

JANUARY AND FEBRUARY 2011

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JANUARY AND FEBRUARY 2011

Review was granted in the following cases during the months of January and February:

Secretary of Labor, MSHA v. Dynatec Mining Corporation, Docket No. WEST 2009-434-M.
(Chief Judge Lesnick, unpublished Default order of December 2, 2010)

Performance Coal Company v. Secretary of Labor, MSHA, Docket No. WEVA 2010-1909-R.
(Judge Miller, December 17, 2010)

Secretary of Labor, MSHA v. The American Coal Company, Docket No. LAKE 2007-139, et al.
(Judge Miller, January 4, 2011)

Secretary of Labor, MSHA v. Clintwood Elkhorn Mining Company, Inc., Docket No. KENT
2011-40-R, et al. (Judge Gill, January 3, 2011)

Review was denied in the following case during the months of January and February:

Secretary of Labor, MSHA v. Highland Mining Company, Docket No. KENT 2008-1083, et al.
(Judge Melick, December 16, 2010)

COMMISSION DECISIONS AND ORDERS

On December 2, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 7446687 to McCoy. McCoy filed a notice of contest for that citation. See Docket No. KENT 2010-343-R. On January 13, 2010, MSHA issued Proposed Assessment No. 000208623, which assessed penalties for 17 violations, including Citation No. 7446687. In an affidavit, the safety director for McCoy states that he inadvertently paid the penalty for Citation No. 7446687 when he paid the other penalties contained on the assessment. McCoy asserts that it learned of its mistake on March 29, 2010, in conjunction with the underlying contest matter. McCoy filed its motion to reopen within a month of discovering its mistake.

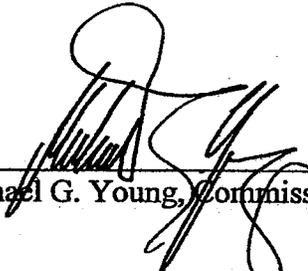
The Secretary opposes reopening the proposed penalty assessment, maintaining that the motion fails to sufficiently explain the inadvertence so as to warrant the reopening. She also faults the operator for failing to present facts that would constitute a meritorious defense if the case were to be reopened.

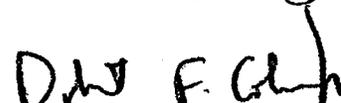
The Commission determines that McCoy has established that its payment of the penalty assessment associated with Citation No. 7446687, resulted from inadvertence or mistake. We find that its prior filing of a notice of contest demonstrates an intention to contest. *Phelps Dodge Sierrita, Inc.*, 24 FMSHRC 661, 662 (July 2002) (reopening when an operator contested the citation and then inadvertently paid the associated penalty). Moreover, McCoy acted very promptly in submitting its request to reopen the assessment, within 30 days of discovery of its mistaken payment. *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009).

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


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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January 6, 2011

KEVIN BAIRD

v.

PCS PHOSPHATE COMPANY, INC.

:
:
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:
:

Docket No. SE 2010-74-DM

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

DECISION

BY: Jordan, Chairman, and Nakamura, Commissioner

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). Pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), Administrative Law Judge Jacqueline R. Bulluck had ordered miner Kevin Baird temporarily reinstated to his position at PCS Phosphate, Inc. (“PCS”) after he had been discharged by the operator. Unpublished Orders, dated Dec. 18, 2009, and Feb. 2, 2010 (ALJ) (hereinafter, respectively, “TR Order No. 1” and “TR Order No. 2”). Following the Secretary of Labor’s subsequent withdrawal of the discrimination complaint she had earlier filed on Baird’s behalf, Baird filed his own discrimination complaint pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3). The judge then dissolved the order of reinstatement and dismissed both the reinstatement proceeding and the discrimination case that the Secretary had brought. 32 FMSHRC 325, 327 (Mar. 2010) (ALJ).

Baird filed a timely petition for discretionary review, challenging the dissolution of the reinstatement order in light of the pendency of his section 105(c)(3) case. The Commission granted the petition, and a Commission majority now reverses the judge’s decision to dissolve reinstatement, holding that a miner’s temporary reinstatement continues until the Commission issues a final order regarding the merits of the miner’s allegation of discrimination, whether it be under section 105(c)(2) or section 105(c)(3) of the Mine Act. A majority also orders Baird economically reinstated to his former position, retroactive to November 16, 2009, at his former rate of pay.

I.

Factual and Procedural Background

On March 13, 2009, Baird was discharged from his position as a shift foreman at PCS's Lee Creek Mine, a phosphate mine in Aurora, North Carolina. TR Order No. 1, at 1; TR Appl. at 2. According to Baird, his termination was due to safety complaints his wife, an employee of a PCS contractor, had filed regarding conditions at the Lee Creek Mine which had resulted in inspections by federal agencies. *Id.* Consequently, on August 15, 2009, Baird filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"), alleging that his discharge by PCS was unlawful under section 105(c) of the Mine Act, 30 U.S.C. § 815(c). TR Order No. 1, at 1.

On October 14, 2009, the Secretary filed an application with the Commission to temporarily reinstate Baird to his position with PCS. *Id.* After initially requesting a hearing on the application, PCS withdrew its request, and the parties agreed to the judge ruling on the application based on their written submissions. *Id.* In her order temporarily reinstating Gray, the judge applied the "not frivolously brought" standard for temporary reinstatement found in section 105(c)(2). *Id.* at 1-2. The judge concluded that, under that low standard, there was sufficient evidence that Baird's wife had engaged in protected activity and that Baird's discharge was motivated by that protected activity. *Id.* at 3-4. Consequently, the judge ordered Baird temporarily reinstated (*id.* at 4), and later amended her order to reflect the parties' subsequent agreement that Baird would not return to work but rather his reinstatement would be economic. TR Order No. 2, at 4.

The Secretary filed a discrimination complaint on behalf of Baird pursuant to section 105(c)(2) on December 23, 2009, in Docket No. SE 2010-304-DM. PCS filed an answer to the complaint, and according to the operator the Secretary and it engaged in extensive discovery, including multiple depositions. PCS Br. at 3. The judge set a hearing on the merits of Baird's discrimination case for February 10, 2010.

On February 4, 2010, the Secretary filed a notice to withdraw her discrimination complaint, after she had determined that section 105(c) had not been violated and that she would be unlikely to meet her burden of proving that discrimination against Baird had occurred. S. Br. at 3. At the same time, the Secretary requested that Baird's temporary reinstatement continue while he pursued a potential action on his own behalf under section 105(c)(3). 32 FMSHRC at 325. Baird initiated such an action through private counsel, who filed a discrimination complaint for Baird with the Commission on March 10, 2010, in Docket No. SE 2010-523-DM. That case is presently pending before the judge.

Meanwhile, PCS had moved to dissolve the order of temporary reinstatement, a motion which the Secretary opposed. The judge granted PCS's motion, holding that the language of section 105(c) and the legislative history of the Mine Act established that the remedy of

temporary reinstatement was coincident only with the Secretary's involvement under section 105(c)(2), and did not extend beyond that to a miner's private complaint under section 105(c)(3). 32 FMSHRC at 326-27. Consequently, the judge dissolved her amended order of temporary reinstatement effective February 4, 2010, and dismissed both the reinstatement proceeding and the discrimination case brought by the Secretary. *Id.* at 327.

Baird, through counsel, petitioned the Commission to review the judge's order dissolving the temporary reinstatement order in light of his section 105(c)(3) action. The Commission granted the petition,¹ and subsequently granted the Secretary's unopposed motion to participate as *amicus curiae* in support of Baird.

II.

Disposition

The Commission recently addressed the issue this case raises in *Phillips v. A&S Construction Co.*, 31 FMSHRC 975 (Sept. 2009). The judge below in *Phillips* had ordered dissolution of the temporary reinstatement order and dismissal of the temporary reinstatement proceeding. 30 FMSHRC 1119 (Nov. 2008) (ALJ). In *Phillips*, Commissioners were evenly divided on the question of whether the judge correctly decided that a temporary reinstatement order no longer remains in effect after the Secretary has made a determination of no discrimination. 31 FMSHRC at 979-1004. Thus, the effect of the split decision was to allow the judge's decision to stand, as if affirmed. *Id.* at 979 (citing *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992)).

In *Phillips*, Commissioners Duffy and Young voted to affirm in result the judge's dissolution of the temporary reinstatement order and dismissal of the temporary reinstatement proceeding. They did so on the ground that, under the plain meaning of section 105(c), a reinstatement order can only remain in effect while the Secretary is pursuing a section 105(c)(2) action; once she had determined that discrimination had not occurred, reinstatement was no longer appropriate. 31 FMSHRC at 980-89.

Chairman Jordan and Commissioner Cohen voted to reverse the judge's order, and would have had the temporary reinstatement order remain in effect. Chairman Jordan did so on the ground that the plain language of section 105(c) mandates that temporary reinstatement continue until the Commission issues a final order regarding the merits of the miner's allegations of discriminatory conduct, whether it be under section 105(c)(2) or section 105(c)(3). *Id.* at 990-97. Commissioner Cohen found the language of section 105(c) to be ambiguous, that deference was

¹ Baird's petition included a request that the Commission stay the effect of the judge's order dissolving temporary reinstatement (PDR at 1, 8), a request which PCS opposed. Only two of the then four Commissioners voted to grant the stay, so it was denied. *See Unpublished Order*, dated Apr. 8, 2010.

due the Secretary's reasonable construction of the statutory provision, and that the Secretary's interpretation of the provision to require that temporary reinstatement remain in effect while the miner pursues relief under section 105(c)(3) is a reasonable one. *Id.* at 998-1004.

In his petition for review, Baird argued that the instant case is distinguishable from *Phillips*, because here the Secretary had gone so far as to file a discrimination complaint on behalf of the miner, whereas in *Phillips* she had never done so. PDR at 5-7. In his brief, Baird takes the position that the Secretary's interpretation that section 105(c) requires that a temporary reinstatement order remain in effect while the miner pursues an action under section 105(c)(3) is a reasonable and thus permissible one, given the language of the statute and the legislation's history and purpose. B. Br. at 9-13.

In her amicus brief, the Secretary maintains that section 105(c) can only be read one way: a temporary reinstatement order must remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether that final order is obtained pursuant to section 105(c)(2) by the Secretary, or by a miner under section 105(c)(3). S. Br. at 9. The Secretary takes issue with the opinion of Commissioners Duffy and Young in *Phillips*, both with regard to their conclusion that the Mine Act, by its plain meaning, prohibits the continuation of temporary reinstatement beyond the Secretary's determination that no discrimination occurred (*id.* at 10-21), and their holding that the Secretary is not due deference in her interpretation of section 105(c) with respect to the question at hand because she does not participate in section 105(c)(3) cases. *Id.* at 6-8.

PCS responds that the plain meaning of the text of section 105(c) indicates that temporary reinstatement is to end once the section 105(c)(2) process involving the Secretary has run its course, and does not extend to proceedings under section 105(c)(3). PCS Br. at 6-14. PCS maintains that such a reading of the Mine Act is further supported by its legislative history and purpose. *Id.* at 14-16. PCS further argues that, because the Secretary does not administer section 105(c)(3), her interpretation that temporary reinstatement continues during 105(c)(3) proceedings is not entitled to deference. *Id.* at 16-18. PCS takes the position that such a continuation would deprive the operator of due process of law. *Id.* at 18-20.

The Secretary requested and was granted permission by the Commission to file an amicus reply brief to respond to PCS's due process arguments. She argues that the temporary reinstatement procedures of section 105(c)(2) have been upheld as non-violative of the Due Process Clause of the Fifth Amendment. S. Reply Br. at 5. According to the Secretary, any additional period of time a miner is reinstated while a section 105(c)(3) case is litigated does not deprive the operator of due process. *Id.* at 4.

Consistent with the decision the Commission issues today in *Secretary on behalf of Gray v. North Fork Coal Corp.*, Docket No. KENT 2009-1429-D, the judge's order dissolving the temporary reinstatement order is reversed. The miner shall be economically reinstated to his

former position, retroactive to November 16, 2009.² His economic reinstatement shall be at the rate of pay, including any pay increases, bonuses, and other benefits, as specified in the judge's February 2, 2010 order. *See Sec'y on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1091 (Oct. 2009).³


Mary Lu Jordan, Chairman

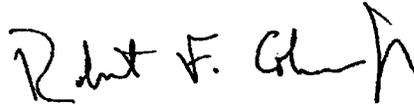

Patrick K. Nakamura, Commissioner

² In her initial order of December 18, 2009, granting reinstatement, the judge ordered Baird reinstated retroactive to November 16, 2009. TR Order No. 1, at 4. In her February 2, 2010 amended order granting temporary economic reinstatement, the judge, upon motion of the parties, economically reinstated Baird to his former position retroactive to November 16, 2009. TR Order No. 2, at 4. The judge's February 2, 2010 order economically reinstating Baird retroactive to November 16, 2009, was subsequently dissolved by her order of March 10, 2010, which we now overturn.

³ Our dissenting colleagues, in addition to basing their decision in this case on their position in *Gray*, suggest that the Commission should not "turn a blind eye" towards the Secretary's conduct of the litigation in this matter. Slip op. at 7-8. Even if we accepted their view of the Secretary's actions, which we do not, it seems to us exceedingly unfair to deprive this miner of temporary reinstatement as a means of expressing disapproval of the Secretary.

Commissioner Cohen, concurring:

Consistent with my opinion in the decision the Commission issues today in *Secretary on behalf of Gray v. North Fork Coal Corp.*, Docket No. KENT 2009-1429-D, I agree that the judge's order dissolving the temporary reinstatement order should be reversed, and that Mr. Baird shall be economically reinstated to his former position, retroactive to November 16, 2009.¹ His economic reinstatement shall be at the rate of pay, including any pay increases, bonuses, and other benefits, as specified in the judge's February 2, 2010 order.²



Robert F. Cohen, Jr., Commissioner

¹ In her initial order of December 18, 2009, granting reinstatement, the judge ordered Baird reinstated retroactive to November 16, 2009. TR Order No. 1, at 4. In her February 2, 2010 amended order granting temporary economic reinstatement, the judge, upon motion of the parties, economically reinstated Baird to his former position retroactive to November 16, 2009. TR Order No. 2, at 4. The judge's February 2, 2010 order economically reinstating Baird retroactive to November 16, 2009, was subsequently dissolved by her order of March 10, 2010, which we now overturn.

² I agree with footnote 3 in the opinion of Chairman Jordan and Commissioner Nakamura.

Commissioners Duffy and Young, dissenting:

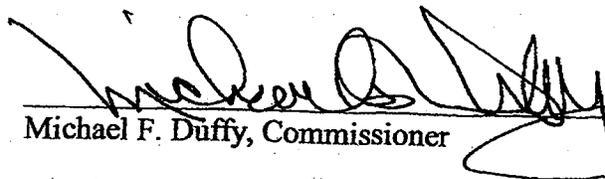
Consistent with our opinion in the decision the Commission issues today in *Secretary on behalf of Gray v. North Fork Coal Corp.*, Docket No. KENT 2009-1429-D, we disagree that the judge's order dissolving the temporary reinstatement order should be reversed, and instead would affirm the judge's order to dissolve the temporary reinstatement order.

In so doing we cannot help but notice that the Secretary has apparently succumbed to the temptation her interpretation of section 105(c) raises. It is undisputed that: (1) the Secretary applied for Baird's temporary reinstatement two months after having received his discrimination complaint; (2) two and one-half months later, the Secretary filed a discrimination complaint on Baird's behalf pursuant to section 105(c)(2); and (3) over the next month the Secretary engaged in extensive discovery, including taking multiple depositions.

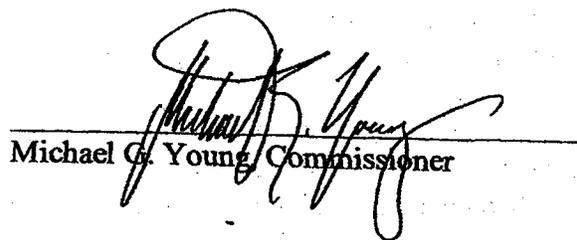
Then, less than a week before the discrimination hearing was set, the Secretary withdrew her section 105(c)(2) discrimination complaint because her near six-month involvement in the case had demonstrated to her that Baird had not been discriminated against. Consequently, the judge issued a "final order" under section 105(c)(2) dismissing the complaint. Given the language of section 105(c)(2), that ended Baird's right to temporary reinstatement, in our view at least.

Nevertheless, the Secretary urged the judge, and now urges the Commission, to keep "temporary" reinstatement in place while the miner pursues his own action under section 105(c)(3). It needs to be kept in mind that the invocation of section 105(c)(3) does not simply result in the miner's privately retained counsel taking the place of the Secretary in representing the miner at the hearing, or a brief continuance being granted for his new counsel to get up to speed. No, *an entirely new case begins, and even as we issue this decision the scheduled hearing in this case is months away.*

We do not believe the Commission should turn a blind eye toward these events, particularly at a time when the number of cases pending before our judges has increased greatly.¹



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner

¹ We note that it is the Commission's judges who deal with the Secretary and the litigants on a daily basis in both the temporary reinstatement and discrimination phases of the proceedings, yet none of the multiple judges who have been faced with these circumstances have been persuaded that extending "temporary" reinstatement is appropriate.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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January 6, 2011

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

v.

KEOKEE MINING LLC

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Docket No. VA 2011-63
A.C. No. 44-06947-230981

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

ORDER

BY THE COMMISSION:

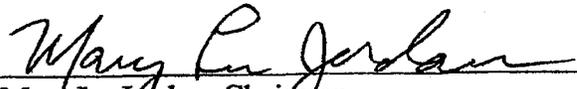
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On October 25, 2010, the Commission received a motion by Keokee Mining LLC (“Keokee”) seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On November 18, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

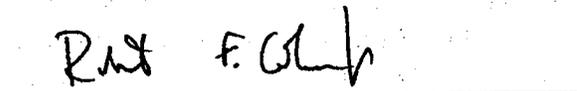
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, Keokee's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.¹


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

¹ Based on statements in Keokee's motion, we interpret its request as one to reopen the entire assessment so that it can contest all of the proposed penalties. If that is not Keokee's intention, to save the Secretary from having to prepare an overly broad penalty petition, Keokee should immediately contact counsel for the Secretary and identify which penalties it is contesting, and transmit payment for the remaining penalties if it has not already done so.

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**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 6, 2011

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

v.

A.B.C. SAND & ROCK CO., INC.

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Docket No. WEST 2011-64-M

A.C. No. 02-02357-222842

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On October 13, 2010, the Commission received from A.B.C. Sand & Rock, Inc., a letter requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On November 2, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

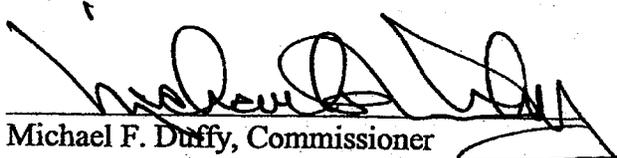
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

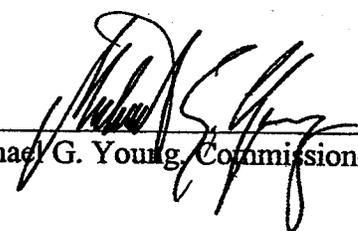
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a)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

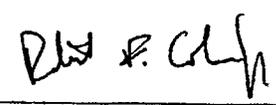
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

January 6, 2011

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

v.

DYNATEC MINING CORPORATION

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Docket No. WEST 2009-434-M
A.C. No. 42-02426-172386 WJ6

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

DIRECTION FOR REVIEW AND ORDER

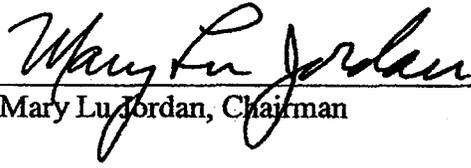
BY THE COMMISSION:

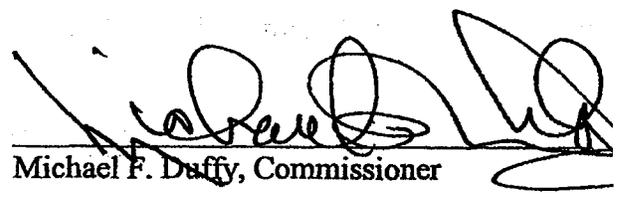
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 23, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000172386 to Dynatec Mining Corp. (“Dynatec”). On March 9, 2009, after Dynatec had timely contested the proposed penalty, the Secretary of Labor (“Secretary”) filed a petition for assessment of civil penalty with the Commission regarding the contested penalty. On August 17, 2010, Chief Administrative Law Judge Robert Lesnick issued an Order to Show Cause to Dynatec for failure to file an answer to the Secretary’s petition. On December 2, 2010, the judge issued an Order of Default entering judgement for the Secretary and directing Dynatec to pay the proposed civil penalty immediately. On December 14, 2010, the Commission received a petition for discretionary review from Dynatec, requesting that the Commission issue an order directing review and vacating the default order.

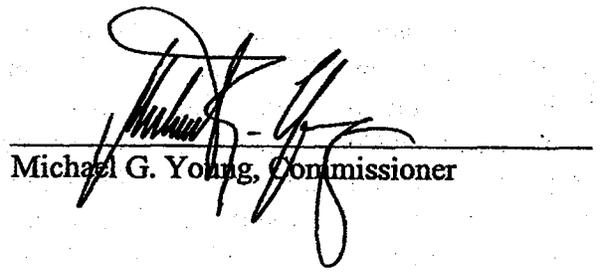
In support of its petition, Dynatec states that on April 10, 2009, it timely filed its answer to the petition. Dynatec further states that it filed an answer to the show cause order on September 22, 2010, explaining that it had previously filed an answer to the Secretary’s petition. On December 15, 2010, the Commission received a letter from the Secretary stating that she does not oppose Dynatec’s petition for discretionary review. The Secretary did not dispute any of Dynatec’s assertions.

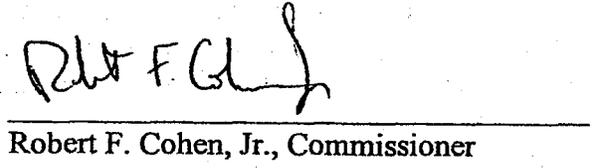
The Chief Judge's jurisdiction over this case terminated when he issued his default order on December 2, 2010. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We conclude that Dynatec's petition for discretionary review was timely filed, and we hereby grant it.

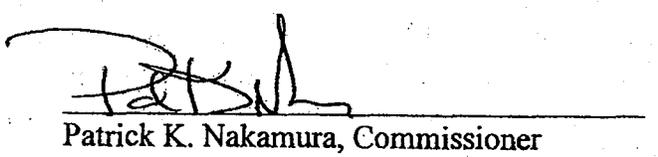
Upon review of the record, in the interest of justice, we hereby vacate the Order of Default and remand this matter to the Chief Judge for further appropriate proceedings. See *REB Enterprises, Inc.*, 18 FMSHRC 311 (Mar. 1996).


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 6, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. YORK 2010-239-M
ADMINISTRATION (MSHA)	:	A.C. No. 30-02994-206555
	:	
v.	:	Docket No. YORK 2010-240-M
	:	A.C. No. 30-02994-211798
BROWN EXCAVATION COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

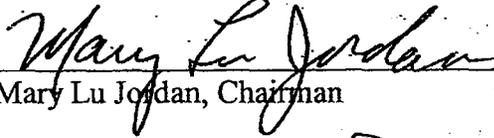
These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”).¹ On May 4, 2010, the Commission received from Brown Excavation Company (“Brown”) a letter seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).² On May 26, 2010, the Secretary of Labor filed oppositions to the operator’s request to reopen.

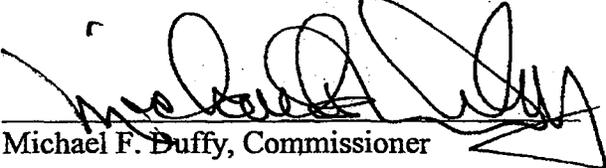
It appears from a review of the Data Retrieval System maintained by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) that the operator has paid the civil penalties that are the subject of its request to reopen. The parties have not filed pleadings subsequent to the May 2010 pleadings to inform the Commission of any change in status of these proceedings.

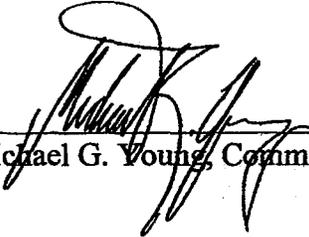
¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers YORK 2010-239-M and YORK 2010-240-M, both captioned *Brown Excavation Company, Inc.*, and involving the same procedural issues. 29 C.F.R. § 2700.12.

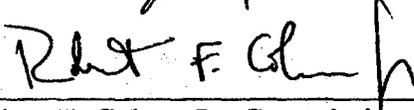
² Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

Brown is hereby ordered to show cause within 30 days of the date of this order why its request to reopen should not be denied as moot.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

January 7, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of MARK GRAY	:	Docket No. KENT 2009-1429-D
	:	
	:	
v.	:	
	:	
NORTH FORK COAL CORPORATION	:	

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

DECISION

BY: Jordan, Chairman, and Nakamura, Commissioner

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). Pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), Administrative Law Judge Gary Melick had ordered miner Mark Gray temporarily reinstated to his position at North Fork Coal Corporation (“North Fork”) following Gray’s discharge by the operator. 31 FMSHRC 1143, 1146 (Sept. 2009) (ALJ). Following the Secretary of Labor’s subsequent announcement that she would not be filing a discrimination complaint on Gray’s behalf, the judge dissolved the order of reinstatement. 31 FMSHRC 1420, 1421 (Dec. 2009) (ALJ). Gray soon thereafter filed his own discrimination complaint pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3).

Both the Secretary and Gray filed timely petitions for discretionary review, challenging the dissolution of the reinstatement order in light of the pendency of Gray’s section 105(c)(3) case. The Commission granted both petitions. A Commission majority now reverses the judge’s decision to dissolve reinstatement, and holds that Gray’s right to reinstatement remains in effect.

I.

Factual and Procedural Background

Gray was discharged from his position as a roof bolter at North Fork’s No. 4 Mine in Partridge, Kentucky, on May 15, 2009. 31 FMSHRC at 1144. According to Gray, his termination

was due to his refusal to perform work he considered dangerous and to his complaints about safety hazards at the mine over the course of the previous month. *See id.* at 1144-45 (detailing Gray's safety complaints and work refusal). Consequently, Gray filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"), alleging that his discharge by North Fork was unlawful under section 105(c) of the Mine Act, 30 U.S.C. § 815(c). *Id.* at 1144.

On August 13, 2009, the Secretary filed an application with the Commission to temporarily reinstate Gray to his position with North Fork, and on September 2, 2009, the judge held the hearing that North Fork had requested on the Secretary's application. In his order temporarily reinstating Gray, the judge applied the "not frivolously brought" standard for temporary reinstatement found in section 105(c)(2). *Id.* at 1143-44. The judge concluded that, under that low standard, there was sufficient evidence that Gray had engaged in protected activity by complaining of unsafe working conditions to his immediate supervisor and engaging in a protected work refusal, and that Gray's discharge was motivated by that protected activity. *Id.* at 1145. Consequently, the judge issued an order temporarily reinstating Gray. *Id.* at 1146. The parties soon thereafter agreed that Gray would not return to work but rather his reinstatement would be economic, and on September 17, 2009, the judge issued an order to that effect. 31 FMSHRC 1167, 1168 (Sept. 2009) (ALJ).

On November 3, 2009, North Fork moved to terminate temporary reinstatement on the ground that the Secretary had failed to file a timely discrimination complaint. In its motion North Fork argued that section 105(c)(2) of the Mine Act requires that the Secretary notify the miner, within 90 days of receiving the miner's complaint, whether discrimination had occurred. Mot. at 2-4.

The Secretary did not file a response addressing North Fork's motion to terminate. Rather, on November 23, 2009, the Secretary informed the judge that, three days earlier, she had sent written notification to Gray that, as a result of her investigation of his complaint, she had decided not to file a complaint pursuant to section 105(c)(2) with the Commission on Gray's behalf. 31 FMSHRC at 1420. The letter was copied to North Fork and stated:

A careful review of the information gathered during the investigation has been made. On the basis of that review, MSHA has determined that facts disclosed during the investigation do not constitute a violation of Section 105(c). Therefore, discrimination, within the confines of the Mine Act, did not occur.

NF Statement in Opp'n to PDR, Attachment. On December 2, 2009, the judge held that the order of temporary reinstatement must be dissolved and the temporary reinstatement proceeding dismissed. 31 FMSHRC at 1420.

On December 30, 2009, Gray, through his own counsel, filed an action on his own behalf pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). The case was docketed with the Commission at KENT 2010-0430, and is presently pending before another Commission administrative law judge

Both the Secretary and the Gray petitioned the Commission to review the judge's order dissolving the temporary reinstatement order in light of Gray's section 105(c)(3) action. In granting both petitions, the Commission directed that the issue of the Secretary's standing to bring an appeal be addressed in the briefs.

II.

Disposition

The Commission recently addressed the issue this case raises in *Phillips v. A&S Construction Co.*, 31 FMSHRC 975 (Sept. 2009). In *Phillips*, Commissioners were evenly divided on the question of whether the judge correctly decided that a temporary reinstatement order no longer remains in effect after the Secretary has made a determination of no discrimination. 31 FMSHRC at 978-1004. Gray stated in his petition that review was again appropriate because, unlike when it decided *Phillips*, the Commission now has its full five-member complement of Commissioners. G. PDR at 2.

The judge in *Phillips* had ordered dissolution of the temporary reinstatement order and dismissal of the temporary reinstatement proceeding. 30 FMSHRC 1119, 1123 (Nov. 2008) (ALJ). The effect of the Commission's split decision was to allow the judge's decision to stand, as if affirmed. 31 FMSHRC at 979 (citing *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992)).¹ The judge's order was appealed only by the miner (who also filed his own discrimination action under section 105(c)(3)), but the Secretary participated as an amicus curiae.

In *Phillips*, Commissioners Duffy and Young voted to affirm in result the judge's dissolution of the temporary reinstatement order and dismissal of the temporary reinstatement proceeding. They did so on the ground that, under the plain meaning of section 105(c), a reinstatement order can only remain in effect while the Secretary is pursuing a section 105(c)(2) action; once she had determined that discrimination has not occurred, reinstatement is no longer appropriate. 31 FMSHRC at 980-89.

¹ We note that in this case the judge relied on the Commission's disposition in *Phillips*, which the judge described as affirming the judge's order below. 31 FMSHRC at 1420. To be clear, the judge's decision in *Phillips* stood *as if* affirmed, because the Commission was evenly split on the case. 31 FMSHRC at 979.

Chairman Jordan and Commissioner Cohen voted to reverse the judge's order, and would have had the temporary reinstatement order remain in effect. Chairman Jordan did so on the ground that the plain language of section 105(c) mandates that temporary reinstatement continue until the Commission issues a final order regarding the merits of the miner's allegations of discriminatory conduct, whether it be under section 105(c)(2) or section 105(c)(3). *Id.* at 990-97. Commissioner Cohen found the language of section 105(c) to be ambiguous, that deference was due the Secretary's construction of the statutory provision, and that the Secretary's interpretation of the provision to require that temporary reinstatement remain in effect while the miner pursues relief under section 105(c)(3) is a reasonable one. *Id.* at 998-1004.

On review, the Secretary maintains that section 105(c) can only be read one way: a temporary reinstatement order must remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether that final order is obtained pursuant to section 105(c)(2) by the Secretary, or by miner under section 105(c)(3). S. Br. at 3-4. The Secretary takes issue with the opinion of the Commissioners Duffy and Young in *Phillips*, both with regard to their conclusion that the Mine Act, by its plain meaning, prohibits the continuation of temporary reinstatement beyond the Secretary's determination that no discrimination occurred (S. Br. at 9-20), and their holding that the Secretary is not due deference in her interpretation of section 105(c) with respect to the question at hand because she does not participate in section 105(c)(3) cases. *Id.* at 5-7. The Secretary also takes the position that, because she has exclusive authority to apply for an order of temporary reinstatement, section 113(d)(2)(A)(i) of the Mine Act confers standing upon her to appeal a judge's decision to dissolve such an order, because she is a "person adversely affected or aggrieved" by the judge's decision. *Id.* at 20-28 (quoting 30 U.S.C. § 823(d)(2)(A)(i)).

