shaffer’s face and said that he was tired of this “fucking shit” on the “fucking equipment,” and that Bond fabricated the threat by Shaffer in order to insulate himself from

being held accountable for his hostility toward Shaffer. Sec’y Br. at 10-11, 21. Additionally, the Secretary maintains that Dixon’s testimony lacks credibility. Sec’y Br. at 10-11, 28 n.9.

According to the Secretary, Bond’s failures to call the police, report the incident to human resources immediately, and send Shaffer home lend credence to his contention that Bond fabricated the threat. Sec’y Br. at 11, 21. I find this reasoning unpersuasive. Primarily, the record establishes Bond as someone who believes that actions have consequences, and gives careful consideration to exercises of his supervisory authority. See e.g., Tr. 355-56, 365, 430-33, 453-54.⁵ Additionally, Bond is well-liked by the employees under his supervision, including Shaffer.⁶ See, e.g., Tr. 248, 493-94, 525. Consequently, I find the Secretary’s claim to be inconsistent with Bond’s character and reputation, as borne out by the record.

The Secretary’s assertion that Dixon was an unreliable witness, insofar as his testimony corroborates Bond’s account of events, is based on his contention that Dixon had reason to be “annoyed” with Shaffer due to the inconvenience of being called in from the emergency room, and possibly because Dixon took the complaints about the equipment personally. Sec’y Br. at 28 n.9. The Secretary presented no evidence to support this contention. Furthermore, Dixon’s assertion that he was working within earshot of Bond’s and Shaffer’s confrontation was not refuted. According to Dixon, he could not hear Bond well during the conversation, but he could hear Shaffer yelling at Bond. Dixon recounted Shaffer repeatedly shouting in Bond’s face that he had his “fucking lights on,” and “fuck you,” and that he heard Shaffer tell Bond that nobody puts his “fucking finger” in his face, and say “gate,” while pointing toward the mine gate. Ex. C-9 at 6; Tr. 305, 307-09, 312.

While it is uncontroverted that Dixon came to the mine from the emergency room to service the No. 4 truck, there is no evidence that this generated hostility on his part. In fact, Dixon and Shaffer never had any issues before the incident in question, and Dixon specifically testified that he was not bothered by having to go to the mine that evening. Tr. 301-02, 313, 320-21; Ex. C-9 at 2. Moreover, if Dixon had harbored any hostility toward Shaffer, he most likely would have misrepresented what he had heard that evening to construct a more damaging story. As it stands, one would have to consider why he merely stated that he heard Shaffer say “gate,” when he could have testified that he heard Shaffer make the entire alleged threat. Additionally, Dixon provided balanced testimony that could be construed against Bond, i.e., Shaffer telling Bond that nobody puts their “fucking finger” in his face, which does not serve the retaliatory motive that the Secretary attempts to construct. Therefore, based on the record, and after

⁵ While the Secretary points to the lunchroom incident between Bond and Todd as evidence of Bond’s antagonistic temperament, I do not find this argument availing for two reasons. See Sec’y Br. at 21. First, Todd’s recounting of the incident does not provide enough context to evaluate the reasonableness of Bond’s alleged actions. Second, if I were to take Todd’s testimony at face value, I do not believe that an isolated display of anger outweighs what the record clearly establishes - - that Bond enjoys a good relationship with his subordinates, and is respected as a manager.

⁶ In the arbitration hearing, Shaffer testified that he had never had a problem with Bond, and went so far as to say, “I’ve had two good bosses in my life, and [Bond’s] the second best and the first was my dad.” Arb. Tr. 262.

observing him testify, I find Dixon wholly credible, and conclude that he harbored no animosity toward Shaffer.

Shaffer's abusive and disrespectful conduct toward Bond was wholly inappropriate, and Bond, although obviously frustrated, was more patient with him than could reasonably be expected under the circumstances. Moreover, I find that Shaffer's overall testimony was extremely self-serving. While he admitted that his conversations with Bond and Dixon were heated, he left out negative information corroborated by multiple witnesses, he denied past inappropriate behavior that had been observed by others, he could not recall many events that were readily established by other witnesses, and his testimony was riddled with inconsistencies. See, e.g., Tr. 90-91, 170-71, 194-97, 203, 290-91. Shaffer painted himself as an easy-going, cooperative employee, but his demeanor was unconvincing, and the record tells a much different story. In fact, the record is replete with examples of Shaffer's hostile and disruptive attitude. See, e.g., Tr. 282, 353-54, 461, 544; Ex. R-34; Ex. C-9 at 5-6, 10.

While I find that Bond also became agitated during the verbal confrontations with Shaffer, given the circumstances, I do not find Bond's conduct antithetical to his reputation as a fair, even-tempered supervisor. Indeed, patience is not without limits. Moreover, I find that Bond's frustration was reasonable, when viewed in reaction to Shaffer's aggressive display of anger. To characterize Bond as intimidating and hostile, as the Secretary urges, ignores Bond's need, as Shaffer's supervisor, to maintain control and respect. Therefore, based on my credibility determinations and the evidence in its entirety, I find that Shaffer did, in fact, threaten Bond.

2. Marion County's Animus

The Secretary contends that both Bond and Sanders displayed animus toward Shaffer's protected activity, and that their conduct was consistent with management's pattern of hostility toward safety complaints. Sec'y Br. at 20-21.

The Secretary argues that Bond displayed hostility toward Shaffer's protected activity when he confronted Shaffer about his headlights. Sec'y Br. at 20. After making the accusation, Shaffer alleges that Bond became angry, put his finger in his face, and told him that he was sick of the "fucking shit" on the equipment. Shaffer interpreted this comment to be in reference to the safety complaints about his truck that he had made earlier that day. Tr. 101-102. While I have found that Shaffer's testimony, as a whole, casts a deep shadow upon his credibility, I find it plausible that Bond said something of this nature to Shaffer during their argument. However, as has been briefly touched upon earlier, it is critical to evaluate any such statement in the context of the events that precipitated it. Bond's alleged comment was made in the midst of an animated exchange in which Bond was taking Shaffer to task for engaging in extremely hazardous conduct. As a reminder, leading up to this confrontation, Bond had actually observed Shaffer park the truck without using headlights. Additionally, I note that this was the second instance of Shaffer engaging in unsafe conduct that shift. On his first trip up to the impoundment, Bond discovered that Shaffer had been driving the No. 4 truck for over two hours, despite having been instructed by Bond to drive Forquer's truck instead. Given Bond's legitimate concerns about Shaffer's attitude and conduct in the mine that evening, and putting Bond's comment in the context of the accusation that actually sparked the confrontation, I conclude that Bond's alleged

comment would have been in reference to Shaffer's repeated safety infraction, i.e., not using his headlights, rather than his safety complaints.

Moreover, the alleged comment must be viewed in light of Bond's reaction to Shaffer's safety complaints throughout the evening. By the time that the alleged statement was made by Bond, Shaffer's complaints were already being addressed. Shaffer was driving Forquer's truck and Dixon was repairing the No. 4 truck; Phillips had been given a replacement radio and the No. 1 truck had cooled down sufficiently. It is clear that Bond took immediate action to address the safety issues that Shaffer had brought to his attention. Importantly, Bond did not raise any objections to Shaffer's safety complaints the first time they spoke, but instead questioned why Shaffer was still driving the malfunctioning truck. This immediate response to Shaffer's safety complaints supports the conclusion that Bond's statement was, in fact, about the headlights issue. Therefore, I find that the record does not support the Secretary's claim that Bond displayed any animus toward Shaffer's protected activity.

The Secretary also identifies statements made by Sanders during the internal investigation as evidence of Sanders' animus toward Shaffer's protected activity. Sec'y Br. at 20; Ex. C-9 at 5. Sanders stated that he was "afraid [Shaffer] would have both trucks down by the end of the shift," which "would only leave [the mine] with a rented 30-ton truck to haul refuse." Ex. C-9 at 5. Sanders also testified that production would be affected if either of the 40-ton refuse trucks were not running. Tr. 530. The Secretary contends that Sanders' statements suggest that management was concerned about production at the expense of safety. Sec'y Br. at 20.

To fully understand Sanders' comments, they must be viewed in light of Sanders' response to Shaffer's complaints about the No. 4 truck. Sanders took immediate action once he was made aware of Shaffer's complaints: he spoke to Bond about the safety issues and availability of trucks, called in the Wheeling Diesel mechanics, and contacted Forquer to work out the issue with the parking brake on the rented truck. Although Sanders stated that he was worried about Shaffer downing trucks, he also testified credibly that mine management would never encourage an employee to continue operating an unsafe piece of equipment. Tr. 506; Ex. C-9 at 5. While not discounting that Sanders had a concern about production, the record does not show that he prioritized it over safety. It does show him to be disdainful of Shaffer's hostility toward Bond throughout the evening. Sanders regarded Shaffer's language and behavior as highly objectionable and disrespectful, and he was impressed that Bond was able to maintain his composure. I fully credit Sanders' testimony about the evening, as consistent with Shaffer's history of uncooperative conduct throughout his tenure at Marion County. The record illuminates Shaffer's disruptive behavior, his negative attitude toward work, and his refusal to follow instructions despite the latitude and assistance afforded him by Bond and Sanders. See, e.g., Tr. 282, 353-54, 461, 544; Ex. R-32; Ex. R-34; Ex. C-9 at 5, 6, 10. Consideration of Shaffer's pattern of bad behavior provides support for Sanders' negative view of him, and any hostility on Sanders' part is reasonably attributable to Shaffer's non-protected conduct. This highlights an important distinction. While the Act protects miners who have legitimately engaged in protected activity, that protection is not without parameters. Therefore, I find that any animus expressed by Sanders was directed toward Shaffer's prolonged demonstration of hostility throughout the evening - - behavior that is wholly unprotected.

Finally, the Secretary notes a few instances in which management, including Bond, responded to safety complaints by telling employees that “Walmart is hiring,” and asserts that this created a general hostility toward protected activity at the mine. Sec’y Br. at 20-21. This contention also lacks support in the record. Shaffer claimed that he was told “Walmart is hiring” after he had made a safety complaint regarding parts on a truck, and also during the August 2017 incident. Tr. 55, 106, 138. Jonathon Moran characterized “Walmart is hiring” as a general response to complaints at the mine. While I credit that this retort has been made by management and, specifically, by Bond, it does not follow, without more, that the statement rises to the level of animus. Shaffer’s allegation is self-serving and uncorroborated; the other instances identified by the Secretary are not tied to any specific safety complaints. I note that the Secretary has offered no evidence of management forcing miners who have raised legitimate safety complaints to continue operating unsafe equipment. See Tr. 235, 238-40, 396, 459, 506. Moreover, it is important to consider that heavy mobile equipment is running 24 hours, six days a week at this mine, and that equipment breaks down often and needs maintenance regularly. Complaints and concerns about equipment are raised multiple times on a daily basis, and the record is devoid of evidence that management does not adequately address safety issues.

Therefore, the Secretary has failed to establish any animus on the part of management toward the safety complaints Shaffer made on October 18.

3. Disparate Treatment

Finally, the Secretary asserts that Shaffer was subject to disparate treatment respecting his termination. Sec’y Br. at 22-24. After threatening Bond, Shaffer was told not to report to work and stay off mine property. Five days later, he was suspended with intent to discharge. The Secretary points out that Dixon engaged in similar threatening conduct during the same shift, but was neither banned from mine property nor suspended from work. Sec’y Br. at 23.

Dixon readily admitted that he threatened to punch Shaffer in the face. However, Dixon contended that, having just observed Shaffer screaming in Bond’s face, his own conduct was in response to Shaffer’s temper and aggressiveness, in an effort to back Shaffer down. While Dixon’s statement could be viewed as defensive, Marion County viewed it as a threat, and I find likewise. Dixon is not a valid comparison employee as the Secretary asserts, however, because Dixon and Shaffer are not similarly situated. Shaffer is an employee of Marion County, and Dixon works at the mine as a contractor employed by Wheeling Diesel. As such, the conditions of Dixon’s employment are not under the dominion of Marion County. Neitzelt did not take any disciplinary action against Dixon, but reported his conduct to his supervisor at Wheeling Diesel, which lends credence to Marion County’s stated zero-tolerance policy regarding threats. Consequently, I find that the Secretary has failed to establish that any similarly situated employee has been treated more favorably than Shaffer, under similar circumstances.

Having reviewed the evidence in its entirety, including the demeanor and credibility of the witnesses, the record shows that Shaffer threatened Bond, that management displayed no animus toward Shaffer’s protected activity, and that Shaffer was not subject to disparate treatment. Therefore, I conclude that the Secretary has failed to show, by a preponderance of the evidence, that Marion County’s stated justification for Shaffer’s termination was a pretext for

unlawful discrimination, or that Marion County's termination of Shaffer was, in any way, motivated by his protected activity.

IV. ORDER

ACCORDINGLY, it is **ORDERED** that the Complaint of Discrimination filed by the Secretary of Labor on behalf of Kevin Shaffer is, hereby, **DISMISSED**; and the Order Granting Temporary Reinstatement is, hereby, **DISSOLVED**, effective November 6, 2019.

/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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November 13, 2019

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

v.

HOOVER EXCAVATING & TRUCKING,
INC., and its successors,
Respondent,

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2019-0268
A.C. No. 35-03805-485254

Docket No. WEST 2019-0269
A.C. No. 35-03805-485254

Mine: Plant #2

DECISION AND ORDER

Appearances: Rebecca W. Mullins, U.S. Department of Labor, Office of the Solicitor,
Arlington, Virginia, for Petitioner;

Reginald S. Hoover, *pro se*, Coquille, Oregon, for Respondent.

Before: Judge Miller

These cases are before me upon petition for assessment of civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“the Act”). These cases involve two citations issued pursuant to Section 104(a) and one order issued pursuant to Section 104(d)(1) of the Act, with originally proposed penalties totaling \$6,421.00. The parties presented testimony and evidence regarding the violations at a hearing held in Eugene, Oregon on September 18, 2019. Based upon the parties’ stipulations, my review of the entire record, my observation of the demeanors of the witnesses, and consideration of the parties’ legal arguments, I find the violations have been established and uphold the penalties as assessed.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Hoover Excavating & Trucking, Inc. (“Hoover Excavating”) operates Plant #2, a surface crushed and broken stone mine located in Myrtle Point, Oregon. (Tr. 12). Hoover Excavating is an “operator” as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and thus the mine is subject to the provisions of the Mine Act and the jurisdiction of the Commission.

The three violations at issue in these cases arise from two separate inspections of Plant #2. Both inspections were conducted by Inspector Jed McGinnis, who has worked for MSHA for three and a half years as an inspector and also has 13 years of experience working in a copper and gold mine. (Tr. 83–84). I found Inspector McGinnis to be credible and thorough in his description of the events. Mine owner Reginald S. Hoover represented Hoover Excavating at the hearing, and I found him to be less credible.

Because the facts associated with each inspection differ significantly, I analyze the violations below in accordance with their corresponding inspection date, rather than by docket number.

A. January 29, 2019 Inspection

a. Factual Background

Prior to the January 29, 2019 inspection at issue here, Inspector McGinnis conducted two pertinent inspections of Plant #2 in late 2018. The first occurred on November 27, 2018. On that date, McGinnis traveled to Plant #2 for a spot inspection and issued Citation No. 9376035 for a violation of 30 C.F.R. § 56.3131. That regulation mandates that “loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall” in places where people work or travel in performing assigned tasks. 30 C.F.R. § 56.3131. The citation described the condition at the mine as follows:

The loose and unconsolidated material along the perimeter of the high wall was not sloped to the angle of repose or stripped back ten feet, other conditions existed that created a fall of material hazard to miners. Large rocks had fallen on the drill area where work had recently been completed. Unconsolidated material was witnessed falling from the top of the high wall during the inspection and a large boulder was witnessed falling from the second bench during the inspection. Other areas on the high wall were undercut creating a fall of material hazard to miners. The pit was accessed daily to mine rock for the crusher. A fatal injury could result if a miner was struck by the falling material. The owner had cut a tree from the top of the high wall where the material was not stripped back or sloped to the angle of repose.

McGinnis determined that a fatal injury was reasonably likely to occur, that one person would be affected, and that the operator’s negligence was high. Though Hoover Excavating initially contested this citation, it was assessed as issued pursuant to settlement in Docket No. WEST 2019-0204. It is therefore admitted and unreviewable here.

On December 10, 2018, Inspector McGinnis returned to Plant #2 to conduct a follow-up inspection of the mine. While there, he issued Section 104(b) Withdrawal Order No. 9376048. Section 104(b) provides as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation

issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b). The order described the continuing violation:

The loose and unconsolidated material had not been removed from the face of the high wall and a berm had not been established at the base of the high wall on the “bench” that had been cleared for drilling and blasting. Work had been started to strip the top of the pit back ten feet, weather conditions prohibited any further work until conditions improved.

McGinnis explained at hearing that he issued the withdrawal order because, although some work had begun on the high wall, “no work had been started (to abate the violation) and no scaling had been done” on the bench section. (Tr. 85). The order required that a specific section of the high wall be removed from operation until the underlying violation was abated by the operator. Sec’y Ex. 6. McGinnis served a copy of the withdrawal order on Hoover Excavating foreman Casey Sabin, explained the scope of the order to him, and determined that he understood the scope and implications of the order. (Tr. 86). Hoover Excavating did not contest the withdrawal order and it is thus admitted and unreviewable.

b. Citation No. 9376074 (Docket No. WEST 2019-0268)

On January 29, 2019, McGinnis again traveled to Plant #2 , and observed that Hoover Excavating had continued to work on the high wall in the face of the 104(b) withdrawal order. As a result, he issued Citation No. 9376074 for a violation of Section 104(b) of the Act. The citation, as modified, described the condition as follows:

The “bench” section of the high wall was not removed from operation as required by Order of Withdrawal No. 9376048 dated 12/10/2018. The mine operator had continued to work on the “bench” preparing the area to be drilled and blasted. The area where work had been performed was below loose and unconsolidated material. The operator had not taken any action to mitigate the hazards on the high wall before working on the “bench”. The Order has not been modified, vacated, or terminated. This condition has not been designated as “significant and substantial” because the conduct violated a provision of the Mine Act rather than a mandatory safety or health standard.

Because this is a violation of the Act, rather than of mandatory health and safety standards, gravity and significant and substantial designations do not apply. McGinnis determined that the negligence level was high.

McGinnis explained at hearing that he observed a shock tube which had not been present when the 104(b) order was issued on December 10. A shock tube is used only for the purpose of blasting. McGinnis stated that he discussed the hazardous condition with Hoover, who confirmed that he had in fact drilled and blasted the bench. (Tr. 87). Photos taken during this inspection and admitted into evidence at the hearing show the still-present hazardous unconsolidated material as well as the white detonating cord and shock tube that had been placed in the area at some point after the 104(b) order was issued. Sec’y Ex. 5.

Hoover, on behalf of Hoover Excavating, explained at hearing that his understanding was that he could drill on the bench as long as he was 15 feet away from the high wall. (Tr. 109). He admitted that he was on the area of the bench that was subject to the withdrawal order in order to drill, and that he did drill, because he “didn’t feel that there was adequate enough material up there” to build a berm. (Tr. 109). He did this “to create some material to build a berm . . . not realizing [he] was in direct violation of the order.” (Tr. 109). According to McGinnis’s credible testimony, there was plenty of material available to build a berm without the need to drill and blast in the unsafe area. (Tr. 95–96).

It is evident from the testimony of both parties and from the photos taken on January 29, 2019, that the company continued to blast and work in the area in the face of the withdrawal order. Sec’y Ex. 5. Therefore, I find the violation has been established.

The Secretary alleges that this violation was the result of high negligence. The Commission has recognized that “[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, the judge must consider “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.” *Newtown Energy Inc.*, 38 FMSHRC 2033, 2047 (Aug. 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

In this case, Hoover Excavating should have known of the unsafe condition even prior to the first citation. Nevertheless, the company was put on definitive notice of the condition on November 27, 2018, when McGinnis issued the first citation for a violation of 30 C.F.R. § 56.3131. During the follow-up inspection on December 10, 2018, when it became obvious that the mine had done nothing to abate the violation, the company was reminded of the hazardous condition and ordered to remove the area from operation until the predicate violation was abated. Though Hoover himself was not served with the order of withdrawal, he nevertheless should have known that blasting in the withdrawn (and previously cited) area was prohibited.