North Fork responds that the Secretary lacks standing in this case because, by declining to pursue Gray's discrimination complaint under section 105(c)(2), she has essentially removed herself from the case. NF Br. at 3-4. North Fork maintains that temporary reinstatement is only effective as long as there is a complaint pending under section 105(c)(2), be it the miner's complaint filed with the Secretary or the Secretary's complaint filed with the Commission. *Id.* at 5-6. According to North Fork, because the miner's subsequent pursuit of his discrimination claim under section 105(c)(3) is described therein as an "action," it does not serve to extend the period during which the miner may be temporarily reinstated. *Id.* at 6-7. North Fork further maintains that this interpretation of section 105(c) is supported by the legislative history of the Mine Act, and that even if the Mine Act was ambiguous on this point, the Secretary's interpretation is not entitled to deference because the Secretary does not administer section 105(c)(3). *Id.* at 7-10. North Fork closes by arguing that to require that temporary reinstatement survive a finding by the Secretary that there has been no discrimination would deprive operators of due process of law. *Id.* at 11-14.

Gray in his initial brief chose to incorporate by reference the Secretary's brief. In his reply brief, Gray disputes that the Secretary does not have a role in a discrimination case brought under section 105(c)(3), and thus argues that her interpretation of section 105(c) is entitled to deference

and that she has standing to appeal the judge's dissolution order in this case. G. Reply at 1-3. Gray further contends that the multiple references in section 105(c)(2) to the "complaint" filed by the miner with the Secretary makes it impossible to hold that the reference to "pending final order on the complaint" can only mean the complaint filed by the Secretary with the Commission. *Id.* at 4-5.

The Secretary responded to North Fork's due process argument in her reply brief. There, she argues that the temporary reinstatement procedures of section 105(c)(2) have been upheld as non-violative of the Due Process Clause of the Fifth Amendment. S. Reply Br. at 2-7. According to the Secretary, any additional period of time a miner is reinstated while a section 105(c)(3) case is litigated does not deprive the operator of due process. *Id.* at 7-10.

A. Standing

Section 113(d)(2)(A)(i) of the Mine Act provides that "[a]ny person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission." 30 U.S.C. § 823(d)(2)(A)(i). Thus, we must decide whether, in the circumstances of this case, the Secretary is a "person adversely affected or aggrieved" by the judge's decision and, thus possessed of standing to petition for review of that decision. We conclude that she does.

In *Mid-Continent Resources, Inc.*, 11 FMSHRC 2399 (Dec. 1989), the Commission determined that the appropriate question was whether the entity seeking review has

shown a direct and concrete interest in this litigation and demonstrated that the outcome below has had an adverse impact on that interest. We stress at the outset that not every disagreement with a judge's decision amounts to a legally recognizable interest that is adversely affected. Rather, more substantial involvements such as a direct stake in the property or events that are the subject of the litigation, some concrete involvement in the controversy between the parties, or some direct effect of the judgment on a recognizable interest of the nonparty are required.

Id. at 2403.²

The Secretary easily meets this test. She clearly has demonstrated "some concrete involvement in the controversy between the parties" (which suffices under the Commission's disjunctive standard), as she filed the temporary reinstatement application and was a party in the proceeding before the judge. The judge's decision in this case was issued over her strenuous

² In *Mid-Continent*, an amicus in the proceedings before the judge sought party status on review. Here, of course, the Secretary was a party at the trial level.

objection. Moreover, the Secretary's interest in promoting miner safety and health is affected by the outcome of this appeal, as the discontinuation of temporary reinstatement could have a chilling effect on the willingness of miners to bring health and safety complaints. As "the designated champion of employees within [the] statutory scheme," the Secretary has a recognizable interest in this appeal. See *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 132-33 (1995).

Notably, under section 106(b) of the Mine Act, 30 U.S.C. § 816(b), the Secretary has the right to obtain review of "any final order of the Commission" in a Court of Appeals. If Congress authorized the Secretary to appeal any adverse order of the Commission to the courts, it would be illogical for her not to have the right to initially appeal the judge's adverse order to the Commission.

We reject North Fork's argument, NF Br. at 3, that because the Secretary concluded that section 105(c)(1) had "not been violated," she no longer has an interest in the temporary reinstatement proceeding in which the judge upheld her determination that the miner's underlying complaint was "not frivolously brought." These are not equivalent findings. Moreover, the statutory scheme is replete with other rights and responsibilities of the Secretary in temporary reinstatement proceedings and section 105(c)(3) discrimination matters, even when she has withdrawn from the discrimination case. For example, as Gray notes in his brief, the Secretary is still charged with issuing a civil penalty under section 110(a) of the Act if the miner prevails. 30 U.S.C. § 820(a). She also has the right to seek an injunction, restraining order, or other appropriate order in federal court if the operator fails to pay that penalty or fails to comply with a reinstatement order in a section 105(c)(3) case. 30 U.S.C. § 818(a)(1)(A). Thus, North Fork's assertion that the Secretary has "essentially remove[d] herself from the case," NF Br. at 3, quoting *Phillips*, 31 FMSHRC at 987 (opinion of Commissioners Duffy and Young), is misplaced. In sum, we find that the Secretary has standing to appear as a party in this appeal.

B. Statutory Interpretation

The question presented in this case is whether, under the provisions of section 105(c) of the Mine Act,³ a temporary reinstatement order remains in effect after the Secretary has

³ Section 105(c) provides in part:

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act

(2) Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner . . . alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. . . .

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . .

determined that the allegations made by the miner in his or her discrimination complaint filed with MSHA do not constitute a violation of section 105(c)(1) of the Mine Act.

Under the Mine Act, a miner's temporary reinstatement remains in effect "pending final order on the complaint." 30 U.S.C. § 815(c)(2). Because the plain language of the statute mandates that temporary reinstatement continue until the Commission issues a final order regarding the merits of the miner's allegations of discriminatory conduct, we reverse the judge's order dissolving the miner's temporary reinstatement in this case.

A miner who alleges an illegal discharge may obtain temporary reinstatement in accordance with section 105(c), which provides in relevant part:

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

30 U.S.C. § 815(c)(2) (emphasis added).

of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance.

30 U.S.C. § 815(c).

Upon completion of her investigation, the Secretary makes a determination as to whether discrimination occurred. If the Secretary determines that the Act was violated, she must “immediately file a complaint with the Commission.” *Id.* If the Secretary concludes that no violation occurred, she must notify the miner of that fact and the miner, pursuant to section 105(c)(3), has the right to “file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).” 30 U.S.C. § 815(c)(3). The issue in this case is whether the temporary reinstatement remains in effect while the miner proceeds on his own behalf to litigate his or her discrimination claim before the Commission.

In considering this question of statutory construction, we are mindful that our first inquiry is “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Deference to an agency’s interpretation of the statute may not be applied “to alter the clearly expressed intent of Congress.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). In ascertaining the meaning of the statute, courts utilize traditional tools of construction, including an examination of the “particular statutory language at issue, as well as the language and design of the statute as a whole,” to determine whether Congress had an intention on the specific question at issue. *Id.*; *Local Union 1261*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989).⁴ The issue before us is the duration of temporary reinstatement. Congress directly addressed this issue in section 105(c)(2) of the Act, which directs the Commission to “order the immediate reinstatement of the miner *pending final order on the complaint*” (emphasis added). We conclude that the plain language of the Mine Act clearly expresses the intent of Congress that a temporary reinstatement order stays in effect until there is a final Commission order on the merits of the miner’s discrimination complaint to MSHA, whether that complaint is brought to the Commission by the Secretary under section 105(c)(2) or by the miner under section 105(c)(3).

The legal question here involves the phrase “pending final order on the complaint.” We conclude that “complaint” in this context means that miner’s complaint to MSHA. The language of section 105(c)(2) supports this view, as the phrase “pending final order on *the* complaint” appears after five references to the miner’s complaint to MSHA, and *before* any mention of the Secretary’s complaint to the Commission. We also note that in this case in particular, it must refer to Gray’s complaint to MSHA because, as Gray correctly points out, the Secretary’s complaint never existed in the case. G. Reply Br. at 5.

⁴ The examination to determine whether there is such a clear Congressional intent is commonly referred to as a “*Chevron I*” analysis. *See Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

The reference to “final order” refers to the *Commission’s* final order, and not a determination by the Secretary. Our dissenting colleagues have previously indicated their agreement on this point. See *Phillips*, 31 FMSHRC at 981. The Mine Act sets forth the method by which the Commission issues a final order in a discrimination proceeding. If, after conducting her investigation, the Secretary decides that the Act has been violated, pursuant to section 105(c)(2) she is required to file a complaint with the Commission and to “propose an order granting appropriate relief.” 30 U.S.C. § 815(c)(2). The Commission, after affording an opportunity for a hearing, is required to “issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary’s proposed order, or directing other appropriate relief.” *Id.* The Commission’s order “become[s] final 30 days after its issuance.” *Id.*

If the Secretary notifies the miner of her determination that no violation of section 105(c)(1) occurred, “the complainant,” pursuant to section 105(c)(3), is entitled to “file an action in his own behalf before the Commission.” 30 U.S.C. § 815(c)(3). The Commission is required to afford an opportunity for a hearing and to “issue an order based upon findings of fact, dismissing or sustaining the complainant’s charges and, if the charges are sustained, granting such relief as it deems appropriate.” *Id.* This Commission order “become[s] final 30 days after its issuance.” *Id.*

Thus, in accordance with the plain meaning of the statute, there is no “final order on the complaint” until the Commission issues an order which either affirms, modifies, or vacates the Secretary’s proposed order in accordance with section 105(c)(2); or dismisses or sustains the complainant’s charges in accordance with section 105(c)(3). It is clear that a final order in either case must be based on the Commission’s findings of fact and the Commission’s determination of whether discriminatory conduct in violation of section 105(c)(1) occurred.⁵

There has been no final Commission order on Gray’s complaint. Therefore, the statutory prerequisite that would justify dissolution of his temporary reinstatement order is lacking. Although our affirming colleagues appear to treat it as such, the judge’s order dissolving the miner’s temporary reinstatement cannot constitute the prerequisite “final order on the complaint.” To consider it in this manner would amount to a ruling that the final order on the complaint, necessary to dissolve the temporary reinstatement, is the order dissolving the temporary reinstatement.

⁵ North Fork contends that if the miner does not choose to go forward under section 105(c)(3), under our view of the statutory language there would never be a Commission final order on the discrimination complaint. NF Br. at 7. Since temporary reinstatement remains in effect “pending a final order on the complaint,” the temporary reinstatement could never be dissolved. However, the requirement that temporary reinstatement remain in effect “pending final order on the complaint” necessarily implies that there is a possibility of obtaining a Commission final order on the discrimination complaint under sections 105(c)(2) or 105(c)(3). In the event the miner foregoes that possibility, obviously the temporary reinstatement provision would no longer be applicable.

The judge did not dissolve the miner's temporary reinstatement because of a final Commission order. The judge never considered the merits of Gray's claim. The sole basis of the judge's decision was the Secretary's determination that a violation of section 105(c) had not occurred, and her notification that she would not be filing a complaint on the miner's behalf.

Although they agree that the Secretary's determination regarding the results of her investigation does not constitute a final order under section 105(c), our colleagues nevertheless proceed to make the duration of the temporary reinstatement contingent on just this determination. Ignoring the statute's plain language, they conclude that if the Secretary determines that there has been no discrimination, the temporary reinstatement order would cease to be effective, and the judge should issue an order dissolving the temporary reinstatement and dismissing the temporary reinstatement proceeding. 31 FMSHRC at 981-82. The statute requires a final order from the Commission, not a determination from the Secretary, in order to dissolve a grant of temporary reinstatement. Our colleagues fail to realize that the judge lacked the necessary statutory prerequisite for dissolving the temporary reinstatement because no final order had been issued on the miner's complaint.

Our colleagues have been led astray by their narrow focus on section 105(c)(3)'s reference to the complainant's right to file an "action" in his own behalf before the Commission.⁶ They consider the reference to filing an "action" under section 105(c)(3) as an indication that there no longer exists a complaint that can be the subject of a Commission order. Since temporary reinstatement stays in effect pending the Commission's "final order on the complaint," initiating an "action" under section 105(c)(3) must, in their view, extinguish the miner's temporary reinstatement. *Id.* at 981. Our colleagues' position is untenable in light of the pertinent statutory language and the Commission case law.

Much as our colleagues would like to erect an impenetrable analytical barrier between the miner's initial filing of a discrimination complaint to the Secretary and the miner's subsequent action before the Commission, neither the statutory language nor the Commission case law permit them to do so. Although section 105(c)(3) refers to an "action" before the Commission, the person who files this action is referred to in that section as the "*complainant*." 30 U.S.C. § 815(c)(3) (emphasis added). Thereafter, the Commission is instructed to afford an opportunity for a hearing and to "issue an order based upon findings of fact, dismissing or sustaining the *complainant's* charges." *Id.* (emphasis added). The reference to "complainant" is an acknowledgment that the proceeding under section 105(c)(3) involves the same alleged discriminatory conduct that prompted the miner's complaint to the Secretary under section 105(c)(2). The statute does not direct the miner to file a complaint under section 105(c)(3) because the miner has already filed a complaint. That is why the miner is referred to in section 105(c)(3) as the "complainant."

⁶ Section 105(c)(3) states that "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission." 30 U.S.C. § 815(c)(3).

Commission rulings have made that fact clear. In *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991), the operator argued that the complainant's amended filing pursuant to section 105(c)(3) differed too substantially from his complaint filed with the Secretary. The Commission agreed that the proceeding under section 105(c)(3) must be based on the matter initially investigated by the Secretary under section 105(c)(2) or else "the statutory prerequisites for a *complaint* pursuant to § 105(c)(3) have not been met." *Id.* at 546 (emphasis added); *accord Sec'y on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009 (June 1997). The Commission's reference to the section 105(c)(3) proceeding as a "complaint" in *Hatfield* was not an isolated occurrence. In *Roland v. Secretary of Labor*, 7 FMSHRC 630 (May 1985), the Commission pointed out that "[s]hould the Secretary determine that no discrimination has occurred, the miner, pursuant to section 105(c)(3) . . . may file a discrimination *complaint* on his own behalf before the Commission." 7 FMSHRC at 635 (emphasis added).

Additional language in the Mine Act refutes the contention that Congress considered claims brought under section 105(c)(2) and (c)(3) to be such entirely separate proceedings, that they deemed it appropriate to provide temporary reinstatement pursuant to only one of them. Section 105(c)(3) states that "[p]roceedings under this section shall be expedited by the Secretary and the Commission." 30 U.S.C. § 815(c)(3). This mandate, however, undeniably applies to section 105(c)(2) actions as well (otherwise the reference to the Secretary makes no sense). Indeed, the Commission has interpreted it in this manner. *See Sec'y on behalf of Noe v. J & C Mining, LLC*, 22 FMSHRC 705, 706 (June 2000) (stating, in a section 105(c)(2) case, that "the Commission will be expediting these proceedings as it is statutorily required to do"). Likewise, section 105(c)(3) refers to Commission orders issued "under this paragraph" being "subject to judicial review in accordance with section 106." 30 U.S.C. § 815(c)(3). Clearly, however, a Commission order issued under section 105(c)(2) is also subject to judicial review.

The legislative history of the Mine Act underscores the strained nature of our colleagues' reading of the statute. The Conference Report states that:

The Commission must afford an opportunity for a hearing, and thereafter, issue an order, based upon findings of fact, dismissing or sustaining *the complaint*, and granting such relief as may be appropriate. If the *complainant* prevailed in an action which he brought himself after the Secretary's determination, the Commission order would require that the violator pay all expenses reasonably incurred by the *complainant* in bringing the action.

S. Conf. Rep. No. 95-461, at 52-53 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1330 (1978) ("*Legis. Hist.*") (emphases added).⁷

⁷ To support their interpretation of current law, our colleagues rely on the language of pending legislation, H.R. 5663 (the Robert C. Byrd Miner Safety and Health Act of 2010) and its

The Commission's Procedural Rules also demonstrate that the significance our colleagues place on the use of the word "action" in section 105(c)(3), as opposed to the word "complaint" in section 105(c)(2), is misplaced. Our rule clearly contemplates that a miner filing a claim under section 105(c)(3) does so by filing a "complaint." Procedural Rule 40(b) states:

A discrimination complaint under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary, after investigation, has determined that the provisions of section 105(c)(1) of the Act, 30 U.S.C. 815(c)(1), have not been violated.

29 C.F.R. § 2700.40(b).

Our dissenting colleagues have found support, and our concurring colleague finds ambiguity, in the Conference Report's instruction that the Secretary shall "seek temporary reinstatement of the complaining miner pending final outcome of the investigation." 31 FMSHRC at 985 (citing S. Conf. Rep. No. 95-461, at 52 (1977), *Legis. Hist.* at 1330); slip op. at 22-23. The literal application of this language, however, would result in the dissolution of the temporary reinstatement order upon conclusion of the Secretary's investigation, even if the Secretary determines that section 105(c)(1) was violated.

accompanying House committee report. Slip op. at 27-28. Ironically, that bill clarifies the Mine Act to conform with our view of current law that temporary reinstatement remains in effect until the Commission disposes of a discrimination complaint on the merits, whether or not the Secretary pursues the complaint. H.R. 5663, 111th Cong. § 401 (2010).

We believe the dissent's reliance is premature and misplaced, given that Congress has not yet passed this legislation and could conceivably fail to enact it. Moreover, as one court has noted:

The unpassed bills of later legislative sessions evoke conflicting inferences. Some legislators might propose them to replace an existing prohibition; others to clarify an existing permission. . . . The light shed by such unadopted proposals is too dim to pierce statutory obscurities. As evidences of legislative intent they have little value.

Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal. App.2d 41, 58 (1968).

That the temporary reinstatement provision was hardly viewed in the cramped fashion suggested by our colleagues is evidenced by the Senate Report, wherein the drafters explained that:

The Committee feels that this temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint.

S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625.

Because, under section 105(c)(3), a miner “brings his own action at his own expense and is in charge of his case,” 31 FMSHRC at 984, our affirming colleagues have concluded that the need to account for harm due to “bureaucratic delay” does not exist. *Id.* Underlying this statement is the unsubstantiated notion that somehow a miner in a section 105(c)(3) proceeding will be able to control how quickly his or her case is resolved. Our affirming colleagues are concerned that if a miner remains temporarily reinstated during a section 105(c)(3) proceeding, there is little incentive for the miner to advance the proceeding expeditiously. 31 FMSHRC at 986 n.7. Of course, the corollary to this concern is that when the complainant miner is not temporarily reinstated, there is every incentive for the respondent mine operator to delay the section 105(c)(3) proceeding. While both scenarios are problematic, the appropriate question for us to consider is: which one caused Congress greater concern?

By making temporary reinstatement dependent on a determination that the miner’s discrimination claim is “not frivolously brought,” 30 U.S.C. § 815(c)(2), Congress “clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding.” *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 n.11 (11th Cir. 1990).⁸ While the employer’s loss of its ability to control its workforce is not to be taken lightly, the legislative history of the Mine Act indicates that section 105(c)’s prohibition against discrimination is to be “construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.” S. Rep. No. 95-181, at 36, *Legis. Hist.* at 624. Recognizing the important role that individual miners play in ensuring a safe and healthy working environment, Congress was also acutely aware that “mining often takes place in remote sections of the country where work in the mines offers the only real employment

⁸ Our colleagues invoke the Court’s observation that “deprivation of an employer’s right to control the makeup of its workforce is only a ‘temporary’ one that can be rectified by the Secretary’s decision not to bring a formal complaint or by a decision on the merits in the employer’s favor.” 31 FMSHRC at 986 (citing *Jim Walter*, 920 F.2d at 748 n.11 (emphasis in original)). However, it appears the Court’s comment was prompted by prior Commission Rule 44(f), 29 C.F.R. § 2700.44(f) (subsequently re-numbered as Commission Rule 45(g), 29 C.F.R. § 2700.45(g)), *id.* at 741, rather than by an independent interpretation of the statute.

opportunity.” S. Rep. No. 95-181, at 35, *Legis. Hist.* at 623. The temporary reinstatement provision was viewed as “an essential protection” for miners who might not be able “to suffer even a short period of unemployment.” S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625. This Congressional balancing of equities applies equally to a section 105(c)(2) case brought by the Secretary, and to a section 105(c)(3) claim, brought by the miner on his own behalf after the Secretary declines to go forward.

Temporary reinstatement is imposed pursuant to a Commission order that the miner’s discrimination claim was not frivolously made. The Secretary’s decision not to proceed with the discrimination complaint does not transform that complaint into a frivolous action.⁹ To hold otherwise would require us to conclude that Congress implemented a statutory provision (section 105(c)(3) of the Mine Act) devoted to the litigation of frivolous claims. To the contrary, not only does the Secretary’s negative determination not reduce the complaint to a frivolous claim, the Commission has explicitly acknowledged that it “may find discrimination where the Secretary has not” and that “the Secretary’s determination not to prosecute [a] discrimination case . . . is not probative of whether [the operator] discriminated against the miners.” *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1117 (July 1995). Indeed, there have been numerous cases in which the Secretary declined to file a complaint and the miner successfully proceeded on his own behalf. See, e.g., *Ross v. Shamrock Coal Co.*, 15 FMSHRC 972, 974-76 (June 1993); *Meek v. Essroc Corp.*, 15 FMSHRC 606, 612-13 (Apr. 1993); *Womack v. Graymont Western US, Inc.*, 25 FMSHRC 235, 261-63 (May 2003) (ALJ); *Adkins v. Ronnie Long Trucking*, 21 FMSHRC 171, 176-77 (Feb. 1999) (ALJ); *Paul v. Newmont Gold Co.*, 18 FMSHRC 181, 191 (Feb. 1996) (ALJ).

Consequently, because the Secretary’s decision not to go forward on the miner’s behalf does not vitiate the previous finding that his or her complaint was not frivolously brought, the temporary reinstatement, which is based on that finding, must remain in effect “pending final order on the complaint.”¹⁰ Balancing the equities does not require the opposite conclusion. Requiring the temporary reinstatement to remain in effect pending the miner’s litigation under section 105(c)(3) is no more inequitable than the Commission’s determination that a temporary reinstatement order remains in effect pending appeal to the Commission, notwithstanding the fact that a Commission judge concluded, subsequent to a hearing on the merits, that no discrimination occurred. See *Sec’y on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947, 949 (Sept. 1999). In *Bernardyn*, the Commission recognized that the statutory language, providing for

⁹ We are mindful that the Secretary’s determination is made without the benefit of discovery or a full hearing.

¹⁰ In *Jim Walter*, the Eleventh Circuit explained that the basis for a temporary reinstatement order and the underlying merits of a miner’s claim are “conceptually different,” and it ruled that the temporary reinstatement order was a collateral order completely separate from the merits of the action. 920 F.2d at 744.

temporary reinstatement “pending final determination on the merits of the complaint,” required this result. 21 FMSHRC at 950.¹¹

In passing the Mine Act, Congress created two different mechanisms for bringing discrimination complaints, under which either the Secretary or the claimant may prosecute the case. Under either procedure, the same underlying complaint (filed initially with MSHA) is at issue. The statute clearly states that a temporary reinstatement order remains in effect pending a final Commission order on this complaint. Here, there has been no such final order on the miner’s complaint. Thus, we reject the judge’s conclusion that temporary reinstatement does not extend to proceedings brought by a miner under section 105(c)(3). We hold that, pursuant to the plain meaning of the Mine Act, a temporary reinstatement order remains in effect until there is a final Commission order on the merits of the miner’s underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under section 105(c)(2) or by the miner under section 105(c)(3).

C. Due Process

We also find the operator’s due process challenge unavailing. In *Jim Walter*, the Court held that the due process requirement that the operator be given the “opportunity to be heard ‘at a meaningful time and in a meaningful manner’” was clearly met by a temporary reinstatement proceeding under section 105(c)(2) of the Mine Act. 920 F.2d at 748 (quoting *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976)). Despite the strenuous efforts of North Fork to distinguish a discrimination proceeding under section 105(c)(2) from that brought by a miner under section 105(c)(3), the reasoning of the Court in *Jim Walter* (regarding the due process afforded an operator in a temporary reinstatement hearing) applies with equal force whether the underlying discrimination proceeding continues under sections 105(c)(2) or 105(c)(3). As the Court explained:

At [the temporary reinstatement hearing], the employer has the opportunity to test the credibility of any witnesses supporting the miner’s complaint through cross-examination and may present his own testimony and documentary evidence contesting the temporary

¹¹ We recognize that in *Bernardyn*, the Commission refers to prior Procedural Rule 45(g), 29 C.F.R. § 2700.45(g) (1999), which provided for dissolution of a temporary reinstatement order if the Secretary determined that discrimination did not occur, as a “gap filling provision designed to deal with a situation not addressed by the statute – the status of a temporary reinstatement order following a determination by the Secretary that there has been no violation of section 105(c).” 21 FMSHRC at 950. We believe this comment, which is dictum, to be incorrect since we have concluded that the referenced situation is addressed by the statutory language “pending final order on the complaint” and requires the maintenance of temporary reinstatement until there is a final determination by the Commission on the merits of the miner’s claim of discrimination.

reinstatement. . . . Most importantly, section 105(c)(2) requires that an *independent* decisionmaker determine whether a miner's complaint in a particular dispute meets the "not frivolously brought" standard. . . . [T]he statute grants [the employer] the right to seek an adjudication from a neutral tribunal, prior to a deprivation of its property interest, with all the regalia of a full evidentiary hearing at its disposal. Thus, the risk of an erroneous deprivation from the standard of proof is substantially lessened by the provision of the panoply of additional procedural guarantees in section 105(c)(2).

920 F.2d at 747-48. What North Fork neglects to point out is that the "panoply of additional procedural guarantees in section 105(c)(2)" relied on by the Court in *Jim Walters* is identical whether the subsequent discrimination case proceeds with or without the Secretary. In both instances, there is a determination by an administrative law judge after an evidentiary hearing that the miner's complaint was "not frivolously brought."

North Fork also argues that there is no "expeditious review" because a miner's case brought pursuant to section 105(c)(3) can take years. NF Br. at 13. However, as we noted *supra* at 12, Congress mandated *in section 105(c)(3)* that "[p]roceedings under this section shall be expedited by the Secretary and the Commission." In addition, pursuant to the Commission's procedural rules, an operator can always file a motion to expedite the case. Commission Procedural Rule 52, 29 C.F.R. § 2700.52. Moreover, despite North Fork's argument that neither the Mine Act nor its implementing regulations establishes a deadline for section 105(c)(3) review, this is also true of a discrimination case brought by the Secretary under section 105(c)(2).

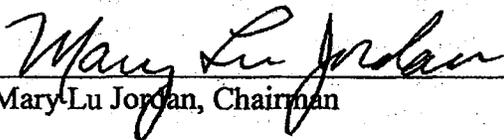
North Fork also contends that there is no "reliable initial check against mistaken decisions" (in violation of the standard set forth by the Supreme Court in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987)),¹² when the Secretary decides not to file a section 105(c)(2) complaint and reinstatement continues despite the Secretary's finding that no violation occurred. NF Br. at 13. However, this claim is unpersuasive, as, consistent with Commission precedent, reinstatement continues when a case is appealed to the Commission even after a *judge* determines that no discrimination occurred. *See Bernardyn*, 21 FMSHRC at 949-50.

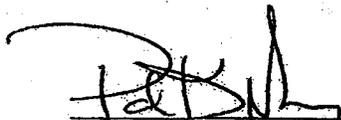
Consequently, we reject the operator's claim that the continuation of temporary reinstatement violates the due process clause.

¹² We note that in *Brock*, the Supreme Court held that the lack of an evidentiary hearing before temporary reinstatement pursuant to the Surface Transportation Assistance Act did not deny procedural due process. 481 U.S. at 258-68. Of course, in the case before us, an evidentiary hearing was held and the judge ruled that the applicable legal standard of "not frivolously brought" had been met.

D. Conclusion

The judge's order dissolving the temporary reinstatement is reversed. The miner is ordered economically reinstated to his former position, retroactive to September 14, 2009, including any pay increases, bonuses, and other benefits, as specified in the judge's September 17, 2009 order. *See Sec'y on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1091 (Oct. 2009).


Mary-Lu Jordan, Chairman


Patrick K. Nakamura, Commissioner

Commissioner Cohen, concurring:

I concur with sections II.A. (standing) and II.C (due process) of the opinion in these proceedings by my colleagues Chairman Jordan and Commissioner Nakamura. I also concur in result with section II.B of their opinion, and join them in reversing the judge's order dissolving Mark Gray's temporary reinstatement, and ordering Mr. Gray's economic reinstatement to his former position, retroactive to September 14, 2009, at his former rate of pay.

I join with my colleagues in concluding that a temporary reinstatement order stays in effect pending final resolution of a discrimination complaint filed with the Mine Safety and Health Administration ("MSHA"). I write separately because I find that the relevant statutory language – "pending final order on the complaint" – does not, as my colleagues conclude, have a plain meaning. I therefore find that the Commission must defer to the Secretary's reasonable interpretation of the statute.¹ This is the position I articulated in my opinion in *Phillips v. A&S Construction Co.*, 31 FMSHRC 975, 998 (Sept. 2009). Nothing that has been said or written in this case has persuaded me to change my conclusions in *Phillips*.

I.

In order to determine whether Congress' intention as to the question at issue can be gleaned from the "plain meaning" of the statutory language, we employ the "traditional tools of statutory construction." *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (quoting *Chevron*, 467 U.S. at 843 n.9). These include examination of the statute's text, legislative history, and structure, as well as its purpose. See *Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). As the D.C. Circuit recognized in *Bell Atlantic*, a court utilizes the text, history, and purpose of a statute to determine whether they convey a plain meaning that *requires* a certain interpretation. *Id.* at 1049 (emphasis in original).

Statutory language is considered ambiguous if reasonable minds may differ as to its meaning, and when it is open to two or more constructions. 73 Am. Jur. 2d Statutes § 114. Consequently, we must determine "whether the language of [the] statute is susceptible to more than one natural meaning." *Taing v. Napolitano*, 567 F.3d 19, 23 (1st Cir. 2009) (citation omitted).

¹ The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If a statute is clear and unambiguous, effect must be given to its language. See *id.* at 842-43. If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. See *id.* at 843-44. Under *Chevron II*, deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844).

II.

The critical statutory language in this case is from section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2): Upon a finding that a miner's complaint was not "frivolously brought," the Commission shall order "immediate reinstatement of the miner pending final order on the complaint" (emphasis added). The entire Commission agrees that the phrase "final order" refers to an order of the Commission rather than an administrative determination of the Secretary not to pursue the case. *Phillips*, 31 FMSHRC at 981 (opinion of Commissioners Duffy and Young), 991 (opinion of Chairman Jordan). Hence, the dispute relates to the meaning of the word "complaint": Either it refers to the complaint the miner initially files with the Secretary of Labor alleging discrimination, or it refers to the complaint the Secretary subsequently may file with the Commission pursuant to section 105(c)(2).

The most natural reading of the text of the statute is that of the Secretary, Mr. Gray, and my colleagues Chairman Jordan and Commissioner Nakamura. The word "complaint" is used five times in section 105(c)(2) before the phrase "pending final order on the complaint" appears, each time referring to the complaint filed by the miner with the Secretary. Only after the language creating the right to temporary reinstatement is set forth does Congress refer to the "complaint" filed by the Secretary with the Commission for the first time. Thus, the word "complaint" occurs seven times in section 105(c)(2), and the first five times it clearly refers to the miner's complaint filed with the Secretary.

Moreover, the word "complaint" is used three times in the sentence which includes the phrase "pending final order on the complaint." The first two times, it clearly refers to the miner's complaint with the Secretary. It is difficult to understand how Congress would use the word "complaint" twice to mean one thing and then, in the same sentence, use the same word to refer to something entirely different. The same word should not have multiple meanings when used in the same sentence. *Lewis v. Philip Morris, Inc.*, 355 F.3d 515, 536 (6th Cir. 2004).

However, the statutory text is not free from ambiguity. The word "complaint" in section 105(c)(2) also refers to the complaint filed by the Secretary with the Commission ("If, upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . ."). Under section 105(c)(3), when the Secretary declines to file a complaint with the Commission, the original "complainant" has a right to file an "action" with the Commission. It can rationally be argued, as my colleagues Commissioners Duffy and Young do, *Phillips*, 31 FMSHRC at 981, 983-84, that the "action" filed under section 105(c)(3) is analytically different for purposes of temporary reinstatement than a "complaint" filed under section 105(c)(2) by the Secretary.² Since the word "complaint" is susceptible to different meanings, I conclude that it is ambiguous.

² Yet, it is the "complainant" who files the "action" under section 105(c)(3), and "complainant" would rationally refer back to the miner or other party who originally filed the complaint with the Secretary under section 105(c)(2).

Moreover, each of the proponents claiming that the statute has a plain meaning can point to a literal impossibility created by the other proponents' interpretation.

As Mr. Gray and Chairman Jordan and Commissioner Nakamura point out, if the complaint to the Secretary is "not frivolously brought," section 105(c)(2) creates the right to "immediate reinstatement of the miner pending final order on the complaint." G. Br. at 5; slip op. at 8. The interpretation by Commissioners Duffy and Young that "complaint" refers to the Secretary's complaint with the Commission is a literal impossibility because at the time that temporary reinstatement comes into existence, the Secretary's complaint with the Commission is not in existence. Indeed, as in this case, it may never come into existence. It is hard to understand why Congress would have intended the phrase "pending final order on the complaint" to refer to the Secretary's non-existent complaint, when the miner's complaint to the Secretary is already in existence.

However, Commissioners Duffy and Young point out a literal impossibility resulting from the interpretation of Chairman Jordan and Commissioner Nakamura. Slip op. at 31. Assuming a miner is placed in temporary reinstatement under section 105(c)(2) and the Secretary does not file a complaint with the Commission, if the miner does not file an "action" under section 105(c)(3), the Commission will never have an opportunity to issue a "final order on the complaint." The miner's complaint with the Secretary no longer exists, having perished with the Secretary's finding of no discrimination upon investigation and the miner's failure to file an action within 30 days under section 105(c)(3). However, read literally, the right to temporary reinstatement continues because there has been no final order by the Commission on the complaint. Clearly, Congress did not intend this result either. Chairman Jordan and Commissioner Nakamura assert that if the miner does not file an action under section 105(c)(3), "obviously the temporary reinstatement provision would no longer be applicable." Slip op. at 10 n.5. I agree that temporary reinstatement ceases in this scenario, but I do not think it is "obvious" under a literal reading of the statute.

Thus the literal impossibilities created by each of the "plain meaning" interpretations of the statute confirm that the statute actually is ambiguous.

In terms of the statute's structure, Commissioners Duffy and Young describe a "two-track system" where the miner's "complaint" in section 105(c)(2) is distinctly different from the miner's "action" in section 105(c)(3). *Phillips*, 31 FMSHRC at 983-84. According to them, temporary reinstatement applies in section 105(c)(2) cases but not in section 105(c)(3) proceedings. *Id.* However, this analysis is undercut by the fact that section 105(c)(3) contains three provisions which are not explicitly stated in section 105(c)(2), but which are clearly applicable to 105(c)(2):

Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with

section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

30 U.S.C. § 815(c)(3). Indeed, if the Secretary is uninvolved with proceedings under section 105(c)(3), as Commissioners Duffy and Young, suggest, then there would be no reason for Congress to say that the Secretary, together with the Commission, is charged with expediting proceedings “under this section.”

Commissioners Duffy and Young assert that if, upon investigation, the Secretary determines that the provisions of section 105(c) have not been violated, “[a]s a practical matter, this terminates the Secretary’s involvement in the case.” Slip op. at 29. This statement assumes that the miner is unsuccessful in his action under section 105(c)(3). But if the miner should prevail in this action, then, as Mr. Gray points out, the Secretary must issue a civil penalty to the operator under section 110(a), and may seek an injunction, restraining order, or other appropriate order in federal district court under section 108 if the operator, for example, should fail to comply with an order to reinstate the prevailing miner or fail to pay the civil penalty assessed in the case. G. Br. at 2. Thus, “as a practical matter” the Secretary’s involvement is terminated only if the miner doesn’t prevail.³

With regard to the legislative history, as I pointed out in my opinion in *Phillips*, 31 FMSHRC at 1001, it may be read to support either of the conflicting interpretations.

The Secretary relies on the Senate Report, which states that Congress intended that section 105(c) “be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.” S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (“*Legis. Hist.*”). The Secretary quotes the same report to the effect that upon determining that the complaint was not frivolously brought, she shall seek “an order of the Commission temporarily reinstating the complaining miner pending *final outcome* of the investigation *and complaint*” as “an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint.” S. Br. at 17-19 (citing S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625 (emphasis in brief)).

In contrast, Commissioners Duffy and Young cite the Conference Report, which states that the Conference Committee adopts the Senate version of the provision, but which, according to the Conference Committee, provides that if the complaint was not frivolously brought, the Secretary shall “seek temporary reinstatement of the complaining miner pending the *final outcome of the investigation.*” *Phillips*, 31 FMSHRC at 985 (citing S. Conf. Rep. No. 95-461, at 52-53 (1977), *Legis. Hist.* at 1330-31) (emphasis in opinion of Commissioners Duffy and Young).

³ Even so, the Secretary may have become involved to expedite the proceedings under section 105(c)(3).

Thus, the Conference report referred to temporary reinstatement until completion of the investigation (if the Secretary did not find discrimination), while the Senate Report spoke of temporary reinstatement until the resolution of the entire complaint. The legislative history can be interpreted quite differently depending on which report is quoted.

Commissioners Duffy and Young assert that a provision of the proposed Robert C. Byrd Miner Safety and Health Act of 2010 (“proposed Byrd Act”), H.R. 5663, supports their view that termination of a miner’s temporary reinstatement is mandated by the plain meaning of section 105(c)(2) of the existing Mine Act upon the Secretary’s investigative finding of no discrimination. Slip op. at 27-28. The proposed Byrd Act, as approved by the House Committee on Education and Labor on July 21, 2010, would amend the temporary reinstatement provision of the Mine Act so as to clearly state that a miner’s temporary reinstatement continues until all proceedings on the miner’s discrimination complaint are concluded, irrespective of whether the Secretary files a complaint with the Commission. Commissioners Duffy and Young insist that this Congressional proposal is a “vindication” of their view that under existing law an order of temporary reinstatement must be dissolved if the Secretary does not file a discrimination complaint with the Commission. *Id.* They base this assertion on the fact that H.R. Rept. No. 111-579, which contains the proposed Byrd Act, does not state that *Phillips* was “wrongly decided.” *Id.* at 28. In point of fact, (1) *Phillips* was not “decided” at all but rather was a 2-2 tie vote of the Commission which allowed the underlying ALJ decision to stand, and (2) the discussion of the provision in House Rept. No. 111-579 does not address either the time or the circumstances when temporary reinstatement ceases. *See* House Rept. No. 111-579, Part I, at 42 (Summary of Bill), 62-63 (solution to the problem of protecting miners from retaliation), and 98-99 (Section-by-Section analysis) (2010). The likelihood is that the drafters of the proposed Byrd Act recognized that present section 105(c) is ambiguous.

Hence, I conclude that the statute is ambiguous, a conclusion reinforced by the Commission’s previous statement that “the status of a temporary reinstatement order following a determination by the Secretary that there has been no violation of section 105(c)” is “a situation not addressed by the statute.” *Sec’y on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947, 950 (Sept. 1999) (emphasis added). If the Commission decided in *Bernardyn* that the statute is ambiguous, it is difficult to understand the Commission now saying that the statute has a plain meaning.

III.

Since the statute is ambiguous, *Chevron II* requires the Commission to defer to the interpretation of the Secretary, if that interpretation is reasonable. As stated in *Energy West*, 40 F.3d at 460, “we will defer to an agency’s interpretation of the statute it is charged with administering when that interpretation is reasonable.” Commissioners Duffy and Young assert that, assuming the statute is ambiguous, this is not a case where the Commission is required to defer to the reasonable interpretation of the Secretary. Slip op. at 31 n.5. I disagree, and conclude that the principle of deference is plainly applicable.

Commissioners Duffy and Young assert that the principle of deference does not apply here because, within the *Energy West Mining* framework, section 105(c) is not a “statute [the Secretary] is charged with administering.” According to my colleagues, the Secretary “admits that section 105(c) has been *specifically* designed to give the Commission, and not the Secretary, the final word in discrimination cases under the Mine Act.” *Id.* (emphasis in original). However, my colleagues misconstrue the Secretary’s position. In terms of deference principles, the Fourth Circuit, in *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996), analyzed an analogous situation involving whether, under section 105(c) of the Mine Act, unemployment compensation should be deducted from a back pay award. The Secretary and the Commission proposed conflicting answers. The Secretary claimed deference for her interpretation and the mine operator claimed deference for the Commission’s interpretation. The Court concluded that it was the Secretary, based on her “constant contact with the daily operations of the mines,” who was entitled to deference. *Id.* at 113-15. As a decision involving consideration of deference in the context of a discrimination case, *Wamsley* has controlling weight.

Thus, since the statute is ambiguous, it is part of the Secretary’s function to offer an interpretation of the parameters of temporary reinstatement under the Act. Pursuant to *Chevron II* and its progeny, the Commission must defer to it if it is reasonable.⁴

IV.

The final inquiry is whether the Secretary’s interpretation of the statute is reasonable. As I stated in *Phillips*, 31 FMSHRC at 1002-04, the Secretary’s interpretation is reasonable, and therefore entitled to deference. *See Sec’y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003).

As indicated above, and in the opinion of Chairman Jordan and Commissioner Nakamura, the Secretary’s interpretation that temporary reinstatement must be continued if a miner proceeds in a discrimination action under section 105(c)(3) is consistent with the text of the statute, the structure of the statute, and one version of the legislative history. It is also consistent with the purpose of the statute.

⁴ Commissioners Duffy and Young, quoting the Secretary’s acknowledgment that she may be wrong in failing to find a violation of section 105(c)(1) in a specific case (as evidenced by the fact that in numerous cases over the years, a miner prevailed in a section 105(c)(3) action even though the Secretary declined to file a complaint under section 105(c)(2)), S. Br. at 17, also assert that it is “not logical” for the Secretary to claim deference as to general legal principles relating to temporary reinstatement. Slip op. at 31 n.5. However, the flaw in logic is on the part of my colleagues, not the Secretary. The fact that the Secretary may be wrong in failing to detect discrimination in particular cases (after an investigation lacking the tools of discovery and subpoena power) is entirely unrelated to whether deference should be given to the Secretary’s interpretation of the temporary reinstatement provision, assuming that interpretation is reasonable.

Commissioners Duffy and Young assert, essentially, that if the Secretary finds, upon investigation, that the statute was not violated, it renders the Commission's determination that the miner's complaint was "not frivolously brought" a nullity. However, temporary reinstatement during the litigation of a discrimination complaint is a provisional measure. The requirement of "not frivolously brought" is a lesser hurdle than proof of the ultimate fact of discrimination. See *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 744 (11th Cir. 1990) ("The temporary reinstatement hearing merely determined whether the evidence mustered by the miners to date established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement."). Hence, it is not inconsistent for the Secretary to say that her investigation (without discovery or subpoena power) may not have found discrimination, but the miner is still entitled to temporary reinstatement if he chooses to file an action under section 105(c)(3). Indeed, unless our holding in *Bernardyn, supra* (temporary reinstatement order remains in effect pending appeal to the Commission after a Commission judge concludes that discrimination was not proven), was wrongly decided, which my colleagues do not assert, it would be incongruous to conclude that temporary reinstatement must cease upon the Secretary's investigative finding of no discrimination. After all, the judge who found no discrimination in *Bernardyn* did so after discovery and a full evidentiary hearing, a much more thorough proceeding than the Secretary's initial investigation in this case.

Moreover, a finding that a discrimination complaint was "not frivolously brought" is made by a Commission judge after a hearing.⁵ It is no more dependent on the Secretary's investigative finding that a violation of the statute did not occur than is a Commission judge's finding in an operator's appeal from a citation that a violation of a mandatory safety standard did occur.

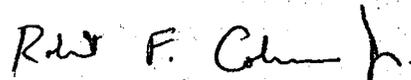
The Secretary has a vital interest in ensuring that miners who file section 105(c) complaints are entitled, as a class, to temporary reinstatement until the Commission issues a final order – regardless of whether the Secretary has determined, for whatever reason, that a miner has not demonstrated to her satisfaction that discrimination has occurred in a particular case. Because "enforcement of the [Mine] Act is the sole responsibility of the Secretary," *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006), she has an interest in ensuring that section 105(c) is interpreted in an expansive manner, as vigorous protection for miners who make safety complaints. The unfettered right of miners to complain about safety issues without fear of economic penalty is an important and necessary adjunct to the Secretary's effective enforcement of the Act. The legislative history of the Mine Act clearly demonstrates the importance Congress attached to temporary reinstatement, and its concern about miners who would otherwise be out of work while their discrimination complaints were being processed: "[T]emporary reinstatement is

⁵ As Chairman Jordan and Commissioner Nakamura note, slip op. at 16-17, it is the right to a hearing which protects the operator's due process rights. See *Jim Walter, supra*. I note that when *Jim Walter* was decided, Commission Rule 45(g) required that temporary reinstatement end when the Secretary decided not to proceed under section 105(c)(2). In 2006, the Commission revised Rule 45(g) so as to delete this provision. 71 *Fed. Reg.* 44,190, 44,199 (Aug. 4, 2006).

an *essential protection* for complaining miners who may not be in the financial position to suffer even a short period of unemployment pending the resolution of the discrimination complaint.” S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625 (emphasis added).

Anything that could potentially interfere with or diminish the willingness of any miner to complain about safety in his or her workplace – including the prospect of being fired in retaliation for complaining and not having the right to temporary reinstatement at any point before a final resolution of the complaint – would thwart the Secretary’s overarching mission to make our nation’s mines safer. It would also assign to the complaining miner all risk of error when it is the miner who is least able to bear such risk. See *Jim Walter*, 920 F.2d at 748 n.11 (Congress “clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding”). I find that to cut off a complaining miner’s entitlement to the protections afforded by temporary reinstatement at any time before his or her complaint has been fully adjudicated is at odds with what the Mine Act stands for.

Hence, I conclude that the judge erred when he issued an order dissolving Mark Gray’s temporary reinstatement, and join with my colleagues in the majority in reversing that order, and restoring to Mr. Gray the economic benefits of his former position.



Robert F. Cohen, Jr., Commissioner

Commissioners Duffy and Young, dissenting:

We continue to hold to the view on this issue we expressed in our opinion upholding the judge's decision to dissolve the order of temporary reinstatement in *Phillips v. A&S Construction Co.*, 31 FMSHRC 975, 980-89 (Sept. 2009). As we expressed in that case, the structure of and language used in section 105(c) of the Mine Act, 30 U.S.C. § 815(c), as well as the legislative history and historical background of the provision,¹ leads to only one conclusion: the availability of the temporary reinstatement remedy is inextricably linked to the Secretary's continued participation before the Commission in the reinstated miner's complaint of unlawful termination under the Act. Once the Secretary has, for whatever reason, chosen to end her participation in the underlying discrimination case, the extraordinary right to temporary reinstatement ceases, and the judge has no choice but to dissolve the order of reinstatement. That is the case where the Secretary has refused to go forward with a complaint of discrimination under section 105(c)(2), as she has here, and where she has filed such a complaint but refused to follow through with a hearing before a Commission judge, as she has in the companion case we issue today, *Baird v. PCS Phosphate Company*, Docket No. SE 2010-74-DM.

If anything, legislative events since the Commission issued its *Phillips* decision have confirmed that this was the position of Congress when it enacted the Mine Act and section 105(c). On July 21, 2010, the House Committee on Education and Labor approved H.R. 5663, the Robert C. Byrd Miner Safety and Health Act of 2010. Section 401 of the bill would amend the temporary reinstatement provisions of the Mine Act to read as follows in a new section 105(c)(3)(B):

(B) REINSTATEMENT.—If the Secretary finds that [the discharged employee's discrimination] complaint [to the Secretary] was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner or other employee until there has been a final Commission order disposing of the underlying complaint of the miner or other employee. If either the Secretary or the miner or other employee pursues the underlying complaint, such reinstatements shall remain in effect until the Commission has disposed of such complaint on the merits, regardless of whether the Secretary pursues such complaint by filing a complaint under subparagraph (D) or the miner or other employee pursues such

¹ Our colleagues Chairman Jordan and Commissioner Nakamura question whether the literal language of the Conference Report on the Mine Act should be looked to in discerning legislative intent. Slip op. at 13. In *Phillips*, however, we did not state that the report language in question should be taken literally; rather, we cited it as a strong indication that the ultimate drafters of the Mine Act viewed the Secretary's continued participation in the discrimination proceedings as a prerequisite to the miner's continued right to temporary reinstatement. See *Phillips*, 31 FMSHRC at 985.

complaint by filing an action under paragraph (4). If neither the Secretary nor the miner or other employee pursues the underlying complaint within the periods specified in paragraph (4), such reinstatement shall remain in effect until such time as the Commission may, upon motion of the operator and after providing notice and an opportunity to be heard to the parties, vacate such complaint for failure to prosecute.

Cf. Chisom v. Roemer, 501 U.S. 380, 396 (1991) (revisions and lack of revisions in subsequent legislation, as well as silence in extensive legislative history, taken into account in discerning legislative intent).

H.R. 5663, should it eventually become law, would give the Secretary in future cases exactly what she is seeking in this case through her petition for review. The extent of the right to temporary reinstatement is a policy choice best entrusted to Congress, not shifting Commission majorities or a Secretary of Labor tempted to save resources by sponsoring a miner only for temporary reinstatement but leaving him to fend for himself in the subsequent, more rigorous, discrimination proceeding.

Moreover, there is no indication that the House Education and Labor Committee views the result in *Phillips* as having been contrary to existing law. The report that accompanies the bill is not reticent in discussing relevant administrative and court decisions under existing law. However, while the report mentions three separate times that the bill would change the Mine Act's anti-discrimination provisions, in none of those instances does it state that *Phillips* was wrongly decided under the version of section 105(c) that is now in effect. See H.R. Rep. No. 111-579, Part 1, at 42 (Summary of Bill), 62-63 (solution to the problem of protecting miners from retaliation), and 98-99 (Section-by-Section Analysis) (2010). Consequently, we view the apparent necessity to revise section 105(c) as a vindication of our view that, under existing law, the judge has no choice but to dissolve temporary reinstatement upon the Secretary's exit from the underlying discrimination proceeding.

Congress – that body whose laws we enforce, consistent with its intent – is hardly alone in viewing the miner's action and remedies as separate from those pursued by the Secretary. Our administrative law judges have considered that a miner who disclaims any private remedy effectively terminates his case before the Commission. See *Alvarez v. Loudoun Quarries*, 32 FMSHRC 1346, 1349-50 (Sept. 2010) (ALJ) (complainant's unqualified rejection of reinstatement from point of termination to present renders claim moot because damages are precluded); *Sonney v. Alamo Cement Co.*, 29 FMSHRC 310, 312-15 (Apr. 2007) (ALJ) (claim is moot "when it is impossible for the court to grant any effectual relief" to a prevailing party) (emphasis added, citations omitted). Thus, the notion advanced here that the Secretary's public duty continues in the miner's private case is alien to and unprecedented in our jurisprudence.

This is critical, because the temporary reinstatement the Secretary secures for the miner, pending her investigation and determination of whether a violation of the Act has occurred or not, is inextricable from her public duty as the steward of the Act and the protector of the rights of miners who labor under it. She has a duty to faithfully and thoroughly investigate the underlying facts, and that duty runs not only to the individual miner whose complaint to the Secretary initiates the investigation, but to all miners. But the Act goes further in defining her obligations: “If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated,” she is required to notify the claimant, who may initiate an action on his or her own behalf. 30 U.S.C. § 815(c)(3). As a practical matter, this terminates the Secretary’s involvement in the case.²

This public duty must be related back contextually to the original action initiated by the Secretary for temporary reinstatement. Importantly, the initial determination as to whether or not the complaint is frivolously brought is made by the Secretary. Yet this determination is made before the completion of the investigation the law requires her to undertake. Our colleagues Chairman Jordan and Commissioner Nakamura downplay the significance of the investigation commanded by the statute, stating that the Secretary’s determination is made without the benefit of discovery or a full hearing. Slip op. at 15 n.9. There are several manifest weaknesses in this argument.

First, the initial determination of non-frivolousness is also made without discovery, and the hearing provided for is exceedingly narrow, with a forgiving standard of proof. Second, while the Secretary does not have the benefit of discovery, she has access, through her investigatory powers, to both sides of the case, presumably including witnesses and documentation. Third, it is the Secretary’s burden to establish, by a preponderance of the evidence, that discrimination has occurred. That is the purpose of the hearing. Yet her determination must be grounded, not on an unlikelihood that her action will be successful, but on a determination by the Secretary, after a “full administrative investigation,” *see Hatfield*, 13 FMSHRC at 545 (emphasis added), “that the provisions of this subsection have *not been violated*.” 30 U.S.C. § 815(c)(3) (emphasis added).

² Our colleagues observe that we have held that a miner’s action under section 105(c)(3) must be based on the matter initially investigated by the Secretary pursuant to section 105(c)(2). Slip op. at 11-12 (citing *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991)). This is true, but misses the point of *Hatfield*. The Commission held in that case that “the statutory scheme provides to miners a *full* administrative investigation and an evaluation of an allegation of discrimination, *as well as the right to a private action in the event that the administrative evaluation results in a determination that no discrimination occurred*.” *Hatfield*, 13 FMSHRC at 545 (citations omitted, emphases added). The miner in *Hatfield* had made no specific allegations of protected activity in his complaint to MSHA. Thus, the Commission held that the Secretary was effectively prevented from carrying out her investigative duties under the Act, while observing the clear distinction between those duties and the *private* action available to the miner after a full investigation and a finding that no discrimination had occurred.

Our colleagues nonetheless hold that “[t]he Secretary’s decision not to proceed with the discrimination complaint does not transform the complaint into a frivolous action,” and then go on to state that “*because* the Secretary’s decision not to go forward on the miner’s behalf does not vitiate the previous finding that” the miner’s complaint was not frivolously brought, temporary reinstatement must remain in effect. Slip op. at 15 (emphasis added). First of all, the Secretary most assuredly does *not* merely “decide not to proceed” or “decide not to go forward on the miner’s behalf.” Rather, as we have noted, she determines that a violation of the law has not occurred and discontinues the participation of the United States in the case.³

Secondly, our colleagues’ reasoning greatly simplifies the problem before us in this case by assuming away the issue. While it is true that the statute does not expressly require the Secretary to find that the miner’s action, upon investigation, appears to be “frivolous,” the Act *does* require her to determine whether or not there is a sufficient factual and legal basis to permit continued prosecution of the matter complained of, and to act accordingly.⁴ Permitting the Secretary to abandon meritorious claims is inconsistent with her public duties and with the express statutory mandate to determine through investigation whether or not the law has been violated.

Thus, the nature of the Secretary’s investigation and the conclusion she reaches is inescapable. As we previously noted, a finding by the Secretary that the Act was not violated is a determination with legal effect and consequences. *Phillips*, 31 FMSHRC at 983. The Secretary has a clear obligation to file a complaint *immediately* on behalf of the miner if she determines the Act has been violated, and to notify the miner that she will not prosecute the claim, thereby permitting a private action, if she finds to the contrary.

³ Our colleagues claim that Congress would not permit a frivolous action before the Commission. Slip op. at 15. Congress has expressly determined that the United States should not participate in an action where the Secretary, empowered to act on behalf of the United States and the miner, affirmatively finds that the terms of the Act have not been violated. The same subsection of the law empowers the Secretary, again acting on behalf of the United States, to protect the public interest in ensuring that those who draw attention to unsafe conditions or practices in our mines are not punished for doing so. The temporary reinstatement provided to secure this interest is imposed before the investigation commanded by the subsection. Congress clearly did not intend the inspection to be meaningless, superficial, or inconsequential.

⁴ Assuming, *arguendo*, that when the government agency charged with the protection of miners and the interpretation and application of the Mine Act on their behalf expressly finds that there is insufficient legal or factual support to allow continued prosecution, the matter is not rendered frivolous as a matter of law, we would hold that an operator should be permitted to seek dissolution of the order of temporary reinstatement on the grounds that it has been found to be unsupported in fact or law. This would at least require the Secretary to explain why she has decided not to seek the vindication of a miner’s rights in a case that may have merit or, in the alternative, why temporary relief should continue in a case that lacks merit.

Moreover, the center of our colleagues' case – that because there is no “order” terminating the complaint to MSHA, reinstatement must continue – is undercut by a fact acknowledged by the majority: there is no order disposing of the temporary reinstatement if the miner elects *not* to proceed with a private action within 30 days. Slip op. at 10 n.5. They attempt to finesse this by claiming that the “*possibility*” of a final order is a necessary implication requiring temporary reinstatement to continue during the interregnum between the Secretary’s determination and the expiration of the 30-day period, on the one hand, or the miner’s initiation of a private action on the other. *Id.* Why a complementary implication requiring dismissal does not arise if the miner elects to proceed with a private action is not explained, beyond the acknowledgment that if the “miner foregoes that possibility, obviously the temporary reinstatement provision would no longer be applicable.” *Id.* We are baffled as to how the Secretary – whose judgement and expertise we acknowledge routinely – is unable to make a binding determination because the statute requires a final order, yet the decision of a miner is fatal and binding on the Commission, even though there has been no order in that instance either.⁵

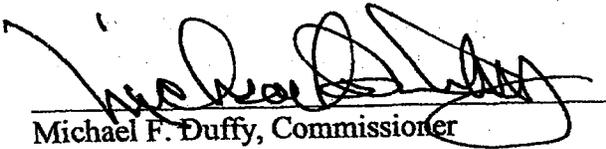
Finally, our colleagues dismiss the operator’s claim that its due process rights are violated by continuation of reinstatement even though the Secretary has found that the operator did not

⁵ As we explained in our opinion in *Phillips*, even if we were to find section 105(c) ambiguous on this issue, we do not believe this is an issue on which deference to the Secretary is appropriate. While on one hand the Secretary continues to argue that deference to her is required by *general* principles of administrative law and statutory construction (S. Br. at 5-7), she also admits that section 105(c) has been *specifically* designed to give the Commission, and not the Secretary, the final word in discrimination cases under the Mine Act, because the Secretary could be wrong in refusing to pursue a miner’s discrimination complaint. *See id.* at 14-16. We fail to see why resort to general principles is necessary when Congress has directly spoken on the subject of the division of administrative authority. On the subject of general principles, we also note that the Secretary “could be wrong” about any number of matters entrusted to her, a fallibility which does not appear to similarly trouble her as she insists on deference to her expertise in this and other contexts. It is not logical for the Secretary to assert that we defer to her here, even as she acknowledges that her judgment is so likely to be flawed that we should, in effect, presume that the possibility of error or dereliction on her part justifies preserving a remedy in the face of her express finding that the miner is not entitled to it.

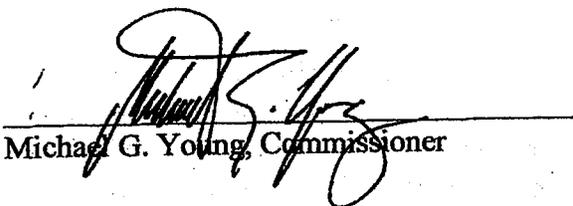
Commissioner Cohen in his concurrence argues that under *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996), we must defer to the Secretary’s interpretation of the statute. Slip op. at 24. We do not find *Wamsley* pertinent authority in this instance, however, because here, unlike in that case, the Secretary has ceased participating in the miner’s discrimination case. The fact that the statute may require the Secretary to return to the case to protect the miner’s interests and fulfill her duties under the Mine Act if the Commission upholds the miner’s action (*see* slip op. at 6, 22) is of little consequence to the deference question, given the Secretary’s intentional absence from the primary part of the proceeding – its merits – after her thorough investigation of those merits.

violate the law. Slip op. at 16-17, 19. We would not find it necessary to reach this claim. We would instead hold that the process as we have previously interpreted it does protect the operator's rights. The Secretary's duty to investigate and to prosecute only those claims which she finds factually and legally sufficient is an important component of the process designed to ensure that the rights of operators are not unreasonably constrained in this context.

We thus would affirm the judge's decision here to dissolve the order of temporary reinstatement, and respectfully dissent from the majority opinions reversing the judge's order.



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner

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SE 2010-74-D

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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January 11, 2011

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

v.

ENOS MILLER

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Docket No. WEST 2008-1569-M
A.C. No. 24-02519-159643

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 27, 2010, the Commission received from Enos Miller a letter seeking to set aside an order of Chief Administrative Law Judge Robert J. Lesnick entering default judgment for the Secretary of Labor in this case. On January 10, 2011, the Commission received a response from the Secretary stating that she does not oppose Mr. Miller’s request.

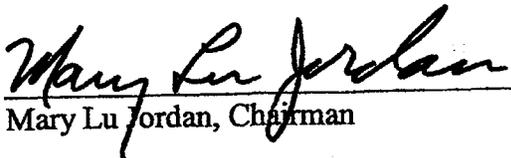
The Chief Judge’s jurisdiction in this matter terminated when his default order was issued on December 2, 2010. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, relief from a judge’s decision may be sought by filing a petition for review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We construe the letter from Mr. Miller to be a timely filed petition for discretionary review.

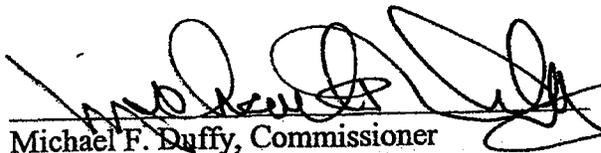
On December 14, 2009, Chief Judge Lesnick issued a show cause order to Mr. Miller stating that he had failed to file an answer to a petition for penalty assessment sent to him by the Secretary of Labor on November 3, 2008 and that Mr. Miller would be found in default if he did not file an answer or show good cause for not doing so within 30 days of the order. On March 3, 2010, the Secretary filed a motion to dismiss the instant proceeding due to Mr. Miller’s failure to file an answer or respond to the judge’s show cause order. On December 2, 2010, Chief Judge

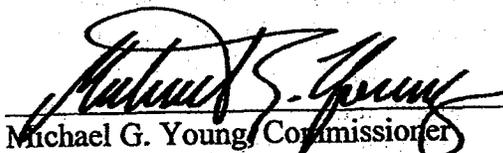
Lesnick issued an order finding that Mr. Miller had failed to respond to the show cause order and entering a judgment by default for the Secretary.

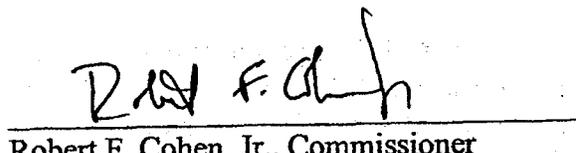
In support of his petition, Mr. Miller states "it is increasingly difficult to have any time for anything but a losing battle to stay financially solvent." Mr. Miller also asserts that he has laid off all employees that he can operate without thereby increasing the burden on him as the owner.