Mitigating circumstances sufficient to reduce the negligence level of this citation are not present in this case. In *Jeppesen Gravel*, the Commission Judge modified the negligence level of a number of citations issued for working in the face of a failure to abate order where the Secretary acknowledged that the mine had put forth effort toward compliance. 37 FMSHRC 2319, 2326 (Oct. 2015) (ALJ). In that case, the operator had fully abated four and partially abated another three violations before MSHA issued citations for working in the face of failure

to abate orders. *Id.* Regarding those citations, the judge found that a high negligence designation was inappropriate. *Id.* However, she determined that, for several other citations at issue in the case where the operator had not partially or fully abated violations, high negligence was appropriate. *Id.* at 2329.

In this case, I remain unconvinced that Hoover was blasting in the withdrawn area in order to abate the dangerous condition. As McGinnis stated at trial, “that’s not customarily how you do mining. You actually build the berm before you drill and blast. You don’t drill and blast to build a berm.” (Tr. 96–97). Hoover has ample experience with mining and with MSHA compliance, and I find his testimony concerning this violation untenable. I accordingly find that the violation had not been either partially or fully abated at the time McGinnis issued this citation, and that high negligence is appropriate.

B. February 5, 2019 Inspection

On February 5, 2019, Inspector McGinnis, along with his supervisor, Randy Cardwell, returned to Plant #2 to conduct another inspection of the mine. Upon arriving at the mine, McGinnis noticed that blasting had occurred recently and developed concerns regarding Hoover Excavating’s transportation of explosives. He asked Hoover a few questions, which Hoover refused to answer. McGinnis then asked if he could inspect the back of Hoover’s truck, and Hoover said that he could not. (Tr. 98).

McGinnis then explained to Hoover that if he did not allow the inspection he would be issued a citation. Hoover then got in the truck and drove it across the street. In McGinnis’ opinion, Hoover did this in order to prevent inspection of the truck. (Tr. 99). Photos entered as exhibits at hearing show Hoover getting in the truck to drive it off of the mine site and the truck parked across the street from the mine. Sec’y Ex. 7. Cardwell then received instruction from his district manager to inform Hoover that local authorities would be contacted about Hoover’s possible transportation of explosives in the truck. After being so informed, Hoover allowed inspection of the truck. (Tr. 102).

Two violations issued during this inspection are under consideration here. One is a Section 104(a) citation issued for a violation of Section 103(a) of the Act, and the other is a Section 104(d)(1) order issued for a violation of 30 C.F.R. § 56.6202(a). Each violation is discussed in turn below.

a. Citation No. 9376080 (Docket No. WEST 2019-0268)

After Hoover had driven his truck off mine property, McGinnis issued Citation No. 9376080 for a violation of Section 103(a) of the Act. Section 103(a) directs authorized representatives of the Secretary to conduct inspections of mines and declares that representatives conducting such inspections “shall have a right of entry to, upon, or through any coal or other mine.” 30 U.S.C. § 813(a).

The citation described the violation as follows:

Mr. Reggie Hoover, owner of Hoover Excavating & Trucking Inc., refused to allow inspection of the box in the back of the truck that was used to transport explosives to the mine site and used on the day of the inspection. He would not open the box on the back of the truck and would not answer questions regarding the transportation of the explosives to the mine site. Reggie Hoover, owner, drove the truck off the mine site and parked it across the street from the mine to avoid having to open the box. This condition has not been designated as “significant and substantial” because the conduct violated a provision of the mine act rather than a mandatory safety or health standard.

At hearing, Hoover admitted that he moved his truck to a parking area across the street. He claimed that the parking area was still on mine property, but also stated that he did not feel that inspection of the truck “was pertinent to the bench thing that they were there for.” (Tr. 111, 123). He went on, however, to assert that he moved his truck in order to “g[et] it out of the way of what was going on in the pit.” (Tr. 113). Hoover’s tenuous and inconsistent account of these facts leads me to find that he is not a credible witness.

I credit McGinnis’ testimony concerning the facts surrounding this citation. Moreover, whether the truck was driven off of or remained on mine property is not dispositive of whether a violation occurred. Hoover refused to answer questions and then drove the truck away from MSHA inspectors who were actively attempting to inspect the vehicle in the course of their inspection of the mine. The Act specifically grants inspectors the right to conduct inspections of mines, and Hoover’s truck, used to transport explosives to the site, was unquestionably subject to this inspection. I find that in refusing to answer questions, refusing to open the box, and finally, moving his truck, an act to which Hoover admitted at trial, Hoover violated Section 103(a) of the Mine Act.

The Secretary alleges that the violation was the result of high negligence. McGinnis testified that Hoover’s action were intentional. I agree. The Commission has held that “an operator’s intentional violation constitutes high negligence for penalty purposes.” *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (*citing Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992)). Hoover intentionally impeded an inspection of the truck and I find the high negligence determination appropriate.

b. Order No. 9376082 (Docket No. WEST 2019-0269)

After Hoover was informed that authorities would be contacted if he continued to impede the inspection, he returned the truck and allowed McGinnis and Cardwell to inspect it. (Tr. 102). Based on this inspection, McGinnis issued Order No. 9376082 pursuant to Section 104(d)(1) of the Act for a violation of 30 C.F.R. § 56.6202(a).

Section 104(d)(1) orders are only issued after 104(d)(1) citations, which are assessed if an inspector finds a violation that is both significant and substantial and results from an unwarrantable failure by the operator to comply. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1622

n.7 (Aug. 1994). “If, during the same inspection or a subsequent inspection within 90 days of [issuing the 104(d)(1)] citation, another violation resulting from unwarrantable failure is found, a withdrawal order is issued under section 104(d)(1) of the Act.” *Id.*

30 C.F.R. § 56.6202(a) sets standards for vehicles containing explosives for use at surface metal and nonmetal mines. In part, it states as follows:

Vehicles containing explosive material shall be— (1) Maintained in good condition and shall comply with the requirements of subpart M of this part; (2) Equipped with sides and enclosures higher than the explosive material being transported or have the explosive material secured to a nonconductive pallet; (3) Equipped with a cargo space that shall contain the explosive material (passenger areas shall not be considered cargo space); (4) Equipped with at least two multipurpose dry-chemical fire extinguishers or one such extinguisher and an automatic fire suppression system; (5) Posted with warning signs that indicate the contents and are visible from each approach . . .

30 C.F.R. § 56.6202(a). McGinnis, in the citation, described his findings concerning Hoover’s truck:

The truck used to transport explosives to the mine site did not have warning signs indicating the contents and did not have two multipurpose dry-chemical fire extinguishers. Additionally the container used for the explosives was not approved for explosives and had exposed metal in the container. The improper transportation of explosives created an explosion hazard to miners and others. The truck was used on the day of the inspection for a blast that was completed prior to arrival. A fatal injury could occur if the explosives were to detonate. The owner has held a blasting license and ATF permit for approximately twenty years and knows the requirements for transporting explosives. Citation 9376080 was issued for the owner not allowing MSHA to inspect the truck. This violation is an unwarrantable failure to comply with a mandatory standard.

McGinnis determined that an injury was not likely, that an injury resulting from the violation would be fatal, that one person would be affected, and that the negligence was high. First, at hearing, Hoover testified that he did in fact have two fire extinguishers in the truck at the time of inspection. However, no evidence presented or testimony suggests he attempted to show them to McGinnis at the time of the inspection. His invitation, at the *hearing*, to “walk down to my pickup in front of this building” to see the two fire extinguishers in the truck leads me to believe that, at the time of the *inspection*, two fire extinguishers were not in the truck. (Tr. 111).

Next, Hoover admitted at hearing that his truck did not have placards signifying that the vehicle was used to transport explosives. That fact alone is sufficient to find a violation of 30 C.F.R. § 56.6202(a). Because I find that a violation of the cited standard has been established based on the lack of fire extinguishers and placards, I do not reach the issue of whether the truck’s box used to transport explosives was a violation.

I find high negligence an appropriate designation for this violation. Hoover has been hauling explosives for his blasting operations for many years. If he did not know the mandatory standards applicable to doing so, he should have. At hearing, he made it clear that he knew the standard for the placards, and stated “I know that I’m supposed to have placards.” (Tr. 111).

In *Lhoist North America of Virginia, Inc.*, another judge similarly affirmed a high negligence designation for an operator’s failure to equip a truck transporting explosives with two dry-chemical fire extinguishers. 36 FMSHRC 2413, 2428 (Sept. 2014)(ALJ). Here, the truck not only did not have adequate fire extinguishers, but it was not marked to signify that it contained explosives. I find Hoover Excavating was highly negligent in allowing the condition to exist, especially given Hoover’s longtime familiarity with blasting.

i. Unwarrantable Failure

Order No. 9376082 was designated as an unwarrantable failure to comply with a mandatory standard. The unwarrantable failure terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has explained that unwarrantable failure is “aggravated conduct constituting more than ordinary negligence. [It] is characterized by conduct described as ‘reckless disregard,’ ‘intentional misconduct,’ ‘indifference,’ or a ‘serious lack of reasonable care.’” *Consol. Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2007) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987)) (citation omitted). In determining whether a violation is an unwarrantable failure, the Commission has instructed its judges to consider all of the relevant facts and circumstances in the case and determine whether there are any aggravating or mitigating factors. *Id.* Aggravating factors to be considered include:

the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator’s knowledge of the existence of the violation.

IO Coal Co., 31 FMSHRC 1346, 1352 (Dec. 2009); *see also Consol.*, 22 FMSHRC at 353.

I find that Hoover Excavating made no efforts to abate the violative condition. A lack of abatement efforts may be excusable if the operator had a reasonable, good faith belief that the condition did not exist. *See IO Coal*, 31 FMSHRC at 1356. Here, Hoover explicitly recognized that he was in violation, at least concerning the placards. He never intended to abate the violation, and instead expressed his reasons for purposefully violating the standard. (*See Tr.* 111). I find that the lack of fire extinguishers and placards posed a high degree of danger. I further find that the violation was obvious—it was Hoover’s personal vehicle which he controlled. Finally, the operator’s knowledge of the existence of the violation has been established. I find that there was no evidence that Hoover had been placed on notice that greater efforts were necessary for compliance and that the violative condition was extensive. Nonetheless, based on these findings, I find the unwarrantable failure designation appropriate.

II. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). Commission Judges are not bound by the Secretary’s penalty regulations. *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 explained 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); *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000). 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 purpose underlying the Act’s penalty assessment scheme.” *Sellersburg Stone*, 5 FMSHRC at 294. *See also Am. Coal*, 38 FMSHRC at 1993 (when assessing a penalty, Commission Judges must make findings of fact under each of the statutory penalty criteria); *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864-68 (Aug. 2012) (deterrence is a central tenet of the Mine Act and its penalty provisions). The Commission has also explained that a judge may consider additional relevant facts outside of the six statutory penalty criteria when assessing a penalty. *Am. Coal Co.*, 40 FMSHRC 983, 989 (Aug. 2018) (when considering a proposed settlement, a judge may consider facts that fall outside of the section 110(i) factors, but that support settlement).

The history of assessed violations has been admitted into evidence and shows a reasonable history for this mine. Hoover Excavating is a small operator, but was highly negligent, as discussed above. Hoover stated at hearing that he thinks the “fines are a little extravagant.” (Tr. 119). However, he did not put forth any evidence to demonstrate that the penalties will affect his ability to continue in business. When asked about the ability to pay, Hoover indicated that he had not prepared tax returns for many years, but was now working on it, so had nothing to show. Furthermore, Hoover Excavating did not abate these violations in good faith.

Based upon the penalty criteria, I uphold the penalty amounts as assessed by the Secretary, which are as follows:

Citation/ Order No.	Originally Proposed Penalty	Penalty Assessed
Docket No. WEST 2019-0268		
9376074	\$2,000.00	\$2,000.00
9376080	\$2,000.00	\$2,000.00
Docket No. WEST 2019-0269		
9376802	\$2,421.00	\$2,421.00
TOTALS	\$6,421.00	\$6,421.00

III. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of \$6,421.00 within 30 days of the date of this decision.

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

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

Rebecca W. Mullins, U.S. Department of Labor, Office of the Solicitor, Division of Mine Safety and Health, 201 12th Street, Suite 401, Arlington, VA 22209

Reginald S. Hoover, Hoover Excavating & Trucking, Inc., P.O. Box 309, Coquille, OR 97423

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 20, 2019

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

v.

HOOVER EXCAVATING & TRUCKING,
INC., and its successors,
Respondent,

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

v.

REGINALD S. HOOVER, employed by
HOOVER EXCAVATING & TRUCKING,
INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2019-0092
A.C. No. 35-03805-463667

Mine: Plant #2

CIVIL PENALTY PROCEEDING

Docket No. WEST 2019-0277
A.C. No. 35-03805-486106 A

Mine: Plant #2

DECISION AND ORDER

Appearances: Rebecca W. Mullins, U.S. Department of Labor, Office of the Solicitor,
Arlington, Virginia, for Petitioner;

Reginald S. Hoover, *pro se*, Coquille, Oregon, for Respondents.

Before: Judge Miller

These cases are before me upon petitions for assessment of a civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“the Act”). These cases involve one citation and one order issued to Hoover Excavating & Trucking, Inc. pursuant to Section 104(d)(1) of the Act, with originally

proposed penalties totaling \$110,400.00. The Secretary also seeks to impose individual liability pursuant to Section 110(c) of the Act, 30 U.S.C. § 820(c), against mine owner Reginald Hoover for the violations. The alleged violations relate to a blasting accident that occurred on December 11, 2017. The parties presented testimony and evidence regarding the citation and order at a hearing held in Eugene, Oregon on September 18, 2019.

Plant #2 is a surface crushed and broken stone mine located in Myrtle Point, Oregon. Hoover Excavating is an “operator” as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d). Thus, the mine is subject to the provisions of the Mine Act and the jurisdiction of the Commission. The mine consists of an open pit area where rock is blasted, crushed into aggregate, loaded, and hauled out of the mine.

On December 11, 2017, an accident occurred at the mine following a detonation of explosives by Reginald Hoover, the mine’s owner. Three miners in the pit area were struck with flyrock and debris and seriously injured. MSHA conducted an investigation into the accident and as a result, a citation and order were issued to Hoover Excavating for failure to follow the manufacturer’s instructions on the blast initiating device and for failure to effectively clear the blast area of all non-essential persons prior to attaching the initiating device. A section 110(c) case was assessed for the two violations against Reginald Hoover as an agent of the operator.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact detailed below are based on the record as a whole and my careful observation of the witnesses during their testimony.

On December 11, 2017, Hoover Excavating planned to perform blasting on the 50-60 foot highwall at Plant #2. The blast required several thousand pounds of explosives and was set to be detonated, as was the practice at the mine, by mine owner Reginald Hoover. A contractor worked to set up the area and Hoover, the blaster-in-charge, made preparations to initiate the blast.¹ Hoover was concerned about the design of the shot because there was an area of water, 40 feet by 50 feet nearby, but the drilling contractor did not deem it a factor in blast preparations. Tr. 69. For this blast, Hoover chose a non-electric EIT HR-1 Scorpion-style initiating device. The initiating device had a safety jack located at the top of the narrow area of the initiator that could be removed in order to safely test or repair the device. A warning label directing users not to connect the device until ready for detonation was stamped on the initiating device directly above the firing button. Sec’y Ex.4. Based upon his prior experience with this type of initiator, Hoover decided to test fit the shock tube by inserting the initiating device into the tube before detonating.

As Hoover handled the device, a miner began to record the process. Hoover stood off to the side with the device in hand, while a group of eight miners gathered in the pit area joked with one another and took bets on how far the rocks would fly. The pit area was about 150 to 200 feet from the highwall and miners had warned Hoover that the highwall itself was unsafe, that they

¹ Hoover testified that he has years of experience with blasting and has a Federal permit issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives to possess explosives.

were too close to the highwall during blasts, and that the water in the area added an additional hazard. Tr. 39.

Just prior to the blast, the miners in the pit area moved to grab their hard hats and called out to Hoover to ask where they should stand, but Hoover did not respond. Tr. 27, 59-60. Hoover told investigators he failed to respond because he wanted to be certain that the shock tube fit the initiating device, and so there was no “sense in telling everybody to clear out of the area” until he was ready to detonate. Tr. 42. Nonetheless, miners began to move out of the pit.

Two miners made their way to the excavator located nearby and crawled under, while another moved next to a nearby pickup. Without first unplugging the safety jack, Hoover tried to “dry fit” the shock tube into the initiating device. Hoover told investigators that he had to whittle the shock tube down with a pocket knife in the past to make it fit and that he was aware that the safety jack could be removed, but he did not remove it so that he could more easily grip the device. While attempting to fit the initiating device with the shock tube, Hoover detonated the blast.

Softball-to basketball-sized rock shot outward from the face of the highwall and rolled through the pit area. The larger pieces of flyrock hit the front of the excavator where the two miners sought shelter, bounced, and rolled underneath. As a result, both of the miners were hit by the rocks and received serious injuries. The force of the blast was so intense that the miner standing next to the pickup truck’s tailgate was blown nearly 30 feet past the truck and the truck itself was blown ahead 20 feet. The miner suffered severe injuries and was airlifted to a Portland hospital, where he underwent multiple surgeries to address a collapsed lung, crushed pelvis, crushed spinal cord, and several torn ligaments. Flyrock and debris also caused extensive damage to the body of the pickup truck, and buried the county road, an estimated 100 feet behind where the miners had taken cover. Tr. 28, 36, 62.

The following day Inspector Scott Amos, a certified accident investigator for MSHA, arrived at the mine, accompanied by Inspector Benjamin Burns, an MSHA inspector since 2007, along with two other MSHA inspectors. The inspectors examined the initiating device, the pit area, and spoke to the miners. Photographs taken during the investigation and entered into evidence depict the initiating device with the safety jack intact. Sec’y Ex. 4. A warning label stamped directly on the initiating device above the firing button reads “NEVER CONNECT UNTIL READY TO DETONATE.” Sec’y Ex. 4. Inspector Amos explained that it would have taken the user only seconds to remove the safety jack to prevent accidental discharge while dry fitting. Tr. 24-25.

A photo of the pit area where the accident occurred, introduced as Secretary’s Exhibit 3, depicts an overview of the accident scene and the red pickup truck that was in the pit area and severely damaged by flyrock and other debris. Sec’y Ex. 3, 61-62. The §103(k) order to secure the accident scene was terminated on December 20, 2017 and was not contested. Citation No. 8998987 and Order No. 8998988 remain at issue in this case.

A. WEST 2019-0092

Citation No. 8998987

As a result of the investigation into the December 11, 2017 accident, MSHA Inspector Amos issued a §104(d)(1) citation for a violation of 30 C.F.R. § 56.6308. The citation describes the violation as follows:

The mine operator failed to follow manufacturer instructions on the EIT HR-1 Scorpion Style blast initiating device. The device was clearly marked “never connect until ready to detonate.” The mine operator stated that he was “dry fitting” the initiating tube into the device and “he didn’t want to bother with clearing people out” of the blast area, until he was sure the initiator would fit the NONEL type explosive initiating tube. Furthermore, the initiating device had a removeable [sic] plugin to “dry fit” the tubing, without being connected to the device. Reggie Hoover stated that he knew that the plugin should not be hooked to the device while dry fitting. Reggie Hoover stated he was aware of the manufacturer’s warning written onto the device itself. Reggie Hoover engaged in more than ordinary negligence in that he was aware of the manufacturer’s stated use of the device, and he chose not to follow written warnings. This violation stems from an unwarrantable failure to comply with a mandatory standard.

30 C.F.R. § 56.6308 requires that “[i]nitiation systems shall be used in accordance with the manufacturer’s instructions.” The Secretary alleges that the mine operator failed to follow the manufacturer’s instructions on the EIT HR-1 non-electric blast initiating device in that the manufacturer’s instructions warn the user not to connect the blasting device until ready to detonate. Hoover concedes that he was aware of the manufacturer’s warning stamped on the device itself, but argues that it was difficult to read. Hoover argues that he did not knowingly initiate the blast but instead it was a premature detonation. The violation was designated as significant and substantial and as an unwarrantable failure, with high negligence. The Secretary specially assessed a penalty of \$55,200.00.

To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). The Secretary may establish a violation by inference in certain situations, but only if the inference is “inherently reasonable” and there is “a rational connection between the evidentiary facts and the ultimate fact inferred.” *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152-53 (Nov. 1989).