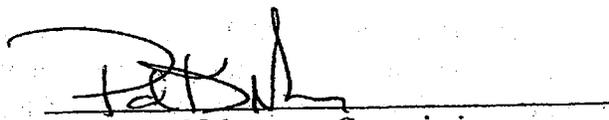
Because the petition filed by Mr. Miller does not explain why he failed to file an answer or to respond to the Chief Judge's show cause order and does not provide any reasons why the default order should be vacated, we hereby deny the petition.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 12, 2011

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

v.

LEHIGH CEMENT COMPANY

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Docket No. PENN 2010-462-M
A.C. No. 36-00185-211813

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 26, 2010, the Commission received from Lehigh Cement Company (“Lehigh”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

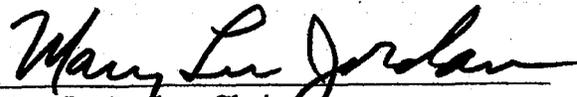
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

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

Counsel for the operator states that Lehigh intended to contest the penalties contained on Proposed Assessment No. 000211813, but that counsel was unaware that the proposed assessment was among other materials forwarded to counsel by Lehigh. Because of this error, counsel inadvertently failed to timely contest the penalties on the operator's behalf, and the proposed assessment became a final Commission order. When the operator's counsel realized the mistake by reviewing the materials sent by Lehigh, the operator promptly sought reopening within 30 days of the assessment becoming a final order and before a notice of delinquency had been issued.

The Secretary opposed reopening of the proposed penalty arguing that inadequate or unreliable procedures and being extremely busy do not constitute sufficient grounds for reopening. The operator filed a response to the Secretary's opposition explaining at length the specific nature of the operator's claims and the prompt manner in which reopening was sought.

Having reviewed Lehigh's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. We base our decision to reopen on the promptness of the motion to reopen, the detailed explanation provided, as well as counsel's representation that he has initiated a review of case handling procedures so as to ensure that contest matters will be more carefully monitored in the future.¹ Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

¹ We note that Lehigh also brought a motion to reopen based on similar circumstances in *Lehigh Cement Co.*, 32 FMSHRC 473, 474 (June 2010). We strongly caution counsel and the operator to take greater care to ensure that all penalty contests are timely and properly filed in the future.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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January 19, 2011

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

v.

WHITE FLAME ENERGY, INC.

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Docket No. WEVA 2011-276

A.C. No. 46-08632-219236

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On October 29, 2010, the Commission received a motion by counsel for White Flame Energy, Inc., seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On December 7, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

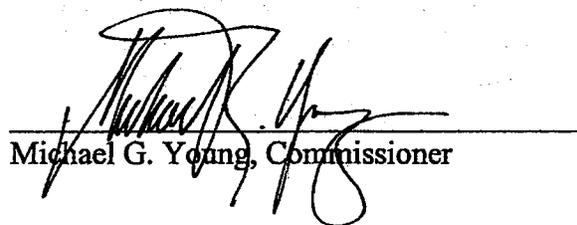
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.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



Mary Lu Jordan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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January 19, 2011

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

v.

NORTHEAST SOLITE CORPORATION

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Docket No. YORK 2011-13-M
A.C. No. 30-00287-224817

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

ORDER

BY THE COMMISSION:

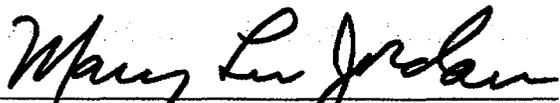
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On October 21, 2010, the Commission received a motion by counsel for Northeast Solite Corporation seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On November 23, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

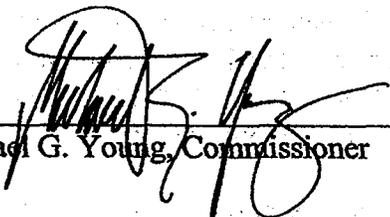
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a)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

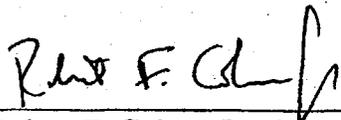
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

January 25, 2011

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

v.

NORTH COUNTY SAND &
GRAVEL, INC.

Docket No. WEST 2010-977-M
A.C. No. 04-05632-188492

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On April 2, 2010, the Commission received a motion by counsel to reopen a penalty assessment issued to North County Sand & Gravel, Inc. ("North County") that became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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

On June 18, 2009, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000188492 to North County. North County asserts that it timely sent in a contest form but because of “some undetermined mistake, not attributable to the operator, . . . MSHA did not receive the request for a hearing.” North County submitted the affidavit of its chief financial officer and office manager stating that she placed the completed contest form in “the self-addressed envelope that was included with the assessment” and mailed the form, without obtaining proof of mailing, before the expiration of the 30-day deadline.

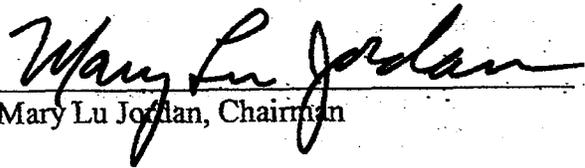
The Secretary opposes North County’s request to reopen because its explanation is inconsistent with MSHA’s procedures in that MSHA does not provide self-addressed envelopes with proposed assessments. In addition, MSHA has no record of receiving a contest form. She maintains that the operator’s contention of “some indeterminate mistake” is conclusory, lacks sufficient detail, and does not provide adequate grounds for reopening. The Secretary also notes that a delinquency notice was sent to the operator on September 10, 2009, more than six months before it filed its reopening request, and the case was referred to the Treasury Department for collection on January 7, 2010.

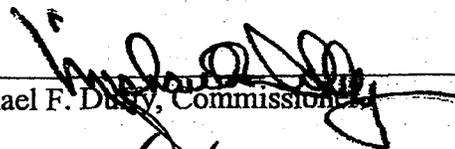
Having reviewed North County’s request to reopen and the Secretary’s response thereto, we agree that the operator has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. In addition, North County has failed to explain why it delayed approximately six months in responding to the delinquency notice sent by MSHA.¹ Accordingly, we hereby deny without prejudice North County’s request to reopen. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words “without prejudice” mean that North County may submit another request to reopen the Assessment No. 000188492.² Any amended or renewed request by the operator to reopen this

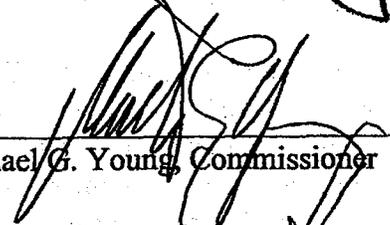
¹ In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator’s receipt of a delinquency notice and the operator’s filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313,1316 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion).

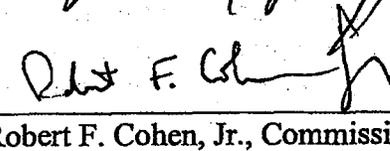
² If North County submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of “good cause” may be shown by a number of different factors including mistake, inadvertence, surprise, or

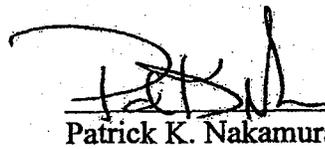
assessment must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. North County should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. North County should also submit copies of supporting documents with its request to reopen and specify which proposed penalties it is contesting. North County should further include an explanation for why the operator waited so long to file for reopening after receipt of the notice of delinquency.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

January 28, 2011

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

v.

CEMEX CONSTRUCTION MATERIALS,
FLORIDA, LLC

:
:
:
:
Docket No. SE 2011-30-M
A.C. No. 08-00046-227907

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 13, 2010, the Commission received from Cemex Construction Materials, Florida, LLC ("Cemex"), a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On November 2, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment. The Secretary's response included a copy of Cemex's contest form, filed one day late, that the operator had marked to indicate its intention to contest 27 penalties.

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

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

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

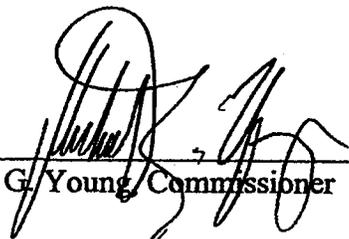
Having reviewed the facts and circumstances of this case, the operator’s request, and the Secretary’s response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of the 27 penalties within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



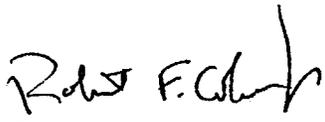
Mary Lu Jordan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



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Patrick K. Nakamura, Commissioner

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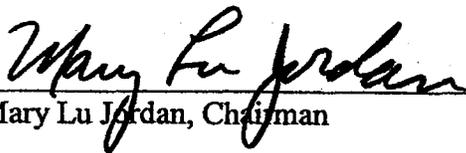
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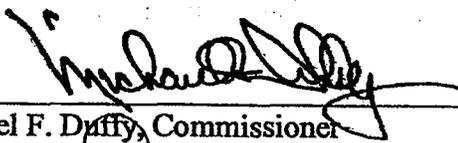
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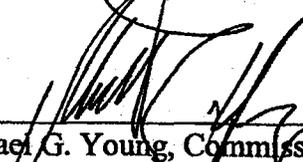
Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
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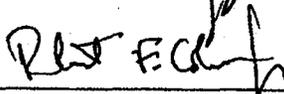
by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. See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

Having reviewed the facts and circumstances of this case, the operator’s request, and the Secretary’s response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.¹


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

¹ We note that the Secretary’s response indicates that the operator’s payment of penalties that it was not contesting has been, in part, applied to penalties that the operator is now being permitted to contest. We trust that the Secretary will ultimately allocate the payments properly.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

February 1, 2011

SECRETARY OF LABOR,	:	Docket No. CENT 2010-1273-M
MINE SAFETY AND HEALTH	:	A.C. No. 13-02297-225215
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-1302-M
v.	:	A.C. No. 13-02297-215099
	:	
PATTISON SAND COMPANY, LLC	:	Docket No. CENT 2010-1642-M
	:	A.C. No. 13-02297-221933

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 10, September 17, and September 20, 2010, the Commission received motions by counsel for Pattison Sand Company, LLC (“Pattison”) seeking to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

On March 29, 2010, June 9, 2010, and July 7, 2010, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment Nos. 000215099, 000221933, and 000225215, respectively, to Pattison, proposing civil penalties for various citations. Pattison states that its mine has been inspected numerous times in 2010, which has resulted in the issuance of a large number of citations and orders. Regarding Proposed

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2010-1273-M, CENT 2010-1302-M, and CENT 2010-1642-M, all captioned *Pattison Sand Company, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

Assessment Nos. 000215099 and 000225215, the operator submits that the proposed penalty assessments were “missed” or “slipped through the cracks.” Pattison explains further that it has no record of receiving either proposed penalty assessment.

The Secretary opposes Pattison’s request to reopen Proposed Assessment Nos. 000215099 and 000225215. She notes that MSHA’s records indicate that Pattison received Proposed Assessment Nos. 000215099 and 000225215 on April 1, 2010, and July 14, 2010, respectively. The Secretary asserts that the operator’s receipt of a large number of citations does not constitute an excuse for the operator’s failure to timely contest the proposed assessments. With respect to Proposed Assessment No. 000215099, the Secretary further notes that although a delinquency notice was sent to the operator on June 30, 2010, the operator did not file the reopening request until almost three months later.

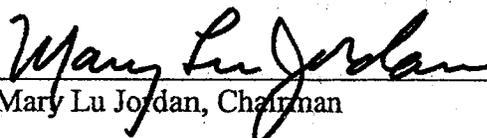
Regarding Proposed Assessment No. 000221933, the operator states that it initially misplaced the assessment form. However, Pattison found the proposed assessment form on July 7, 2010, and then immediately forwarded the form by email to its counsel with instructions to contest the proposed penalties. The operator states that its counsel was on vacation from July 9 through July 18 and did not notice the operator’s email until her return. The Secretary does not oppose reopening Assessment No. 000221933.

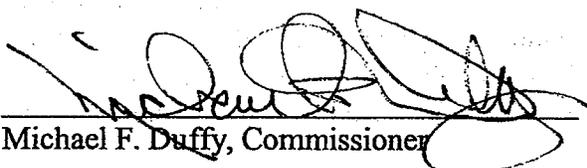
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the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

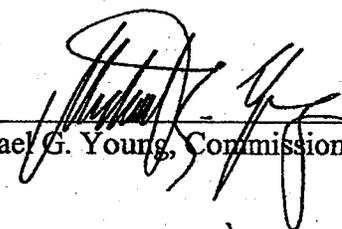
Having reviewed Pattison’s requests to reopen and the Secretary’s responses, we conclude that Pattison has failed to provide an adequate basis for the Commission to reopen the three penalty assessments. Pattison’s requests do not adequately explain the company’s failure to contest the proposed assessments on a timely basis. At a minimum, the operator must provide a more detailed explanation of how it normally contests proposed penalties and specific information regarding why that process did not work in these instances. For instance, it is not clear why the operator’s email regarding Assessment No. 000221933 was not received until after July 18 although the email was sent on July 7 and its counsel did not leave for vacation until July 9. Furthermore, in considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator’s receipt of a delinquency notice and the operator’s filing of its motion to reopen.

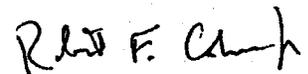
See, e.g., Left Fork Mining Co., 31 FMSHRC 8, 11 (Jan. 2009). Although the Secretary's response raised the issue that Pattison failed to explain why, after it was informed of the delinquency regarding Proposed Assessment No. 000215099, it took as long as it did to request reopening, the operator did not file a reply providing an explanation.²

Having reviewed Pattison's requests and the Secretary's responses, we conclude that Pattison has not provided the Commission with an adequate basis to reopen. *See, e.g., C.S.A. Mining, Inc.*, 31 FMSHRC 773, 775 (July 2009). Accordingly, we deny without prejudice Pattison's requests to reopen. Any amended or renewed request by Pattison to reopen the assessments must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

² We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008). Accordingly, where the Secretary raises the issue of the delay between receipt of a delinquency letter and the filing of the request to reopen, an operator who does not explain why, after it was informed of a delinquency, it took as long as it did to request reopening, does so at its peril.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SUITE 9500

WASHINGTON, DC 20001

February 1, 2011

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

v.

SIKES PIPE COMPANY

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Docket No. SE 2010-1161-M
A.C. No. 08-01060-222560

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On September 8, 2010, the Commission received from Sikes Pipe Company (“Sikes”) a letter requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

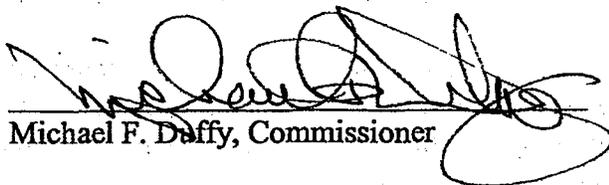
The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000222560 to Sikes on June 15, 2010. Sikes states that it never received the proposed assessment form. In August 2010, the operator's records keeper discovered that the proposed penalties set forth on the form were considered final Commission orders when she reviewed MSHA's data retrieval system regarding unrelated citations. Upon investigation, the operator discovered that the form had been sent by FedEx but returned as unclaimed. Sikes' records keeper states that until recently, she had been traveling out of town for a week-and-a-half every month, and that it was possible that delivery had been attempted during her absence.

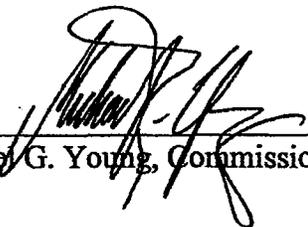
The Secretary does not oppose Sikes' request to reopen. However, she states that if the person responsible for processing mail is going to be away for a length of time each month, the operator should make arrangements to ensure that proposed assessments are received and processed in a timely manner during that person's absence.

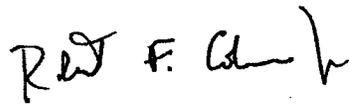
Having reviewed the facts and circumstances of this case, Sikes' request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Within 30 days of the date of this order, Sikes must notify the Secretary as to which citations it wishes to contest on Proposed Assessment No. 000222560. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of notification by the operator. See 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Daffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

February 7, 2011

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

v.

NALLY & HAMILTON ENTERPRISES, INC. :

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Docket No. KENT 2010-748
A.C. No. 15-19301-200653

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 4, 2010, the Commission received from Nally & Hamilton Enterprises, Inc. ("N&H") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

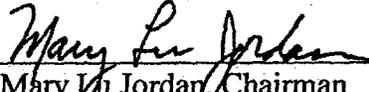
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

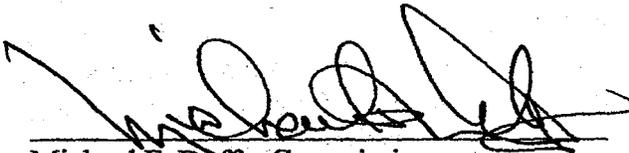
On October 15, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000200653 to N&H for eight citations it had issued to N&H in September 2009. N&H states that it was not aware of the proposed assessment until it was notified of the delinquency by MSHA. It contends that the clerical staff did not forward the documents to the correct employees and that the employee who normally receives the assessments was ill at the time the assessment was received in its office in Calvin, Kentucky. The operator asserts that it is in the process of ensuring that assessments are sent to its office in Bardstown, Kentucky, for processing.

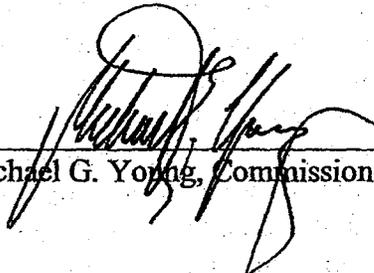
The Secretary opposes and states that the operator's conclusory statements are insufficient to justify reopening. She states that the record indicates that the assessment was delivered via FedEx to, and signed for by, the operator on October 22, 2009, and that a delinquency notice was sent to the operator on January 7, 2010. She argues that the operator's internal office procedures were inadequate in that it did not assign another employee to perform the duties of the absent employee responsible for processing assessments during the time of his absence, and thus do not constitute grounds for reopening.

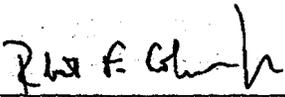
Having reviewed N&H's request and the Secretary's response, we conclude that N&H has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. The operator's explanation that it failed to file a timely contest because its clerical staff failed to forward the documents to the correct employees and because the responsible employee who normally handles assessments was absent (Mot. at 1), without any further elaboration, does not provide us with an adequate basis to justify reopening the assessment. Additionally, the operator does not explain why it waited nearly two months after receiving the delinquency notice to request reopening. Accordingly, we deny without prejudice N&H's request. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

Any amended or renewed request by N&H to reopen Assessment No. 000200653 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.


Mary Li Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 7, 2011

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

v.

COALFIELD SERVICES, INC.

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Docket No. WEVA 2009-1796
A.C. No. 46-05992-183453 R58

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

ORDER

BY THE COMMISSION:

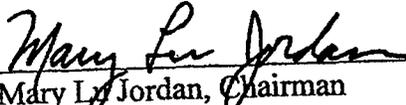
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 13, 2009, the Commission received from Coalfield Services, Inc. (“Coalfield”), a motion requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

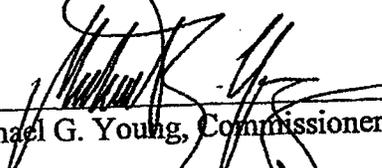
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a)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

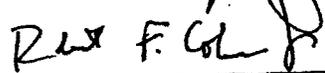
On April 23, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000183453 to Coalfield. Coalfield asserts that it did not send in the contest form because of "a clerical error." It further contends that when it learned of its error on or about June 30, 2009, it unsuccessfully attempted to file the contest with MSHA at that point. Although the Secretary does not oppose Coalfield's request to reopen, she urges the operator to take all steps necessary to ensure that future penalty assessments it wishes to contest are contested in a timely manner.

Having reviewed Coalfield's request to reopen and the Secretary's response thereto, we determine that the operator has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. The operator's contention of "a clerical error" is conclusory, lacks sufficient detail, and does not provide adequate grounds for reopening. Accordingly, we hereby deny without prejudice Coalfield's request to reopen. *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Coalfield may submit another request to reopen the Assessment No. 000183453.¹ Any amended or renewed request by the operator to reopen this assessment must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.


Mary L. Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

¹ If Coalfield submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Coalfield should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Coalfield should also submit copies of supporting documents with its request to reopen.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 7, 2011

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

v.

OAK GROVE RESOURCES LLC

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Docket No. SE 2009-812
A.C. No. 01-00851-183518

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

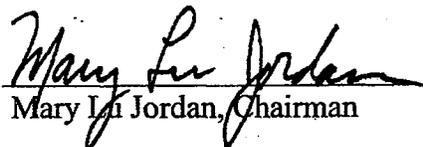
ORDER

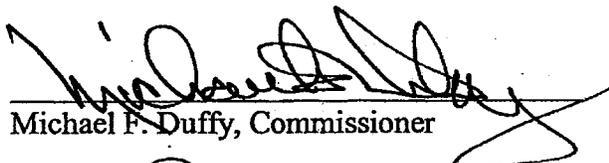
BY THE COMMISSION:

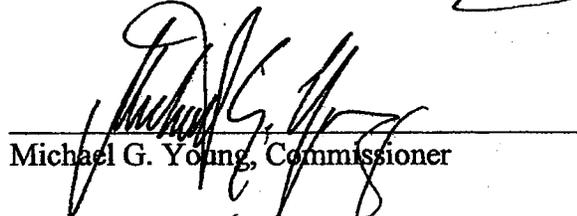
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On January 26, 2011, the Commission received from Oak Grove Resources LLC (“Oak Grove”) a motion by counsel to permit late filing of a renewed motion to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

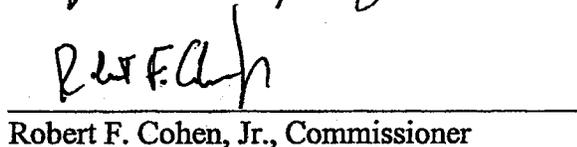
On October 28, 2010, the Commission denied without prejudice Oak Grove’s prior motion to reopen the subject penalty assessment. *Oak Grove Res., LLC*, 32 FMSHRC 1253, 1254 (Oct. 2010). The Commission instructed that, if Oak Grove sought reopening again, “it must do so within 30 days.” *Id.* Oak Grove waited nearly 90 days to bring its renewed motion to reopen, contrary to the Commission’s explicit instruction.

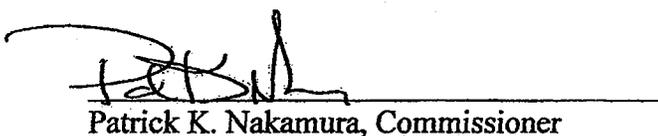
Because Oak Grove failed to timely file its second motion to reopen for failing to file a timely contest of the penalty assessment, we deny the motion to permit late filing and deny the motion to reopen the penalty assessment.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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On June 3, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Penalty Assessment No. 000221338 to Oak Grove, proposing penalties of nearly \$125,000 for 80 citations and orders issued to the operator the previous April. In its motion to reopen the assessment so that it can contest 27 of the penalties proposed for a total of nearly \$111,000,¹ Oak Grove states that it failed to timely file a contest due to a miscommunication between its counsel and its safety director. Its safety director further states that the contest form was submitted in July to MSHA with Oak Grove's payment of the uncontested penalties, with both sent to MSHA's address for penalty payments, not to the separate address for contests.

The Secretary opposes the reopening of the proposed assessment on the ground that inadequate or unreliable internal procedures do not constitute an adequate excuse for reopening. She argues that the large amounts of the penalties involved indicate that the operator's internal procedures were particularly inadequate. She also states that payment for the uncontested penalties was by check dated October 7, 2010, that there was no contest form attached to the payment, and that the payment did not designate which penalties were being paid.

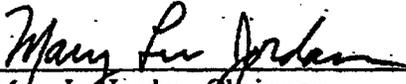
Since the time Oak Grove filed its motion and the Secretary her response, the Commission issued an order denying two other Oak Grove motions to reopen, including one which contained almost exactly the same excuse regarding a miscommunication between the safety director and counsel. We held that such an explanation provided insufficient grounds to reopen, and stated that if Oak Grove wished to renew its request to reopen with a detailed explanation of the circumstances, it should file its renewed or amended request within 30 days. *Oak Grove Res., LLC*, 32 FMSHRC 1253, 1254-55 (Oct. 2010).

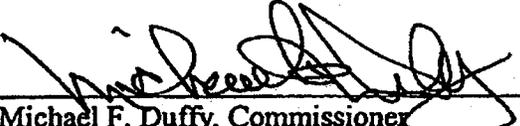
The operator did not do so, but instead waited nearly three months, and then filed a renewed motion to reopen accompanied by a motion to permit late filing. In a separate order, the Commission is denying the motion to permit late filing and thus will not consider the renewed motion in that case.

We are also hereby denying, without prejudice, the motion to reopen the assessment in this case. We have held that an inadequate or unreliable internal processing system does not constitute inadvertence, mistake or excusable neglect so as to justify the reopening of an assessment which has become final under section 105(c) of the Mine Act. *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Elk Run Coal Co.*, 32 FMSHRC 1587, 1588 (Dec. 2010). Should Oak Grove renew its request to reopen this assessment, it must do so within 30 days, and fully explain the circumstances in its failure to timely contest the proposed assessment. It must

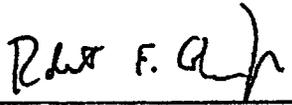
¹ Oak Grove's motion refers to Order No. 6690851 and Citation No. 8518607 twice each when listing the penalties it seeks to reopen in its motion.

also address what it has done to ensure that it responds to proposed assessments in a timely manner, in order to avoid a repeat of the mistakes it outlined in its motion.²


Mary L. Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

² Prompted by the Secretary's contradiction of Oak Grove's claim regarding the timing of its payment of uncontested penalties in this instance, we also note the following: (1) the proposed assessment at issue shows that, at least as of June 2010, Oak Grove was significantly delinquent with regard to the payment of penalties to MSHA; (2) the publicly available MSHA Data Retrieval System indicates that in the case of more than one recent assessment, Oak Grove has apparently timely contested certain penalties, but is delinquent in paying other penalties that were part of the same assessment. This information further detracts from Oak Grove's credibility in seeking relief from proposed penalty assessments that have become final orders.

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On December 8, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000205195 to Buche. In its letter, Buche asserts that because of a miscommunication between the operator and the consultant as to who was to contest the penalty assessment, it was never contested.

The Secretary opposed reopening, asserting that an unreliable internal processing system is not grounds for reopening. She further asserted that the operator failed to adequately detail and justify the circumstances that warrant reopening.

Attorneys for Buche then submitted supplemental authority and affidavits in support of the request to reopen. In those affidavits, the President of Buche explains that he spoke with Mr. Redding, Buche's consultant, shortly after the assessment was received and understood that Mr. Redding would file the contest form with MSHA. Mr. Redding, however, stated that, in that conversation, he understood that the President of Buche was to check off the violations to contest them and to send the form to MSHA. The President of Buche avers that he first learned that the contest had not been submitted when he received the delinquency notice in early March 2010. Buche then promptly took steps seeking to reopen the penalty assessment.

Having reviewed Buche's request, the Secretary's response, and Buche's supplemental filing,¹ in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

¹ The Commission encourages parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *Highland Mining Co.*, 31 FMSHRC 1313, 1316 n.3 (Nov. 2009)

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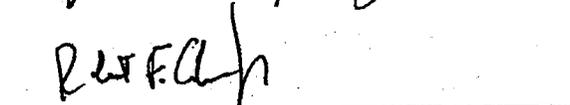
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 7, 2011

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

v.

NEVADA READY-MIX CORPORATION

:
:
:
:
Docket No. WEST 2011-112-M
A.C. No. 26-02142-227907

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

ORDER

BY THE COMMISSION:

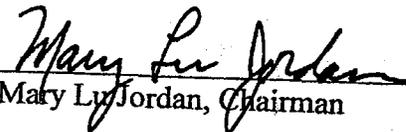
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 20, 2010, the Commission received a motion by counsel for Nevada Ready-Mix Corporation seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On December 13, 2010, the Commission received a response from the Secretary of Labor, dated November 15, 2010, stating that she does not oppose the request to reopen the assessment.

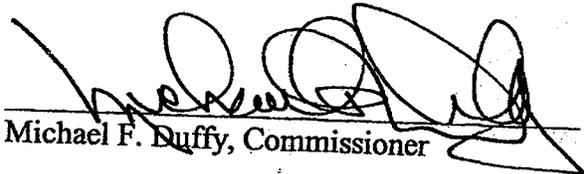
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

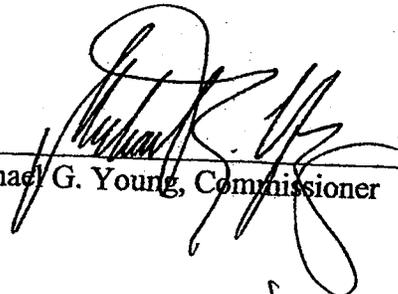
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

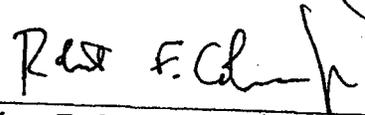
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

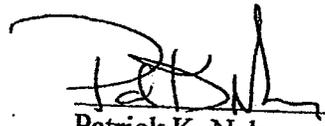
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.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


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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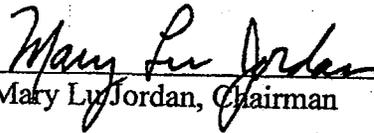
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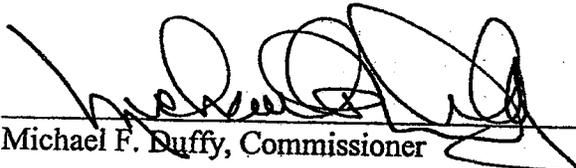
Chief Administrative Law Judge Robert J. Lesnick
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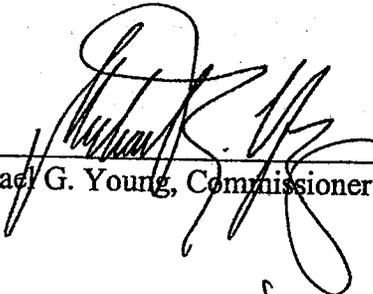
On July 29, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000192595 to Detroit Salt, proposing civil penalties for several citations. In its letter seeking reopening, the operator asserts that it intended to contest the penalty for one of the citations included in that assessment. The letter does not explain why the operator failed to timely contest the penalty but instead indicates that possibly the "Proposed Assessment Case document was missing from the payment packet documents" sent to MSHA.

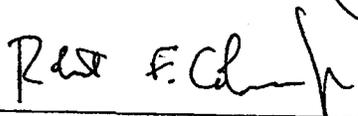
The Secretary opposes reopening on the ground that in an earlier case Detroit Salt had similarly claimed that it thought it had sent the notice of contest along with the payment to MSHA at its St. Louis, Missouri office. *Detroit Salt Co.*, 31 FMSHRC 759 (July 2009). In that case, the Secretary by letter dated April 20, 2009, did not oppose reopening but specifically reminded the operator of the proper way to contest penalties and warned the operator that she might oppose future reopening requests.

Having reviewed Detroit Salt's request to reopen and the Secretary's response, we deny Detroit Salt's request to reopen this matter. The Secretary's response in the prior case involving Detroit Salt made clear that the form to contest a proposed assessment may not be sent along with payment of uncontested penalties to MSHA's payment processing center in St. Louis.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


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Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 7, 2011

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

v.

IRON EAGLE ENTERPRISES LLC

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Docket No. KENT 2010-747
A.C. No. 15-19351-199923

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

ORDER

BY THE COMMISSION:

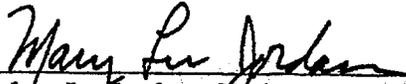
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 3, 2010, the Commission received from Iron Eagle Enterprises LLC a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On March 18, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

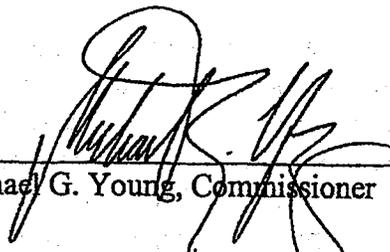
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

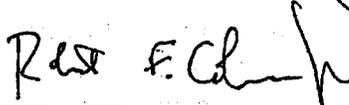
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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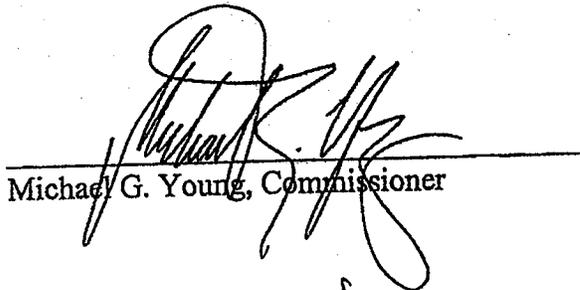
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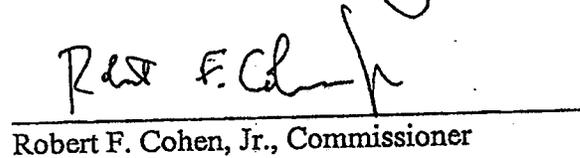
that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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


Mary Lu Jordan, Chairman


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

February 15, 2011

KEVIN BAIRD

v.

PCS PHOSPHATE COMPANY, INC.

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:
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Docket No. SE 2010-74-DM

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

ORDER

BY: Jordan, Chairman, and Cohen and Nakamura, Commissioners

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). On January 6, 2011, the Commission issued a decision (“*Decision*”) reversing an administrative law judge’s order which dissolved her previous orders that miner Kevin Baird be temporarily reinstated with PCS Phosphate Company, Inc. (“PCS”). On January 20, 2011, PCS filed a motion to stay the Commission’s decision pending federal court review. On February 1, 2011, the Secretary of Labor, who had previously been granted amicus curiae status in this proceeding, filed a response in opposition to the motion.¹ On February 2, 2011, Baird also filed a response in opposition to PCS’s motion. On February 3, 2011, the United States Court of Appeals for the Fourth Circuit docketed No. 11-1102, *PCS Phosphate Co. v. FMSHRC and Baird*.² For the reasons that follow, we deny PCS’s motion for stay pending appeal.

¹ The Secretary also filed an unopposed motion for leave to file her response. The motion for leave is granted.

² Section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), states that, upon appeal of a final decision of the Commission, the court of appeals shall have exclusive jurisdiction in the proceeding at such time as the record before the Commission is filed with the court. Because the record has not yet been filed, the Commission has jurisdiction to consider PCS’s motion. *Sec’y on behalf of Smith v. The Helen Mining Co.*, 14 FMSHRC 1993, 1994 (Dec. 1992).

I.

Factual and Procedural Background

The background of Baird's discrimination claims, brought under section 105(c) of the Mine Act, 30 U.S.C. § 815(c), are set forth in the Commission's decision reversing the judge. *See Decision* at 2. Pursuant to section 105(c)(2), Administrative Law Judge Jacqueline R. Bulluck had ordered Baird temporarily reinstated to his position at PCS after he had been discharged by the operator. Unpublished Orders, dated Dec. 18, 2009, and Feb. 2, 2010 (ALJ) (hereinafter, respectively, "TR Order No. 1" and "TR Order No. 2"). Following the Secretary's subsequent withdrawal of the discrimination complaint she had earlier filed on Baird's behalf, Baird filed his own discrimination complaint pursuant to section 105(c)(3). The judge then dissolved the order of reinstatement and dismissed both the reinstatement proceeding and the discrimination case that the Secretary had brought. 32 FMSHRC 325, 327 (Mar. 2010) (ALJ).

Baird filed a timely petition for discretionary review, challenging the dissolution of the reinstatement order in light of the pendency of his section 105(c)(3) case. The Commission granted the petition, and a Commission majority reversed the judge's decision to dissolve reinstatement, holding that a miner's temporary reinstatement continues until the Commission issues a final order on the merits of the miner's allegations of discrimination, whether that order be issued under section 105(c)(2) or section 105(c)(3) of the Mine Act. *See Decision* at 4-5 (opinion of Chairman Jordan and Commissioner Nakamura), 6 (opinion of Commissioner Cohen).³ That same majority also ordered Baird economically reinstated to his former position, retroactive to November 16, 2009, at his former rate of pay, including any pay increases, bonuses, and other benefits. *Id.* This was consistent with the judge's last order reinstating the miner. *See TR Order No. 2*, at 4.

II.

Disposition

The PCS motion for stay has been filed pursuant to Rule 18 of the Federal Rules of Appellate Procedure, which provides that "[a]pplication for a stay of a decision or order of an agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency." In *Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1312 (August 1987), the Commission held that a party seeking a stay must satisfy the factors set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958): (i) a likelihood that the party will prevail on the merits of its appeal;

³ The rationales for the separate Commissioner opinions, including that for the dissenting opinion of Commissioners Duffy and Young, were set forth in the decision the Commission issued on January 7, 2011, in *Secretary on behalf of Gray v. North Fork Coal Corp.*, Docket No. KENT 2009-1429-D ("Gray"). *See Decision* at 4, 6, 7.

(2) irreparable harm to it if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. *Id.* at 925. The court also made clear that a stay constitutes “extraordinary relief.” *Id.*; see also *W.S. Frey Co.*, 16 FMSHRC 1591 (Aug. 1994). The burden is on the movant to provide “sufficient substantiation” of the requirements for the stay. *Stillwater Mining Co.*, 18 FMSHRC 1756, 1757 (Oct. 1996).

A. Whether It is Likely That PCS Will Prevail on the Merits of its Appeal

PCS contends that there is a substantial likelihood it will prevail before the Fourth Circuit, describing the *Decision* as having reversed 30 years of Commission precedent. Mot. at 3-4. The Secretary responds by correctly pointing out that the issue of whether an order of temporary reinstatement obtained by the Secretary under section 105(c)(2) of the Mine Act remains in effect while a miner pursues his own discrimination complaint under section 105(c)(3) had never before been decided by a Commission majority. S. Resp. at 12 n.5; see *Gray*, slip op. at 3.

Baird responds to PCS’s motion by pointing out that the arguments PCS makes that it will prevail on appeal – reliance on what it contends is the plain meaning of the terms of section 105(c) and its legislative history – are no different from the arguments PCS made previously. B. Resp. at 3-4. Baird is correct that the Commission majority considered and rejected those arguments in both *Gray* and in the *Decision*. Consequently, we are not persuaded that there is a substantial likelihood that PCS will succeed in overturning the *Decision*. See *Gray*, slip op. at 9-16, 20-23, 24-26.⁴

B. Whether PCS Will Suffer Irreparable Harm Should a Stay Not Issue

The Commission, in reversing the judge’s order dissolving temporary reinstatement, specified that the order of economic reinstatement, because it should not have been dissolved, would go back into effect as if it had not been interrupted. *Decision* at 4-5 & n.2, 6; see also *Gray*, slip op. at 17, 18. PCS alleges that it will be irreparably harmed by having to pay the miner all that he is owed under the economic reinstatement agreement until such time as the miner’s section 105(c)(3) case is heard and decided, because PCS would be unlikely to recover the payments should the company succeed on appeal. Mot. at 6-7 (citing *Virginia Petroleum*, 259 F.2d at 925).

PCS’s argument is one that, if accepted, would effectively nullify the temporary reinstatement provisions of the Mine Act. Reinstated miners often are not ultimately successful

⁴ PCS, citing *Washington Metro Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977), also maintains that, even if it cannot establish “a mathematical probability of success,” the other factors argue in favor of a stay, so the status quo should be maintained while the court hears the appeal. Mot. at 4. As discussed below, we do not agree with the operator’s conclusions as to those other factors.

on the merits of their discrimination claims, even when their claim is brought by the Secretary pursuant to section 105(c)(2). There is nothing in the Mine Act which contemplates that such miners would be expected to repay the amounts paid them pursuant to their reinstatement orders; indeed, that would run counter to the very spirit of the provision, which is to provide immediate relief to complaining miners while they wait for their cases to be decided. See *Gray*, slip op. at 14-15, 25-26. That it is the miner, instead of the Secretary, who ultimately brings the case is irrelevant to this principle.

In any event, “[i]t is also well-settled that economic loss does not, in and of itself, constitute irreparable harm.” *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); see also *Virginia Petroleum*, 259 F.2d at 925.

Consequently, we disagree with PCS that not staying the *Decision* will lead to it suffering irreparable harm; it will merely be in the same position it would have been had the judge not erred by dissolving the economic reinstatement order.

C. Whether Other Interested Parties Would be Adversely Affected by a Stay

PCS also asserts that Baird will not be harmed by a stay. Mot. at 7. Not surprisingly, Baird and the Secretary vociferously disagree. B. Resp. at 5-6; S. Resp. at 14-16. Given the aforementioned purpose of the temporary reinstatement provisions, the notion that Baird will not be harmed by a stay does not withstand scrutiny.

D. Whether a Stay Would Serve the Public Interest

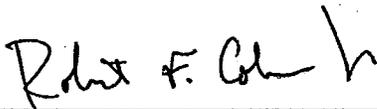
PCS characterizes the litigation as one only involving private parties, and one in which it is only requesting that the status quo be maintained while the court hears its appeal. Mot. at 7. Again, however, it is giving short shrift to the beneficial effect of the Commission’s decision upon the miner and his ability to pursue his discrimination claim. Accordingly, while a stay would serve the private interest of PCS, we fail to see how a stay would serve the public interest, as set forth by Congress in the Mine Act’s temporary reinstatement provisions.

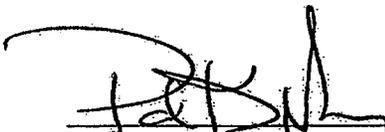
III.

Conclusion

For the foregoing reasons, we deny PCS's motion for stay pending appeal.

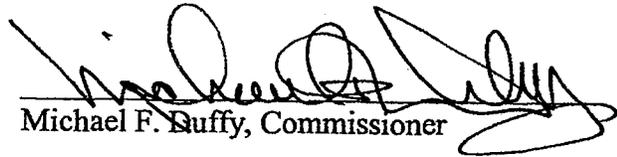

Mary L. Jordan, Chairman


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Commissioners Duffy and Young, dissenting:

We would grant PCS's motion and stay the effect of the Commission's January 6, 2011, decision pending appeal to the Fourth Circuit, because that decision constituted a substantial departure from the Commission's past practice with regard to the question at issue. *See Decision* at 8 n.1 (Commissioners Duffy and Young, dissenting).



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner

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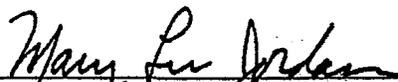
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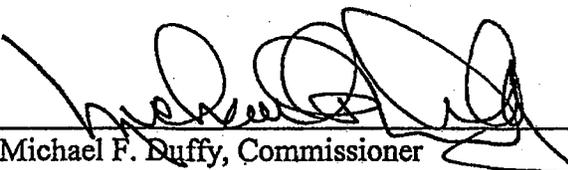
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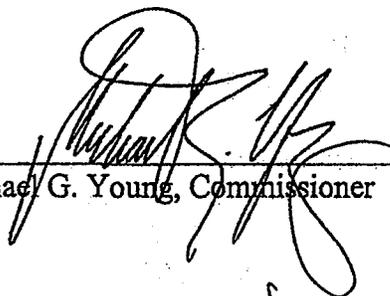
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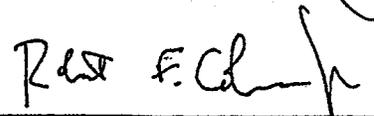
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Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's responses, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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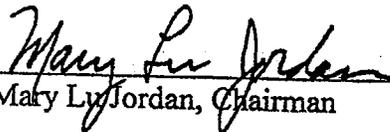
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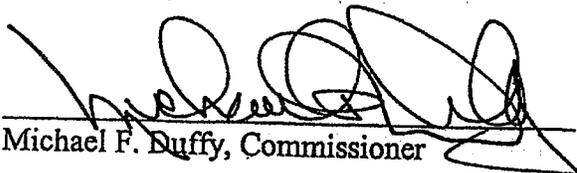
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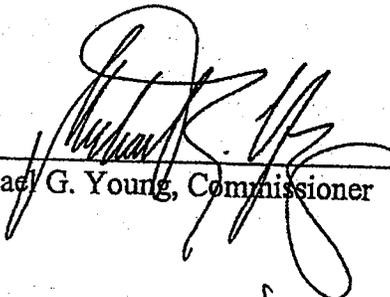
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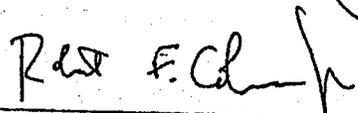
timely respond; the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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


Mary Ly Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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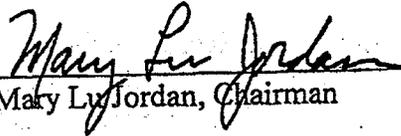
Rowdy requests reopening of Proposed Assessment No. 000208355, dated January 12, 2010, because it never received the proposed assessment. It also states that it has been contacted by a collection agency with regard to the penalties involved.

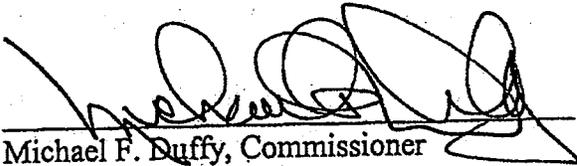
According to the Secretary, the proposed assessment and a subsequent delinquency notice were returned undelivered from the address of record that the Department of Labor's Mine Safety and Health Administration ("MSHA") has had for Rowdy since early 2007. The Secretary does not oppose reopening, but states that it is the operator's responsibility to keep its address of record current with the MSHA district office.

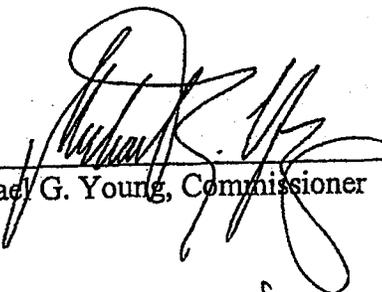
Rowdy explains that it filed a change of address with MSHA's Boise office. That office, however, is an MSHA field office, not an MSHA district office. Rowdy should ensure that its current address is on file with the MSHA district office for Idaho, which is in Vacaville, California.

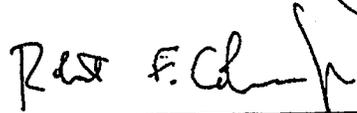
Having reviewed Rowdy's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R.

Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.¹


Mary Lynn Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

¹ The request to reopen was filed by Troy Thurgood of Thurgood Business Services, LLC. Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an “owner, partner, officer or employee” of certain parties, or “[a]ny other person with the permission of the presiding judge or the Commission.” 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Thurgood satisfied the requirements of Rule 3 when he filed the operator’s request. We have determined that, despite this, we will consider the merits of the operator’s request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Thurgood must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

February 17, 2011

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

v.

JOHNSON CONSTRUCTION
MATERIALS

Docket No. LAKE 2011-96-M
A.C. No. 12-02265-225455

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On October 27, 2010, the Commission received from Johnson Construction Materials (“Johnson”) a letter requesting to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

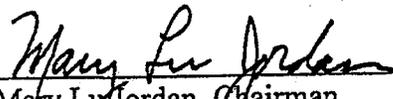
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a)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

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Johnson requests reopening of Proposed Assessment No. 000225455, dated July 8, 2010, because it did not receive the assessment on a timely basis. According to Johnson, it relocated its offices that month, and a business with which it shared the former location has been signing for its mail there but not forwarding it. The Secretary does not oppose reopening, but states that it is the operator's responsibility to keep its address of record current with the MSHA district office.

Johnson includes its new address in its letter requesting reopening. Johnson should ensure that its current address is on file with the applicable MSHA district office, which in this instance is in Duluth, Minnesota.

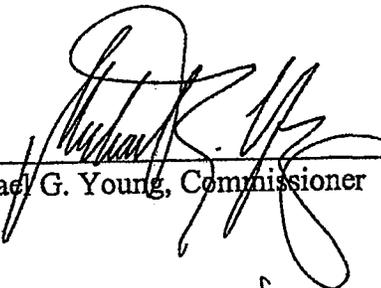
Having reviewed Johnson's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent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



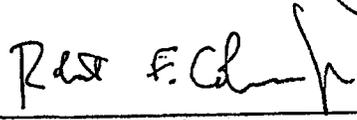
Mary Lu Jordan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

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**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

February 17, 2011

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

v.

THUNDER BASIN COAL COMPANY, LLC :

Docket No. WEST 2010-1600
A.C. No. 48-00977-222396

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

ORDER

BY THE COMMISSION:

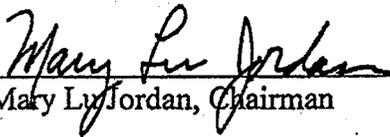
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On July 28, 2010, the Commission received from Thunder Basin Coal Company, LLC, a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On August 6, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

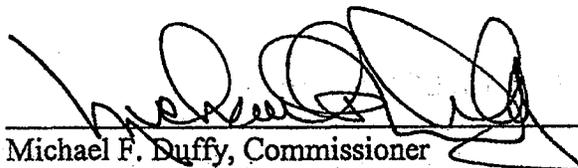
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

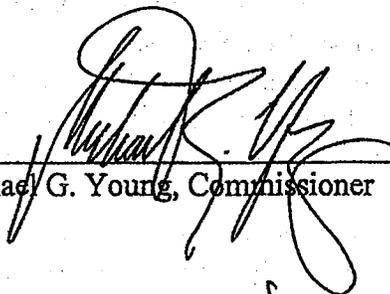
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a)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

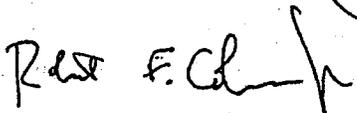
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 17, 2011

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

v.

HOLSCHBACH EXCAVATING, INC.

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Docket No. LAKE 2011-65-M
A.C. No. 47-03228-230756

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

ORDER

BY THE COMMISSION:

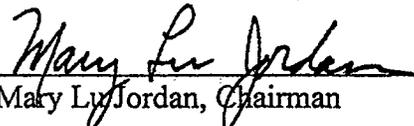
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 15, 2010, the Commission received from Holschbach Excavating, Inc., a letter requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On November 23, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

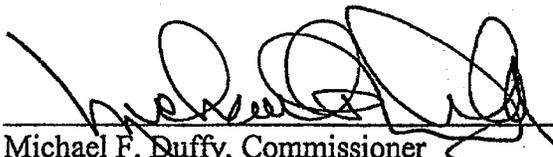
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

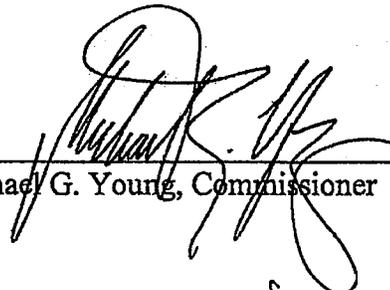
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

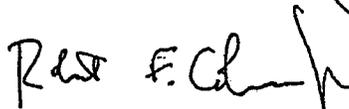
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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


Mary Lynn Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 22, 2011

SECRETARY OF LABOR,	:	Docket No. KENT 2010-790
MINE SAFETY AND HEALTH	:	A.C. No. 15-18687-203607
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2010-791
v.	:	A.C. No. 15-18854-203608
	:	
LIGGETT MINING, LLC	:	Docket No. KENT 2010-792
	:	A.C. No. 15-19080-203613

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”).¹ On March 10, 2010, the Commission received from Liggett Mining, LLC (“Liggett”) motions seeking to reopen three penalty assessments that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2010-790, KENT 2010-791, and KENT 2010-792, all captioned *Liggett Mining, LLC*, and all involving the same procedural issues. 29 C.F.R. § 2700.12.

Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On November 19, 2009, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment Nos. 000203607, 000203608, and 000203613 to Liggett for 54 citations that MSHA had issued to the operator. Liggett, represented by George R. Bowman,² states that upon receipt, the company’s human resources manager forwarded the assessments via email to the company’s representative to have contests filed for each, but “could not confirm with any certainty that the email transmittal was received.” Mot. at 2. Liggett asserts that its representative did not have any record of receiving the emails. *Id.* On April 6, 2010, the Commission received responses from the Secretary of Labor stating that she does not oppose the request to reopen the assessments.

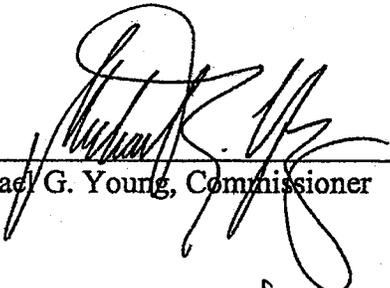
Having reviewed Liggett’s requests and the Secretary’s responses, we conclude that Liggett has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. The operator’s explanation that it could not confirm the emails it sent to its representative were received, without any further elaboration, does not provide us with an adequate basis to justify reopening the assessment. We note in particular that Liggett failed to provide any documentation of those emails or explain its failure to do so. Nor did Liggett explain what, if anything, was done to confirm that the emails, which related to a total of \$67,544 in penalties, were received by the representative. Accordingly, we deny without prejudice Liggett’s request. *See, e.g., Eastern Assoc. Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

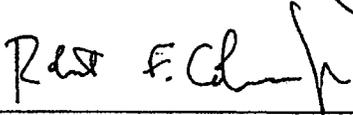
² The request to reopen was sent by George R. Bowman, who states that he represents Liggett. Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an “owner, partner, officer or employee” of certain parties, or “[a]ny other person with the permission of the presiding judge or the Commission.” 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Bowman satisfied the requirements of Rule 3 when he filed the operator’s request. We have determined that, despite this, we will consider the merits of the operator’s request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Bowman must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

Any amended or renewed request by Liggett to reopen Assessment Nos. 000203607, 000203608, and 000203613 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 25, 2011

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

v.

ALSOP SAND COMPANY, INC.

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Docket No. CENT 2010-1063-M
A.C. No. 14-00481-221117

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

ORDER

BY THE COMMISSION:

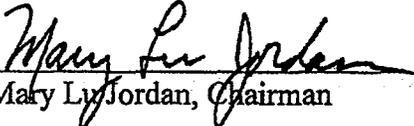
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On July 28, 2010, the Commission received from Alsop Sand Company, Inc., a letter from the company’s president requesting to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On August 5, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

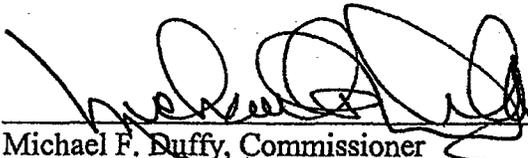
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

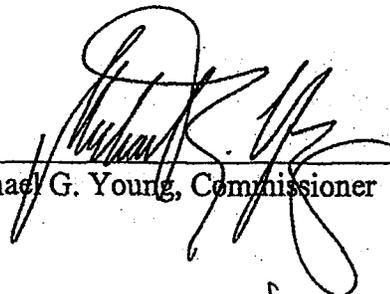
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a)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

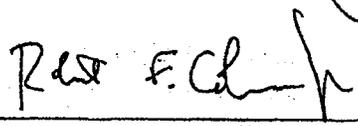
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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


Mary Lynn Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

February 25, 2011

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

v.

CANTERA HIPODROMO, INC.

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Docket No. SE 2008-738-M
A.C. No. 54-00298-150207

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

ORDER

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 9, 2009, Chief Administrative Law Judge Robert J. Lesnick issued to Cantera Hipodromo, Inc. ("Cantera") an Order to Show Cause for failure to answer the Secretary of Labor's petition for assessment of civil penalty. On August 11, 2010, Judge Lesnick entered an Order of Default against Cantera.

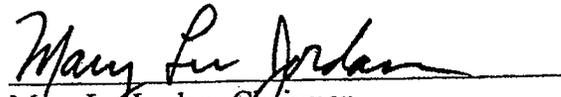
On September 20, 2010, the Commission received a motion from Cantera requesting that the Commission reopen the penalty assessment proceeding and relieve it from the order of default. Cantera explains that it never received the Judge's December 9 Order to Show Cause. The operator requests an opportunity to file an answer to the Secretary's petition for assessment of penalty. The Secretary does not oppose the operator's motion to reopen.

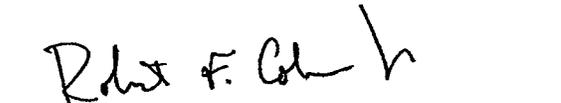
The judge's jurisdiction in this matter terminated when his decision was issued on August 11, 2010. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 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). The judge's order became a final decision of the Commission on September 20, 2010.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled

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

Upon review of the record, it appears that Cantera did not receive the show cause order. The envelope containing the show cause order was marked with a message indicating that it was not deliverable as addressed. In the interest of justice, we hereby reopen the proceedings and vacate the Order of Default. See generally *Sanders, formerly emp. by Natural Materials, LLC*, 31 FMSHRC 1022, 1024 (Sept. 2009) (vacating default order when show cause order might not have been received). Cantera shall file a response to the judge’s show cause within 30 days after the date it receives this order.¹


Mary L. Jordan, Chairman

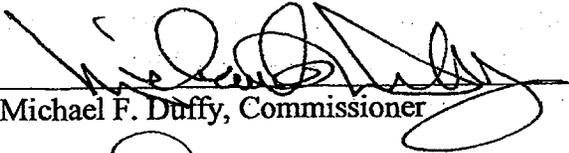

Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

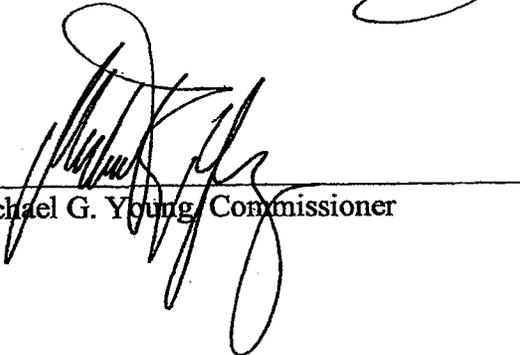
¹ Our colleagues Commissioners Duffy and Young would have the Commission reopen the case directly rather than require a response to the judge’s show cause order, in order to “conserv[e] judicial resources.” While this approach is simpler, it fails to recognize that the matter before us is the show cause order which Cantera did not respond to because it did not receive it. It is the province of the Chief Judge, not us, to determine whether Cantera can demonstrate good cause for its failure to answer the Secretary’s petition for assessment of civil penalty, as required by 29 C.F.R. § 2700.29.

Commissioners Duffy and Young, concurring in part and dissenting in part:

We conclude that Cantera Hipodromo, Inc. has provided adequate justification and documentation to support its request for relief from default, particularly given that the Secretary of Labor does not oppose the operator's request. Like our colleagues in the majority, we would vacate the order of default. However, in the interests of justice and conserving judicial resources, rather than requiring the operator to respond to the show cause order, we would require the operator to file an answer to the Secretary's petition for assessment of penalty within 30 days of this order.



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
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On July 1, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000189700 to Drummond. Counsel for Drummond contends that on the day management sent the email notifying him to contest the proposed penalty, he was out of the office on business in an area without mobile data service and that he received the email later that evening when he returned to a covered area. He contends that he attempted to set a reminder on his calendar via his mobile phone, but failed to properly do so. Consequently, he failed to file a contest. Counsel contends that this oversight was discovered during a recent audit of the company's files.

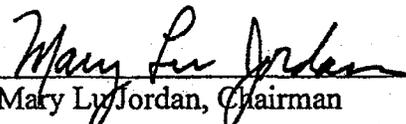
The Secretary opposes Drummond's request to reopen. She states that Drummond's inadequate and unreliable internal office procedures do not constitute grounds for relief under Rule 60(b). The Secretary also notes that the operator waited approximately five and a half months (from about September 24, 2009, to March 22, 2010) after being notified of its delinquency to file its request.

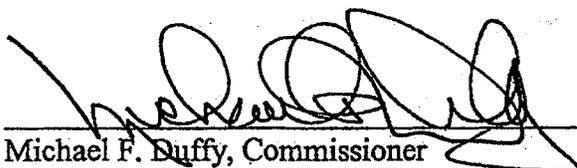
Drummond filed a response explaining in great detail its counsel's oversight and stating that the incident was not a case of unreliable internal office procedure, but an inadvertent error on counsel's part. It contends that it did not knowingly delay in seeking to reopen, but only discovered the omission when it recently audited its civil penalty files in the second week of March 2010 and promptly file a request to reopen.

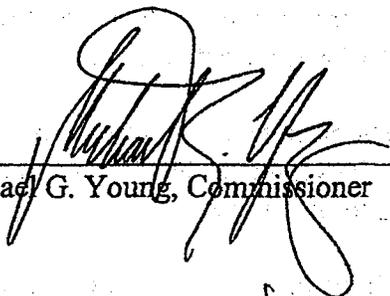
The Secretary continues to oppose the operator's request, noting that the operator's response does not even attempt to explain why the operator waited approximately five and a half months after it was sent a delinquency notice.

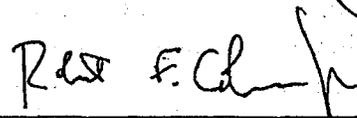
Given the significant time lapse between MSHA's notification of delinquency and the operator's failure to sufficiently explain the delay, we cannot conclude that its failure to timely contest this assessment amounts to mistake or inadvertence warranting relief. Moreover, even after the Secretary's identification of Drummond's failure to seek reopening promptly after being notified of its delinquency, Drummond provided no explanation for the delay of over five months in seeking to reopen.

Based on the foregoing, we conclude that Drummond has failed to provide an adequate basis for the Commission to reopen the penalty assessment. *See Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062-63 (Dec. 2008) (denying relief because operator's excuse was insufficient); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067-68 (Dec. 2008) (same). Accordingly, we deny Drummond's request to reopen.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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303-844-5266/FAX 303-844-5268

January 4, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2007-139
Petitioner,	:	A.C. No. 11-02752-113419
	:	
	:	Docket No. LAKE 2008-79
	:	A.C. No. 11-02752-131664-01
	:	
	:	Docket No. LAKE 2008-41
	:	A.C. No. 11-02752-129287-05
	:	
	:	Docket No. LAKE 2008-84
	:	A.C. No. 11-02752-131664-06
	:	
	:	Docket No. LAKE 2008-122
	:	A.C. No. 11-02752-133868-05
	:	
v.	:	Docket No. LAKE 2008-237
	:	A.C. No. 11-02752-139912-07
	:	
	:	Docket No. LAKE 2008-532
	:	A.C. No. 11-02752-153962-08
	:	
	:	Docket No. LAKE 2008-536
	:	A.C. No. 11-02752-153962-12
	:	
	:	Docket No. LAKE 2008-537
	:	A.C. No. 11-02752-153962-13
	:	
	:	Docket No. LAKE 2008-538
	:	A.C. No. 11-02752-153962-14
	:	
	:	Docket No. LAKE 2008-539
	:	A.C. No. 11-02752-153962-15
	:	
THE AMERICAN COAL COMPANY,	:	Docket No. LAKE 2008-42
Respondent.	:	A.C. No. 11-02752-129287-06

for Summary Decision accompanies this decision and addresses the remaining safeguards. Both orders affirm the validity of the underlying safeguards. The parties have agreed that the remaining matters related to each citation can be addressed through stipulations. The stipulations allow for a final order to be issued so that the validity of the underlying safeguards can then be appealed.