During the investigation, Inspector Amos examined the initiating device and observed that the label stamped onto the device above the fire button was clearly marked with a warning for the user not to connect until ready to detonate. Amos also noticed that the removable safety jack had been left in the device but, in order to comply with the manufacturers’ direction, it

should have been unplugged and all miners cleared from the area. When asked about his use of the initiating device, Hoover replied that he was “dry fitting” the shock tube into the initiator because he had previously encountered fit issues with a similar device. He intended only to fit the two pieces together and did not intend to detonate the blast.

Inspector Burns also inspected the blast initiating device, and although he was not familiar with the specific device, he immediately found the manufacturer’s warning label above the fire button. Sec’y Ex. 4. According to Burns, the label was obvious to the user and clearly warned that the initiating device should not be connected with the shock tube until the user was ready to initiate the blast. If the safety jack had been removed while Hoover was dry fitting the device, the blast would not have occurred. Tr. 56-57. Hoover, on the other hand, stated that the device should not have gone off even though he did not engage the safety device, and therefore, it must have malfunctioned. Tr. 72.

I find that the Secretary has demonstrated that Hoover did not use the initiating device in accordance with the manufacturer’s instructions. Inspectors Amos and Burns were able to see clearly that the device was marked “NEVER CONNECT UNTIL READY TO DETONATE” just above the fire button. I credit Amos’ testimony that it would have taken seconds to comply with the warning label and remove the safety jack so that Hoover could continue to dry fit the shock tube into the initiating device. While Hoover argues that the detonation was inadvertent, he clearly disregarded the warning label printed on the device, failed to remove the safety jack, and connected the shock tube to the initiating device, which triggered the blast. His actions, therefore, violated the mandatory standard.

Significant and Substantial

The Secretary alleges that the violation occurred, that any injury could reasonably be expected to be permanently disabling, and that the violation was significant and substantial. A significant and substantial (“S&S”) violation is described in Section 104(d)(1) of the Mine Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated S&S “if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation is S&S:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard

contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984).

The second element of the *Mathies* test addresses the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037-38 (Aug. 2016). The Commission has explained that “hazard” refers to the prospective danger the cited safety standard is intended to prevent. *Id.* at 2038. For example, Newtown involved a violation of a standard requiring that equipment be locked out and tagged out while electrical work is being performed. The Commission determined that the hazard was a miner working on energized equipment. The likelihood of the hazard occurring must be evaluated with respect to “the particular facts surrounding the violation.” *Id.*; see also *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991-92 (Aug. 2014); *Mathies*, 6 FMSHRC at 4. At the third step, the judge must assess whether the hazard, if it occurred, would be reasonably likely to result in injury. *Newtown*, 38 FMSHRC at 2037. The existence of the hazard is assumed at this step. *Id.*; *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 161-62 (4th Cir. 2016). As with the likelihood of occurrence of the hazard, the likelihood of injury should be evaluated with respect to specific conditions in the mine. *Newtown*, 38 FMSHRC at 2038. Finally, the Commission has found that the S&S determination should be made assuming “continued normal mining operations.” *McCoy*, 36 FMSHRC at 1990-91.

Having found the underlying violation of a mandatory safety standard, I find that this standard, which requires users to heed the manufacturer’s warnings, is designed to promote safe use of a detonating device and prevent an unplanned detonation. Thus, the standard is designed to protect against misuse of blasting materials that could result in a premature detonation. Hoover, while ignoring the warning to not connect until ready to detonate, caused a premature blast and as a result miners were not prepared or in a safe area when the blast occurred. Given the conditions at this mine, the violation contributed to a hazard which was highly likely to occur. The premature blast caused large pieces of rock to be thrown into the area, striking miners and resulting in serious injury. Therefore, the hazard was reasonably likely to result in injury and any injury was reasonably likely to be serious, satisfying steps three and four of the *Mathies* test. I conclude that the violation is properly designated as S&S.

Negligence and unwarrantable failure

The Secretary alleges next that the violation was the result of high negligence and constituted an unwarrantable failure to comply with a mandatory standard. As the Commission has recognized, “[e]ach mandatory standard ... carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, the judge must consider “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.” *Newtown*, 38 FMSHRC at 2047; *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). Commission judges are not limited to the negligence analysis

contained in Part 100 and instead consider “the totality of the circumstances holistically.” *Brody*, 37 FMSHRC at 1702-03.

Inspector Burns and Inspector Amos explained that Reginald Hoover, the blaster-in-charge, failed to follow the warning label on the initiating device. Hoover mentioned at hearing that he could not read the label on the device, but as a person experienced in working with explosives and initiating devices similar to the one used that day, he should have known the correct way to safely operate the device. By ignoring the warning label, his actions resulted in an early detonation and caused serious injuries to three miners in the pit area. A reasonably prudent operator would have followed the explicit manufacturer’s instructions to “NEVER CONNECT UNTIL READY TO DETONATE” printed on the initiating device. In an attempt to test the device, a mine operator would have disconnected the removable safety jack from the initiation tube to prevent a connection to the firing mechanism. Hoover did neither of these things, demonstrating an aggravated lack of care constituting more than ordinary negligence.

The unwarrantable failure terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has explained that unwarrantable failure is “aggravated conduct constituting more than ordinary negligence. [It] is characterized by conduct described as ‘reckless disregard,’ ‘intentional misconduct,’ ‘indifference,’ or a ‘serious lack of reasonable care.’” *Consol. Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2007) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987)) (citations omitted). In determining whether a violation is an unwarrantable failure, the Commission has instructed its judges to consider all of the relevant facts and circumstances in the case and determine whether there are any aggravating or mitigating factors. *Id.* Aggravating factors to be considered include

the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator’s knowledge of the existence of the violation.

IO Coal Co., 31 FMSHRC 1346, 1352 (Dec. 2009); *see also Consol.*, 22 FMSHRC at 353.

There is generally a high degree of danger involved when handling explosives and initiating devices and that degree of danger was heightened here when Hoover ignored the warning label. The warning printed on the device, while stamped in small print, should have been obvious to a blaster-in-charge who had extensive experience blasting. Hoover knew or at least should have known the hazard associated with failing to use the safety jack as intended and should have known not to attempt to fit the shock tube into the initiator with the safety jack engaged until he was ready to detonate. The hazard was obvious, known to Hoover, and he did nothing to abate it. The extent of the violative condition was widespread, as the blast area comprised the entire pit area where miners were located when the explosives were detonated.

While the condition existed for a relatively short period of time, the Commission has recognized that a brief duration is not necessarily enough to remove a finding of

unwarrantability. *Knight Hawk*, 38 FMSHRC at 2371. In *Midwest Materials Inc.*, 19 FMSHRC 30, 36 (Jan. 1997), the Commission reversed a finding of no unwarrantability and took issue with the judge's reliance on the brief duration of the condition in light of the condition's high degree of danger and obviousness. Similarly, in this case the duration was short due to the nature of the condition—it took only seconds for Hoover to ignore the instructions on the initiating device and trigger the blast without warning. Finally, there is no evidence that the mine was placed on notice that greater efforts were necessary or that the mine had previously been cited for similar violations. Taken as a whole, the factors analyzed here weigh in favor of an unwarrantable failure finding.

Order No. 8998988

Inspector Amos next issued a §104(d)(1) order alleging that the mine operator failed to clear the blast area of persons not essential prior to initiating the blast. In the citation, Amos described his findings as:

The mine operator initiated a blast which injured three miners. The blast area had not been effectively cleared of persons not essential to blasting operations. Effective blasting shelters or safe locations were not utilized. Reggie Hoover, owner, stated that he was aware of safe blasting procedures. He stated that he “incidentally” initiated the blast early, while dry fitting NONEL shot tube into an initiating device. He stated he “didn’t clear the area” before hooking up to the initiating device, because he “wasn’t sure” that the initiating tube would fit the initiating device. No verbal warning was given prior to initiating the blast, giving the miners little time to prepare for the damage that unfolded shortly afterwards. Reggie Hoover engaged in aggravated conduct constituting more than ordinary negligence, in that he stated he was aware of safe blasting procedures, but knowingly failed to follow them. This violation is an unwarrantable failure to comply with a mandatory standard. Citations #8998987 and 8998989 are being issued in conjunction with this order.

The Secretary alleges a violation of 30 C.F.R. § 56.6306(e), which provides that “[i]n electric blasting prior to connecting to the power source, and in nonelectric blasting prior to *attaching an initiating device*, all persons shall leave the blast area except persons in a blasting shelter or other location that protects them from concussion (shock wave), flying material, and gases.” 30 C.F.R. § 56.6306(e) (emphasis added). The violation was designated as S&S and as an unwarrantable failure, with high negligence. The Secretary specially assessed a penalty of \$55,200.00.

In order to substantially comply with § 56.6306(e), an operator must determine the extent of the blast area. According to 30 C.F.R. § 56.2, “blast area” means “the area in which concussion (shock wave), flying material, or gases from an explosion may cause injury to persons.” In determining the blast area, the following factors must be considered: (1) geology or material to be blasted; (2) blast pattern; (3) burden, depth, diameter, and angle of the holes; (4)

blasting experience of the mine; (5) delay system, powder factor, and pounds per delay; (6) type and amount of explosive material; and (7) type and amount of stemming. 30 C.F.R. §56.2.

The Secretary argues that because the blast area was not cleared prior to Hoover attaching the initiating device, a violation is shown. Amos and Burns agreed that in non-electric blasting, the person in charge of the blast is responsible for determining the blast zone and clearing the area or directing miners to seek shelter in a location that protects them from the effects of the blast. Here, Hoover failed to give a verbal warning and clear the blast area prior to utilizing the initiating device. Hoover contends that he told the miners present to get in a safe spot, which he evaluated based on past experience and previous shots. Hoover testified that although it was not on the video, he told all of the miners in the area to get in a safe place and cleared the area. Tr. 73. Later, Hoover explained that he did not call out to and warn the miners of a forthcoming explosion, as he normally does in a blast, because he was not in the initiating stage. Tr. 77. Given Hoover's contradictory testimony, I credit the inspectors' testimony that Hoover did not give a warning or otherwise cause persons to leave the blast area.

As the blaster-in-charge, Hoover did not correctly determine the blast area. Both of the inspectors explained that in the process of investigating the accident, they determined the blast area had not been cleared because the miners were not aware of the extent of the blast area and did not move to a safe location. Hoover failed to adequately take into account all of the factors articulated in 30 C.F.R. § 56.2. Hoover acknowledged only that he relied on past experience and "w[h]ere you're at and that kind of stuff" to determine the blast area. Tr. 81. He explained that he did not factor in the water and did not consider the specific factors enumerated in the MSHA standards with respect to this particular blast.

Hoover not only failed to adequately determine the blast area, he also failed to ensure miners were cleared or adequately sheltered to protect them from flyrock, gases, and other debris prior to connecting the initiating device. To shield themselves from the blast, two miners sought shelter underneath an excavator in the pit area. However, as Inspector Amos acknowledged, an excavator has no protection in the front and is not adequate shelter. Because of the lack of protection, large rocks from the blast flew under the excavator where the miners were sheltering and caused serious injuries. In addition, the miner who moved to the side of the pickup was thrown by the blast and suffered life-threatening injuries. I find that Hoover violated the mandatory standard when he did not adequately consider all factors in determining the range of the blast, did not warn miners to clear the area, and did not instruct miners to take adequate shelter from the blast.

Hoover insists that he was not required to take steps to see that the miners were in a safe location because he was not ready to blast; he was simply preparing to blast. However, he was in the process of attaching the initiating device and the standard requires the area to be cleared prior to attaching that device.

Significant and Substantial

The Secretary alleges that the violation occurred, was permanently disabling, and was S&S. As noted in the discussion above, I have found that there is a violation of a mandatory standard. The standard requires all persons to leave the blast area, or to be protected by adequate shelter, prior to the connection of the initiating device. The standard is meant to protect against the hazard of flyrock or other loose material striking miners who are not in a safe and protected area when a blast is detonated. A miner who either remains in the blast area, or is not in adequate shelter, will suffer a serious injury. Here, the miners were in the blast area, yet were not in an adequate shelter. Therefore, an injury was likely to and did occur. As Amos explained, miners remained in the pit area about 150 to 200 feet from the highwall when the initiating device was triggered. According to Burns, some miners had moved closer to the excavator in preparation for the blast, but they were still exposed to the blast area. Three miners were seriously injured either because of almost complete exposure to the blast and debris, or because of the inadequate shelter of the excavator. Finally, the resulting injury would be reasonably serious due in large part to the size of the flyrock and other debris blasted through the pit. Therefore the violation was properly designated as S&S.

Negligence and unwarrantable failure

I find that the high negligence is an appropriate designation. A reasonably prudent operator would have taken the steps outlined in 30 C.F.R. § 56.2 to determine the potential extent of the blast area instead of assuming that the blast area would be the same as previous shots. Likewise, a reasonably prudent operator would have cleared the blast area or ensured that all persons in that area were protected from flyrock and debris in a blasting shelter or other safe location prior to using the initiating device in any way. It was Hoover's responsibility as blaster-in-charge to determine the blast area and see that the area was clear, or that miners were in a safe place, before connecting the initiating device. He failed to do any of those things.

The Secretary has demonstrated that the violation was the result of an unwarrantable failure to comply. Here, the obviousness and high degree of danger are important aggravating factors. It should have been obvious to Hoover that miners must clear the area before he began using the initiating device, even if he was uncertain the device would work. The failure to clear or otherwise protect miners in the blast area constituted a high degree of danger and serious injuries resulted from the flyrock and debris that struck the miners.

The elements of knowledge, extent, and lack of abatement are also aggravating factors in this case. Hoover knew or reasonably should have known that the blast area needed to be cleared, or that an adequate blasting shelter needed to be in place prior to attaching the shock tube to the initiating device. An experienced blaster also should have known that the miners were not in a safe location. Hoover admitted to investigators that he knew he should have cleared the area, but he did not want to clear the area until he was certain the blast would detonate. The extent of the violation was widespread and the mine operator made no effort to abate the violation.

The length of time the condition existed was relatively brief but the condition involved a high degree of danger and was obvious to Hoover. The Secretary argues that the mine was on

notice that the miners needed to be further away in order to be clear from the blast area. However, no evidence was presented that the mine had been cited for similar violations or otherwise been given notice prior to December 2017. Given the evidence as a whole, I find that the violation was a result of an unwarrantable failure to comply.

B. WEST 2019-0277

110(c) Agent Case Against Reginald Hoover

The Secretary seeks to impose personal liability pursuant to Section 110(c) of the Act against Reginald Hoover for his actions at the time of the accident on December 11, 2017. Section 110(c) provides that:

[w]henver 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, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) [providing for assessment of civil and criminal penalties against mine operators].

30 U.S.C. § 820(c). The Commission has explained that an agent is liable under Section 110(c) when the agent “knew or had reason to know of a violative condition. *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1996 (Aug. 2014). The relevant question is whether the agent knowingly acted; the Secretary need not prove that the individual knowingly violated the law. *Id.*; *Warren Steen Constr. Inc.*, 14 FMSHRC 1125, 1131 (July 1992).

The Commission has determined that “[a]n individual acts knowingly where he is ‘in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.’” *McCoy*, 36 FMSHRC at 1996 (quoting *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1148 (Oct. 1998)) (alteration in original). Liability under Section 110(c) “is generally predicated on aggravated conduct constituting more than ordinary negligence” but “does not hinge on whether an agent engaged in ‘willful’ conduct. *Matney, employed by Knox Creek Coal Co.*, 34 FMSHRC 777, 783 (Apr. 2012). For the purposes of Section 110(c), “knowing” conduct includes deliberate ignorance and reckless disregard as well as actual knowledge. *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 363 (D.C. Cir. 1997).

The Secretary asserts that Hoover is an agent of the mine because he is and was the owner and president of Hoover Excavating at the time the violations occurred. In addition, Hoover was the blaster-in-charge at the time of the blast. According to Section 3(e) of the Mine Act, agent means “any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of the miners in a coal or other mine.” 30 U.S.C. § 802(e). The Commission describes an agent as someone whose job function is crucial to the mine’s operation and involves a level of responsibility normally delegated to management personnel. See *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996). Hoover agreed at hearing that he is the owner and operator of Hoover Excavating, and I find that he is an agent as described in the Act.

The Secretary argues next that Hoover, as the mine's agent, knowingly authorized, ordered, or carried out each of the violations of the mandatory standards at issue. Amos and Burns concluded that Hoover was responsible for detonating the blast, and clearing the blast area or ensuring that miners were in a blast shelter or other protective location prior to using the initiating device. Hoover argues that he did not knowingly authorize, order, or carry out the violations. He claims he did not know that the accident would result and would not have knowingly proceeded with the actions that resulted in the violations.

There is sufficient evidence to demonstrate that Hoover, acting as an agent of the mine, knew that he was not complying with the warning label on the initiating device on the day of the accident. Hoover's actions resulted in the findings of high negligence and unwarrantable failure for Citation No. 8998987, and can be attributed to Hoover as an agent of the mine. For example, Hoover had experience working with initiating devices similar to the EIT HR-1 device and knew that the safety jack should have been removed before attempting to dry fit. Hoover was aware of the manufacturer's warning, ignored it, and continued to tinker with the device until the blast went off prematurely. Experienced blasters and those experienced with explosives should understand the serious consequences of mishandling the devices they routinely use. While Hoover testified that he did not intend to initiate the blast, he also testified that he had many years of experience in blasting and in using similar types of initiators. Hoover knew or should have known of the manufacturer's instruction and that he had the option to utilize the safety device prior to dry fitting the shock tube.

Similarly, there is sufficient evidence to support the finding that Hoover knowingly failed to comply with 30 C.F.R. § 56.6306(e) as alleged in Order No. 8998988. Prior to attaching the initiating device, Hoover did not clear the blast area or see to it that miners were protected by an adequate blast shelter or other location. As Hoover was handling the initiating device, miners remained in the pit area and one questioned Hoover about what they should be doing. On one hand Hoover argued that he told miners to leave the area, but on the other hand, he said he did not "holler" as he usually does because he was not in that stage of initiating the blast, and was not certain the device would work. Tr. 73, 77. An experienced blaster should know and use all of the factors in the regulation to determine a blast area and then, before using the initiating device, be certain that all miners are clear of the hazards associated with the blast. Based on the record as a whole, I find Hoover individually liable for both violations pursuant to Section 110(c) of the Act.

II. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). 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 explained 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); *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000). 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 purpose underlying the Act's penalty assessment scheme." *Sellersburg Stone*, 5 FMSHRC at 294. 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 Secretary has proposed a penalty of \$55,200.00 for the violation cited in Citation No. 8998987, which alleges a failure to use the initiation device in accordance with the manufacturer's instructions. The proposed penalty was assessed as a special assessment, but in determining the penalty, I have considered and applied the six penalty criteria found in Section 110(i) of the Act. The history of assessed violations has been admitted into evidence and shows five violations by this operator in the 15-month period prior to the accident, none of which involve a similar standard. Sec'y Ex. 1. I have addressed the negligence and the gravity in the discussion above and have found that the violation was S&S and the result of high negligence and an unwarrantable failure to comply with a mandatory standard. Good faith abatement has been considered.

The mine has not properly raised the ability to pay argument, as "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *John Richards Constr.*, 39 FMSHRC 959, 965 (May 2017) (citing *Sellersburg Co.*, 5 FMSHRC at 294). Hoover argues that the penalties assessed were excessive but he could not provide financial information to support his claim, as he had not completed and filed taxes for a number of years. Tr. 121. Separate from ability to pay, the record demonstrates that Hoover Excavating is a small operator. The penalty reflects the gravity and negligence, but is mitigated by good faith abatement, history of similar violations, and the size of the operator. Therefore, I assess a penalty of \$30,000.00.

The Secretary has proposed a penalty of \$55,200.00 for the violation cited in Order No. 8998988, which alleges a failure to clear the blast area or provide adequate blast shelter prior to attaching the non-electronic initiating device. The proposed penalty was a special assessment. In assessing a penalty, I have considered and applied the statutory penalty criteria. The history of assessed violations shows no similar violations for this standard in the preceding 15-month period. Sec'y Ex. 1. Negligence and gravity are addressed in the discussion above, with findings of high negligence, unwarrantable failure, and S&S. I have considered the operator's history, good faith abatement and size as mitigation of the proposed penalty, and I assess a penalty of \$30,000.00.