I have reviewed the stipulations and explanations of the parties and agree that the modifications and proposed penalties contained in the stipulations are appropriate and the basis for issuing the final decisions in these cases. The stipulations are as follows:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.
2. At all times relevant to these proceedings, American Coal's operations affected interstate commerce.
3. At all times relevant to these proceedings, American Coal owned and operated the Galatia Mine, which is located in Saline County, Illinois.
4. The Galatia Mine is an underground mine for the extraction of bituminous coal.
5. At all times relevant to these proceedings, the Galatia Mine was owned by American Coal Company.
6. Respondent produced 6,267,253 tons at all of its mines during the period January 1, 2009 to December 31, 2009.
7. Respondent had 1857 previous violations in the 15 month period ending February 18, 2007.
8. The subject citations were properly served upon an agent of Contestant.
9. Pending appellate review of the Judge's decision in this case on the validity of the safeguards, the determinations of gravity and negligence and the penalty amounts of the following citations are stipulated to by the parties as follows:¹

The parties have also agreed through joint stipulation, to the following findings as to the gravity, negligence and penalty amount for each citation:

Docket No. LAKE 2007-139

This docket has a total of 16 violations assessed at \$44,612.00. All but two violations are subject to a partial settlement that has been entered. The remaining two citations are safeguards with total assessed penalties for \$5,246.00. The parties agree that the penalty amount for the safeguard citations should be \$4,814.00.

¹ The remaining stipulations of the parties are incorporated into the findings and order that follow.

Citation No. 7491576: the parties agree that the citation remains unchanged with a proposed penalty of \$3,086.00.

Citation No. 7491342: the parties agree that due to the dispute over the gravity, the penalty is reduced from \$2,160.00 to \$1,728.00.

Docket No. LAKE 2008-41

This docket has 19 violations assessed at \$6,063.00. All but four violations are subject to a partial settlement that was previously ordered. The total assessed penalty for the remaining safeguards is \$1,051.00 and the proposed settlement amount is \$1,051.00.

Citation No. 6667302: the parties agree that the citation remains as issued with a proposed penalty of \$127.00.

Citation No. 6669738: the parties agree that the citation remains as issued with a proposed penalty of \$308.00.

Citation No. 7490537: the parties agree that the citation remains as issued with a proposed penalty of \$308.00.

Citation No. 7490540: the parties agree that the citation remains as issued with a proposed penalty of \$308.00.

Docket No. LAKE 2008-42

This docket has 20 violations assessed a total penalty of \$6,381.00. All but five violations are subject to a partial settlement that was previously ordered. The total assessed penalty for the remaining safeguards is \$1,530.00 and the proposed total penalty amount is \$1,530.00.

Citation No. 7490993: the parties agree that the citation remains as issued with a proposed penalty of \$334.00.

Citation No. 7490844: the parties agree that the citation remains as issued with a proposed penalty of \$285.00.

Citation No. 7490562: the parties agree that the citation remains as issued with a proposed penalty of \$334.00.

Citation No. 7490563: the parties agree that the citation remains as issued with a proposed penalty of \$334.00.

Citation No. 6668301: the parties agree that the citation remains as issued with a proposed penalty of \$243.00.

Docket No. LAKE 2008-43

This docket contains 18 violations assessed a total penalty of \$5,857.00. All but two violations are subject to a partial settlement order. The total assessed penalty for the remaining safeguards is \$570.00 and the penalty proposed by the parties is \$570.00.

Citation No. 6668322: the parties agree that the citation remains as issued with a proposed penalty of \$285.00.

Citation No. 6668325: the parties agree that the citation remains as issued with a proposed penalty of \$285.00.

Docket No. LAKE 2008-79

This docket contains 20 violations with a total assessed penalty of \$52,383.00. All but three of the violations are subject of a partial settlement order entered previously in this case. The remaining violations have a proposed assessment of \$7,801.00 and the parties agree that the amended penalty amount for these safeguards is \$3,047.00.

Citation No. 6667854: the parties agree to the fact of the violation but there is a dispute as to the gravity of the violation and therefore the penalty is from \$1,700.00 to \$1,360.00.

Citation No. 7490598: the parties agree that the negligence is reduced from moderate to low with a reduction in penalty from \$4,689.00 to \$1,052.00.

Citation No. 666811: the parties agree that the negligence of the citation should be changed from moderate to low with a reduction in the proposed penalty from \$1,412.00 to \$635.00.

Docket No. LAKE 2008-81

This docket contains 21 violations with a proposed assessment of \$61,247.00. All but two of the violations were resolved by partial settlement order. The total assessed penalty for the remaining safeguards is \$2,970.00 and the proposed amended penalty for the safeguards is \$2,376.00.

Citation No. 6666952: the parties agree that the violation is as set forth in the citation but there is a dispute as to the gravity of the violation and therefore the penalty is reduced from \$1,026.00 to \$821.00.

Citation No. 6667919: the parties agree that there is a dispute as to the gravity of the

violation and therefore the proposed penalty is reduced from \$1,944.00 to \$1,555.00.

Docket No. LAKE 2008-84

This docket contains 12 violations with a total proposed penalty of \$3,103.00. All but one of the violations was resolved in a partial settlement. The remaining violation has a proposed assessment of \$285.00 and the Respondent has agreed to pay \$ 285.00 for the remaining violation.

Citation No. 6668128: the parties agree that the citation remains unchanged with a proposed penalty of \$285.00.

Docket No. LAKE 2008-122

This docket contains 20 violations with a total proposed penalty of \$6,426.00. All but four of the citations have been resolved by a partial settlement agreement. The remaining violations have a proposed penalty of \$1,074.00 and the Respondent has agreed to pay a penalty of \$1,074.00 for the violations.

Citation No. 7490888: the parties agree that the citation remains as issued with a proposed penalty of \$263.00.

Citation No. 7490889: the parties agree that the citation remains as issued with a proposed penalty of \$285.00.

Citation No. 7490890: the parties agree that the citation remains as issued with the proposed penalty of \$263.00.

Citation No. 6668512: the parties agree that the citation remains as issued with a proposed penalty of \$263.00.

Docket No. LAKE 2008-145

This docket contains 20 violations with a total proposed penalty of \$5,355.00. All but four of the citations were settled by agreement and an order for partial settlement has been entered. The remaining citations have a proposed penalty of \$1,052.00 and the Respondent has agreed to pay \$1,052.00 for the four violations.

Citation No. 6673223: the parties agree that the citation remains as issued with a proposed penalty of \$263.00.

Citation No. 6668599: the parties agree that the citation remains as issued with a proposed penalty of \$263.00.

Citation No. 6668169: the parties agree that the citation remains as issued with a proposed penalty of \$263.00.

Citation No. 6673811: the parties agree that the citation remains as issued with a proposed penalty of \$263.00.

Docket No. LAKE 2008-237

This docket contains 20 violations with a total proposed penalty of \$4,590.00. All but four of the violations have been resolved by a motion for partial settlement that has been previously ordered. The total assessed penalty for the four remaining safeguard violations is \$949.00 and the Respondent has agreed to pay \$949.00 for the violations.

Citation No. 6673822: the parties agree that the citation remains as issued with a proposed penalty of \$263.00.

Citation No. 6672946: the parties agree that the citation remains as issued with a proposed penalty of \$362.00.

Citation No. 6672947: the parties agree that the citation remains as issued with a proposed penalty of \$100.00.

Citation No. 6673246: the parties agree that the citation remains as issued with a proposed penalty of \$224.00.

Docket No. LAKE 2008-532

This docket contains 20 violations with a proposed penalty assessed at \$53,982.00. All but two of the violations have been resolved previously by a motion for partial settlement. The total assessed penalty for the remaining two safeguard violations is \$3,551.00. The proposed amended penalty for the violations is \$1,901.00

Citation No. 6673534: the parties agree that the violation occurred as set forth in the citation but there is a dispute as to the gravity of the violation. The proposed penalty is reduced from \$873.00 to \$698.00.

Citation No. 6673539: the parties agree that the negligence will be modified from moderate to low with a reduction in the proposed penalty from \$2,678.00 to \$1,203.00.

Docket No. LAKE 2008-533

This docket has 20 violations that were assessed a total penalty of \$ 30,707.00. All but two of the violations are subject to a previous order granting a partial settlement. The total assessed

penalties for the remaining two safeguard violations is \$1,746.00 and the proposed amended amount is \$1,396.00 for the two violations.

Citation No. 6673547: the parties agree that the violation is as issued but that there is a dispute as to the gravity of the violation and therefore the parties have agreed to reduce the penalty from \$873.00 to \$698.00.

Citation No. 6673550: the parties agree that the violation is as issued but that there is a dispute as to the gravity of the violation and therefore the parties have agreed to a reduction in penalty from \$873.00 to \$698.00.

Docket No. LAKE 2008-534

This docket contains 20 violations with a total assessed penalty of \$45,361.00. All but three of the violations have been settled and are subject to a previous order. The total proposed penalty for the remaining three safeguard violations is \$12,667.00 and the amended proposed amount \$2,774.00.

Citation No. 6673581: the parties agree that the violation remains as issued but an element of the gravity is changed to "unlikely" and therefore the parties agree to a reduction in penalty from \$8,893.00 to \$1,796.00.

Citation No. 6673564: the parties agree that the violation remains as issued, but an element of the gravity is modified to "unlikely" with a reduction in penalty from \$2,901.00 to \$586.00.

Citation No. 6673568: the parties agree that the violation remains as issued but there are mitigating factors as to the negligence and it is modified from moderate to low with a reduction in penalty from \$873.00 to \$392.00.

Docket No. LAKE 2008-535

This docket contains 20 violations with a total assessed penalty of \$35,279.00. All but two violations have been settled and are subject to a previous order approving settlement. The penalty amount remaining for the two violations is \$3,774.00 and the Respondent has agreed to pay \$3,774.00 for the violations.

Citation No. 6674181: the parties agree that the citation remains as issued with a proposed penalty of \$2,901.00.

Citation No. 6673599: the parties agree that the citation remains as issued with a proposed penalty of \$873.00.

Docket No. LAKE 2008-536

This docket contains 11 violations assessed at \$27,473.00. All but one of the citations have been settled and are subject to a previous order approving settlement. The total assessed penalty for the remaining safeguard violation is \$3,996.00 and the proposed amended penalty is \$3,197.00.

Citation No. 6674210: the parties agree that the violation remains as issued but there is a dispute as to the gravity and therefore the parties agree in a reduction of penalty from \$3,996.00 to \$3,197.00.

Docket No. LAKE 2008-537

This docket contains 20 violations with a total assessed penalty of \$4,242.00. All but four of the violations were settled and are subject to a previous order approving settlement. The remaining four violations are assessed a total penalty of \$738.00 and Respondent has agreed to pay \$738.00 for those violations.

Citation No. 6673300: the parties agree that the citation remains as issued with a proposed penalty of \$207.00.

Citation No. 6673286: the parties agree that the citation remains as issued with a proposed penalty of \$207.00.

Citation No. 6673913: the parties agree that the citation remains as issued with a proposed penalty of \$162.00.

Citation No. 6673926: the parties agree that the citation remains as issued with a proposed penalty of \$162.00.

Docket No. LAKE 2008-538

This docket contains 19 violations with a total penalty assessed at \$7,271.00. All but two citations are settled and subject to a previous order approving settlement. The remaining two violations have a proposed total assessed penalty of \$324.00 and the Respondent has agreed to pay \$324.00 for those violations.

Citation No. 6672815: the parties agree that the citation remains as issued with a proposed penalty of \$162.00. This citation was mistakenly addressed in Docket No. Lake 2008-539 in the settlement agreement but is properly included in this docket.

Citation No. 6674135: the parties agree that the citation remains as issued with a proposed penalty of \$162.00.

Docket No. LAKE 2008-539

This docket contains 8 violations with a proposed assessed penalty of \$7,271.00. All but one of the citations were settled and are the subject of a previous order approving settlement. The total assessed penalty for the remaining safeguard violation is \$162.00 and the Respondent has agreed to pay that amount for the violation.

Citation No. 6674186: the parties agree that the citation remains as issued with a proposed penalty of \$162.00.

I accept the representations and the modifications of the Secretary as set forth in the joint stipulations and issue this decision based upon those stipulations. I have considered the representations and documentation submitted, find that the modifications are reasonable and I conclude that the penalties proposed are appropriate under the criteria set forth in section 110(i) of the Act.

I incorporate into this decision, the order on summary decision that I issued on September 20, 2010, and the order on summary decision issued contemporaneously with this order. Those decisions explain the basis for accepting the safeguards as issued by MSHA, and with these stipulations, I reach a final decision on all matters related to these cases.

ORDER

The total amount assessed for the safeguard citations at issue in these dockets is \$49,486.00. I **AFFIRM** each citation as set forth above and assess the following penalties:

Citation No. 7491576	\$3,086.00
Citation No. 7491342	\$1,728.00
Citation No. 6667302	\$127.00
Citation No. 6669738	\$308.00
Citation No. 7490537	\$308.00
Citation No. 7490540	\$308.00
Citation No. 7490993	\$334.00
Citation No. 7490844	\$285.00
Citation No. 7490562	\$334.00
Citation No. 7490563	\$334.00
Citation No. 6668301	\$243.00
Citation No. 6668322	\$285.00
Citation No. 6668325	\$285.00
Citation No. 6667854	\$1,360.00
Citation No. 7490598	\$1,052.00
Citation No. 6668111	\$635.00
Citation No. 6666952	\$821.00

Citation No. 6667919	\$1,555.00
Citation No. 6668128	\$285.00
Citation No. 7490888	\$263.00
Citation No. 7490889	\$285.00
Citation No. 7490890	\$263.00
Citation No. 6668512	\$263.00
Citation No. 6673223	\$263.00
Citation No. 6668599	\$263.00
Citation No. 6668169	\$263.00
Citation No. 6673811	\$263.00
Citation No. 6673822	\$263.00
Citation No. 6672946	\$362.00
Citation No. 6672947	\$100.00
Citation No. 6673246	\$224.00
Citation No. 6673534	\$698.00
Citation No. 6673539	\$1,203.00
Citation No. 6673547	\$698.00
Citation No. 6673550	\$698.00
Citation No. 6673581	\$1,796.00
Citation No. 6673564	\$586.00
Citation No. 6673568	\$392.00
Citation No. 6674181	\$2,901.00
Citation No. 6673599	\$873.00
Citation No. 6674210	\$3,197.00
Citation No. 6673300	\$207.00
Citation No. 6673286	\$207.00
Citation No. 6673913	\$162.00
Citation No. 6673926	\$162.00
Citation No. 6672815	\$162.00
Citation No. 6674135	\$162.00
Citation No. 6674186	\$162.00
Total	\$31,014.00

In addition to the penalties that were assessed in the decision approving partial settlement in each docket, The American Coal Company is hereby **ORDERED** to pay the Secretary of Labor the sum of \$31,014.00 for the 48 violations listed above, within 30 days of the date of this decision.



Margaret A. Miller
Administrative Law Judge

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January 4, 2011

LONNIE BELCHER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. VA 2010-249-D
v.	:	NORT CD 2009-08
	:	
BATES CONTRACTING AND	:	
CONSTRUCTION, and SURFACE	:	MINE: Surface Minerals/Jones Fork
MINERALS COMPANY	:	MINE ID: 44-07126
Respondent	:	

DECISION

Appearances: Lonnie Belcher, Jr., Big Rock, VA, pro se;
Anna M. Daily, Esq., Dinsmore & Shohl, Charleston, WV
Behalf of Surface Minerals, Co.;
Randal Scott May, Esq., Barret, Haynes, May & Carter, Hazard, KY
On behalf of Bates Contracting & Construction

Before: Judge Rae

This case is before me on a complaint of discrimination filed by Lonnie Belcher ("Belcher") against Surface Minerals Company ("Surface") and Bates Contracting & Construction, Inc. ("Bates")(or collectively "Respondents"), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Act" or "Mine Act"), 30 U.S.C. §815(c). A trial was held in Abingdon, Virginia on September 27, 2010.¹

I. Procedural Background

Belcher filed a complaint on October 1, 2009, with the Mine Safety and Health Administration ("MSHA"), pursuant to section 105 (c)(2) of the Mine Act, 30 U.S.C. §815(c)(2).² By letter

¹ The transcript from the hearing was sent back for corrections of errors. The corrected transcript still has mistakenly recorded the Complainant's name as "R"onnie Belcher rather than "L"onnie Belcher. A copy of the corrected transcript has been sent to all parties prior to issuance of this decision.

² Section 105 (c)(2) of the Mine Act states, relevant part:
Any miner---who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt

dated February 2, 2010, MSHA informed Belcher that, based on the information gathered during its investigation of his complaint of discrimination, it had determined that a violation of section 105 (c) of the Mine Act did not occur. Belcher, without the assistance of counsel, initiated this case in an undated request for review which was filed with the Commission, under section 105(c)(3) of the Act, 30 U.S.C. §815(c)(3).³ Belcher alleges he was terminated from employment at the Jones Fork mine by Surface and Bates for complaints he made regarding health and safety at the Jones Fork mine. He also alleges that he was demoted when assigned to direct traffic the day after he was involved in an accident with a mine truck.

Surface, a Wellmore company, operates the mine at Jones Fork. Bates was hired as an independent contractor to supply men to work at the facility, Belcher being one of the Bates employees assigned to the job. Both Surface and Bates engage in operations that affect interstate commerce and both are subject to the jurisdiction of the Mine Act.

Neither Surface nor Bates acknowledges that Belcher was engaged in protected activity or suffered any adverse action, and they assert that Belcher was removed from driving a truck due to unsafe practices which was in no way motivated by Belcher engaging in protected activity. Furthermore, Surface alleges that they are not responsible for any action taken against Belcher as they were not his employer.

For the reasons set forth below, Complainant's discrimination claim is dismissed.

II. Statement of the Case

of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as (s)he deems appropriate...If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, (s) he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner,.. alleging such discrimination or interference and propose an order granting appropriate relief.

³ Section 105(c)(3) of the Act states, in relevant part:

Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

30 U.S.C. §815(c)(3).

In the summer of 2009, Surface was involved in reclamation activities at the Jones Fork job site where the company had previously engaged in surface mining activities. Surface anticipated that the reclamation job would take approximately six weeks to complete and contacted Bates to supply miners to assist in the project. (TR 140.) Bates operates a contracting business supplying workers to both surface and underground mines on an as-needed basis and sent Belcher to Jones Fork on the reclamation project. (TR 144-147.) Belcher was assigned as a driver of a 35 ton Volvo A35C articulated truck. (TR 114-115.)

Belcher was supervised in his job by Foreman Jimmy Kennedy, a certified foreman with 19 ½ years of mining experience. (TR 30-31.) In addition to Kennedy, there were several other Surface employees - Tracy Cledinger, Gerald Hess, Joe Vance, Mike Southern, John Bennett, and Timothy Hibbitts- on the Jones Fork site. The reclamation work started in August 2009 and ended by mid-October 2009, when only Kennedy and Cledinger were kept on by Surface. (TR 32.)

On September 2, 2009, Belcher was involved in an accident where he drove his truck down an embankment and rolled the cab onto its side. The next day, he was informed by Bates that he was no longer needed at the job site. Belcher alleges he was fired for having engaged in protected activity prior to the accident. Bates and Surface maintain that Belcher did not engage in protected activity, that he was not fired, that he was removed from the job site due to his reckless operation of the truck, that he could have been placed in another position had he not gone out on workers compensation immediately after the accident. Also, his job as a truck driver at Jones Fork was temporary and no longer available. Bates also asserts that they informed Belcher soon after the accident that he would be given other work of a similar type at the same pay as soon as he informed them he was medically cleared to return to work. Belcher disagrees with each of these assertions.

III. Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Act, 30 U.S.C. §815(c)(1), provides that a minor cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint...of an alleged danger or safety or health violation," (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "has instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or (4) he has exercised "on behalf of himself or others...any statutory right afforded by this Act."

In order to establish a prima facie case of discrimination under section 105 (c)(1), a complaining miner must show: (1) That he engaged in protected activity; and (2) That the adverse action he complains of was motivated, at least partially, by that activity. *Drissen v Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr.1998); *Secretary on behalf of Robinette v. United Castle Coal, Co.*, 3FMSHRC 803 (Apr. 1981); *Secretary on behalf of Pasula v.*

Consolidation Coal Co., 2 FMSHRC 2786 (Oct. 1980), rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd. Cir. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. Pasula, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it, nevertheless, may defend affirmatively 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. Id. At 2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 42 (4th Cir. 1987).

The evidence, as discussed below, establishes that the Complainant engaged in protected activity and that he was discharged, or otherwise removed from his position, at least in part, as a result of his protected activity. However, the evidence also supports an affirmative defense under Robinette.

A. Protected Activity

Belcher was assigned to drive a Volvo articulating truck at Jones Fork. Shortly after he started working there, he made several complaints about various mechanical problems ranging from a stalling issue and an alternator problem to smoking brakes, a transmission leak and finally, on the day of the accident, a warning light on the dash board. (TR 14, 79, 81-83, 94-95.) The records from the maintenance department verify that several repairs were made on the truck including replacement of the alternator, installation of a transmission gasket to repair a leak, repair of an oil leak, and dismantling of the fuel line to remove foreign objects from the tank. (TR 82-83 and R/SM # 11, 12 and 15.) Mechanic Dale Hibbitts confirmed that he was the one who performed the multiple repairs on the truck. (TR 82-85.) Belcher testified that on September 2, 2009, he reported to Foreman Kennedy that two lights had lit up on the dashboard and Foreman Kennedy told him to keep an eye on it but keep operating the truck. (TR 14.) Belcher alleges that the brakes had caught fire two days prior to the accident and that they again malfunctioned causing him to override them, travel down the hill and flip the cab of the truck. He was fired the next day.

Respondents argue that the Complainant did not engage in protected activity. Belcher did testify that he had never made any complaints to MSHA. And when asked if he had ever refused to work due to an unsafe condition, he replied "No. I mean Foreman Kennedy he done a good job he kept everything up." (TR 21.) Daniel Bates also testified that no safety concerns were ever made known to him by Belcher. (TR 155.) Surface also introduced pre-shift reports completed by Mr. Belcher to demonstrate that he inspected the vehicle every day and never reported any issues. R/SM #4 is entitled "Pre-operational Checklists for Surface Mobile Equipment signed by Lonnie Belcher on August 4, 2009 through September 2, 2009." The testimony established that Belcher was the only person who operated the Volvo truck during that period with the exception of September 1, 2009, when he had a doctor's appointment. Quite interestingly, however, the pre-operational checklists for August 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, September 17, 18, 19,

20, 21, 24, 25, 26, 27, 28 and 29 (four weeks and one day of reports) are absent. I therefore find this evidence has little, if any, probative value.

It is quite clear from the record, however, that Belcher had made several mechanical issues known to his foreman, Jimmy Kennedy, and to the maintenance department as evidenced by the testimony of Hibbitts, the receipts produced for the repairs and Mr. Bennett's calendar entries indicating when the repairs were made. (TR 79-96 and R/SM #10-12 and 15.) Thus, I find sufficient evidence that Belcher was engaged in protected activity under the Act.

B. Adverse Action

Belcher claims that the day after the accident, on September 3, he reported to work and was put on flagging duty monitoring a red zone instead of driving a truck; a job he was not trained to do. He was then fired the evening of September 3, by Daniel Bates. His version of what occurred is that "after going home, Bates Construction and Contracting Owner Daniel Bates called me that evening at approximately 7:00 p.m. I was in church and I returned the call at 8:30 p.m. Bates told me, he and Tammy Fields had talked it over and I was no longer needed on the job. At first, I asked him if he was joking and he said no. Bates wanted to know what happened at Jones Fork mine and I told him." (Complainant's Exhibit C-1.) As Belcher understood it, he had been fired.

Respondents contend that Belcher was not fired and no adverse action occurred. Instead, they argue that Belcher was taken off his duty as a truck driver because the Volvo truck was out of commission for the remainder of the project and no other vehicle was available for Belcher to drive. Furthermore, since the job had almost come to an end, they determined that the work Belcher was doing was no longer needed. In support of their position, Foreman Kennedy testified as follows in an exchange with counsel for Surface:

A. He came to work the next morning without a return to work slip and was put on flagging duty because when he reported to work that morning, he didn't have a return to work slip, so we had to send him back off. I think he might have had to go back home to get it. And he come to Larry Dicky and showed him that he had his return to work slip and he come back up the hill and I sent him down the bottom where I flagged the road off to watch for traffic

Q. And at that juncture was the truck that he had been driving operational?

A. No.

Q. And when somebody - when you got a piece of equipment down, what sort of work will you have somebody do if there's not a piece of equipment for them to operate?

A. They would work trash, change oil in equipment, just stuff that I need, bag trash, note

if we got any danger situations or something like that, work like traffic. Something -try to keep them busy.

Q. Did anybody step into the position that Mr. Belcher had been doing there at the Jones Fork job?

A. No

(TR 44-45.)

Robert Litton of the Human Resources and Safety Department further testified as follows:

Q. Would you tell the judge, Mrs. Fields has said that you told her to contact Bates and say that Mr. Belcher was no longer needed. Would you explain to the judge how you ended up telling Mrs. Fields that?

A. Well, there's more than one aspect to that. One is that the truck was out of service and no longer available, so at that point, I can't pay a contractor to sit around doing nothing. So I didn't need him from that standpoint. Plus, after reviewing the history of the issues that we had had with him over the last two or three weeks, I saw no need to have him back on the property.

(TR at 141-142.)

Mr. Litton clearly stated that there were reasons for removing Belcher from the work site, other than his truck being inoperable. Foreman Kennedy also testified that he told management, "I said I don't want him on my job no more. He's a liability risk and I didn't want this-the responsibility, because I am responsible for all the men. And I felt like he was an unsafe worker and I just didn't want the responsibility of him." (TR 43.)

Bates testified that on October 27, 2009, he sent Belcher a letter which stated, in part, "when and if we receive the proper documentation from your treating physician releasing you to return to work at full duty you will be allowed to return to the same type of work for Bates Contracting prior to your injury at the same rate of pay." (Defendant's Exhibit 4). This letter, however, was sent after Belcher filed for workers compensation, and more significantly, after he had filed this discrimination complaint. I find this letter to be self-serving and of little probative value.

Based upon a preponderance of evidence, I conclude that Belcher was fired from both Surface and Bates. I do not find, however, that his assignment to traffic duty for one day was adverse action. That was occasioned by the Volvo being out of commission and no other truck being available for Belcher to driver.

C. Causal Connection between Protected Activity and Adverse Action

Having concluded that the miner's discharge was an adverse action, I must now determine whether he was discharged because of his safety complaints. Because the intent or motivation of the respondent in these cases is difficult to discern, the Commission has set forth guidelines to assist in making this determination. It has provided:

We have acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect... Intent is subjective and in many cases the discrimination can be proven only by use of circumstantial evidence." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), rev'd on other grounds, 709 F.2d 86 (D.C. Cir. 1983) (Quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). In *Chacon*, we listed some of the circumstantial indicia of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Id.*

Secretary on behalf of Baier v. Durango Gravel, 21 FMSHRC 953, 957 (Sept. 1999).

This case is a close call in determining whether Belcher's discharge was motivated, at least in part, by his protected activity.

Belcher testified that he didn't make complaints to MSHA about safety issues because: "Kennedy, he done a good job, he kept everything up." (TR 21.) Belcher also indicated in his written statement that on the day he reported a suspected brake fire, Kennedy told him to bring the truck to the parking lot and tag it out for the mechanics to take a look at it. (Complainant's Exhibit C-1.) There was also extensive testimony from Dale Hibbitts and John Bennett, the two on-site mechanics, indicating that Surface was highly responsive to safety issues. Furthermore, Belcher offered no testimony of any hostile reaction from management in response to his reports of mechanical issues involving the Volvo truck. He did say in his written statement that Kennedy told him to stop making his reports because the company was aware of the problems but, again, he indicated no animosity. (Complainant's Exhibit C-2). The only inference that there was some exchange of words between Belcher and Kennedy after the accident on September 2 was during Belcher's cross-examination of Tracy Cledinger which went as follows:

Q. Okay. On the day after the accident -you was there during the whole meeting, I mean Daryl's had to meet me the next day?

A. Yeah, the safety meeting the next day?

Q. Okay. And you heard everything that went on that day?

A. Pretty much, yes.

Q. Okay, Now, did you hear Mr. Kennedy state that he didn't have to work for Wellmore?

A. No, sir, I didn't.

Q. That he could go back on the road?

A. No, sir. I did not come down here and y'all change the words and you told him the only reason we was working was because you were there.

Q. Yeah. Okay.

A. You remember saying that?

Q. Yes.

(TR 109.)

I am hard pressed to find this exchange amounts to an indication of hostility or animosity. I do, however, recognize that Mr. Belcher has preceded pro se and lacks sophistication or legal expertise and is therefore at a disadvantage in adequately presenting his case. I find that there are sufficient circumstantial indicia of discriminatory intent as set forth in Chacon based upon the nexus in time between the complaints made and the discharge and management's knowledge of those complaints which effectively removed the piece of equipment from service for a substantial amount of time during the six-week reclamation project.

Accordingly, I conclude that Belcher has established a prima facie case of discrimination in violation of the Act.

D. Affirmative Defense

Respondents, in the alternative to alleging that no protected activity is involved in this case, assert an affirmative defense for removing Belcher from the North Fork mine. Their position is that Belcher engaged in several safety violations that caused management grave concern for the safety of the miners and others at the job site. Specifically, Belcher was reprimanded several times for running his truck through berms resulting in two accidents, reckless operation of his equipment and making a false official statement regarding the cause of the September 2nd accident.

The respondent has the burden of proving by a preponderance of all the evidence that it would have fired Belcher solely because of these unprotected activities. Pasula, Supra;

Robinette, Supra and Eastern Assoc. Coal Corp, Supra.

The Respondent presented evidence through Foreman Kennedy and dozer driver Joe Vance that Belcher repeatedly drove over the safety berms causing great concern. Kennedy testified as follows when questioned by Ms. Dailey:

Q. And did you have an incident or a time with Lonnie Belcher where you had to talk to him about backing into berms?

A. Yes.

Q. Would you tell the judge what happened?

A. I was with Gerald Hess, we was dumping around the walls this way and with the dozer pushing them this way so we were working the walls from both ends. And Gerald Hess (sic) was in the truck backing up on the dump and he was backing up on the dump and was backing up and putting his wheels over and Gerald Hess said, "you're scaring me." And then I overheard the conversation so I went straight down to the area where the men were working and rolled out on the dump and the dump looked good -went back to where the men talked. It was Lonnie that was doing it. So I got Lonnie out of the truck and talked to him about the berm. I said that's why we got a dump dozer there to push it over. And he said he was trying to get it before the dozer saving him from making trips out there. And I said, well, you know, that's why we pay the dump dozer to be pushed over. Don't - I don't want you on the berms.

Q. Now, did you have a second opportunity to talk to Mr. Belcher about berms?

A. Yes, I did.

Q. Would you tell the judge what happened and how did that come about?

A. It was hauling in the holler field number 2 because the pond - we had a pond fill up and we were trying cleaning out the pond back up with the dozer they call a dump hole to dump the clean ones in so they can cover it up to get rid of the material... It was Joe Vance hollered at me, we need a pull cable that we got a truck stuck down here. So I got the pull cable, went down there and seen where Lonnie backed over into the hole and I talked to him again about the berms and I gathered the Bates contractors and I had three Bates contractors right there. There was one Wellmore employee and I gathered all four of them together and talked to them. I said, I don't want to see this right here no more. The next time I'll send you off the hill to HR.

Q. What did you say to Mr. Belcher?

A. I told him I didn't want to catch him on that berm. I asked him why he was backing through the berm. He said he was throwing the mud over into the dump, but once again, I told him, that's why we keep the dozers there to knock the dump down. That's his job.

Q. Did Mr. Belcher say anything about the berms during these conversations?

A. He said we wouldn't keep the berms, Joe Vance, my dump man says he couldn't keep the berms for Lonnie riding them down.

Q. Did you have any conversation with Joe Vance about the berm?

A. Yes, I did.

Q. And what did you learn from Joe Vance about the berms that day?

A. He told me that every time he pitches a good berm, the truck that Lonnie Belcher is riding them down. He said he couldn't- he said I talked to him about the berms also. Feel like we had problem at ... and Joe said that he was pitching berms, but every time he pitched the berms, Lonnie would ride them down.

(TR 33-39.)

Joe Vance testified consistently with Mr. Kennedy about Belcher riding over the berms. He testified as follows:

A. In the back to the berm they was - I was down below where they were dumping. And I was fixing the road. They were checking the road and checking the berm itself too. And when he backed around the road I was already doing (inaudible). And when I looked to see him up there, he went through the berm. Instead of turning, he went through the berm.