Reginald Hoover, as the agent named in this matter, has been assessed proposed penalties of \$5,700.00 and \$6,300.00 for his actions with respect to Citation No. 8998987 and Order No. 8998988. The same penalty criteria apply to Hoover as an agent and have been addressed above. Hoover has raised the issue of ability to pay but has provided no evidence in that regard. He does

not have a history of violations as an agent of the mine. Therefore, I assess penalties of \$5,000.00 for each violation.

Citation/ Order No.	Originally Proposed Penalty	Penalty Assessed
Docket No. WEST 2019-0092		
8998987	\$55,200.00	\$30,000.00
8998988	\$55,200.00	\$30,000.00
TOTAL	\$110,400.00	\$60,000.00

Citation/ Order No.	Originally Proposed Penalty	Penalty Assessed
Docket No. WEST 2019-0277		
8998987	\$5,700.00	\$5,000.00
8998988	\$6,300.00	\$5,000.00
TOTAL	\$12,000.00	\$10,000.00

III. ORDER

Respondent, Hoover Excavating & Trucking, Inc., is hereby **ORDERED** to pay the Secretary of Labor the sum of \$60,000.00 within 30 days of the date of this decision.

Further, Reginald S. Hoover, as an agent of the operator, is **ORDERED** to pay the Secretary of Labor the sum of \$10,000.00 within 30 days of the date of this decision.

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

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

Rebecca W. Mullins, U.S. Department of Labor, Office of the Solicitor, Division of Mine Safety and Health, 201 12th Street, Suite 401, Arlington, VA 22209

Reginald S. Hoover, Hoover Excavating & Trucking, Inc., P.O. Box 309, Coquille, OR 97423

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9900 / FAX: 202-434-9954

December 18, 2019

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

v.

HOPKINS HILL SAND & STONE, LLC,
Respondent

CIVIL PENALTY PROCEEDING:

Docket No. YORK 2019-0025
A.C. No. 37-00202-481040

Mine: Hopkins Hill Sand & Stone

SUMMARY DECISION

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of the Mine Safety and Health Administration (“MSHA”) against Hopkins Hill Sand & Stone, LLC (“Hopkins Hill”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). The Secretary seeks a civil penalty in the amount of \$5,903.00 for an alleged violation of this mandatory safety standard regarding timely accident notification.

Hopkins Hill filed a Motion for Summary Decision (“Resp’t Mot.”); a Memorandum in Support of Respondent’s Motion for Summary Decision (“Resp’t Mem.”), including Barry Manfredi’s Affidavit (“Manfredi Aff.”) and an attached exhibit (“Ex. A”); Joint Factual Stipulations of the Parties (“Jt. Stips.”); and a Supplemental Memorandum on Behalf of Respondent In Support of Motion for Summary Decision (“Resp’t Supp. Mem.”). The Secretary filed an Opposition to Respondent’s Motion for Summary Decision and Cross-Motion for Summary Decision (“Sec’y Mot.”); a Memorandum of Points and Authority in Support of His Opposition to Respondent’s Motion for Summary Decision and In Support of Secretary’s Cross-Motion for Summary Decision (“Sec’y Mem.”), and attached exhibits (“Exs. P-1 through P-8”), including a copy of the Citation, MSHA Inspector Jerry Anguiano’s notes, Patrol Officer Michael Dugan’s Incident Report, and Renzo Marietti’s Witness Statement; and Inspector Jerry Anguiano’s Affidavit (“Anguiano Aff.”). The following are issues for resolution in this case: (1) whether Hopkins Hill violated 30 C.F.R. § 50.10(a) and, if so, (2) whether Hopkins Hill was moderately negligent in violating the standard, and (3) the appropriate penalty.

Pursuant to Commission Rule 67(b), “[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions and affidavits, shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67.

It is well settled that summary decision is an extraordinary measure and the Commission has analogized it to Rule 56 of the Federal Rules of Civil Procedure, which the Supreme Court has construed to authorize summary judgment only “upon proper showings of the lack of a genuine, triable issue of material fact.” *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citations omitted). When considering a motion for summary decision, the Commission has noted that “the Supreme Court has stated that ‘we look at the record on summary judgment in the light most favorable to . . . the party opposing the motion,’ and that ‘the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.’” *Id.* at 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Moreover, Commission Judges should not grant motions for summary decision “unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances.” *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)); *but see Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding that there is no genuine issue for trial unless a rational trier of fact could find for the nonmoving party).

Based on agreement of the parties to file cross-motions for summary decision and the facts, as represented by the parties, I find that there is no genuine issue as to any material fact. For the reasons set forth below, I conclude that the Secretary is entitled to summary decision as a matter of law, **AFFIRM** the Citation, and assess a penalty of \$5,903.00 against Hopkins Hill.

I. Joint Stipulations

Stipulations of Fact:¹

1. Hopkins Hill Sand and Stone (“the mine”) is an “operator” as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the crushed stone mining plant at which the Citation at issue in this proceeding was issued.
2. The mine at issue is located at 190 New London Turnpike in West Greenwich, Rhode Island.
3. The mine at issue is subject to the jurisdiction of the Mine Act.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges, pursuant to sections 105 and 133 of the Mine Act, 30 U.S.C. §§ 815, 823.
5. The mine is an open-pit crushed stone plant.
6. On November 29, 2018, General Manager Bernard Alderson, aged 71, reported to work at the mine site, made his rounds at the plant, left the mine site to get coffee for himself and others, drove to Warrick, Rhode Island to meet with the owner, and returned to the

¹ The Joint Stipulations have been numbered for clarity in this Decision.

mine site at about 9:45 a.m. Mr. Alderson was in the office area between 9:45 a.m. and 11:00 a.m., not performing any physical duties.

7. At about 11:00 a.m., Mr. Alderson was observed to be lying on the ground face-down by an employee of the Respondent, Kurt Wilcox. Mr. Wilcox, in turn, informed Steven Sustakowsky (dispatcher) about Mr. Alderson's situation, and Mr. Sustakowsky called "911" and then summoned Renzo Marietti, an employee of the Respondent, by radio to help Mr. Anderson. Mr. Sustakowsky called the main office at around 11:12 a.m.
8. Mr. Marietti moved Mr. Alderson to level ground and began chest compressions, which were maintained until the West Greenwich Rescue EMS arrived.
9. The EMS put a heart monitor on Mr. Alderson, but it was flat-lining as Mr. Marietti observed it.
10. At 11:24 a.m., EMS Paramedic Kelly Guastini called the death of Mr. Alderson.
11. At 11:25 a.m., Police Officer Michael P. Duggan arrived at the mine and began an investigation. Officer Duggan in his report stated that when he observed Mr. Alderson, his face was blue in color.
12. At 11:25 a.m., Barry Manfredi, the environmental health and safety director, received a phone call from Steve Cardi II, Vice President and COO, notifying Mr. Manfredi of Mr. Alderson's heart attack.
13. At 12:56 p.m., Barry Manfredi called the MSHA Hot Line to report Mr. Alderson's heart attack.
14. At 1:20 p.m., the Medical Examiner took control of Mr. Alderson's body.
15. Mr. Alderson's death was a natural death and not accident-related.

II. Factual Background

On November 29, 2018, Hopkins Hill's general manager Bernard Alderson suffered a fatal heart attack while working at the mine site, an open-pit crushed stone plant in West Greenwich, Rhode Island. Jt. Stips. 1, 2, 5, 6, 10. At approximately 11:00 a.m., Kurt Wilcox found Alderson lying face-down on the ground and informed the dispatcher, Steven Sustakowsky, who called "911," the main office around 11:12 a.m., and then requested help from Hopkins Hill employee Renzo Marietti. Jt. Stip 7. Marietti arrived on the scene around 11:15 a.m. and moved Alderson onto the ground below the stairs, where he began chest compressions until West Greenwich Rescue EMS arrived. Jt. Stip. 8; Ex. P-8. According to Marietti, Alderson was already blue, cold, and unresponsive. Exs. P-7; P-8. At approximately 11:18 a.m., EMS arrived and placed a heart monitor on Alderson, which Marietti observed flat-lining. Jt. Stip. 9; Ex. P-6 at 2. At 11:24 a.m., EMS Paramedic Kelly Guastini pronounced Alderson dead. Jt. Stip. 10; Ex. P-7. At 11:25 a.m., Vice President Steve Cardi called Hopkins Hill's environmental health and safety director, Barry Manfredi. Jt. Stip. 12. Manfredi called MSHA to report Alderson's death at 12:56 p.m. Jt. Stip. 13; Ex. P-3.

On November 30, 2018, MSHA Inspector Jerry Anguiano was assigned to investigate the death. Anguiano Aff. After inspecting the scene and interviewing witnesses, Anguiano issued

the Citation at issue to Hopkins Hill for its failure to report Alderson's death to MSHA within 15 minutes of the accident. Anguiano Aff.

III. Findings of Fact and Conclusions of Law

Inspector Anguiano issued 104(a) Citation No. 9412696 on December 3, 2018, alleging a violation of section 50.10(a) that was "unlikely" to cause an injury, and was due to Hopkins Hill's "low" negligence.² The "Condition or Practice" is described as follows:

The Mine Operator failed to notify the Mine Safety & Health Administration (MSHA) that General Manager – Bernard Alderson had suffered a fatal heart attack, while working at the Hopkins Hill Sand Stone mine site. On Thursday November 29, 2018, at approximately 11:00 a.m. the Manager was discovered facing down on the stairway and landing platform that leads to the inside of the Lab building. The West Greenwich Rescue 2 EMS – Kelly Guastini, called the time of death at 11:24 a.m. The Environmental Health & Safety (EH&S) Director – Barry Manfredi was out of town when the death occurred but, he received a cell phone call from the Vice President of Operations – Steve Cardia at 11:27 a.m. At 12:56 p.m. Mr. Manfredi dialed the 1-800 Hot Line, to notify MSHA about the heart attack. MSHA initiated an investigation on Friday November 30, 2018.

Ex. P-3. Anguiano terminated the Citation later in the afternoon of December 3, after reviewing MSHA's accident reporting requirements with environmental health and safety director Manfredi, and Respondent established and posted a written plan highlighting the appropriate actions to be taken under section 50.10(a). Ex. P-3.

A. Fact of Violation

Hopkins Hill argues that it is entitled to summary decision because Alderson's fatal heart attack was the result of a non-occupational illness from natural causes rather than any work-related "accident" within the meaning of sections 50.10(a) and 50.2(h)(1) and, therefore, no immediate reporting was required. Resp't Mem. at 1-4. On the other hand, the Secretary takes the position that he is entitled to summary decision because any death occurring at a mine is a reportable accident under section 50.10(a). Sec'y Mem. at 3-4.

² 30 C.F.R. § 50.10(a) states that: "[t]he operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred involving: [a] *death* of an individual *at the mine*." (emphasis added).

In relevant part, section 103(j) of the Mine Act provides:

[i]n the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof For purposes of the preceding sentence, the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine . . . has occurred.

30 U.S.C. § 813(j). Accordingly, section 3(k) of the Mine Act defines “accident” as “a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or *death of, any person.*” 30 U.S.C. § 802(k) (emphasis added).

Section 50.10(a) of the Secretary’s regulations largely mirrors the mandate of the Mine Act, requiring that the operator report an accident at a mine once it is known or should have been known within 15 minutes. Included in the definitions of “accident” is “[a] death of an individual at a mine.” 30 C.F.R. § 50.2(h)(1). Moreover, the Commission has emphasized that questions of whether an operator should report an accident to MSHA “must be resolved in favor of notification.” *Signal Peak Energy, LLC*, 37 FMSHRC 470, 476-77 (Mar. 2015).

Notably, the question of whether the requirement of section 50.10(a) applies to fatal heart attacks at a mine site was decided in a remarkably similar case, finding a violation, which was appealed to the Commission. *See Richmond Sand & Stone*, 41 FMSHRC 12 (Jan. 2019) (ALJ). In its recent affirmation of the decision, the Commission found that:

[T]he plain language of MSHA’s reporting regulations at 30 C.F.R. Part 50 unambiguously defines any on-site death as an “accident” subject to the immediate reporting requirement in section 50.10(a). Accordingly, [Respondent’s] failure to timely notify MSHA of a fatal heart attack at the mine site violated the standard.

Richmond Sand & Stone, LLC, 41 FMSHRC 402, 407 (Aug. 2019); *see also Consol Pennsylvania Coal Co., LLC v. FMSHRC*, 941 F.3d 95 (3d Cir. 2019) (emphasizing the clarity of section 50.10 and the critical importance of reporting). As the Commission makes clear in *Richmond*, by requiring reporting of all deaths at mine sites, the Secretary is fulfilling Part 50’s purpose to “implement MSHA’s authority to investigate, and to obtain and utilize information pertaining to, accidents, injuries, and illnesses occurring or originating in mines.” *Richmond*, 41 FMSHRC at 405; *see also* 30 C.F.R. § 50.1. The reporting scheme is critical to MSHA’s investigations to ensure prospective safety at the mines. In the moment, a miner or the operator may not be able to readily ascertain the cause of death and, therefore, failure to report could expose more miners to unknown or unidentified hazards. *See Signal Peak*, 37 FMSHRC at 477 (citing *Emergency Mine Evacuation*, 71 Fed. Reg. 71430, 71431 (Dec. 8, 2006)). Immediate reporting also allows MSHA to gather data that it can analyze in aggregate regarding the causes of deaths at all mine sites to improve miner safety. *See Richmond*, 41 FMSHRC at 405-06. All of this information is crucial for the Secretary to access, but it can only be used if it is timely

gathered and preserved. Hence, the effectiveness of the reporting requirement in fulfilling the objectives of the Mine Act depends upon compliance by mine operators.

Using nearly identical language and essentially the same arguments that were unsuccessfully raised in *Richmond*, Hopkins Hill relies on *Vulcan Construction Materials* and *Hanson Aggregates Midwest* to support its contention that there was no reportable accident. Resp't Mem. at 4-7. In these cases, judges found that *nonfatal* heart attacks were not *injuries* for purposes of mandatory MSHA reporting under section 50.10(b).³ See *Vulcan Constr. Materials*, 35 FMSHRC 2868, 2874-75, 78 (Aug. 2013) (ALJ); *Hanson Aggregates Midwest*, 35 FMSHRC 2412, 2416 (Aug. 2013) (ALJ). Hopkins Hill's reliance on *Vulcan* and *Hanson* is misplaced, however, because these cases contemplate the reasonableness of *injuries* resulting in death, rather than deaths occurring at mines, for whatever reasons, whether natural or accident related. Likewise, Hopkins Hill's contention that my decision in *Nyrstar Gordonsville, LLC*, 38 FMSHRC 1819 (July 2016) (ALJ), was wrongly decided has been invalidated by the *Richmond* and *Consol* decisions. See Resp't Mem. at 7.

Finally, Hopkins Hill argues that sections 50.10 and 50.2(h)(1) do not provide a usable definition of "accident" because the sections presuppose a predicate accident, not defined by the regulations, and the inclusion of natural death is overly broad. Resp't Mem. at 3-4. Therefore, according to Hopkins Hill, the word "accident" should be construed according to its ordinary meaning.⁴ Resp't Mem. at 4. This argument is also misguided, as "Part 50 *unambiguously defines any on-site death as an 'accident'* subject to the immediate reporting requirement." *Richmond*, 41 FMSHRC at 407 (emphasis added).

It is undisputed that Alderson had been lying on the ground face-down and unresponsive around 11:00 a.m. At 11:15 a.m., Marietti moved Alderson and began chest compressions. By Marietti's account, Alderson was blue, cold, and never responsive, and the heart monitor placed by EMS was flat-lining. When EMS Paramedic Guastini pronounced Alderson dead at 11:24 a.m., Vice President Cardi proceeded to call environmental health and safety director Manfredi at 11:25 a.m. Based on these facts, I find that Hopkins Hill management knew or should have known of Alderson's death by 11:24 a.m. and, at that time, the 15-minute reporting interval began to run.

Under these circumstances, having found that Hopkins Hill knew or should have known that it had experienced a reportable accident at the mine by 11:24 a.m., it had a duty to notify MSHA by 11:39 a.m. Hopkins Hill contacted MSHA at 12:56 p.m., one hour and 17 minutes outside of the 15-minute window. Accordingly, I conclude that Hopkins Hill violated the reporting requirement of section 50.10(a).

³ 30 C.F.R. § 50.10(b) requires the operator to immediately contact MSHA within 15 minutes of "[a]n *injury* of an individual at the mine which has a *reasonable potential to cause death*." (emphasis added).

⁴ Hopkins Hill's reliance on a dictionary definition of "accident" sidesteps the Mine Act's and regulations' inclusion of "any death" in a mine within the ambit of the 15-minute reporting requirement.

B. Gravity and Negligence

Based on the clarity of the standard and regulatory definition of “accident,” and the importance of timely notice to MSHA as explained in Commission precedent, Hopkins Hill’s failure to report Alderson’s death was a significant breach of duty. The record establishes, however, that Alderson’s death did not occur as a result of an ongoing hazard affecting miners’ safety, and I find that the delay in reporting the accident to MSHA had no likelihood of putting other miners in peril.

The Secretary contends that Hopkins Hill’s negligence should be elevated to moderate because environmental health and safety director Manfredi stated that he knew he needed to call MSHA, but was unaware of the need to call within 15 minutes; therefore, managers who become aware of a death at a mine should be prepared to adhere to the reporting requirements of section 50.10(a). Sec’y Mem. at 6.

There is a contradiction between Anguiano’s Affidavit, stating that Manfredi was aware of the reporting requirement, but unaware of the 15-minute mandate, and Manfredi’s Affidavit, indicating that he believed that only work-related accidents were reportable. See Anguiano Aff. at 1-2; compare with Manfredi Aff. at 1. In fact, Manfredi claims that the report made to MSHA was merely informational rather than the result of any perceived duty. Manfredi Aff. at 1. Taking Manfredi at his word, Hopkins Hill management is responsible for knowing and adhering to the reporting regulations that govern its operations and, because Alderson’s death was reported to MSHA within an hour and a half of the mandated 15-minutes, I ascribe less than ordinary negligence to the violation, consistent with the Citation, as originally issued.

IV. Penalty

While the Secretary has proposed a civil penalty of \$5,903.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). See *Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff’d* 736 F.2d 1147 (7th Cir. 1984). Notwithstanding application of *Sellersburg* criteria, however, the Mine Act imposes a minimum penalty of \$5,903.00 for section 50.10 violations.⁵ 30 C.F.R. § 110(a)(2). The Commission has found that its judges are bound by the statutory minimums imposed by the Mine Act. *Consol Pennsylvania*

⁵ Section 110(a)(2) of the Mine Act states that an operator “who fails to provide timely notification to the Secretary as required under 103(j) of [the Mine Act] (relating to the 15-minute requirement) shall be assessed a civil penalty by the Secretary of not less than \$5,000 and not more than \$60,000.” 30 U.S.C. § 820(a)(2). Similarly, section 100.4(c) of the Secretary’s penalty regulations states that the penalty for failure to provide timely notification to MSHA “will not be less than \$5,000 and not more than \$65,000 for the following accidents: (1) the death of an individual at the mine.” 30 C.F.R. § 100.4(c). In January 2018, the minimum penalty was increased to \$5,903 and the maximum penalty was increased to \$70,834 to account for inflation. 30 C.F.R. § 100.4(c); see also *Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2018*, 83 Fed. Reg. 7, 15 (Jan. 2018).

Coal Co., LLC, 40 FMSHRC 998, 1008 (Aug. 2018), *aff'd*, 941 F.3d 95 (3d Cir. 2019) (reemphasizing that the statutory minimums imposed by 30 U.S.C. § 820(a)(4) for reviewing courts must also apply to the Commission). Therefore, in light of *Consol*, Respondent's reliance on *E.S. Stone & Structure* is misplaced. Resp't Supp. Mem.; see *E.S. Stone & Structure*, 33 FMSHRC 515 (Jan. 2011) (ALJ).