Q. And did Mr. Belcher make any reply to Gerald Hess on the CB radio?

A. He said - Gerald said "excuse me" or said something to him and he said, "I know what I'm doing and I ain't going through no berm."

Q. Would you tell the judge what the berms looked like that day?

A. They looked good all except where he went through it. It was four to five foot tall, three of four foot wide across for the ride (inaudible).

Q. Were you there the day Mr. Belcher put the truck in the pond?

A. Yes.

Q. Would you tell the judge what happened?

A. Okay. When we got up there where he'd backed up into it, he'd backed up on the berm and it looked like he backed up on it and dumped his load. He backed up on it and the truck just sit there on the road.

Q. Where was the swivel part of the articulating truck?

A. Sitting on the berm.

Q. And did Mr. Belcher say anything about why he backed into the berm or backed into the pond?

A. He said there was no berm.

Q. Was that true?

A. No.

Q. And why do you believe that that was not a true statement by Mr. Belcher?

A. Because he'd been on down in the mud over the berm but the berm wasn't holding up.

(TR 65-66).

Dale Hibbitts also testified that on September 2nd when Belcher had his second accident, he was involved in towing the truck up the hill. Hibbitts testified that Belcher had driven over berm on that date as well. When shown a photograph of the crash site, (R/SM #1, page 2), Hibbitts identified the mound of earth by the tires as what remained of the berm. (TR 92.)

After maintaining that there were no berms at any of the locations he was admonished by management for running down, Belcher admitted on cross-examination "I only talked to the mine foreman one time about that I hit the berms. And that's all I talked to him." (TR 176.)

I credit the testimony of Kennedy, Vance and Hibbitts. They testified consistently with one another giving detailed accounts of the events at issue which are corroborated by the physical evidence. R/SM # 3, is Kennedy's notebook. Kennedy testified that as a matter of course, he kept a daily log of events he felt noteworthy. An entry was made for period indicated as August 17, 2009 through August 21, 2009, which stated that Lonnie Belcher had backed through a berm and put his truck in a hole and had to be pulled out. It was further noted that this was not the first occasion on which Kennedy had trouble with Belcher driving over berms and that he had been

told not to do it again or he would be sent off the hill. An entry was made on August 31, 2009 indicating Kennedy had a safety talk with his men about the berms and operating in a safe manner. These entries are entirely consistent with Kennedy's and Vance's recounting of the events leading up to September 2nd. Additionally, photographs were provided of the accident scene on September 2 in which both Kennedy and Vance were able to identify the berm material surrounding the wheels of the Volvo truck.

The accident on September 2, 2009 was the final event which led to management's decision to remove Belcher from the North Fork mine. Mr. Belcher's version of the events as he told Surface and Bates and MSHA, is that in the early afternoon hours, he was making a run with his truck when he stalled out on the upper road where he was hauling material. He called out for jumper cables to be brought to him and in the mean time, he latched the safety belt, engaged the parking brake and attempted to start the truck when it lurched forward, bypassing the brakes, and rolled down an adjacent hill where it came to rest with the cab turned over onto the driver's side. He alleged that there was no berm to retard the truck's forward movement. He was pulled out of the cab through the window.

Belcher claimed in his written statement to MSHA dated October 1, 2009, that he was knocked unconscious and came to as Cledinger was pulling him out of the truck. All he could remember was that he hurt his right rib cage. (Complainant's Exhibit C-1.) His second statement of April 16, 2010, filed in response to Surface's Answer and adopted by him at the hearing as part of his testimony, Belcher stated that it was a Surface employee who told him he was unconscious. A Surface employee came running down the hill calling his name and all Belcher could do was raise his right arm in response. He thought at the time his left arm was broken. Before he was helped out of the truck, he reached down to get his hard hat because a Surface employee asked him where it was. He retrieved it and was then helped out of the truck. (Complainant's Exhibit C-2.)

This version of events is at odds with, and contradicted by, the physical evidence as well as the testimony of those persons who responded to the scene and investigated the cause of the accident. Both Tracy Cledinger, a miner of nine years, and Joe Vance, the dozer operator, were on the scene immediately after Belcher's truck flipped over.

Cledinger testified that Belcher was conscious and was yelling for someone to get him out of the truck as he (Cledinger) was approaching the truck. (TR 107.) According to both Vance and Cledinger, after they removed Belcher from the passenger side window of the cab, he was standing to the side of the truck for a few minutes and he then crawled back inside of it for a few minutes and then climbed back out without assistance. Neither of them could see what he was doing because he was fully inside the cab and out of sight. (TR 72-73, 103-104.)

With respect to the alleged malfunctioning of the parking brake, there was a great deal of testimony offered in contradiction to Belcher's assertions. Surface mechanics testified that the parking brake was set when the cable was hooked up to tow the truck up the hill. It was evident;

however, that the brake was not engaged on this 35 ton truck when it went down the hill as the four back wheels would have been locked up leaving visible skid marks in the dirt. Furthermore, it would be impossible for the brakes to fail and then reset or function properly thereafter. John Bennett superintendent for Surface with 26 years of experience as a mechanic explained as follows:

Q. Now, did you have any problem with the wheels rolling up?

A. Yeah. There were on - the park brake was locking.

Q. Is it possible then when the park brake is set where it was on the hillside - not on the hillside but on the No. 3 that's on the map there (indicating a photograph of the upper haul road), is it possible if Mr. Belcher had truly had his park brake set as he claims it was for the truck to have rolled over or through the berm and down to where the circle is on the map? (Referring to R/SM #2.)

A. No, ma'am.

Q. And why do you say that?

A. The park brake is only applied in pressure release. The park brake was fully functional, no broke spring or anything and it- there was no way it would fix itself. You know, for the truck to roll off, the park brake had to be released.

Q. Is it possible for the truck brake to have been off or broken and rolled - for the truck to have rolled in the ditch as it did, to have landed with the cab turned over and for the truck to have reset its brake itself?

A. Not with the lever. But the brake if your air pressure bleeds off would set.

Q. In this instance, was the lever brake on?

A. Yeah, the lever was in the safe position.

Q. Have you ever had a situation where a truck brake failed and then for some reason set themselves and began to work again after an accident?

A. None

(TR 120-126.)

Dale Hibbitts, roving mechanic with 24 years of experience as a mechanic, confirmed the assessment made by Bennett as well. He testified:

Q. Did you have any problem pulling the truck - you said you righted the cab?

A. Yes.

Q. Did you have any problem then rolling the truck up the hill?

A. Once we got the truck back on its wheels with the help of an excavator and a dozer, we hooked the dozer to the back of the truck and we proceeded to pull it back up over the hill and the dozer would not pull the truck back there.

Q. And why was the truck or the dozer unable to simply roll the truck back up the hill?

A. All the rear wheels on it was scooting.

Q. Was scooting?

A. Yeah. Sliding.

Q. And did you do any more inspections of the truck then about the brake or anything else?

A. Yeah. Well, we proceeded to check park brake, the service brake and actually checked to see if the truck would start in gear.

Q. And would you tell the judge what you found out about the brake on the truck?

A. The park lever was in the set position at that time. And if you put the truck in any gear other than neutral, it will not crank, or if the neutral switches out on the park brake switch itself, it will not crank.

Q. Did you test out the brake at all?

A. Actually, I drove the truck back out of the hole to see about the fuel load.

Q. And did you try the brakes while you were doing it?

A. Yes.

Q. And did you have any problem with the brakes at all?

A. No.

Q. If the park brake had been set on this truck as Mr. Belcher says it was, before it went

over the - rolled over, would the tires have rolled if the park brake was set?

A. No, ma'am.

A. It would have had to slide on all four of the back tires went over the berm.

Q. And did you see any evidence of sliding or skidding?

A. No, not at that time I got there.

Q. Did you have to do anything with the brakes?

A. No, we didn't do anything with the brakes.

Q. Have there been any problems with the brakes on that Volvo truck since then?

A. No, ma'am, not any problems with the brakes on the truck. None that's been reported to me.

(TR 87-91.)

Joe Vance also confirmed the absence of skid marks at the scene and also added that in his experience brakes will not fail and then reset themselves. (TR 74-75.) The cause of the truck stalling out on the upper haul road was explained by Tracy Cledinger. From his experience in driving this Volvo A35C, he knows that the steering is hydraulic and if the driver puts the vehicle into too tight a turn, it will cause a stall. (TR 110-112.) Bennett testified that he thoroughly investigated the reported brake fire by pulling apart the brakes and found that there had not been a fire. The brakes were fine. He explained that the smoke could be caused by operating the truck at excessive speeds. (TR 95-96, 119.)

I find the assessment of the condition and functionality of the brakes offered by Bennett and Hibbitts credible. It is based upon their 50 years of collective experience as mechanics and upon their thorough examination of the brakes immediately before and after the accident. Additionally it is corroborated by the photographs taken at the scene in which skid or slide marks are clearly absent. (R/SM #1 pgs 1-2.) I find Surface's theory of the case - that Belcher set the park brake when he climbed back into the cab of the truck after being pulled out by Cledinger, quite plausible. I also accept the explanation for the truck stalling on the haul road and the cause of the smoking brakes as reasonable and consistent with Belcher's reckless disregard for the safe operation of the truck.

I find Belcher to be less than credible based upon the many discrepancies in his written statements and his testimony, as well as from the total lack of evidentiary support for his version of the facts. Joe Vance, Tracy Cledinger, Jimmy Kennedy, and Dale Hibbitts were all present on

the scene of the accident on September 2nd. While all four men saw that there was a berm present on the upper road which Belcher drove through, and identified it in a photograph, only Belcher seems not to have noticed a berm being present. (TR 130, 103, 52, 91.) Moreover, there was credible testimony from Kennedy and Vance that he had been counseled in the past for this behavior. He had, in fact, put his truck in a pond on a previous occasion by running through a berm. Only after hearing each of these witnesses testify did Belcher finally admit that he had been counseled for hitting a berm "once."

He offered differing versions of the events of September 2nd with regard to whether it was his right rib cage or left arm that was injured, whether he was conscious after the crash or whether someone with Surface told him he was or whether he crawled back into the cab to allegedly retrieve his hat or whether he retrieved it before he was pulled out of the truck. (Complainant's Exhibits C-1 and C-2.)

In addition, Belcher denied on the stand that he had ever shown to anyone at Surface a photograph he took on his cell phone of a truck he had crashed on another job site. (TR 17.) Tracy Cledinger, however, testified that he and Belcher were talking one day and Belcher showed him a picture on his cell phone of a truck turned over against a wall and said he had turned it over. (TR 106.)

Belcher testified that he was promised a full time job with Surface by Tammy Fields, Human Resources Manager, in August 2009. Belcher's testimony was that he was working at a full-time temporary job with another company when Fields called him about a job. She said it would start on Monday with Bates and then immediately thereafter, he would be a permanent employee with Surface. This testimony was contradicted by Fields who testified that Belcher contacted her asking if there was any work available as he had lost his job. She informed him that they did not have anything available. In early August, she called him and told him to contact Bates because they would be doing some temporary contract work for Surface and he might be able to find work with them. (TR 134-135.)

On cross-examination Belcher stated that he had a great temporary job with another company and would not have taken the job with Bates if he had known it was temporary. When asked which company he had been working for that he would not have left, he was evasive and responded "the company I worked for before I went to Wellmore." He went on to say he was offered a truck driving job until something on the strip came open. When asked if Ms. Fields actually said all of that to him, he admitted that she had not. Belcher insisted that he remembered the conversation with Ms. Fields "as if it was yesterday" and that Ms. Fields told him he would be full time after 60 or 90 days but then he had to "admit that, I guess, I believe it was 60 days, two months, that would be 60 days, I believe." Fields denied this entire conversation saying that she would not have offered Belcher a full time job at any time because there was none available. (TR 134-135, 171-173.) In fact, after the Bates contract ended in mid-October, all but two of Surface's employees were also laid off. (TR 141.)

In Belcher's written statement to MSHA of October 1, 2009, the relief he asked for from the alleged discrimination was to be "temporarily reinstated."⁴ (Complainant's Exhibit C-1.) This indicates that Belcher was well aware that his position was a temporary one and he had never been promised a permanent job. However, he changed his version of the facts subsequent to execution of that statement.

In sum, I find the Respondent's position that Belcher repeatedly engaged in reckless operation of his truck - disregarding berms and counseling from his foreman, and causing two accidents, one of which could have resulted in serious injuries to himself or others at the mine - is fully supported by the testimony and physical evidence produced. The decision to take Belcher off the job, as Foreman Kennedy said, was because he was "a liability risk" and "an unsafe worker" who after being told right from wrong did not listen. (TR 43.) Robert Litton of the Worker Safety and Human Resources department, who made the decision to take Belcher off the job site, confirmed that after reviewing Belcher's performance issues between mid-August and September 2nd, they felt they had no need for him on the job. Backing over the berms was not acceptable safety behavior at their mine site, he said. (TR 142.) Thus, I find that the Respondents have proven by a preponderance of evidence that they would have removed Belcher solely for his reckless operation of the vehicle coupled with his disregard for the safety of himself and others, rather than for engaging in protected activity.

IV. ORDER

Based upon the foregoing, the Complainant's discrimination claim is **DISMISSED**.


Priscilla M. Rae
Administrative Law Judge

⁴ Assuming *arguendo* that I found for Belcher, reinstatement would not be available as the job he held was temporary. Robert Litton testified that his position was not filled after September 2, 2009, as the job was nearly complete and the truck was no longer needed. Back pay would also be tolled as a result. See *Chadryk Casebolt v. Falcon Coal Company, Inc.*, 6 FMSHRC 485 (Feb. 29 1984); and *Secretary of Labor on behalf of Robert Gatlin v. Kenamerican Resources, Inc.*, 31 FMSHR 1050 (Oct. 8, 2009). Furthermore, Belcher has been on workers compensation since the time of the accident and had not been medically cleared by his physician to return to work.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021

January 10, 2011

JUSTIN NAGEL,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2010-464-DM
v.	:	WE MD 09-11
	:	
NEWMONT USA LIMITED,	:	
Respondent	:	Mine ID: 26-02512
	:	Leeville Mine

**DECISION AND ORDER GRANTING RESPONDENT’S MOTION TO DISMISS
FOR FAILURE TO COMPLY WITH DISCOVERY ORDERS
AND LACK OF CANDOR WITH THE TRIBUNAL**

Before: Judge McCarthy

This matter is before me upon a discrimination complaint filed by Justin Nagel (“Complainant”) pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended. Section 105(c)(1) of the Act prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety-related, protected activity. A discrimination complaint under section 105(c)(3) of the Act may be filed by the complaining miner if the Secretary, after investigation conducted pursuant to section 105(c)(2) of the Act, has determined that the provisions of section 105(c)(1) of the Act have not been violated. Complainant Justin Nagel appears *pro se* in this matter, as the Secretary of Labor decided not to pursue Nagel’s discrimination allegations under section 105(c)(2).

I. Procedural Background

On October 27, 2010, I issued a Dismissal Order entitled, “Order Certifying Interlocutory Discovery Ruling to the Commission; Order Granting Respondent’s Motion to Dismiss for Failure to Comply with Discovery Orders and Repeated Lack of Candor with Tribunal; Order Staying Dismissal Pending Commission Ruling on Certified Interlocutory Discovery Order.” On November 23, 2010, the Commission issued Direction for Review and Order, which considered the legal implications of my attempt to stay the October 27 Dismissal Order, and whether to the address the issues set forth in Complainant Nagel’s petitions for review of discovery issues. Pursuant to Commission Rule 71, 29 C.F.R. § 2700.71, the Commission limited their review of my Dismissal Order to the issue of whether I had the authority to stay the effect of my decision. The Commission unanimously concluded that an Administrative Law Judge did not authority to stay the effect of his or her decision. See *Capitol Aggregates, Inc.*, 2 FMSHRC 1040, 1041 (May 1980); see also *Sec. of Labor on behalf of Pasula v. Consolidation*

Coal Co., 1 FMSHRC 25 (Apr. 1979) (neither the Mine Act nor the Commissions Interim Rules of Procedure provide for a stay of the effective date of a judge's decision once the decision is issued). Accordingly, the Commission vacated my Dismissal Order and remanded the case for issuance of a final decision.

The Commission recognized that Complainant's petitions for discretionary review of my discovery orders regarding the hiring of private security for his deposition and partially granting Respondent Newmont's motion to compel production of audio tape recordings were in essence petitions for interlocutory review under Rule 76. The Commission concluded that review of such issues was not appropriate at this time since the Commission usually does not grant interlocutory review of discovery orders. *See e.g., Asarco, Inc.*, 14 FMSHRC 1323, 1328 (Aug. 1992) ("unless there is a 'manifest abuse of discretion' on the part of a judge, discovery orders are not ordinarily subject to interlocutory appellate review.") (citations omitted). Therefore, the Commission denied both petitions. Similarly, the Commission, at footnote 3, denied Complainant Nagel's November 19, 2010 petition for discretionary review of a related discovery order.

Finally, the Commission directed that once I issued a final decision on remand, a petition for discretionary review of that decision may be filed within 30 days after issuance of the decision or order, pursuant to section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(i), and the Commission's Procedural Rule 70(a), 29 C.F.R. § 2700.70(a). The Commission noted that if Mr. Nagel files a petition for discretionary review within 30 days of my revised decision, he may seek review on all the discovery issues raised.

I accept the Commission's Direction for Review and Order as the law of the case. On remand, for the reasons provided in my initial order, as reiterated below, I hereby dismiss this case effective immediately, without stay. Mr. Nagel is hereby placed on notice that he has 30 days to file a petition for discretionary review of this revised decision with the Commission pursuant to section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(i), and the Commission's Procedural Rule 70(a), 29 C.F.R. § 2700.70(a).

Once again, a detailed outline of the salient procedural motions and Administrative Law Judge (ALJ) orders leading up to my dismissal of this proceeding is set forth below.

A. The Complaint and Order to Answer

On January 5, 2010, Complainant Nagel filed a complaint of discrimination under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended. On January 6 and February 16, 2010, the Commission sent a letter requesting certain material from Complainant before the case could be processed. More specifically, Complainant was requested to provide proof that he had served Respondent with a copy of his Complaint. On March 16, 2010, Chief Judge Lesnick issued an Order to Respondent to Answer the Complaint.

B. Initial Order Denying Respondent's Motion to Dismiss

On March 26, 2010, Respondent filed a Motion To Dismiss for failure to state a claim upon which relief could be granted. On April 30, 2010, the Complainant filed a letter with the Commission explaining his service of the Complaint and attaching as Exhibit A, a copy of an audio recording of a meeting that Complainant had with Respondent's management representatives Thayne Church, Monty Holland, and Mike Woodland concerning certain events surrounding his termination on or about August 20, 2009. On May 28, 2010, Chief Judge Lesnick issued an Order Denying Respondent's Motion to Dismiss.

On June 2, 2010, this discrimination proceeding was assigned to the undersigned. On July 2, 2010, I issued a Pre-Hearing Order in this proceeding. Also on July 2, 2010, I issued an Order Consolidating Cases and Denying Complainant Motion for Temporary Reinstatement.

On June 10, 2010, Respondent served its Answer on Complainant.¹

C. Initial Conference Calls, Extension for Time to Procure Counsel, and Order Confirming Discovery Schedule and Trial Dates

On August 3, 2010, I participated in a conference call with Mr. Nagel and Respondent's counsel to discuss issues related to this matter, particularly Mr. Nagel's request for an extension of time to obtain an attorney and file a pre-conference statement. His request for an extension of time was granted during the conference call. At that time, Mr. Nagel indicated that he was "very close" to obtaining an attorney based on several referrals. Respondent's counsel indicated that discovery from Mr. Nagel was due on August 16, 2010. Mr. Nagel indicated that he thought he would have an attorney by that time. Accordingly, I scheduled another conference call for August 17, 2010.

On August 17, 2010, I participated in another conference call between Mr. Nagel and counsel for Respondent. Mr. Nagel indicated that he had been unsuccessful in obtaining an attorney to represent him in this matter despite contact with the referrals and with two state bar associations. Nevertheless, he expressed confidence that he could obtain an attorney by August 31, 2010. Otherwise, he assured this tribunal that he was prepared to proceed *pro se* and represent himself at trial, which was scheduled for October 25 and 26, 2010 in Elko, Nevada. Respondent's counsel argued that Mr. Nagel's responses to discovery were inadequate and non-responsive. Counsel further indicated that Respondent had been served with discovery requests from Mr. Nagel. Based on the discussion at the conference call concerning the issues of legal representation, outstanding discovery, and trial dates, I informed the parties that I would issue an order codifying the parties' agreements and my instructions.

On August 19, 2010, I issued an Order Confirming Conference Call Agreements and

¹Upon inquiry from my office, Respondent filed its Answer with the Commission on October 27, 2010.

Discovery Schedule. That order set this matter for trial, as follows:

A conference call will be held on August 31, 2010 at 4:00 pm E.S.T. (2:00 pm M.S.T., 1:00 pm P.S.T.) to discuss Mr. Nagel's continuing efforts at obtaining counsel, the status of discovery, and any remaining pre-hearing issues related to this matter.

Mr. Nagel has agreed to acquire legal representation by August 31, 2010, or to continue to represent himself in this matter.

Mr. Nagel shall provide full and complete responses to Newmont's discovery requests no later than September 14, 2010. Privileged information, and the names of other miner witnesses, need not be disclosed at this time.

Newmont shall provide responses to Mr. Nagel's discovery requests no later than September 21, 2010.

Newmont will take Mr. Nagel's deposition on September 28, 2010 in Spokane, Washington [later changed to Elko, Nevada].

A hearing on the merits will take place in Elko, Nevada, on October 25-26, 2010. A Notice of Hearing containing further details will be issued to the parties after the August 31, 2010 conference call.

The parties are hereby ORDERED to comply with the above schedule and agreements.

D. Complainant's Inability to Procure Counsel and Agreement to Proceed Pro Se

On August 31, 2010, I held a conference call with the parties. Complainant Nagel indicated that despite his best efforts, he had been unable to obtain counsel in this matter and he would represent himself.

E. The Onslaught of Procedural Motions and ALJ Orders

On September 9, 2010, Respondent filed a Motion for Partial Summary Decision or to Strike or Limit Certain Claims. On September 22, 2010, Complainant Nagel filed a response. On September 27, 2010, I issued an Order Conditionally Limiting Certain Claims and Granting Partial Summary Judgment on certain claims. My Order specifically set forth the claims of interference and discrimination at issue in this case.

On September 20, 2010, Complainant filed a Motion to Dismiss [Counsel] for Ethics

Violations. On September 23, 2010, Complainant filed a Motion to [Amend] and Correct Motion to Dismiss [Counsel] for Ethics Violations. On September 24, 2010, Counsel for Respondent filed a Statement in Opposition to Complainant's Motion to Dismiss Patton Boggs for Ethics Violation[s]. On September 30, 2010, Complainant filed a Disciplinary Referral with the Commission. On October 5, 2010, counsel for Respondent filed a Statement in Opposition to Complainant's Disciplinary Referral.

During a conference call between the parties on September 24, 2010, Respondent requested that they be allowed to hire private security for the scheduled September 28, 2010 deposition of Complainant, and that all participants in said deposition submit to a reasonable search upon entry. I orally granted that request, as reasonable, to be followed up by written Order. Said Order Granting Respondent's Request For Security issued on October 13, 2010. On October 20, 2010, I issued an Order Denying [Complainant's] Motion to Require Respondent to Reduce its Oral Motion for Security to Writing.

In the interim, on September 24, 2010, Respondent filed a Motion to Compel Production of Recorded Conversations that Complainant had made with representatives of Newmont management concerning discussions or meetings related to allegations of interference and discrimination, as alleged in his Complaint.

On September 28, 2010, Complainant was deposed by Counsel for Respondent. During the deposition, counsel for Respondent asked Complainant how many tape recordings of conversations Complainant had with Respondent's management about issues in this case. Complainant answered that he thought that he had five tapes in his possession.

On October 5, 2010, Complainant filed a notarized Affidavit pursuant to Commission Rule 80, requesting that I withdraw and recuse myself from hearing this matter on the grounds of bias and impossibility for a fair trial.

On October 13, 2010, Complainant Nagel filed his Response to Newmont's Motion to Compel Production of Recorded Conversations.

On October 14, 2010, Complainant Nagel filed a Motion for Partial Summary Judgment. On October 14, 2010, Respondent filed its Opposition. On October 14, 2010, Complainant filed a Response to the Opposition. On October 15 and 21, 2010, respectively, Complainant Nagel filed Amendment to Partial Summary Judgment and [Second] Amendment to Partial Summary Judgment, with 2008 employee handbook attached. As further set forth below, on October 21, 2010, I issued an Order Denying Complainant's Motion for Partial Summary Judgment.

In the interim, on October 15, 2010, Complainant served Respondent with a motion entitled "Motion to Review Decision of Releasing the Number of Tapes and Strike from Deposition Record." In his motion, Complainant states that he incorrectly stated the number of tapes in his possession during his deposition in order to "protect the integrity of criminal

investigation and any informants that may or may not be on audio recordings.” This motion eventually was filed with the Commission on October 21, 2010, although the motion had been brought to my attention as Exhibit B to Respondent’s Response to Complainant’s Motion for Continuance and Motion to Dismiss, discussed below. I denied Complainant’s October 15 Motion in my October 22, 2010 Order Denying Motion to Strike Testimony From Deposition Record.

Also on Friday, October 15, 2010, I convened a conference call with the parties to discuss settlement prospects and any outstanding discovery matters. Respondent’s counsel indicated that Mr. Nagel had not provided Respondent with a copy of his affidavit motion that I recuse myself. I informed the parties that my clerk would send Respondent a copy. My clerk did so.

Because I was concerned this *pro se* Complainant had made one-party consent recordings that may be illegal under Nevada law and implicated Fifth Amendment self-incrimination issues, I further informed the parties that I had researched Nevada law and concluded that the act of producing in-person recordings, which are legal in Nevada, raised no Fifth Amendment privilege against self-incrimination. Accordingly, I ordered Nagel to produce all in-person recordings, but not any telephone recordings, as the later appeared to be illegal under Nevada law (see *Lane v. Allstate Insurance Co.*, 969 P.2d 938 (Nev. 1998)), and the act of production itself implicated self-incrimination concerns. I also ordered Nagel to provide answers to interrogatories 13 and 15. I informed the parties that my written Order compelling discovery would issue on Monday, October 18, 2010.

During the conference call on October 15, 2010, Mr. Nagel agreed to overnight copies of the five audio recordings to Respondent’s counsel for delivery on Monday, October 18, 2010. Complainant Nagel assured the Court and Respondent that he would do so. Mr. Nagel further agreed to provide answers to interrogatories 13 and 15 by said date. To preclude premature disclosure of any potential miner witnesses under Commission Rule 62, the parties agreed to a redaction procedure, which was incorporated into the terms of my Order compelling discovery.

On October 18, 2010, I issued my Order Partially Granting [Respondent’s] Motion to Compel Production of Recorded Conversations and Order Granting [Respondent’s] Motion To Compel Answers to Interrogatories 13 and 15. On October 18, 2010, I also issued an Order Denying Complainant’s Motion for Recusal.

On October 18, 2010, Complainant Nagel did not provide Respondent’s counsel with answers to Interrogatories 13 and 15 or provide Respondent’s counsel with the in-person audio recordings, as he had agreed to do during the conference call with the undersigned on October 15, 2010.

On October 19, 2010, Complainant Nagel filed a Motion for New Hearing Date. In his motion, Complainant Nagel requested that the upcoming hearing in this matter, scheduled for October 25-26, 2010 in Elko, Nevada, be postponed.

F. Respondent's Instant Motion to Dismiss

On October 19, 2010, Respondent filed a Response to Complainant's Motion for Continuance and the instant Motion to Dismiss. Respondent opposed Complainant's request that the hearing be postponed and moved to dismiss this proceeding due to Mr. Nagel's repeated failure to comply with my Orders pursuant to Commission Rule 59. Respondent argues that Complainant has demonstrated a pattern of unwillingness to comply with direct orders from the undersigned and is not likely to abide by my orders or Commission procedural rules in any future proceeding, including the impending hearing, no matter when it may be scheduled. Because the Complainant has demonstrated clear contempt of my direct orders and Commission rules, Respondent argues that this discrimination proceeding should be dismissed.

More specifically, the Respondent argues that when a party refuses to comply with an order directing the production of discoverable information, the Judge has the authority under Commission Rule 59 to "make such orders with regard to the failure as are just and appropriate, including . . . dismissing the proceedings in favor of the party seeking discovery." Respondent argues that Complainant has continually abused the discovery process and refused to abide by my orders and Commission procedural rules. While the Respondent acknowledges that dismissal is considered a harsh sanction, Respondent argues that Complainant has demonstrated that he considers himself to be above the authority of this tribunal, and therefore un-sanctionable. As a result, Respondent contends that any sanction short of dismissal is insufficient to remedy the continual contempt that the Complainant has demonstrated for the authority of this tribunal and Commission rules and procedures.

In its Motion to Dismiss, Respondent enumerates how the Complainant's alleged contempt for ALJ authority is evidenced by the following instances of refusal to comply with ALJ orders. I set forth Respondent's specific arguments below:

1. Refusal to Respond to Interrogatories Despite [Judge] Orders

Respondent contends that the Complainant has refused to respond to Respondent's interrogatories, despite four separate orders to do so. Respondent notes that Newmont issued its interrogatories to Mr. Nagel on July 15, 2010. Respondent states that after Mr. Nagel neglected to respond to two interrogatories, Nos. 13 and 15, the ALJ required him to do so. The Respondent states that during a conference call held on September 24, 2010, the ALJ issued his third order to Mr. Nagel to respond to Respondent's interrogatories Nos. 13 and 15. (See Ex. A, attached to Respondent's Motion). Respondent further notes that on September 29, 2010, the Respondent e-mailed the Complainant, alerting him to the fact that his ordered responses were still outstanding. *Id.* Respondent further notes that during the conference call on October 15, 2010, the ALJ issued, for the fourth time, an order requiring the Complainant to provide the outstanding interrogatory responses. (See Ex. B, attached to Respondent's Motion). Respondent asserts that as of October 19,

2010, six days prior to trial, the Complainant has yet to respond to the ALJ's orders.

2.. Refusal to Comply with [ALJ] Order by
Untruthfully Responding to Deposition Questions

The Respondent argues that the Complainant refused to truthfully answer deposition questions under oath because he disagreed with the ALJ's order to respond to the questions posed. Specifically, Respondent notes that during his deposition, Mr. Nagel was asked about the tape recordings that he made of conversations with Newmont supervisors and management while he was employed at Newmont. Respondent states that Mr. Nagel refused to answer questions pertaining to those tapes. Respondent notes that pursuant to prior agreement, the parties contacted the ALJ, who ordered that Mr. Nagel respond to the questions, and Mr. Nagel provided answers during the deposition. (See Tr. 214:5-15, 217:1-10, attached as Ex. C to Respondent's Motion). Respondent points out that subsequent to the deposition, on October 15, 2010, Mr. Nagel moved to strike his deposition testimony responsive to the questions at issue because he had not truthfully answered the questions regarding the number of tape recordings that he has in his possession. (See Ex. D, attached to Respondent's Motion). Respondent argues that Mr. Nagel has taken the position that he was not required to give a truthful answer at deposition because he disagreed with the ALJ order. Id.

Respondent argues that Mr. Nagel has likewise demonstrated contempt for the discovery process and procedures by refusing to truthfully answer deposition questions. Respondent argues that in his deposition testimony, Mr. Nagel specifically stated, under oath, that he intended to call six miner-witnesses at trial. (See Ex. C at Tr. 239:21-25, attached to Respondent's Motion). Respondent notes, however, that in his recently filed pre-hearing statement,² Mr. Nagel identifies nine separate unnamed individuals as confidential miner witnesses. (See Ex. E, attached to Respondent's Motion). Respondent states that in order for Newmont to successfully prepare its case for trial, it has the right to depose Mr. Nagel's miner witnesses within the 48 hours prior to trial. Since Mr. Nagel cannot truthfully provide the number of witnesses that Newmont is required to depose, Respondent argues that it has been disadvantaged in its deposition scheduling and trial preparation.