Applying the penalty criteria, and based upon a review of MSHA's online records, I find that Hopkins Hill is a small operator, with no prior violations of section 50.10(a), and an overall violation history that is not an aggravating factor in assessing an appropriate penalty. There was no evidence proffered that the civil penalty proposed by the Secretary will affect Hopkins Hill's ability to continue in business. I also find that Hopkins Hill demonstrated good faith in achieving rapid compliance after notification of the violation. The remaining criteria involve consideration of the gravity of the violation and Hopkins Hill's negligence in committing it. I have found that this was a very serious violation, and that Hopkins Hill demonstrated low negligence in committing it. Therefore, I find that a penalty of \$5,903.00, the statutory minimum, is appropriate.

ORDER

ACCORDINGLY, the Secretary's Cross-Motion for Summary Decision is **GRANTED**, Respondent's Motion for Summary Decision is **DENIED**, and it is **ORDERED** that Hopkins Hill Sand & Stone, LLC, **PAY** a civil penalty of \$5,903.00 within 30 days of the date of this Decision.⁶

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

Distribution:

James Polianites, Office of the Regional Solicitor, U.S. Department of Labor, Government Center, JFK Federal Building, Room E-375, Boston, MA 02203

Girard R. Visconti, Shechtman Halperin Savage, LLP, 1080 Main Street, Pawtucket, RI 02860

/adm

⁶ 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. Please include docket number and AC number.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 23, 2019

PETE TARTAGLIA, JR.,
Petitioner,

v.

FREEMPORT-MCMORAN BAGDAD,
INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2018-0362-DM
MSHA Case No. RM-MD-18-07

Mine: Freeport-McMoran Bagdad Inc.
Mine ID: 02-00137

DECISION AND ORDER
ORDER GRANTING MOTION TO UPHOLD FINAL DECISION APPROVING
SETTLEMENT
ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SANCTIONS

Before: Judge Simonton

This case is before me pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, (“Mine Act”), 30 U.S.C. § 815(c)(3) and the Commission’s Order dated November 7, 2019. Pete Tartaglia, Jr. (“Tartaglia” or “Complainant”) brought this case against Freeport-McMoran Bagdad Inc. (“Freeport” or “Respondent”), alleging that the company violated the Mine Act when it terminated him. This case has settled, and the Commission has now remanded the matter to me to determine whether relief from the final order is warranted and whether sanctions against any party are appropriate.

I. BACKGROUND

In late April 2018, Tartaglia filed a complaint of discrimination on his own behalf with this Commission. The case was assigned to me on June 6, 2018. A hearing was held September 19–20, 2018 in Phoenix, Arizona. On those two days, the hearing was periodically paused and resumed in order to facilitate intermittent discussions of settlement. Ultimately, the parties reached a settlement and read the terms of the agreement into the record. The parties agreed to confidentiality as to its terms.

In the months following the hearing, after Freeport produced a written version of the settlement, the court held a number of conference calls with the parties to address concerns Tartaglia had with the details and language of the written version. Several revisions were made to the written document and Tartaglia ultimately signed the agreement, as did the Respondent. Before the written agreement was entered into the record in this case, however, Tartaglia allegedly encountered other conflicts at the mine and determined that he no longer wished to and was no longer required to adhere to the terms of that agreement. Respondent ultimately did not submit the executed written version of the agreement for entrance into the record.

On January 14, 2019, this court issued an order which gave Tartaglia ten days to either provide the court with proof that he had complied with the settlement terms reached at the time of the hearing, or to notify the court and Freeport that he wished to submit a post-hearing brief and pursue a decision on the merits. Tartaglia failed to elect either option within the time provided.

On January 25, 2019, Freeport submitted a motion to enforce the settlement agreement reached at the hearing as stated on the record and to file that portion of the hearing transcript under seal. Respondent's Motion to Enforce Settlement Agreement and Motion to File Hearing Transcript Under Seal, at 2–3. Freeport contended that under Arizona state law, Freeport's offer and consideration and Tartaglia's recognition and assent to the settlement terms on the record rendered the agreement enforceable. *Id.* at 3. Freeport argued that the court should therefore approve the settlement agreement and enforce its terms as stated in the record. *Id.*

The court acknowledged receipt of Freeport's motion and allowed Tartaglia to respond as to why the settlement should not be approved and this case dismissed. On February 1, 2019, Tartaglia filed a brief response which reiterated that he would not comply with the settlement terms. Tartaglia cited alleged "fraudulent criminal activity" that occurred after the agreement was reached on the record. Complainant's Response to Order of Acknowledgement, at 2. He asserted that Freeport was taking money out of his pay in order to satisfy the terms of the settlement agreement. *Id.* at 1. These allegations were vague and were not substantiated by any evidence. More importantly, they did not relate to Tartaglia's initial Section 105(c)(3) complaint or to the specific terms of the settlement agreement.

On February 11, 2019, this court issued a Decision Approving Settlement Under Seal and Order Enforcing Settlement Agreement. In that decision and order, I found that the agreement entered into on the record during the hearing on September 20, 2018 was valid and enforceable. Tartaglia had put forth no evidence that Freeport misrepresented or failed to comply with its responsibilities under the settlement agreement. Instead, Tartaglia had consistently refused to comply with the terms of the agreement, that he had agreed to at the hearing. Having received no valid legal justification to set aside the settlement agreement and no request from Tartaglia stating he wished to pursue a decision on the merits, I granted Freeport's motion to enforce the settlement agreement.

The February 11, 2019 decision and order concluded my jurisdiction over this case. 29 C.F.R. § 2700.69(b). Tartaglia then had 30 days to file a petition for discretionary review of the decision with the Commission. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). He did not file a petition within that time frame.

On March 14, 2019, one day after the 30-day window for filing a petition for discretionary review had passed, the Commission received a letter from Tartaglia ("March Letter"). At that time, the Commission was still within the 40-day window in which it could direct review of my initial decision in this matter. 30 U.S.C. § 823(d)(1). However, the Commission did not direct review of the decision and it became final on March 25, 2019.

Tartaglia's March Letter remained unaddressed by the Commission for several months. Furthermore, according to Freeport, Tartaglia never served the Respondent with a copy of the letter. This court's review confirms that Tartaglia never provided the Commission with confirmation that he served the Respondent with the letter. Both Freeport and this court remained unaware that the letter existed until September 9, 2019, when Tartaglia referenced the document during a conference call between the parties and the court concerning a separate case brought by Tartaglia against Freeport. After the call, the court located the letter, sent a copy to Freeport, and inquired with the Commission as to the status of the document.

On October 9, 2019, Freeport filed a Motion for Clarification with the Commission, seeking confirmation that the court's February 11, 2019 decision and order was considered final. Tartaglia's response was received by the Commission on October 16, 2019. On October 22, 2019, before the Commission had taken action on the Motion for Clarification, Freeport filed an Amended Motion for Sanctions against Tartaglia, claiming that Tartaglia's response to the motion contained "false, threatening, and slanderous accusations" in violation of Commission Procedural Rule 80. Respondent's Amended Motion for Sanctions, at 2–3.

On November 7, 2019, the Commission issued an order confirming that my decision and order was final, but remanding the case to me nonetheless. The Commission explained that, in the March Letter, Tartaglia was "essentially requesting review of [my] decision approving the settlement in the discrimination proceeding." *Tartaglia v. Freeport-McMoRan Bagdad Inc.*, 41 FMSHRC ___, slip op., at 1, No. 2019-362-DM (Nov. 7, 2019). The case was remanded for me to determine whether relief from the final order is warranted, and whether sanctions against any party are appropriate.

On November 25, 2019, Freeport filed with the court a Motion to Uphold Final Decision Approving Settlement Under Seal and Order Enforcing Settlement Agreement in Docket No. WEST 2018-362-DM and to Impose Sanctions ("Freeport's November Motion"). The motion conveys Freeport's opinion that the settlement should be upheld and enforced and reiterates its request for sanctions against Tartaglia. Freeport's November Motion, at 6–8. After Freeport submitted this motion, I issued an Acknowledgement of Receipt informing Tartaglia that he had an opportunity to respond. He submitted a response on December 16, 2019, which essentially repeats previous nonspecific allegations of fraud and requests review of the record in this case.

II. DISPOSITION

A. The March Letter

In now reviewing the March Letter and all other filings in this matter, I find that relief is not appropriate for several reasons. First, if Tartaglia's March Letter is to be treated as a petition for review, it is a defective filing. It was late and was not served upon the Respondent. Commission Procedural Rule 70(a) allows parties 30 days to file a petition for discretionary review with the Commission, which is effective upon receipt. 29 C.F.R. § 2700.70(a). Tartaglia's March Letter was received after this deadline had passed. Additionally, Rule 7(a) requires that "[a] copy of each document filed with the Commission shall be served on all parties." *Id.* § 2700.7. Rule 7(e) mandates that "[a]ll pleadings and other filed documents shall be accompanied

by a statement setting forth the date and manner of service.” The March Letter was not served to Freeport, and did not contain a statement asserting the date and manner of service. Even if Tartaglia was unaware of the requirements of Rule 7, the notice accompanying the Decision Approving Settlement Under Seal and Order Enforcing Settlement Agreement should have adequately alerted him to the need to serve filings on Respondent. The Commission has interpreted the March Letter essentially as a petition for review. The notice states plainly that “[a] Petition for Review must be served on the opposing party.”

The Commission holds the pleadings of pro se litigants to less stringent standards than pleadings submitted by attorneys. *Martin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citations omitted). However, pro se litigants are not exempt from following the agency’s procedural rules. The Commission has denied requests for relief from final Commission decisions where pro se litigants have submitted untimely requests without satisfactory explanations for why the requests were late. *See Cusic Trucking, Inc.*, 21 FMSHRC 701, 702–03 (July 1996); *see also Dykhoff v. U.S. Borax Inc.*, 21 FMSHRC 976, 977-78 (Sept. 1999). Here, Tartaglia provided no explanation for his late submission. Treating the letter as a request for relief, this deficiency coupled with his critical failure to serve the letter on Freeport warrant a finding that relief from the Decision Approving Settlement Under Seal and Enforcing Settlement Agreement is not appropriate.

Second, prior to issuing the February 11, 2019 decision, and after multiple conference calls to address Tartaglia’s issues with the written agreement, I gave Tartaglia a choice. He had an opportunity to either comply with the terms of the agreement or to request that the parties be permitted to submit post-hearing briefs and seek a decision from this court on the merits of the case. Tartaglia failed to avail himself of either option. After Freeport submitted its Motion to Enforce Settlement Agreement, I gave Tartaglia yet another opportunity to address why the settlement agreement should not be enforced. Though he submitted a timely response, he failed to address why the settlement agreement should not be enforced. As discussed above, his allegation that money was being taken from his check to pay the settlement was not relevant to his initial discrimination complaint or to whether the agreement reached orally at hearing was enforceable and valid. In his multiple opportunities to speak up before the decision was issued, Tartaglia did not once claim that the agreement reached at hearing was invalid. On the contrary, his own references to the settlement support the contention that Tartaglia understood the agreement to be both valid and enforceable.

Third, even if it had been filed on time and properly served on Respondent, I do not consider Tartaglia’s March Letter to be an adequate request for relief of the decision approving settlement. The document consists of one handwritten page dated March 11, 2019, one undated typed page, copies of Tartaglia’s prior submissions, various copies of employment reports and letters, and tax records. A close reading of the submission reveals that Tartaglia does not specifically request a review of the settlement agreement reached at hearing. The March Letter

does allege fraudulent activity,¹ but the claims do not relate to Tartaglia's initial complaint of discrimination or to any supposed invalidity of the settlement agreement. Instead, the purpose of the March Letter appears to be to notify the Commission that Tartaglia had ordered a portion of the hearing transcript containing one witness's testimony and to complain about said testimony. He notes new, unspecified retaliatory activity and brings up an overpayment issue that was discussed at hearing but that was not material to the settlement reached by the parties. Even under a generous interpretation, this filing does not request review of the court's decision approving settlement.

Fourth is Tartaglia's currently pending discrimination case against Freeport. Assigned to this court, Docket No. WEST 2019-0382-DM concerns substantially the same issues as those addressed by Tartaglia in the March Letter. As noted by the Commission in its order remanding this case to me, the March Letter and Freeport's motion for clarification "raise issues that are not directly or fully addressed in the current record." *Tartaglia*, 41 FMSHRC ___, slip op., at 2. This is an accurate assessment. These issues are, however, being addressed in Tartaglia's currently pending 2019 case against Freeport. In his one-page complaint in that case, Tartaglia alleges fraudulent activity concerning a supposed double-payment of an arbitration award and accuses Freeport of breaching the settlement agreement. The overpayment issue and any concerns regarding a possible breach of the valid settlement agreement will be heard by this court at a hearing currently scheduled for WEST 2019-0382-DM on January 15, 2019. Accordingly, for this reason and the others noted above, I find it appropriate once again to affirm the validity and enforceability of the settlement agreement the parties have entered into and dismiss this docket.

B. Freeport's Motion for Sanctions

On October 22, 2019, Freeport filed an Amended Motion for Sanctions with the Commission. In its order remanding this case, the Commission directed this court to determine if sanctions are appropriate in this matter. Freeport alleges that Tartaglia's response to Freeport's motion for clarification contained false, threatening, and slanderous accusations and threats in violation of Commission Procedural Rule 80, 29 C.F.R. § 2700.80(a). Respondent's Amended Motion for Sanctions, at 2–3. Through its motion, Freeport seeks an order of dismissal, "and/or

¹ The March Letter contains allegations that Respondent's counsel and Respondent "have there [sic] own agenda but its not according to the law, its Flagrant Fraudulent Activity at will to [sic] the level of criminal activity ." March Letter, at 2. It further alleges that Respondent's witness lied on the stand at hearing. *Id.* at 1. The decision I issued in this matter solely approved the parties' settlement agreement reached orally at the hearing held in this matter. Because I did not issue a decision on the merits of this case, no testimony or other evidence presented at hearing factored into the final disposition of this case. Accordingly, these allegations are immaterial to the issue before me—the settlement. Though I may refer disciplinary concerns to the Commission in the form of a referral pursuant to Procedural Rule 80(c), I choose not to do so in this case because I do not have actual knowledge of circumstances which warrant disciplinary proceedings. To the extent that Tartaglia wished to make a disciplinary referral to the Commission either in the March Letter or in subsequent filings, he has not done so under the procedure set forth in the rules. If he wishes to now make such a referral, he must follow the procedure outlined in Rule 80(c). The entirety of Rule 80 is attached as Appendix A.

other appropriate disciplinary action, including monetary sanctions, against Tartaglia for engaging in unprofessional conduct and failing to follow Commission Rules in failing to serve his prior pleading before the Commission on [Freeport's] counsel," and also seeks an order "barring Tartaglia from appearing before the Commission or Commission Judges." *Id.* at 4.

At this time, I find that dismissal based on Tartaglia's allegations and unprofessional conduct unnecessary.² Additionally, I will not impose monetary sanctions on Mr. Tartaglia or prohibit him from appearing before me. However, I grant Freeport's request, in part, for "other appropriate disciplinary action" by issuing Tartaglia a warning about his actions and behavior before this court. Tartaglia's response to Respondent's Motion for Clarification contained inappropriate, unsubstantiated accusations. These have no place in the filings before this court or the Commission. Tartaglia is hereby instructed to treat counsel for Freeport with an appropriate level of respect and professionalism in all future matters before this court. Personal attacks by either party toward each other will not be tolerated in future conference calls between the court and the parties, in filings, or at the hearing scheduled for Docket No. WEST 2019-0382-DM. Tartaglia is also hereby placed on notice that the Federal Mine Safety and Health Review Commission does not refer cases for criminal prosecution. Tartaglia's requests to this effect, such as his most recent demand that counsel for Freeport be placed on "the list to be Prosecuted [sic] to the fullest" are inappropriate and unwarranted. Complainant's Response to Respondent's Motion for Clarification, at 1.

I find it necessary to reiterate here that I am not making any rulings on the issue of breach of the settlement agreement in this decision. To whatever extent the parties still have yet to comply with the terms of that agreement, they should effectuate compliance now. Issues pertaining to any potential breach by either party may be addressed at the hearing scheduled in WEST 2019-0382-DM.

III. ORDER

As detailed above, Respondent's Motion for Sanctions against Complainant is **GRANTED IN PART AND DENIED IN PART**. For the aforementioned reasons, I find that relief from the final decision issued in this matter is unwarranted. Freeport's Motion to Uphold Final Decision Approving Settlement is **GRANTED**. Freeport and Tartaglia are **ORDERED** to comply with the terms of the settlement agreement entered into on the record at hearing. Accordingly, this case is **DISMISSED**.

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

² This case is being dismissed based on my finding that relief from the Decision Approving Settlement Under Seal and Order Enforcing Settlement Agreement is not warranted. *See supra* Part II.A. If Respondent wishes to pursue a disciplinary proceeding against Tartaglia, it may do so under the procedure provided by Rule 80(c). Rule 80 is attached as Appendix A.

Distribution: (U.S. First Class Mail and e-mail)

Pete Tartaglia, Jr., 8340 N. Thornydale Road, #209 Suite 110, Tucson, AZ 85741

Laura E. Beverage, Karl F. Kumli, Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

APPENDIX A

§ 2700.80 Standards of conduct; disciplinary proceedings.

(a) Standards of conduct. Individuals practicing before the Commission or before Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.

(b) Grounds. Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that such person has engaged in unethical or unprofessional conduct; has failed to comply with these rules or an order of the Commission or its Judges; has been disbarred or suspended by a court or administrative agency; or has been disciplined by a Judge under paragraph (e) of this section.

(c) Disciplinary proceedings shall be subject to the following procedure:

(1) Disciplinary referral. Except as provided in paragraph (e) of this section, a Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission shall forward to the Commission for action such information in the form of a written disciplinary referral. Whenever the Commission receives a disciplinary referral, the matter shall be assigned a docket number.

(2) Inquiry by the Commission. The Commission shall conduct an inquiry concerning a disciplinary referral and shall determine whether disciplinary proceedings are warranted. The Commission may require persons to submit affidavits setting forth their knowledge of relevant circumstances. If the Commission determines that disciplinary proceedings are not warranted, it shall issue an order terminating the referral.

(3) Transmittal and hearing. Whenever, as a result of its inquiry, the Commission, by a majority vote of the full Commission or a majority vote of a duly constituted panel of the Commission, determines that the circumstances warrant a hearing, the Commission's Chief Administrative Law Judge shall assign the matter to a Judge, other than the referring Judge, for hearing and decision. The Commission shall specify the disciplinary issues to be resolved through hearing and may designate counsel to prosecute the matter before the Judge. The Judge shall provide the opportunity for reply and hearing on the specific disciplinary matters at issue. The individual shall have the opportunity to present evidence and cross-examine witnesses. The Judge's decision shall include findings of fact and conclusions of law and either an order dismissing the proceedings or an appropriate disciplinary order, which may include reprimand, suspension, or disbarment from practice before the Commission.

(d) Appeal from Judge's decision. Any person adversely affected or aggrieved by the Judge's decision is entitled to review by the Commission. A person seeking such review shall file a notice of appeal with the Commission within 30 days after the issuance of the Judge's decision.

(e) Misconduct before a Judge. A Judge may order the removal of any person, including a representative of a party, who engages in disruptive conduct in the Judge's presence. If a representative is ordered removed, the Judge shall allow the party represented by the person a reasonable time to engage another representative. In all instances of removal of a person for disruptive conduct, the Judge shall place in the record a written statement on the matter. A party aggrieved by a Judge's order of removal may appeal by requesting interlocutory review pursuant to § 2700.76 or, alternatively, may assign the Judge's ruling as error in a petition for discretionary review.

29 C.F.R. § 2700.80.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 30, 2019

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

v.

CONSOL PENNSYLVANIA COAL CO.,
LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2019-8
A.C. No. 36-07416-474254

Mine: Enlow Fork Mine

DECISION AND ORDER

Appearances: Brian P. Krier, Esq., Office of the Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for the Secretary of Labor

Patrick Dennison, Esq., Fisher & Phillips, Pittsburgh, Pennsylvania, for
the Respondent

Before: Judge Lewis

I. STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Act” or “Mine Act”). A hearing was held in Pittsburgh, Pennsylvania wherein the parties presented testimony and documentary evidence.

At hearing the parties indicated that they had reached a partial settlement regarding 16 of the citations associated with the within docket. (*see also* Petitioner’s brief outlining partial settlement). On August 29, 2019, this Court issued a decision approving this partial settlement.

The remaining Citation Nos. 9079297 and 9077387 were litigated at hearing. The parties have submitted post hearing briefs and reply briefs which have been fully considered in reaching the within decision.

FINDINGS OF FACT AND CONCLUSION OF LAW

The findings of fact are based on the record as a whole and the undersigned’s careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness’s testimony and between the testimonies of the

witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

II. JOINT STIPULATIONS

The parties' joint stipulations are contained in Joint Exhibit 1 and read as follows:

1. The Respondent was an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C § 802(d), at the mine at which the Citation(s)/Order(s) at issue in this proceeding were issued.
2. Enlow Fork Mine is a "mine" as defined in § 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. Operations of the Respondent at the mine at which the Citations were issued are subject to the jurisdiction of the Mine Act.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
5. Enlow Fork Mine is owned by the Respondent.
6. Payment of the total proposed penalty of \$2,850.00 for the two remaining citations in this matter will not affect the Respondent's ability to continue in business.
7. The individual whose name appears in Block 22 of the Citations in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the Citations were issued.
8. The Citations contained in Docket No. Penn 2019-0008 were issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time and place stated in the Citations, as required by the Act.

9. Exhibit "A" attached to the Secretary's Petition in Docket No. PENN 2019-8 contains authentic copies of Citation Nos. 9077387 and 9079297 with all modifications or abatements, if any.

J-1.¹

III. CITATION NO. 9077387

SUMMARY OF TESTIMONY

At hearing Walter Young appeared and testified on behalf of the Secretary.² On August 8, 2018, Young had written a violation for a branch line that was not connected to a refuge chamber (T. 19). Consol Safety Inspector Matthew Roebuck was escorting Young.³ Roebuck and Young walked up the No. 2 entry through the crosscut at 44 wall, toward the No. 1 entry. (T. 98). While investigating the branch line, Young noticed another hazard at number 44 crosscut where the

¹ References to the transcript of the hearing in this matter are designated "T." followed by the page number. References to joint exhibits are designated as "J" followed by the number. References to the Secretary of Labor's exhibits are designated as "GX." References to Respondent's exhibits are designated "R." References to the Secretary's Post-Hearing Brief are designated "SB" followed by the number. References to the Secretary's Reply Brief are designated "SRB" followed by the number. References to the Respondent's Post-Hearing Brief are designated "RB" followed by the number. References to Respondent's Reply Brief are designated "RRB" followed by the number.

² He had been working for MSHA for approximately 14 years. (T. 16). At the time of hearing, he was currently working as a mine safety specialist/ventilation and had worked for a few months as a field office supervisor. (T. 17). He had nearly 36 years of experience in underground mining. (T. 17). Previously, he had worked as a mine foreman, weekly examiner, a fire boss, section foreman on both longwall and development, field and shift foreman, and field and construction foreman. (T. 17).

Young had worked at Enlow Fork for 15 years. (T. 18). He had West Virginia miner's papers, Pennsylvania miner's papers, Pennsylvania mine foreman certificate, federal electrical cards, and federal dust certification. (T. 18). He had previously conducted 44 quarterly E01 inspections at Enlow Fork over the span of approximately 11 years. (T. 18).

³ Matthew Roebuck appeared and testified on behalf of Respondent. He had worked for Consol for approximately eight years, his jobs including industrial trainee, foreman trainee, and safety inspector. (T. 91). In August 2018 he was working as a safety inspector. (T. 91). This position involved escorting MSHA and state mine inspectors approximately four to five days per week. (T. 93).

Roebuck had taken written notes regarding Young's inspection which he had transcribed on his computer approximately five to seven days after receiving the citation. (T. 95; *see also* R-A).

mine roof and part of the rib were not being adequately supported. (T. 20; GX-16). The lower half of the right outby corner was undercut—likely as a result of mobile equipment going around it—and had the rib torn away, creating an overhang or brow. (T. 21). Young cited a violation of section 75.202(a), which requires that roof, face, and ribs of areas where persons work or travel be supported or otherwise controlled. (T. 21). The brow measured 28 inches in length, 32 ½ inches in height, and 30 inches at base.⁴ (T. 22). The overhang’s weight was calculated to be about 621 pounds. (T. 22).

The average ceiling height at Enlow Fork Mine was roughly 8 feet, which means that a miner could have walked underneath the cited condition. (T. 23). If the full weight of the overhang had fallen on a miner, the resulting injury would have been fatal.⁵ (T. 24). Young observed the brow being scaled down by Roebuck. (T. 116). Once the point of the bar was stuck into the fine crack at the roof and got a foothold, he testified that it took “hardly nothing to pull it down.”⁶ (T. 25). The crack at the roofline into which the scaling bar was placed was a hairline crack and not a gaping 3 to 4 inch gap. (T. 66). If there were a large gap in the crack, the overhang would have been on the ground. (T. 66). Young testified that except for the overhang, which should have had a post or crib placed under it, the roof and ribs in the cited area were in “decent” condition. (T. 74).

Young described “a lot of” foot traffic going through the cited area. (T. 25). The easiest way to get materials to the working section was through the open crosscut. (TT.26-27, 32). Additionally, the examiner and contractors would travel through the area. (T. 27). People might also travel through the area to avoid mud in the track entry. (T. 27). Miners would travel or work in the area multiple times a shift. (T. 28). Additionally, there would be multiple examinations in the area, including a required exam every 8 hours. (T. 28). Further, the lifeline to the primary escapeway ran through the area and under the overhang.⁷ (T. 30). Roebuck testified that men on foot would have been in the cited area when they were assisting the can setter. (T. 120). A pre-shift examiner, depending upon his route of travel, would need to come up through the primary

⁴ Young had used a tape measure in taking the rib’s measurements and stood approximately six feet—2.3 feet plus his arm’s length—from the corner. (T. 55). Young was not permitted to pull down the overhang himself due to workers’ compensation considerations. (T. 86).

⁵ On cross-examination, Young agreed that there could be circumstances where a roof fall could occur without a violation of section 75.202(a). (T. 42).

⁶ Roebuck testified that the process involved six to ten minutes of pulling down the piece which was in a “semi-higher spot.” (T. 117). He stated that Young stood back 6 to 6 ½ feet from the area. (T. 117). Roebuck did not remember Mr. Young standing and taking measurements. (T. 117).

⁷ Young had used poor wording in his notes when he stated that the lifeline was rerouted to the center of the entry as a result of pulling down the corner. (T. 67). The rerouting was actually to the crosscut. (T. 67).

escapeway and cited area to examine where cans were being set, the crosscut, the roof/rib conditions. (T. 122).

It appeared that some type of mobile equipment—likely the scoop hauling materials to the face—had damaged the corner while making the turn. (T. 28). Multiple trips had knocked off multiple pieces of the corner creating the overhang. (T. 28). On the date he issued his citation, Young did not personally observe a scoop travel in the cited area or undercut the rib at issue. (T. 51). He had not interviewed any scoop operators as to whether they had undercut the cited corner. (T. 52). Similarly, Roebuck had not spoken with any scoop operators regarding the citation. (T. 111). Roebuck had observed cracks in the corner cited by Young, but stated that the roof conditions were “fairly good.” (T. 112, 114). However, based upon Young’s 36 years of experience and the facts that no other ribs were blown off or deteriorated “that bad,” and that there were scoop tracks up through the entries, he concluded that a piece of equipment had undercut the corner. (TT. 52-53).

The citation had been evaluated as “low negligence” because—although Young had suspected that the condition had “probably” lasted more than one shift—he could not prove it. (T. 32). Young has past experience with such hazards. He had seen in the past where corners could pop or start to deteriorate quickly. (T. 32). There was therefore “a reasonable chance” that the condition had only become existent since the last pre-shift was conducted. (T. 32). Young conceded that the unsafe condition could have occurred after the last pre-shift examination—which would have been conducted between 5:00 am and 8:00 am that morning. (T. 71-72). He further agreed that management’s lack of knowledge regarding an unsafe condition would lessen the degree of negligence. (T. 73). He did not encounter anyone during his inspection who knew of the cited condition. (T. 76). In finding low negligence, Young opined that the operator should have known of the violative condition. Further, in terminating the condition, the operator had no question of what brow was being referenced in the citation or when they moved the lifeline. (T. 78).

The violation was listed as affecting one person because it was deemed unlikely that, in the event of a rib fall, more than one person at a time would be injured. (T. 33). Any injury could reasonably be expected to result in lost workdays. (T. 33). Young had witnessed roof falls in the past. In one instance he observed the upper part of a rib fall off, resulting in a chunk approximately the size of a softball striking a miner’s foot and fracturing his metatarsal bones. (TT 33-34).

Given the size and the weight of the brow at issue here, the types of injury could range from a “fatality to a concussion, to broken bones, to contusions, lacerations, evulsions, concussions.” (T. 34). In assessing the likelihood of injury as being “reasonably likely” rather than “highly likely,” Young described himself as being “pretty kind” to Respondent in that a falling 641 pound piece or quarter of such could easily cause more than broken bones. (T. 77).

Young, in his notes, had written that the lifeline for the primary escapeway had been installed directly under the corner. (T. 56; GX-16). Roebuck disagreed with Young’s contention that the lifeline for the primary escapeway was located directly underneath the cited corner. (T. 98). He explained that the line was a branch line. (T. 98). Between Enlow Fork’s secondary

escapeway, which was in the No. 2 entry, and the primary escapeway, which was in No. 1 entry, Consol had a branch line on the long wall face going from the secondary to primary. (T. 98-99). Roebuck asserted that Consol had been forced to install such and that it was confusing to miners. (T. 99-101). On August 21, 2018, the branch line was yellow with red fiber nylon rope. (T. 106). It had no cones or reflectors. (T. 106). It only had the spiral, which was directly where the secondary escapeway lifeline met the branch line. (T. 106). Going to the left of a can, it was connected to the primary escapeway lifeline. (T. 106). If an issue arose necessitating the use of an escapeway, Roebuck would travel outby, taking the easiest route, the No. 2 entry. (T. 106).

However Young explained that it was not a “branch line” because under the law “branch lines” only go to de-refuge chambers and SCSR caches. (T. 56). However, Consol trains its people to follow the branch to the lifeline in the primary escapeway. In the event of an emergency, Consol had also trained people to use the No. 2 entry to get to the track. (T. 57). However, if there were smoke coming up the track, the No. 2 entry would not be used. (T. 57). Young stated that the lifeline for the primary escapeway, which was located in the No. 1 entry, was not located directly underneath the corner, stating thusly: “That is true. The branch line that connects the two escapeway lifelines would run underneath it, yes sir.” (T. 57).

Roebuck testified that cans were located in the No. 1 entry as a permanent floor to roof support to support the entry for bleeder travel and bleeder examination.⁸ (T. 107). The can closest to the area cited by Young was two to three feet away. (T. 107). One could not get equipment into the crosscut with the can there. (T. 108). Roebuck, however, could not say when the can was built there. (T. 108). Roebuck did not recall seeing anyone working in the No. 1 entry while he accompanied Young. (T. 110). The only supplies that could be hauled into the No. 1 entry would be cans for permanent roof support, wall sealant, wall replacement, and building supplies. (T. 110).

Young had seen evidence of scoop tracks in the No. 1 entry, which was the primary escapeway. (T. 79). Scoops could not tram past the No. 2 entry which was the secondary escapeway. (T. 70). There were no objections voiced regarding Young’s measurements of the overhang at the scene. (T. 82, 131).

Roebuck disagreed with the S&S designation, stating that in the event of an emergency a miner would “more than likely” use the No. 2 entry and would not be expected to be traveling by the cited corner. (T. 115).

A. CONTENTION OF THE PARTIES

The Petitioner contends that the Respondent had failed to maintain the roof and rib at a right outby corner, allowing a hazardous overbrow to form in violation of § 75.202(a). Given the

⁸ Young could not recall if there were cans in the entry, but testified that if there were cans then a scoop could not have traveled in the entry of the 44 crosscut, unless scoops had traveled in the area before cans were set. (T. 64).

size and location of the overhang, including its proximity to foot and vehicle traffic, the violation was S&S in nature.⁹

The Respondent contends that the cited area was not traveled regularly and that examiners traveled in the middle of the entry and not near the cited corner. Respondent further contends that the cited corner was not loose and not reasonably likely to fall and was, in fact, difficult to pull down. Any violation of § 75.202(a) could not survive a *Mathies/Newtown* S&S analysis.

B. BURDEN OF PROOF AND STANDARD OF PROOF

The burden of persuasion is upon the Secretary to prove the gravamen of a violation by the preponderance of the evidence. *Jim Walter Resources, Inc.*, 28 FMSHRC 983, 992 (Dec. 2006). *RAG Cumberland Resources, Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000). *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 872, 878 (Aug. 2008).

Commission precedents have held that “[t]he burden of showing something by a ‘preponderance of the evidence’ the most common standard in the civil law, simply requires the trier of fact ‘to believe that the existence of a fact is more probably than its nonexistence.’” *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), quoting *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

The United States Supreme Court has held that “[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty.” *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*. 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: “[T]here is a distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to

⁹ The Secretary further argued that the second prong of the S&S analysis should be less burdensome and that its position should be entitled to deference. (SB at 16). Because this Court finds that the Secretary met its burden under the *Newtown* analysis, the question of whether the Secretary’s test for S&S is entitled to deference is left for a future case.

find for the party in whose favor it preponderates.” *Lilienthal’s Tobacco v. United States*, 97 U.S. 237, 266 (1877).¹⁰

While the Secretary must prove the elements of a citation by a preponderance of the evidence, this Court’s factual determinations must be supported by substantial evidence.¹¹

As to this and other controverted matters discussed *intra*, this Court has credited the opinions of Young, an experienced MSHA inspector.¹² (*see also Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-1279 (Dec. 1998) and *Buck Creek Coal, Inc. v. MSHA*, 52 F. 3d 133, 135-136 (7th Cir.) re crediting opinions of experienced MSHA inspectors).

This Court observes that the applicable “degree of certainty” is particularly pertinent to the present controversy. For example, in evaluating the testimony of the MSHA inspectors, this Court was guided by a civil “more probable than not” standard. If the within matters were criminal in nature requiring that the government establish proof of violation(s) beyond a reasonable doubt, the within outcome may have been different.

¹⁰ “What is the most acceptable meaning of the phrase, proof by a preponderance, or greater weight, of the evidence? Certainly the phrase does not mean simple volume of evidence or number of witnesses. *One definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence.* This is a simple commonsense explanation which will be understood by jurors and could hardly be misleading in the ordinary case.” 2 McCormick On Evid. § 339 (7th Ed.). emphasis mine. Indeed the notion of justice being an assessment by weighing has ancient roots, extending at least as far back as the *Iliad’s* Book XXII: “Then, at last, as they were nearing the fountains for the fourth time, the father of all balanced his golden scales and placed a doom in each of them, one for Achilles and the other for Hektor.” HOMER. THE ILIAD, BOOK XXII, trans. Samuel Butler, 1898.

¹¹ When reviewing the finding of fact by a lower court, the Commission will decline to disturb the determination if is supported by substantial evidence. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1687 (Dec. 2010), *U.S. Steel Mining Co.*, 8 FMSHRC 314, 319 (Mar. 1986). This test of factual sufficiency has been a part of Commission jurisprudence since its inception, required by the plain text of the Mine Act itself. 30 U.S.C. § 823(d)(s)(A)(ii)(I). Substantial evidence has been described by the Commission as “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)).

¹² With respect to Citation No. 9079297, *infra*, this Court similarly credits the opinions of Inspector Yates for the same legal reasons.

C. ANALYSIS

1. The Secretary has proved by a preponderance of the evidence that there was a violation of 30 C.F.R. § 75.202(a).

At hearing, MSHA Inspector Young credibly described his discovery of an overhanging brow at the right outby corner of the No. 1 entry, the overhang measuring 28 inches in length, 32 ½ inches in height, with a 30-inch base and weighing approximately 620 pounds. (T. 20-22; GX-16).

Young observed the lower corner being pulled down with a slate bar and noted that it had taken “hardly nothing to pull it down.” (T. 25).

Section 75.202(a) provides, in pertinent part:

The roof, face, and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face, and ribs...

The cited condition patently appears to be in violation of this mandatory safety standard. Neither at hearing nor in its briefs has Respondent offered persuasive evidence or argument to contest the fact of violation.

The Secretary has carried its burden of proving that section 75.202(a) was, in fact, violated.

2. The Respondent’s violation of section 75.202(a) was S&S in nature.

For nearly a generation the Commission’s analytical framework for evaluating purported S&S violations rested upon the four step process set forth in *Mathies Coal Co.*, 6 FMSHC 1, 3-4 (Jan. 1984).

Mathies required that the Secretary prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard; (3) a reasonable likelihood that the hazard contributed to will result in injury; (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, (Jan. 1984).

In *MSHA v. Newtown Energy, Inc.*, 38 FMSHRC 2033, 2036-2040 (Aug. 2016), the Commission modified *Mathies* by shifting the “reasonable likelihood” inquiry to the second step. Under *Newtown*, the S&S analysis inquires whether:

- (1) there has been a violation of a mandatory safety standard;
- (2) 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) based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury; and
- (4) any resultant injury would be reasonably likely to be reasonably serious.

MSHA v. ICG Illinois, LLC, 38 FMSHRC 2473, 2483 (Oct. 2016) (Althen Dissenting).

The Commission, in *Newtown*, held that the proper focus of the second step in *Mathies* was the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Newtown*, 38 FMSHRC at 2037, FN 8. The majority further emphasized that it was essential for the judge to adequately define the particular hazard to which the violation allegedly contributed. *Id.* at 2038. The starting point for determining the hazard should be the actual cited section. *Id.*

For the following reasons, this Court finds that the Secretary has established that all four prongs of *Mathies/Newtown* have been met.

a. Violation of a Mandatory Safety Standard

The discrete safety hazard presented by the within violation was the danger of falling materials upon individuals passing near to or under the overhanging brow. The Secretary has proved the existence of particular facts surrounding the violation of section 75.202(a) to establish that the occurrence of falling materials would be reasonably likely to result in an injury.

b. Reasonable Likelihood of the Occurrence of the Hazard

i. Exposure to the Unsafe Condition

At hearing Inspector Young credibly described the cited area as one involving “a lot of” foot traffic. (T. 25). Persons in this area could have easily walked directly underneath or nearby the unsupported brow. (T. 23). Miners, contractors, and examiners (pre-shift, on-shift, and weekly) could have been exposed to the hazard. (T. 27-28).

Miners driving scoops near the rib corner had apparently contributed to the overhang and were in its vicinity. This exposure of so many individuals who might walk or operate machinery near or under the overhang increased the likelihood of this occurrence of the hazard. (T. 18; *see also* Young testimony re scoop tracks. TT. 52-53).

This Court has carefully considered the arguments advanced by Respondent that the cited area was less heavily traveled than contended by the Secretary and that access to the cited area would be difficult.¹³ (*see inter alia* R-B at 10-11). This Court, however, is persuaded that various individuals, including equipment operators, did travel in vicinity of the area and could have been exposed to the hazard. This Court takes further note of the Commission decisions cited by the Secretary upholding an S&S designation where only a weekly examiner was exposed to the unsafe condition. (*see* SB at p. 24).

¹³ Regardless of disputes in lifelines, the area was travelled.

ii. Size and Weight of Overhang

This Court found the size and weight of the overhang to constitute other particular facts surrounding the violation which contributed to the reasonable likelihood of the occurrence of falling materials. (*see also* T. 22-23).

At hearing and in its briefs, the Respondent offered little evidence or argument contesting the size and weight of the overhang.

iii. Existence of Cracking in the Overhang

At hearing Inspector Young credibly described a crack at the roof line of the overhang and the certain collapse of the overhang if there were a large gap. (T. 66).

Given the size and weight of the overhang, its beginning roof line cracking and considering the inexorable force of gravity, this Court found said factors to increase the likelihood of falling materials.

iv. Ease of Abatement

As noted *supra* the overhang was scaled down without much difficulty, a reasonable inference flowing from such that the overhang could easily have fallen during continuing mining operations.

Considering all of these particular facts surrounding the within violation, there was a reasonable likelihood of the occurrence of falling materials so as to satisfy *Newtown* step 2 requisites.

c. Occurrence of the Hazard Would Be Reasonably Likely to Result in an Injury

There was a reasonable likelihood that if the 600-plus pound brown fell, it would result in would reasonably result in a serious injury to a miner standing or traveling beneath it. Inspector Young testified that he had observed roof and rib falls that resulted in serious injuries. (T. 33-34).

d. Any Injury Resulting from the Occurrence of Falling Materials Would Be Reasonably Likely to Be Serious in Nature

At hearing MSHA Inspector Young credibly testified regarding the serious injuries that could be caused by roof/rib falls. (TT. 33-34). Given the size and weight of the overhang in question, the occurrence of falling materials would reasonably be likely to result in a serious injury, if not a fatal one.¹⁴

¹⁴ This Court takes judicial notice that roof falls remain the leading cause of miner fatality. *See inter alia*, Sep. 8, 2017 “Fatalgram” reporting death of 62 year old section foreman killed in West Virginia mine by a 3 foot by 2 foot rock-fall between roof bolts.

3. The inspector's gravity assessments of lost work days or restricted duty and of one person being affected is supported by the record.

Considering the serious nature of any injury involving the large overhang at issue, the inspector's gravity assessment of lost work days is more than supported by the record.

Likewise, the inspector's assessment of one person affected, given the unlikelihood of more than one person affected, given the unlikelihood of more than one person at a time being injured by the falling corner, is supported by the record. (*see also* T. 32).

4. The low level of negligence designated by the inspector is supported by the totality of the circumstances.

29 C.F.R. § 100.3(d) provides that low negligence is where "the operator exercised diligence and could not have known of the violative condition or practice." As noted *supra*, Commission judges are not required to apply the definitions of Part 100 but may evaluate negligence from the starting point of a traditional negligence analysis, considering the circumstances holistically. (*see also Brody Mining, LLC*, 37 FMSHRC at 1702). After carefully considering the testimony at hearing, including that of Inspector Young who conceded that corners can pop or start to deteriorate quickly (T. 32), this Court is persuaded that the low negligence was a proper finding.

5. The Secretary's proposed penalty of \$363.00 is affirmed.

This Court affirms the penalty of \$363.00 and finds no reason to diverge from such pursuant to *Sellersburg, supra*. In arriving at this conclusion this Court has considered the six statutory factors in section 110(i) of the Act. This Court noted that Respondent stipulated that Secretary's proposed penalty would have no effect on his ability to continue in business and that the size of Consol is relatively large. The operator does have a history of similar violations. (*see* GX-18). As found within, the violation was S&S in nature but involving only low negligence. The operator did display good faith in attempting to achieve rapid compliance.

IV. CITATION NO. 9079297

SUMMARY OF TESTIMONY

On August 26, 2018, Bryan Yates was conducting an E02 spot inspection for methane.¹⁵ (T. 140). Yates was escorted by Respondent's safety inspector, Daniel Colby.¹⁶ (T. 199; R-D). During Yates's inspection, he noticed an energized cable going to a feeder, which was hanging down. (TT. 142, 144). He performed a visual observation and noted possible damage to the cable, which was located in the center of the entry. (T. 143, 146-149). Colby testified that he did not see any damage to the cable which Yates requested be taken down. (T. 203).

After Colby disconnected the power, Yates examined the cable. Yates testified that he would literally put his hands on the cable or slide cables through his hands. (T. 159). He could tell "in a heartbeat" if there was a deformity in the cable. (T. 160). Yates found two damaged locations: one area was approximately three-fourths of an inch wide with no visible damage to the inner conductors; the second area was one and three-fourths of an inch wide with visible damage to the white inner conductor.¹⁷ (T. 144, 166; GX-13). One location involved damage to the white inner conductor which carried electricity to the feeder. (T. 146).

Yates was 5 feet 8 inches in height, but the cable was 7 to 10 feet high. (T. 160, 175, 201). Colby had to help Yates get the cable off the J-hook using a four-foot sounding stick. (T. 174-175, 201). Before Yates and Colby had taken down the cable, it was still energized. (T. 174-175). Yates did not know why the sensitive ground fault had not been working. (T. 182-183). He had not talked to anyone from Consol who knew that there was damage to the cable. (T. 183-184).

¹⁵ At hearing Bryan Yates appeared and testified on behalf of the Secretary regarding the issuance of Citation No. 9079297. Yates had worked for MSHA for 4 ½ years as an underground coal mine inspector. (T. 138). Prior to joining the agency he had worked in underground mining for approximately 13 years. His jobs involved equipment operator, belt shoveler, scoop operator, fireboss, and section foreman. (T. 139). His certifications included miner's foreman's papers, Kentucky miner emergency technician, CPR instructor, and Kentucky miner instructor's certifications. (T. 139).

¹⁶ At hearing Daniel Colby appeared and testified on behalf of the Respondent. Colby had worked for 18 years for Consol, all of which were at Enlow Fork mine. (T. 195). His positions included production maintenance person, tuber event person, bolter, center bolter, rib bolter, side bolter, machine runner, longwall shield operator, safety technician, and safety inspector. (TT. 195-196). At the time of hearing, he was working as a safety inspector and had been doing so in August 2018. (T. 196). He did PPE ordering for the miners. (T. 197). He escorted federal inspectors during their mine inspections. (T. 197). These escorts took place four out of five days. (T. 197).

¹⁷ Yates measured the damaged area with a tape measure. (T. 156). Yates had placed his lock on the lockout/tagout device to protect himself from unauthorized re-energization of the cable. (T. 144). The cited cable had 480 volts. (T. 150).

The hazard to which miners would be exposed would be contacting an energized lead and getting electrocuted. (T. 149, 223). The injury would be fatal. (T. 150). Yates himself had once been badly shocked when he had attempted to pick up a damaged cable to prevent equipment from running over it. (TT. 150-151). The shock nearly killed him. (T. 145). This experience had made him “very observative” on cables. (T. 151). Yates also described a fatality in 84 Mine where a ram car pinched a cable on the rib, energizing the car and killing a miner attempting to exit. (T. 154). It was possible for electricity to track through a pinhole in the cable. (T. 191). A fatality can take place even without obvious evidence that the outer jacket is damaged. (T. 192).

The likelihood of injury was assessed as “reasonably likely.” (T. 150; GX-11). A major factor taken into consideration was “exposure.” (T. 150). If a shuttle car, ram car, or scoop were to knock the cable off its J-hook, a miner, in attempting to rehang it, might grab the cable on its damaged area and sustain a serious or fatal electrical injury. (T. 150). In the past, Yates had witnessed energized cables knocked off J-hooks, falling to the bottom, and being rehung by miners. (TT. 150-151). When considering the factor of exposure to the cited hazard, Yates took into account the number of miners working in and traveling by the area. (T. 186). Yates could physically reach the cable while standing on the bottom. (T. 188). He had measured the cable damage from side-to-side of the tear and not just the hole itself. (T. 190). The other damaged area did not have damage to the inner conductors. (T. 191).

On the date the citation was issued, Yates had observed ram cars, loaded high with coal, passing through the area, with rock coming into contact with the energized cable. (T. 152). Furthermore, miners standing on the bottom could have touched the cable. (T. 152). The area where the cable was located—2 east mains outby, 98 wall—was considered “wet.” (T. 153). Given the way the ram cars were set up and loaded high, a cable could be struck, requiring miners to get out of their cars and rehang the cable. (T. 153).

Yates opined that miners often traveled through the area, including scoopers cleaning the feeder. (T. 154). He determined that only one person would be affected because not more than one person would be grabbing the damaged area of the cable at a time. (T. 155). He agreed that a feeder would move less frequently in a main section than in other sections. (TT. 175-176).

Referring to the photograph of the damaged cable contained in GX-3, Yates denied that he had manipulated the cable in any way before the photograph was taken. (T. 156). However, he testified that he “probably” had twisted the cable to help “get the coal and stuff” out. (T. 173). Yates testified that he had dug into damaged cables in the past in order to make certain they were safe. (T. 156, 172). He would do so only in instances where it was necessary, but testified that he did not do so in the instant case. (Tr. 156). He did not believe that twisting or turning a cable could damage an inner conductor. (T. 173). He was uncertain as to how the cable was damaged. (T. 172). He also denied digging into the cable with any tool. (T. 156, 172). On cross-examination, Yates testified that he could not remember what he had used to tap out the debris from the damaged cable’s tear. (T. 165). In the past he’d use a walking stick or screwdriver. (T. 165). Colby testified that Yates used a small screwdriver to clean out the hole, prying it open and twisting the cable. (T. 204-205).

Colby had never before witnessed an inspector actually rotate a cable and torque it during his inspection. (T. 205). Colby could not detect any inner conductor damage in viewing the photograph contained in GX-13 nor did he recall seeing any such damage in other photographs. (TT. 205-206). Colby referred to his notes in which he stated that he had observed a cut “large enough and deep enough to damage the white conductor cable.” (T. 206). He did not, however, observe this tear before Yates had manipulated the cable. (T. 206). Colby did not think that Yates would intentionally damage the cable, although in his notes he described Yates’ rotating the cable to embellish the opening. (TT. 218-219).

Yates assessed the violation as being the result of “Moderate” Negligence. (T. 158). He did so because a boss is required to do a pre-shift and on-shift examination of the feeder area. (T. 157). The cable had been last examined on August 25, 2018, the day before Yates’ inspection. (T. 158). A member of mine management as well as an examiner should therefore have known of the condition. In order to do a thorough examination or inspection, one should go “hand-over-hand” on the cable. (T. 159). However, there was a lot of dust on the cable, indicating that the examiner had not performed an adequate examination in order to find the problem. (T. 159). Yates did not know when the cable was last examined nor did he attempt to locate and question the previous examiner. (T. 179). He did not know if Respondent had mined on August 25, 2018, or the last time Consol had dumped coal on (No. 13) feeder. (T. 180). Due to Respondent’s problems with damaged cables, Yates was starting to issue citations designating high negligence because the mine operator had now been put on notice of this unsafe condition. (T. 162).

General maintenance foreman Travis Stout noted that there had been an electrical repair on the feeder on August 14, 2018.¹⁸ (T. 235; R-E). The cable in the packing gland on the main contractor panel had pulled out of the gland and the mechanic put it back in the gland and had repaired it. (T. 235). Reviewing an electrical exam report on August 25, 2018, Stout noted that a ground fault associated with the No. 13 feeder had been detected. (T. 236). Consol had a 1 amp fault current limit which was tripped at 300 milliamps—which was 25 times less than the law required. (T. 237). Stout further testified that if the inner conductor was damaged and the sensitive ground fault tripped the breaker, power would not be expected to remain on the cable. (TT. 237-238). However, there was no issue with the sensitive ground fault on the No. 13 feeder at the time Yates had issued his citation. (T. 238).

Colby conceded that he had witnessed damage to the inner white conductor. (T. 220). He further conceded that a ram car conductor might exit his vehicle to rehang the cable, if it were knocked off the J-hook. (T. 221). The feeder cable is inspected every week so the damage could potentially be there for that length of time. (T. 221).

¹⁸ At hearing Travis Stout appeared and testified on behalf of the Respondent. He had worked for Consol for 25 years and for Enlow Fork Mine for 18 years. (T. 232). His current position was that of general maintenance foreman or master mechanic, a position which he had held for approximately seven years. (T. 232). His other jobs included shift maintenance foreman, electrical foreman, long wall maintenance coordinator, assistant master mechanic, and maintenance trainee. (T. 232). He had a B.S. in Electrical Engineering. (T. 232).

A. CONTENTION OF THE PARTIES

The Petitioner contends that Respondent had failed to maintain an energized 480 volt power cable which provided power to a feeder. The MSHA inspector found two damaged areas on the cable, one area measuring one and three-fourths inch in length, having exposed damaged inner conductor and copper. This constituted a clear violation of § 75.517 which requires that power cables be adequately insulated and fully protected. Given the area and traffic where the cable was located, there was a reasonable likelihood that a miner would be exposed to electrical shock satisfying the S&S requirements of *Mathies/Newtown*.

The Respondent contends that the cable in question was, in fact, adequately and safely maintained. Only after the inspector had twisted, contorted, and manipulated it and misused a screwdriver during his examination, did the cable become damaged and unsafe. Further, even if the cable's tear was existent prior to the inspector's manipulations, there was no reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard was directed pursuant to the Commission's holding in *Newtown*.

B. ANALYSIS

1. The Secretary has proved by a preponderance of the evidence that there was a violation of 30 C.F.R. § 75.517.

Section 75.517 provides, in pertinent part, that power cables shall be insulated adequately and fully protected. 30 C.F.R. § 75.517. At hearing the Secretary presented testimonial and photographic evidence that the cable supplying power to the No. 13 feeder was damaged in two places, one of which posed a clear danger of electrocution to miners.

The Respondent has argued that there was no damage to the cable in the cited area until MSHA Inspector Yates had unreasonably bent, twisted, torqued or otherwise manipulated the cable and until Yates had improperly examined the tear itself with a small screwdriver.

This Court initially observes that the Respondent presented no persuasive evidence, expert testimony or otherwise, that manipulating power cables, such as those found at Enlow Fork, would actually cause the type of tear or damage, including exposure to copper, found in the cited cable.

Indeed, as to the fact of violation, Respondent's own witness, Dan Colby, conceded that a violation existed, stating:

"I've seen a lot of citations. *I don't disagree that it's not a citation.* But...I don't believe it's S&S..." (T. 208) (emphasis added).

Considering Yates testified to near fatal electrocution in the past, this Court recognizes that Yates may be abundantly cautious—to a fault—in enforcing electrical safety standards. This Court further recognizes that Yates' vigorous manipulations may have embellished the cable's opening. (*see* Colby's comments regarding such at R-D). However, this Court does not find that

Yates' examination techniques, however unorthodox or embellishing, created the cited cable's inner damage. Yates provided ample reasons why he may need to manipulate a cable, such as removing coal and other debris or making certain the cable was safe. (T. 156, 172, 173). As opposed to this, Respondent presented little or no evidence as to what should be the proper or preferred techniques for examining and photographing damaged cables.

The undersigned has practiced law for over 40 years and is not naïve regarding the regrettable truth that witnesses sometimes lie on the stand.¹⁹ This Court further understands that Yates' personality and zealotry have raised antipathy and suspicion on the part of the Respondent. However, having considered all the evidence presented by the Secretary and Respondent, *in toto* this Court ultimately rejects Respondent's arguments, express or implied, that Yates had deliberately or recklessly damaged the cable so as to have self-created the violation and then had given perjured testimony in support of such.

There may have been some inconsistencies and self-serving exaggerations in Yates' testimony, but this Court neither finds Yates to be a fundamentally mendacious individual nor did it observe any instances where Yates engaged in fabrications.²⁰ On the whole, and as to the particular facts of the cable's tear and inner conductor exposure, this Court found the inspector's testimony to be credible and reliable.²¹

This Court essentially concurs with the arguments advanced by the Secretary at hearing and in his briefs that there was a violation of section 75.517 and finds that the Secretary has presented sufficiently probative and credible evidence establishing this underlying violation of a mandatory safety standard.

¹⁹ See Professor Anthony Salzman's observation: "witnesses have violated their judicially administered oaths to tell the whole truth since the beginning of American jurisprudence..." *Journal of Criminal Law & Criminology*, Vol. 67, No. 3, p. 273.

²⁰ To recall Big Daddy's lines from Tennessee Williams' *Cat On a Hot Tin Roof*: "There ain't nothing more powerful than the odor of mendacity...you can smell it. It smells like death." Tennessee Williams, *Cat on a Hot Tin Roof*, 166 (2004).

²¹ See *inter alia* Respondent witness Colby's observations of the cable's damaged white inner conductor and exposed copper. (T. 218).

2. The Respondent's violation of section 75.517 was S&S in nature.

This Court hereby incorporates the review of S&S requirements recited *supra*. The Secretary has established that all four prongs of *Mathies/Newtown* have been met. In determining whether a violation is S&S, the finding must be made on the facts that existed at the time of issuance of the citation and must assume continual normal mining operations absent abatement. *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574 (July 1984). Many of the “facts” surrounding the within violation, as noted *supra*, are in dispute and must ultimately be resolved by the undersigned who is sitting both as trier-of-fact and trier-of-law. The following facts, supportive of an S&S designation, are found in favor of Petitioner.

a. Violation of a Mandatory Safety Standard

The Secretary has proved the existence of particular facts surrounding the violation of section 75.517.

b. Reasonable Likelihood of the Occurrence of the Hazard

In the within matter, the particular hazard against which section 75.517 is directed is electrical shock or electrocution due to a miner coming into contact with inadequately insulated or not fully protected power cables.

The majority in *Newtown* recognized that “reasonable likelihood” was not an exact standard which could be calculated in precise percentage terms. *Newtown*, 38 FMSHRC at 2039. Further the “reasonable likelihood” standard was a “matter of degree” evaluation with particular focus on the facts and circumstances presented regarding the risk involved. *Id.*²²

The majority noted that the Commission had never construed “reasonable likelihood” in a narrow or cramped manner that would hinder the achievement of the Mine Act’s objective of a safe and healthy mining environment. *Id.*, at 2040.

Considering the particular facts surrounding the within violation of section 75.517 and the Commission’s directives in *Newtown*, this Court finds that there was “a reasonable likelihood” of the occurrence of the hazard against which the mandatory safety standard was directed.

In finding “reasonable likelihood” this Court specifically notes that it has rejected many of the Respondent’s suggested findings of fact in favor of those argued by the Secretary. As noted *supra*, this Court finds that the area where the cable was located was frequently traveled by miners on foot and on motor vehicles, including ram cars, that the cable, whether in a hanging position or knocked to the floor, was accessible to miners traveling or working in the area, that the damage to the cable existed prior to Yates’ examination and was of such character that it

²² The majority rejected (for the time being) an “at least somewhat likely” standard, also noting “more probable than not” did not mean “reasonably likely.” *Newtown*, 38 FMSHRC at 240, fn 12.

could cause electrocution. The area in question was considered “wet.” (T. 153). Miners usually do not wear electrocution-protective gloves or gear. These particular facts also increase the likelihood of electrocution. (*see also* T. 9, 132).

In reaching the within S&S determination, this Court has not considered the redundant safety features utilized by Respondent. Such safety precautions, including the mine’s sensitive ground fault, do not bear upon an S&S inquiry as to whether the hazard is “reasonably likely” to occur. (*see Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015) and Secretary’s arguments with which this Court concurs, including at SB, p. 18).

This court also notes that *Newtown* upheld that whether miners would exercise caution is not relevant under the *Mathies* test. (*Newtown*, 38 FMSHRC at 2044); *See Also Eagle Nest, Inc.*, 14 FMSHRC 1119 (July 1992).

In light of the foregoing matters not to be considered in the S&S inquiry and considering the totality of the circumstances, including those facts found in favor of the Secretary, this Court finds that *Newtown*’s second prong is met. There was a reasonable likelihood of exposure to electrocution due to damaged power cables which section 75.517 was directed against.

i. Access/Exposure to Cable: Height of Cable

The height that the cable hung from the bottom has been disputed by the parties. (*see inter alia* Colby testimony that entry height was 8 feet to 10 feet. T. 201).

Inspector Yates, who is 5 feet 8 inches tall, testified that he could reach the cable while standing upright on the bottom. (T. 152). He estimated the roof in the cited area to be 7 to 7 ½ feet in height and the cable to be 6 feet from the bottom. (T. 160). Although the Respondent presented testimony that the cable was difficult to reach because of the height of the entry (T. 203), it presented no testimonial or photographic evidence that the hanging cable could not be touched by someone standing on the bottom. In fact, Respondent’s witness, Dan Colby, acknowledged that the cable hung lower than the roof. (TT. 216-217).

This Court concludes that miners could have grasped the cited hanging cable—albeit less easily if they were shorter than the 5 feet 8 inches tall Yates or more easily if they were taller. In any case, the potential for coming into contact with the low-hanging cable by grasping it was existent.

ii. Access/Exposure to Cable: Cable on the Mine Floor

At hearing the Secretary presented evidence that coal loaded on top of ram cars could contact the hanging energized cable and knock it to the floor. (*see* T. at 152, 221, and Summary of Testimony *supra*). This created the reasonable potential for a miner who, attempting to retrieve or happening upon the energized cable, could come into contact with it.

iii. Access/Exposure: Trammable Feeder; Belt and Power Moves

At hearing the Secretary also presented testimony that the 480 volt cable powered a trammable feeder which miners moved frequently. (T. 161). While there was some dispute as to how often the feeder in the cited area was moved, there was no dispute that miners would be handling the energized cable during feeder movement, thus creating another occasion where miners might be exposed to electrocution. (*see also* S-B at p.15 for discussion of such).

iv. Access/Exposure: Frequently Traveled Area

At hearing the Secretary also presented evidence that the area was frequently traveled, this factor also increasing the likelihood of a miner coming into contact with the damaged cable. (*see also* T. 153-155).

v. Exposure to Damaged Cable Could Lead to Electrocution

At hearing there was some question as to whether the size and character of the cable damage would allow electrocution. Inspector Yates credibly testified that even a pinhole sized puncture could result in a fatality. (T. 191). The damage to the cable at issue was much larger and more extensive. (*see Harlan Cumberland Coal Co.*, 20 FMSHRC 1275 (Dec. 1998), where a violation of § 75.715 was found for a tear in the outer jacket of a cable.) In assessing Yates' testimony regarding the danger posed by a pinhole sized tear in the inner conductor (T. 190-92), this Court notes the Commission holding in *Sec'y of Labor v. Wolf Run Company*, 30 FMSHRC 1947, at 1955-1956, wherein the Commission upheld the ALJ's crediting of MSHA inspector's testimony regarding the danger posed by a telephone wire lacking a required lightning arrester. Accordingly, this Court finds that the damage in the cited cable was in fact sufficiently extensive so as to have created the hazard of electrocution to any miner coming into contact with such.

- c. Based upon the particular facts surrounding the violation of section 75.517, the occurrence of an electric shock/electrocution hazard would be reasonably likely to result in a serious injury.

In *Newtown* the Commission noted that the third step in *Mathies* was primarily concerned with gravity and that the analytical focus now shifted from the violation to the hazard whose existence had already been established in the analysis. (*Newtown.*, 38 FMSHRC at 2037).

Assuming the existence of an electric shock or electrocution hazard, the occurrence of such would reasonably be likely to result in injury.

Given this Court's above findings and conclusions of law, any resultant electric shock/electrocution injury would be reasonably likely to be reasonably serious or fatal.

3. The expected injury arising from the violation would be fatal, would be expected to affect one person, and involved moderate negligence.

At hearing Inspector Yates credibly testified that the expected injury resulting from a 480 volt shock would be death, the gravity designation of fatal being therefore reasonable and proper. (*see also* TT 149-150; GX-11).

Given that only one person at a time would likely handle the energized cable, the gravity designation of one person who would be affected was also reasonable and proper. Respondent did not contest such. (T. 155; GX-11).

In *Sec'y of Labor v. Brody Mining, LLC.*, 37 FMSHRC 1687, at 1701 (Aug. 2015) the Commission affirmed that, in making a negligence determination, Commission judges are not required to apply the definitions of Part 100, may evaluate negligence from the starting point of a traditional negligence analysis, and are not limited to an evaluation of allegedly mitigating circumstances and could consider “the totality of the circumstances holistically.”

At hearing Yates again credibly testified that the operator knew or should have known of the violative condition. (T. 153, TT. 158-159). This Court affirms the “moderate” negligence designation.²³

4. The penalty assessment of \$2,487 is affirmed.

In *Thunder Basin Coal Co.*, FMSHRC 1495, 1503, the Commission held that all of the statutory criteria in § 110(i) should be considered in the court’s *de novo* penalty assessment but not necessarily assigned equal weight. In *Musser Engineering, Inc.* 32 FMSHRC 1257, at 1289 (Oct. 2010) the Commission held that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. Here, the gravity of the violation as to injury was designated as fatal.

This Court notes the parties’ stipulation that imposition of the total proposed penalties would not affect Respondent’s ability to remain in business. (*see* J-1, paragraph 6).

Enlow fork is a large mine run by a large operator/controller with a history of violations. (*see also* GX-18). The degree of negligence, as discussed *supra*, was “moderate.”

In reaching his own independent penalty assessment, this Court has placed greater weight on the gravity of the violation and the size of the business of the operator than the other § 110(i) factors. In light of such this Court sees no reason to deviate from Secretary’s proposed penalty and affirms the \$2,487.00 penalty that had been assessed. (*see also* *Sellersburg Stone Co.*, 5

²³ This Court notes the Third Circuit’s holding in *Consol v. FMSHRC*, 666 Fed. Appx. 165, 168-169 (3rd Cir. 2016). that even a “high” negligence finding may be warranted in certain instances despite the presence of mitigating circumstances.

FMSHRC 297, 298 (Mar. 1983), Aff'd 736 F. 2d 1147 (7th Cir) regarding ALJ's duty to explain substantial deviation from Secretary's proposed penalty.)

ORDER

The Respondent, Consol Pennsylvania Coal Company, is **ORDERED** to pay the Secretary of Labor the sum of \$2,850.00 within 30 days of this order.²⁴

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

Distribution:

Brian P. Krier, Esq., The Curtis Center, 170 S. Independence Mall West, Suite 630E,
Philadelphia, PA 19106

Patrick Dennison, Esq., Fisher & Phillips LLP, 6 PPG Place, Suite 830, Pittsburgh, PA 15222

²⁴ 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

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9987 / FAX: 202-434-9949

November 6, 2019

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on
behalf of TYLER HERRERA,
Petitioner,

v.

FIELD LINING SYSTEMS, INC.,
Respondent.

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. WEST 2019-0364-DM
MSHA Case No. RM-MD-2019-11

Mine: Freeport-McMoRan Safford Inc.
Mine ID: 02-03131

ORDER GRANTING TEMPORARY ECONOMIC REINSTATEMENT¹

Before: Judge Rae

This matter is before me upon a joint motion to approve the Settlement Agreement for Temporary Economic Reinstatement (“Agreement”) filed on November 4, 2019, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). Section 105(c) prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety related protected activity, and authorizes the Secretary of Labor (“Secretary”) to apply to the Commission for miners’ temporary reinstatement, pending full resolution of the merits of their discrimination complaints. The Secretary seeks an order requiring Field Lining Systems, Inc. (“Respondent”), to temporarily economically reinstate Tyler Herrera (“Herrera”) in lieu of actual temporary reinstatement.

In a Decision and Order issued July 11, 2019, I ordered Respondent to reinstate Herrera to the position he held on April 20, 2019, with restoration of pay, allowances, and benefits retroactive to the date he was discharged. On November 4, 2019, the parties filed for approval of the Agreement, which stated that Respondent stopped employing Herrera on September 3, 2019 and that the parties agreed Respondent will economically reinstate Herrera in lieu of actual reinstatement. The essential provisions of the Agreement are as follows:

1. Respondent agrees to economically reinstate Herrera to his position as laborer effective September 3, 2019. Respondent agrees to pay Herrera at his regular pay, which is \$910.00 per week at a calculated at a rate of \$14.00 per hour for 50 hours, and an overtime rate of \$21.00 for 10 hours each week.

¹ The Secretary filed this Settlement Agreement for Temporary Economic Reinstatement under the related substantive discrimination docket WEST 2019-0489, which concerns the merits of Herrera’s discrimination claim. This Order is properly filed under docket WEST 2019-0364 as an amendment to the July 11, 2019 Decision and Order.

2. Respondent agrees to pay Herrera retroactively between September 3, 2019 and November 4, 2019, the period for which Herrera should have been employed by Respondent under the July 11, 2019 Decision and Order.
3. Respondent shall provide benefits (including but not limited to health insurance, retirement plan, and seniority accrual) associated with Herrera's employment and consistent with those provided pre-termination. Respondent may deduct all applicable tax withholdings and other withholdings on the same basis as generally required for payment of other benefits pursuant to its policies and practices applicable to other employees.
4. The first payment shall be due to Herrera on Respondent's first regular weekly payday after the date this Agreement is executed by the parties. All subsequent payments shall be due on Respondent's regular weekly paydays. All payments shall be made by regular payroll or certified check to "Tyler Herrera" and sent to the following address:

Tyler Herrera
900 East Hollywood Lot #213
Safford, AZ 85546

Proof of each payment shall be forwarded by email within five days of payment to the undersigned counsel for the Secretary at melendez.veronica@dol.gov.

5. Respondent agrees to provide a neutral job reference for Herrera if contacted by potential employers.
6. If Respondent fails to provide payment and benefits as required by this Agreement, the Commission may sanction it.
7. Herrera's temporary economic reinstatement shall terminate upon a final order on the underlying discrimination complaint or by an order of the Judge.

WHEREFORE, the motion to approve the Settlement Agreement for Temporary Economic Reinstatement is **GRANTED**, and it is **ORDERED** that Field Lining Services, Inc. **TEMPORARILY ECONOMICALLY REINSTATE** Tyler Herrera, in accordance with all terms set forth in the parties' Settlement Agreement for Temporary Economic Reinstatement of November 4, 2019.

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

Distribution:

Veronica Melendez, U.S. Department of Labor, Office of the Solicitor, 90 7th Street, Suite 3-700, San Francisco, CA 94103

Paul S. Gerding, Kutak Rock LLP, 8601 North Scottsdale Road, Suite 300, Scottsdale, AZ 85253

Kristy Lagumas, Field Lining Systems, Inc., 439 S. 3rd Ave., Avondale, AZ 85323

Tyler Herrera, 900 East Hollywood Lot #213, Safford, AZ 85546

/smp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE N. W., SUITE 520N
WASHINGTON, D.C. 20004-1710
TELEPHONE NO.: 202-434-9933
TELECOPIER NO.: 202-434-9949

December 19, 2019

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on behalf of
JASON EBERT,
Applicant

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. WEVA 2020-0133-DM
MSHA Case No. MORG-CD-2020-04

v.

THE MARSHALL COUNTY COAL
COMPANY,
Respondent

Mine: Marshall County Mine
Mine ID: 46-01437

ORDER GRANTING TEMPORARY REINSTATEMENT

Appearances: Ryan Atkinson, U.S. Department of Labor, Office of the Regional Solicitor,
Philadelphia, Pennsylvania for the Petitioner

Philip K. Kontul, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Pittsburgh,
Pennsylvania, for the Respondent

Before: Judge William B. Moran

This matter concerns the Secretary of Labor’s (“Secretary”) Application for Temporary Reinstatement of miner Jason Ebert to his position at The Marshall County Coal Company (“Respondent”), filed pursuant to the Secretary’s authority under section 105(c) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”). Application for Temporary Reinstatement, December 6, 2019, (“Application”). On December 11, 2019, Respondent, pursuant to its right under Commission Procedural Rule 45(c), 29 C.F.R. § 2700.45(c), requested a hearing on the Secretary’s Application. A hearing convened on December 17, 2019 in Wheeling, West Virginia. The only issue considered at the hearing is whether the Secretary’s application was frivolously brought.

For the reasons described herein, the Court, finding the Application not frivolously brought, **GRANTS** the Secretary’s Application for temporary reinstatement of Jason Ebert, effective as of the date of this Order.

Statement of Facts

As noted, the Respondent requested a hearing on the Secretary's Application for temporary reinstatement. The Secretary called for its first witness Jason B. Adkins, who is the Supervisor of Human Resources for the Respondent mine. Tr. 26. Not long into Mr. Adkins' testimony an evidentiary issue arose. The Court directed that a recess occur for the purpose of having counsel for the Secretary and for the Respondent to confer regarding that issue. The Court excused itself, retiring to chambers while the parties' counsels privately conferred.

Subsequently, the parties' counsels informed the Court that they had completed their conferencing and the proceeding then resumed on the record. At that point, counsel for the Respondent stated that it was withdrawing its request for a hearing. Tr. 68. The Court responded that, pursuant to Respondent's withdrawal of the hearing request, it would treat the matter as effectively operating under 29 C.F.R. § 2700.45(c), titled "Request for hearing." That provision states, in relevant part, "If 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." The parties agreed to the Court's construction of the applicability of the subsection, effectively treating the matter as if no hearing had been requested. Tr. 69.

Principles of Law

In order for a miner to receive an order granting temporary reinstatement, the Secretary must prove that the miner's complaint was not frivolously brought. 30 U.S.C. § 815(c) ("[I]f the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." In drafting section 105(c) of the Mine Act, Congress indicated that a complaint is "not frivolously brought" when it "appears to have merit." S. Rep. No. 181, 95th Cong. 1st Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of Federal Mine Safety and Health Act of 1977, at 6240625 (1978). As part of a temporary reinstatement proceeding, the Commission has recognized that "[i]t [is] not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary state of the proceedings." *Sec'y of Labor on behalf of Deck v. FTS Int'l Proppants*, 34 FMSHRC 2388, 2390 (Sept. 2012).

While the Secretary is not obligated to make out a prima facie case of discrimination during a temporary reinstatement proceeding, evaluating the Application with regard to the elements of a discrimination claim is a useful method to assess whether an application is not frivolously brought. There are two elements to an act of discrimination: first, that the employee engaged in protected activity, and second, that the adverse action complained of was motivated in part by that activity. *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

The determination of whether an application is frivolously brought is not limited to the four corners of the discrimination complaint. The statutory scheme provides to miners an administrative investigation and evaluation of an allegation of discrimination. *Hatfield v. Colquest Energy*, 13 FMSHRC 544 (Apr. 1991). In *Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317 (June 2016), the Commission expounded upon its *Hatfield* decision, stating that “the miner’s complaint establishes the contours for subsequent action.” *Hopkins*, 38 FMSHRC at 1340. It noted in *Hopkins* that the complainant’s original complaint was general in nature and contained no indication of the new matters apparently alleged for the first time in the amended complaint.” *Id.* at 1341 (citing *Hatfield*, 13 FMSHRC at 546). The Commission held that the initial complaint formed the basis of MSHA’s investigation. *Id.* The key element in these matters is that the determination of the scope of the complaint is not constrained entirely by the four corners of the miner’s complaint, but is also informed by MSHA’s ensuing investigation:

The Commission has previously held that ‘the Secretary’s decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on the Secretary’s investigation of the initiating complaint to [him], and not merely on the initiating complaint itself.’ *Sec’y o/b/o Callahan v. Hubb Corp.*, 20 FMSHRC 832, 837 (Aug. 1998); see *Sec’y o/b/o Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997); *Hatfield*, 13 FMSHRC at 546. If the content of a discrimination complaint filed with the Commission is based on that which is uncovered during the Secretary’s investigation, then it follows that the Secretary’s authority to investigate in the first instance cannot be circumscribed by the early and often uninformed statements made by a miner in his charging complaint. [*Hopkins*], at 1326 n.15.

Mulford v. Robinson Nevada Mining, 39 FMSHRC 1957, 1959-60 (Oct. 2017)(ALJ). Accordingly, the Court need not limit itself strictly to considering the miner’s initial discrimination complaint, so long as the additional evidence considered stems from the Secretary’s investigation, its application for temporary reinstatement, and evidence evinced at hearing.

The Court's Determination

The Court has reviewed the Secretary's Application. The Application includes various jurisdictional prerequisites, which were also read into the record at the commencement of the hearing.¹ The Application also represents that:

Complainant Jason Ebert, was hired by Respondent to work at its Marshall County Mine operation to work as a laborer, and is a "miner" within the meaning of Section 3(g) of the Mine Act, 30 U.S.C. § 802(g). [] Carl Ebert, Complainant's brother, is a miner employed by Respondent who has a long history of being a vocal safety advocate, and who has filed two § 105 (c) discrimination complaints. [] On or around January 30, 2019, Respondent became aware that Jason Ebert and Carl Ebert are brothers.[] On January 30, 2019, Respondent gave Jason Ebert a choice: resign, or be terminated. [] Respondent informed Complainant that, had Respondent been aware that he was Carl Ebert's brother, Respondent would not

¹ These stipulations were as follows:

Stipulation 1. At all relevant times to this proceeding Respondent, The Marshall County Coal Company, was an operator of the Marshall County Mine, Mine ID 46-01437.

Stipulation 2. The Marshall County Mine is a mine. That term is defined in Section 3(d) of the act, 30 U.S.C. Section 802(d).

Stipulation 3. Respondent Marshall County Coal is engaged in the operation of a coal mine, is therefore an operator as defined in Section 3(d) of the act, 30 U.S.C. Section 802(d).

Stipulation 4. At all times relevant to this proceeding products of Marshall County Coal entered commerce or the operations or products thereof affected commerce within the means and scope of Section 4 of the Mine Act, 30 U.S.C. Section 803. Jason Ebert was previously employed by Marshall County Mine. Jason Ebert is a miner within the meaning of Section 3(g) of the Mine Act, 30 U.S.C. Section 802(g). Marshall County Coal is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. The presiding administrative law judge has the authority to hear this case and issue a decision regarding this case.

Tr. 11-12. The stipulations are adopted by the Court as findings of fact for purposes of this temporary reinstatement proceeding.

have hired him.² [] On January 30, 2019, Complainant resigned his employment with Respondent.³ He filed a discrimination complaint with MSHA. [] After receiving Jason Ebert's complaint, MSHA supervisory investigator J. Cajetan Stepanic conducted a discrimination investigation. [] Stepanic's investigation determined that Complainant's complaint that on or about January 30, 2019, Respondent discriminatorily forced him to resign from his employment as a laborer with Respondent because he was related to an individual who had repeatedly engaged in protected activities, was not frivolously brought. [] ...

Application at 2-3.⁴

Based on the Court's review of the four corners of the contents of the Secretary's Application and upon application of the relevant case law for evaluating such temporary reinstatement applications, as set forth above, the Court has determined that the miner's complaint was not frivolously brought. Complainant's employment with Marshall Coal began on January 28, 2019 and he was terminated from employment on January 30, 2019. Application at

² Administrative Law Judge Kenneth R. Andrews recently examined prior decisions regarding alleged discrimination against a miner for protected activity committed by a relative:

“[t]here is decisional support for the proposition that a miner is protected under 105(c) from retaliation based on the protected activity of a relative.” *Sec'y of Labor on behalf of Kizziah v. C&H Company, Inc.*, 14 FMSHRC 1362, 1366 (Aug. 1992)(ALJ Melick) citing *Mackey and Clegg v. Consolidation Coal Co.*, 7 FMSHRC 977 (Jun. 1985)(ALJ Broderick); See also *Sec'y of Labor on Behalf of Flener v. Armstrong Coal Co.*, 34 FMSHRC 1658, 1665-1666 (Jul. 2012)(ALJ Simonton)(rejecting a strict reading and interpretation of 105(c) that would “require that the complaining miner be the only individual who is protected from reprisal for complaining about a health and safety concern.”)

In one particularly well-reasoned instance, Judge Zielinski faced a substantially similar situation: “[t]he central issue raised... is whether a discrimination action can be maintained on behalf of Jimmy Caudill based upon his father's protected activity.” *Sec'y of Labor on behalf of Jimmy Caudill and Jerry Michael Caudill v. Leeco, Inc. and Blue Diamond Coal Co.*, 24 FMSHRC 589, 590 (May 2002).

Kingston Mining, 37 FMSHRC 1282, 1294 (June 2015)(ALJ). Though not precedential, the Court finds these ALJ decisions to be well-reasoned and persuasive.

³ That Ebert officially “resigned” does not cast the situation out of the realm of adverse action. See, e.g., *Simpson v. FMSHRC*, 842 F.2d 453, 461 (D.C. Cir. 1988) (“[c]onstructive discharge doctrines simply extend liability to employers who indirectly effect a discharge that would have been forbidden by statute if done directly.”).

⁴ Government Ex. 1 was entered as an exhibit at the hearing. It is titled “Statement of Jason Barrett Adkins,” but it is not signed by Mr. Adkins. The Court's determination in this matter did not rely upon the statement at all.

2; Tr. 47. Based on the Application, for purposes of the frivolously brought standard of review, Respondent discriminatorily forced the Complainant to resign from his employment as a laborer with Respondent because he was related to Carl Ebert, who had repeatedly engaged in protected activities. *Id.* There is a sufficient nexus between the protected activity and adverse action to support temporary reinstatement. *Sec’y of Labor on behalf of Shaffer v. Marion Cty. Coal*, 40 FMSHRC 39, 43 (Feb. 2018).

ORDER

Having determined the Application was not frivolously brought, it is hereby **ORDERED** that Respondent, The Marshall County Coal Company, reinstate Jason Ebert to his former position at the same rate of pay and with all other benefits that he enjoyed prior to his discharge, effective immediately upon issuance of this Order. This Order shall terminate by operation of law upon the Secretary’s determination that a violation of section 105(c) did not occur, or upon resolution of a complaint of discrimination filed under section 105(c)(2) of the Mine Act, whichever occurs first.

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

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