3. Refusal to Comply with [ALJ] Order
to Produce Tape Recordings

²Complainant Nagel did not file his pre-hearing statement with my office at the Commission, he just served Respondent.

Despite expressly agreeing to comply, Respondent argues that Complainant has also refused to abide by my Order to produce the tape recordings that he made of conversations with Newmont management representatives. Respondent notes that during the [October 15, 2010] conference call with the Court, the ALJ informed Mr. Nagel that he was requiring Mr. Nagel to produce the tape recordings at issue. (See Ex. F, attached to Respondent's Motion). Respondent states that during this call, Mr. Nagel expressly agreed to have the tapes delivered overnight to Newmont's counsel by Monday, October 18, 2010, which was exactly one week before trial. Respondent further states that after the conference call, Mr. Nagel further indicated his compliance with my order in e-mail correspondence with Newmont's counsel regarding the manner of transcription of the tapes. (See Ex. G, attached to Respondent's Motion).

Respondent confirms that on Monday, October 18, 2010, after the tapes did not arrive in the morning delivery, Newmont's counsel contacted Mr. Nagel to request the relevant delivery information and tracking numbers. (See Ex. H, attached to Respondent's Motion). According to Respondent, after several hours, Mr. Nagel responded, indicating that the tapes had not been sent because he is "Appealing the Judges (sic) Decision to the Commission." Id. Respondent states that Newmont is not aware that any appeal has been filed.³

Respondent argues that this alleged instance of contempt is particularly troubling given the short amount of time that Newmont was given to transcribe and redact relevant information on the tapes prior to trial, which is scheduled for October 25 and 26, 2010. Respondent further argues that it is clear from Mr. Nagel's pre-hearing statement, filed on October 19, 2010, that he intends to use the tape recordings, or evidence derived from the tape recordings, at trial. (See Ex. E, attached to Respondent's Motion). By way of example, Respondent notes that the first paragraph of Mr. Nagel's statement appears to have quotations derived from tape recordings, upon which Mr. Nagel intends to rely. (Id. "I don't care if you're recording this.").

Respondent argues that although the above illustrations by no means represent an exhaustive list of the myriad examples of Mr. Nagel's contempt and frustration of judicial authority, such instances demonstrate that Mr. Nagel has little respect for, or intention of abiding by, the Judge's orders in this matter. Respondent reiterates that Mr. Nagel has been issued repeated orders to comply with discovery, and continually has agreed to comply with such orders in word, and then has flat-out refused to comply. Respondent argues that Mr. Nagel has demonstrated that if he does not agree with this tribunal, he is not bound by its authority, nor, apparently, is

³As explained below, on October 25, 2010, Complainant Nagel filed "Petitions of Discretionary Review, Order to produce recordings."

he bound by the oath he took prior to the deposition. Consequently, Respondent argues that Mr. Nagel has demonstrated that any sanctions issued to him for failure to comply with the Judge's Order will be disregarded, ignored or overlooked. Accordingly, Respondent argues that the only appropriate response to Mr. Nagel's constant refusal to fairly participate in this proceeding is to dismiss the matter for repeated failures to comply with the Judge's orders.

Finally, Respondent states that despite Mr. Nagle's actions, Newmont is prepared to go forward with the scheduled trial date. However, should the Judge determine that a postponement is appropriate, Newmont asks that it be conditioned as follows: First, that no further postponements be allowed, and second, that Mr. Nagel be advised that any further failure to comply with Judge's Orders will result in the dismissal of the case. In conclusion, Respondent argues that the ALJ should deny Complainant's Request to Postpone the Hearing and grant the Respondent's Motion to Dismiss.

**G. Pre-Hearing Statements, Additional Conference Calls,
and Additional Orders**

On October 19, 2010, the parties filed their respective Pre-Hearing Statements.

On October 20, 2010, I convened a 90-minute conference call with the parties. I indicated that I would issue an Order on October 21, 2010, Denying Complainant's Motion for Continuance. I again ordered Mr. Nagel to comply with my discovery orders. I indicated that my office had not received any Motion to Compel Discovery from Complainant Nagel. He indicated that perhaps he did not send my office a copy, just Respondent.⁴ Nevertheless, on the conference call, I went through each of the discovery requests that Mr. Nagel indicated that Respondent had not complied with, and resolved them, reserving the right to draw adverse inferences against Respondent at trial for any non-production or failure to preserve evidence.

I also asked Mr. Nagel to explain what the five tapes involved. Mr. Nagel explained that the tapes involved the following: a conversation that he had with management representative Monty Holland and Shane Eisenbarth concerning his reported safety concern regarding alleged improper disposal of pressurized paint cans; the grievance meeting concerning his disciplinary warning for alleged failure to guard an open hole at the waste breaker; the grievance meeting concerning his alleged failure to receive proper training; a conversation he had with supervisor Gilbert Liguizmo, concerning Respondent's alleged failure to give Nagel a pay upgrade; and a conversation

⁴On October 20, 2010, Respondent filed its Responses to Complainant's Motion to Compel Discovery. To date, my office has received no Motion to Compel Discovery from Complainant Nagel.

he had with management representatives Mike Woodland, Thayne Church and Monty Holland concerning his alleged failure to water roads (the missing water truck incident), which Respondent claims led in part to his termination on August 20, 2010. Accordingly, these tapes concern events surrounding critical allegations of interference and discrimination as alleged in Nagel's section 105(c)(3) complaint. See also my September 27, 2010 Order Conditionally Limiting Certain Claims and Granting Partial Summary Judgment, which described the allegations of interference and discrimination at issue in this matter.

During the October 20, 2010 conference call, I informed the parties that Complainant's Motion for Partial Summary Judgment, as amended, would be denied and that an Order to that effect would issue the next day. As noted above, that Order issued on October 21, 2010.

During that same conference call on October 20, 2010, Complainant Nagel again agreed to turn over the tapes and overnight them to Respondent. As explained below, he again renegeed on this agreement the next day.

On October 21, 2010, I issued an Order Denying Complainant's Motion for Continuance. I noted that the critical events at issue in this discrimination proceeding were at least 14 months old and in some cases more than two years old. I further noted that back on August 19, 2010, I issued an Order Confirming Conference Call Agreements and Discovery Schedule. I found that the parties have had sufficient time to complete discovery and prepare for trial. I then explained in detail, why I was denying each reason advanced by Complainant for a continuance. After denying each one of Complainant's reasons for a continuance, I concluded that further delay in this matter was contrary to the public interest and the interests of all parties in a timely resolution of their dispute.

On October 21, 2010, I also issued an Order Denying [Complainant's] Motion to Strike Testimony from Deposition Record.

On October 21, 2010, Complainant Nagel finally provided Respondent with answers to Interrogatories 13 and 15. He also provided Respondent with a list of minor witnesses, since the parties were two business days before trial.

On October 21, 2010, I convened another conference call with the parties. Respondent explained that Mr. Nagel again had refused to overnight the tapes as he had agreed to do. Mr. Nagel explained that he was refusing to turn over the tapes because was appealing my decision to the Commission. I explained to Complainant Nagel, as set forth in my October 21, 2010 Order Denying Complainant's Motion for Continuance, that interlocutory review is governed by Commission Rule 76, and that any interlocutory review by the Commission, assuming that it is granted, shall not operate to suspend the hearing, unless otherwise ordered by the Commission. Nevertheless, Mr. Nagel refused

to comply with my Order to turn over the audio tapes to Respondent because he was appealing my Order to the Commission.

H. The Orders to Show Cause Why Dismissal Is Not Appropriate for Failure to Comply with Discovery Orders, Complainant's Submission of Cause Not To Dismiss, and Respondent's Response To Complainant's Reasons Not To Dismiss

Accordingly, during the conference call on October 21, 2010, Complainant was **ORDERED TO SHOW CAUSE** by email to the Court and Respondent by noon E.S.T. on October 22, 2010, why this proceeding should not be dismissed for failure to comply with my discovery order to produce the audio tapes. A final conference call was scheduled for noon E.S.T. on October 22, 2010. My conference call Order to Show Cause was followed up by written **ORDER TO SHOW CAUSE WHY DISCRIMINATION PROCEEDING SHOULD NOT BE DISMISSED FOR FAILURE TO PRODUCE AUDIO TAPES CONCERNING ALLEGED ACTS OF INTERFERENCE AND DISCRIMINATION AS ORDERED BY THE COURT.**

By attachment to e-mail sent to the Court and Respondent at 6:39 E.S.T. on Thursday, October 21, 2010, Complainant Nagel submitted his explanation for Cause Not to Dismiss. He argued as follows:

Under 29 C.F.R. 2700.56(e) states that discover must be completed 20 days prior to the scheduled hearing date. For good cause shown the Judge may extend or shorten the time of discovery. Both Newmont and I are still in discovery. On or about October, 15 2010 Judge McCarthy ruled of Newmont's Motion to compel recordings. Under Commission Rule 2700.70 Any person adversely affected by a Judge's decision or order may file with the Commission a petition for discretionary review within 30 days of the decision or order. I have stated I'm pursuing this option and I'm within 30 days. I have 30 days to appeal Judge McCarthy's decision. Judge McCarthy stated something about rule 76 criminal procedure, this is civil court. There is no 30 C.F.R 2700 as stated in the order for security. I know who the U.S. Marshals and the Elko County Sheriff are. I have 30 days to ask the commission to review the order. There is a thin line between coercion and corruption. To the extent that I wasted time with a Disciplinary referral, If the court would up hold it's laws I wouldn't have to do their job for them.

Respectfully,
Justin Nagel 10-21-2010

Complainant Nagel failed to appear or participate in the final conference call with the undersigned and Respondent at noon E.S.T. or 9 a.m. Pacific time, on October 22, 2010. The undersigned and Respondent's outside and in-house counsel waited for Mr.

Nagel to call in for twenty minutes and my office tried to reach him by phone leaving voice messages, but received no response, until Monday, October 25, as set forth below. Accordingly, at 1:45 p.m. E.S.T. on October 21, 2010, I sent the following email to the parties:

Good afternoon gentlemen,

Complainant Justin Nagel did not appear for the conference call scheduled for 12 noon E.S.T. today. I have received Mr. Nagel's response to my Order to Show Cause why this matter should not be dismissed. Given Mr. Nagel's refusal to turn over the audio tapes concerning critical allegations of interference and discrimination alleged in his complaint, I have concluded that Respondent cannot receive a fair hearing in this matter. Accordingly, the hearing scheduled for October 25 and 26, 2010 in Elko, Nevada is cancelled. My Order concerning Respondent's Motion to Dismiss will issue by close of business on Monday, October 25, 2010.⁵

On Saturday, October 23, 2010, counsel for Respondent sent the following email to the my office and Complainant Nagel concerning the events of Friday, October 22, 2010.

Dear Judge McCarthy

I am writing to relay to the Court the following information, which I believe may be material to its ruling on Respondent's Motion to Dismiss. We have copied Mr. Nagel on this email so that the parties and the Court do not engage in any ex parte communications regarding potentially substantive information.

On Tuesday, October 19, my associate, Caroline Davidson-Hood, emailed Mr. Nagel, and copied the Court, informing him that we intended to hold depositions of his miner witnesses on Friday October 21, and that he may attend the depositions, if he so chose. On Wednesday October 20, Mr. Nagel responded to that email, noting that the day and date didn't match, and asked on what day we would hold depositions. My colleague noted the mistake and responded that depositions would be held on Friday the 22nd of October. Aside from noting the mismatched day and date, Mr. Nagel did not give any indication that he planned on attending the deposition. The relevant email string is displayed below.

On Thursday October, 21, after Mr. Nagel had issued his list of miner witnesses, after the Court had issued its Order to Show Cause Why not to Dismiss

⁵Given the subsequent events and filings in this case discussed below, I notified the parties by email on October 25 and 26, that my Order concerning Respondent's Motion to Dismiss would not issue until Wednesday, October 27, 2010.

the Case, and after the Court scheduled a conference call for all parties at 9:00am Pacific Time [noon E.S.T.] October 22, Respondent determined that formal depositions on Friday morning would be impractical, because the employees listed as witnesses were members of a crew that would not be coming to work until Friday evening, and therefore we could not serve any of the Newmont employees for depositions until after the time had passed for the previously scheduled depositions. Moreover, it appeared impractical to conduct depositions during a conference call with the Court which would determine the status of the hearing and the necessity to conduct any depositions at all. Therefore, I decided that it was more efficient to cancel the depositions and attempt to speak to the employees once they had arrived at the mine on Friday night, if we needed to speak to them at all.

Because of the number of issues that had arisen, it was not until the afternoon on Friday October 22, 2010, that my paralegal contacted the courthouse to cancel the room reservation that we had made for depositions. At that time, the woman at the courthouse stated that "the dark haired guy" that we deposed last time, had showed up at the courthouse at 8:00 am for depositions and waited around until 9:00 am before he left.

Newmont and its counsel would like to state for the record, that although we did not inform Mr. Nagel that we would not be holding depositions on Friday morning, we had no indication from him that he intended to attend them. Moreover, we had expected him to be a party on the conference call on Friday, at which time each party would be fully aware of whether the hearing, and therefore the depositions, would go forward. As of this writing, the undersigned has not received any oral or written communication from Mr. Nagel regarding the events described above.

If it is a fact that Mr. Nagel did go to the courthouse on Friday morning for depositions, we regret if any miscommunications caused him any inconvenience. However, we had no way of knowing that he would be there, not only because he didn't inform us of his intention, but also because we expected that he would be aware that depositions would not be held during a conference call scheduled with the court, in which he was required to participate. Regardless of any possible miscommunication regarding the depositions, Mr. Nagel was aware of the conference call and simply failed to participate or notify the Court of the reasons for his failure.

In its last filing with the Court, Respondent noted that Mr. Nagel's failure to appear at the October 22 conference call could, without more, constitute a ground for dismissal of this matter. However, as we also pointed out in that filing, there are numerous additional bases on which dismissal can, and should, be based in this matter.

Should the Court desire additional information regarding this matter, Ms. Davidson-Hood and I will be available for a conference all at the Court's convenience.

Respectfully,
Mark N. Savit
Patton Boggs LLP
Counsel for Respondent

On Monday, October 25, 2010, during the preparation of this Order, the undersigned received the following email from Complainant, with copy to Respondent's counsel.

I apologize [sic] for missing the confrence [sic] call. I was at the court house [sic] with the witnesses to be disposed [sic]. I left my call in information and was hoping to obtain it from Mr. Savit at 8:00 am when the deposition was scheduled. Only myself and the witnesses show up.

Respectfully, Justin Nagel

Shortly, thereafter, I received the following email from Respondent's counsel, with copy to Complainant Nagel.

Judge McCarthy,

Just to make sure the record contains all pertinent information, we did not notice any witnesses for deposition, so no witnesses would have been there unless Mr. Nagel brought them with him. The court employee who gave us the information has told us that he appeared to be there by himself. We can check further if the court wishes.

Respectfully,
Mark N. Savit
Patton Boggs LLP

Also on Monday afternoon E.S.T., the undersigned received Newmont's Response to Complainant's Reasons Not to Dismiss. In essence, Respondent again moves to dismiss this matter under the Court's broad authority to manage the course of the proceedings under Commission Rules. See e.g., Rules 55, 56, 59, 66, and 80. Respondent's arguments re-emphasize Complainant Nagel's continual lack of candor to the Court and repeated refusal to comply with direct orders to turn over the tapes. Respondent further argues that Complainant's asserted justification in response to the Order to Show Cause, i.e., that he is unwilling to comply with my orders to produce the tapes because he has filed an appeal of said orders with the Commission, is procedurally improper under Commission Procedural Rule 76 governing interlocutory review. Respondent points out that Complainant Nagel has neither submitted a

motion to the Judge seeking certification of his interlocutory appeal on the discovery order to produce the tapes, nor has the judge certified that appeal upon his own motion. Thus, Respondent argues that Complainant Nagel's direct appeal to the Commission has not met any of the requirements laid out in Rule 76, and is procedurally improper in direct violation of Commission rules of procedure.

Respondent further argues that even if Complainant Nagel had properly applied to the Commission for interlocutory review, he was still obligated to comply with the direct order of the court to turn over the tapes. Respondent notes, as the Judge previously advised Complainant, that Rule 76(a)(2) expressly states that, "[i]nterlocutory review by the Commission shall not operate to suspend the hearing unless otherwise ordered by the Commission." Since the Commission has issued no order suspending proceedings, Respondent argues that Nagel had a duty to release the tapes so that Respondent could prepare for the scheduled hearing date. Respondent argues that as result of Complainant Nagel's failure to do so, the Respondent has been prejudiced and proceeding with the hearing has been rendered impractical.

Further, Respondent argues that even if Complainant Nagel properly sought certification of this matter for interlocutory review, said certification would have been properly denied by the Judge and the Commission because it presented a routine issue of discovery as to whether tapes should be produced before trial, and therefore was not of sufficient weight and importance to interrupt the normal course of the proceeding in order to appeal for a decision of the Commission. Respondent relies on Commission precedent holding that interlocutory review is not appropriate where the issue has been determined in a prior Commission decision or the issue is not a controlling question of law. See *United States Steel Mining Co.*, 16 FMSHRC 1043 (May 1994); *Northwestern Resources Co.*, 22 FMSHRC 255 (Feb. 2000). Respondent notes that the tapes have been deemed non-privileged and relevant by the Judge, and Commission rules state that all relevant, non-privileged evidence is admissible. See Rule 63; cf. Rule 56(b) governing scope of discovery. Respondent further notes that Nagel has refused to produce the tapes because he believes that they may be relevant for some potential, future, criminal proceeding against Respondent in support of charges that have not yet been filed. Respondent argues that such tangential and irrelevant justifications do not trump the well-established Commission rule that non-privileged relevant evidence is admissible. Thus, Respondent argues that the question of law governing the admissibility of the relevant evidence is well-established and it is neither a controlling question in this matter, nor will it immediately materially advance this proceeding.

In sum, Respondent argues that this case should be dismissed for Complainant Nagel's continuing lack of honesty and candor, his failure to participate in relevant proceedings, and his gamesmanship in causing delay and waste in order to garner more time to prepare for trial. Respondent emphasizes that Nagel has not only refused to follow procedural rules and the direct order of the ALJ, but his continuing and constant misrepresentations demonstrate that no amount of delay or relief short of dismissal is appropriate. Accordingly, Respondent requests dismissal for Complainant's continual misconduct.

I. Complainant's Petitions For Discretionary Review

On October 25, 2010, Complainant Nagel filed Petitions for Discretionary Review, Order to produce recordings, with attached exhibits. It is confusing, rambling, and at times incomprehensible. Despite Respondent's arguments to the contrary, consistent with my practice of liberally construing the pleadings of this *pro se* Complainant, I treated it as a motion for certification of my interlocutory discovery ruling to the Commission under Rule 76.

On October 26, 2010, Complainant Nagel filed another Petition for Discretionary Review concerning my October 13, 2010 Order Granting Respondent's Request for Security. I declined to certify that interlocutory ruling for interlocutory review as my Order did not materially advance the final disposition of this proceeding, and has been rendered moot because the deposition has already occurred.

On October 29, 2010, after my initial October 27, 2010 Dismissal Order issued, Complainant Nagel sent the following email to myself and my clerk:

1. In 2008 I was able to warn Elko Nevada resident and co-worker Rubin Garcia in the presence of 4 witness at Newmont Mining of an attempt to murder him with an approximate date and reported it to LAW ENFORCEMENT, not a security guard, Lt. Trouten, Elko City Police.

2. While discussing the death of Rubin Garcia and how I obtained the information with LAW ENFORCEMENT, not a security guard, Trooper Perez of the Nevada State Patrol I was able to Identify the Fort Hood, approximate date, and rank of the offender.

3. In 2009 I was able to Name the date, approximate location, of the BP oil well break off as described to LAW ENFORCEMENT, not a security guard.

4. In 2009 I was able to name the 2nd BP Oil well break off on Oct, 29 2010 at 1:36 PST to everyone on the Internet.

CRIMINAL LAW SUPERCEEDS CIVIL LAW

I'm not perfect but I run about 80%.

If I'm correct today the name Honorable Judge McCarthy will begin to be synonymous with corruption, greed, and murder.

You have about a 20% chance of getting away. Good luck.

Sincerely, Justin Nagel 10/29/2010 10:00 AM PST

As noted above, on November 23, 2010, the Commission issued its Direction for Review and Order in this matter.

Most recently, on January 3, 2010, after remand from the Commission, Mr. Nagel filed a “Motion to Dismiss Newmont for failure to comply with discovery and destroying evidence.” On January 5, 2010, Mr. Nagel supplemented that motion with additional arguments and exhibits. Mr. Nagel alleges that his August 17, 2009 discovery request and his October 12, 2009 motion to compel discovery (Exhibit B) sought his training file in an effort to show that hanging a sign or installing a barricade at the breakers is not part of Respondent’s training. Mr. Nagel alleges that during an October 20, 2010 teleconference with Respondent’s counsel and the undersigned, he requested the investigation results that Newmont used to terminate him. He alleges that Respondent’s counsel stated that the investigation results had been destroyed, that Respondent had no other records of Nagel’s training other than those already provided, and that the training department did not exist. Mr. Nagel argues that the requested evidence should have been retained. Based on Newmont’s alleged willful act of destroying evidence, Mr. Nagel alleges that all arguments made by Respondent be dismissed and that judgment issue in his favor.

I deny Mr. Nagel’s recent motion. There is no probative evidence that Respondent destroyed evidence or withheld requested discovery of documents that in fact exist, and those discovery issues and any adverse inferences that they may warrant, were addressed and resolved during the October 20, 2010 conference call, explained above.

II. Order Granting Respondent’s Motion to Dismiss

Commission Procedural Rule 59 provides that if a party fails to comply with an order compelling discovery, the Judge may make such orders as are just and appropriate, including dismissing the proceeding in favor of the party seeking discovery. For good cause shown, the Judge may excuse an objecting party from complying with the discovery request.⁶

Commission Procedural Rule 66(a) requires that “[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal.”

⁶Specifically, Commission Rule 59 provides, as follows:

§ 2700.59 Failure to cooperate in discovery; sanctions.

Upon the failure of any person, including a party, to respond to a discovery request or upon an objection to such a request, the party seeking discovery may file a motion with the Judge requesting an order compelling discovery. If any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate, including deeming as established the matters sought to be discovered or dismissing the proceeding in favor of the party seeking discovery. For good cause shown the Judge may excuse an objecting party from complying with the request.

As detailed above, on October 18, 2010, I issued my Order Partially Granting [Respondent's] Motion to Compel Production of Recorded Conversations and Order Granting [Respondent's] Motion To Compel Answers to Interrogatories 13 and 15. I cited Commission Rule 59, thereby warning Complainant that failure to comply with my order compelling discovery of the audio tapes may result in dismissal of his case. As further outlined above, I then issued Orders to Show Cause why this proceeding should not be dismissed. Accordingly, the procedural requirements for dismissal of this proceeding as a discovery sanction have been met.

Given the severity of the sanction, the issue remains whether dismissal is just and appropriate, i.e., related to the particular claim at issue and not an abuse of discretion. *See Keefer v. Provident Life and Accident Insurance Co.*, 238 F.3d 937 (8th Cir. 2001)(dismissal of action as discovery sanction under Fed. R. Civ. P. 37(b)(2)(A) was not abuse of discretion given order compelling discovery, willful violation of that order, and prejudice to other party); *see also Ladien v. Astrachan*, 128 F.3d 1051 (7th Cir. 1977) (dismissal of case as sanction under Fed. R. Civ. P. 37(b)(2)(A) for repeated discovery violations not abuse of discretion). Based on the totality of circumstances, I find that dismissal is just and appropriate here as a sanction for Complainant's repeated failure to comply with discovery Orders and lack of candor with the tribunal, which has interfered substantially with a fair hearing in this matter, unduly burdened the record, and caused additional work, delay, and expense through refusal to comply with discovery Orders and Commission rules.

In determining whether dismissal is a just sanction for a party's failure to obey a discovery order under Fed. R. Civ. P. 37(b)(2)(A), district courts generally consider the following factors: the culpability of the non-complying party; the degree of actual prejudice to the party seeking discovery; the amount of interference with the judicial process; whether the non-complying party was warned in advance that dismissal would be a likely sanction for noncompliance; and the efficacy of lesser sanctions. *See e.g., EBI Securities Corporation, Inc. v. Hamouth*, 219 F.R.D. 642, 647 (D. Colo.) citing *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920-21 (10th Cir. 1992).

Applying these factors, I find that Complainant's noncompliance with my discovery orders was repeated and deliberate. Complainant repeatedly failed to respond to two of Respondent's interrogatories until two business days before trial, despite being ordered on several occasions to do so. Complainant admitted in his motion to strike deposition testimony that he incorrectly stated the number of tapes in his possession during his deposition. Most importantly, however, Complainant refused to comply with multiple discovery orders to produce the tape recordings, despite promising to do so, thereby demonstrating forthright lack of candor with this tribunal.

Specifically, during the October 15, 2010 conference call, I explained the basis for my impending October 18 Order compelling discovery of the tapes. I ordered Complainant to provide copies of the tapes to Respondent by overnight mail for morning delivery on October 18,

2010. Complainant agreed to do so and the parties agreed to a redaction procedure for the names of minor witnesses. Complainant then broke his promise to this tribunal and Respondent.

Complainant was served with my written Order to compel production of the recorded conversations on October 18, 2010. Complainant did not produce the tapes. During a subsequent conference call on October 20, 2010, I again ordered Complainant to provide copies of the tapes to Respondent by overnight mail. Complainant again promised this tribunal and Respondent that he would do so. Complainant again breached his promise.

On the October 21, 2010 conference call, Complainant Nagel stated that he was refusing to comply with my Order to turn over the audio tapes to Respondent because he was appealing my Order to the Commission. In doing so, Complainant Nagel failed to comply with Commission Rule 79 governing interlocutory review of my discovery orders, even though he was informed of this rule and further informed that the Commission's grant of such review shall not operate to suspend the hearing, unless otherwise ordered by the Commission. Nevertheless, Mr. Nagel persisted in his refusal to turn over the tapes. Moreover, he failed to participate in the final conference call before trial.

There is no doubt on this record, that the tapes withheld from discovery relate to events that comprise the gravamen of Complainant's allegations of interference and unlawful discipline, suspension and termination. In fact, during the October 20, 2010 conference call, Mr. Nagel acknowledged that the tapes involved the following critical events relative to his protected activity and allegations of interference and discrimination: a conversation that he had with management representatives Monty Holland and Shane Eisenbarth concerning his reported safety concern regarding alleged improper disposal of pressurized paint cans; the grievance meeting concerning his disciplinary warning for alleged failure to guard an open hole at the waste breaker; the grievance meeting concerning his alleged failure to receive proper training; a conversation he had with supervisor Gilbert Liguizmo concerning Respondent's alleged failure to give Nagel a pay upgrade; and a conversation he had with management representatives Mike Woodland, Thayne Church and Monty Holland concerning his alleged failure to water roads (the missing water truck incident), which Respondent claims led, in part, to his suspension and termination.

Since the tapes concern events surrounding critical allegations of interference and discrimination as alleged in Nagel's section 105(c)(3) complaint, I find that Respondent would be prejudiced significantly by not having an opportunity to review the tapes before trial and adjust its defense strategy or settlement posture accordingly. As set forth in my October 18, 2010 Order Partially Granting [Respondent's] Motion to Compel Production of Recorded Conversations and Order Granting [Respondent's] Motion To Compel Answers to Interrogatories 13 and 15, the Commission's discovery rules are construed liberally to permit wide-ranging discovery of all information reasonably calculated to lead to the discovery of admissible evidence, but discoverable information need not be admissible at trial. Thus, a request for discovery should be considered relevant if there is any possibility that information sought may be

relevant to the subject matter of the action and discovery should ordinarily be allowed unless it is clear that information sought can have no possible bearing upon subject matter of action, or it is protected by privilege. See e.g., *Billy Brannon v. Panther Mining, LLC*, 31 FMSHRC 717 (May 2009) (ALJ Barbour) (granting motion to compel audiotapes of mine conversations involving the complainant and other miners made during the time frame of the alleged discrimination).

That standard is clearly met here. Respondent was prejudiced in the preparation of its defense and evaluation of settlement, particularly given the number of tapes at issue and their nexus to critical allegations of interference and discrimination alleged in the Complaint. Furthermore, Complainant's repeated disregard of my discovery orders to turn over the tapes interfered with the judicial process, necessitating cancellation of the hearing to ensure a fair trial for Respondent.

It also cannot be overlooked, that the Court has bent over backwards to ensure that this *pro se* Complainant could receive a fair trial, and has acted consistent with Supreme Court and Commission precedent generally holding the pleadings of *pro se* litigants to less stringent standards than pleadings drafted by attorneys. See *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*pro se* litigant's complaint held to less stringent standards than complaint drafted by attorneys); *Tony M. Stanley, emp. by Mgt. Consultants, Inc.*, 24 FMSHRC 144, 145 n.1 (Feb. 2001) (same); *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (Commission recognized that courts generally consider the special circumstances of litigants untutored in the law).

Consistent with this precedent, the undersigned granted Complainant an extension of time to procure counsel after the Secretary decided that his Complaints (09-06 and 09-11) lacked merit. When Complainant was unable to retain counsel, the Court, consistent with Commission precedent, permitted Complainant to proceed *pro se*, which is his right under section 105(c)(3), even though his case would have been best served by legal counsel or non-legal representative, who could clearly articulate his position in timely and responsive pleadings that were properly served, and engage in meaningful discovery and settlement negotiations. Cf. *Jaxun v. Asarco*, 29 FMSHRC 616, 621 (Aug. 2007). The undersigned then broadly construed Complainant's allegations in my September 27, 2010 Order Conditionally Limiting Certain Claims and Granting Partial Summary Judgment on certain claims. The undersigned then examined Complainant's acts of recording under Nevada law with an eye toward protecting any privilege against self-incrimination that may be implicated. See my October 18, 2010 Order Partially Granting [Respondent's] Motion to Compel Production of Recorded Conversations and Order Granting [Respondent's] Motion To Compel Answers to Interrogatories 13 and 15. Furthermore, as outlined above, Complainant has on several occasions failed to properly file his motions with this tribunal, however, I have treated his motions as properly filed. See e.g., my Order Denying Motion to Strike Testimony from Deposition Record. Finally, over the objection of Respondent, and consistent with my practice of liberally construing the pleadings of this *pro se* Complainant, I treated Complainant's "Petitions for Discretionary Review, Order to produce recordings," with attached exhibits, as a motion for certification of my interlocutory discovery ruling to the

Commission under Rule 76. The Commission agreed with such liberal construction, although noting that interlocutory review was inappropriate.

Despite such liberal treatment of this *pro se* litigant, there is a limit to how far this tribunal can go, and Complainant exceeded that limit here, even though acting *pro se*. The Complainant's repeated refusals to comply with my discovery orders to turn over the tapes, despite promising on numerous occasions that he would do so, placed Respondent at a significant disadvantage from unfair surprise and unnecessary expense during trial preparation, and took away the possibility of a fair trial because the discoverable matter concerned the crux of Complainant's case. Given the subject matter of the tapes, their number, and their nexus to the critical allegations of unlawful interference, discipline, suspension, and termination, a lesser sanction under Rule 59, i.e., deeming as established the matters sought to be discovered, would strike at the heart of Complaint allegations in any event, thereby precluding both meaningful relief sought by Complainant and a practical, fair trial for Respondent.

In these circumstances, in the exercise of my discretion, I find that a lesser sanction would have neither cured the prejudice to Respondent, deterred additional misconduct by Complainant, nor provided an effective or practical sanction. After all, courts are not constrained to impose the least onerous sanction available, but exercise discretion to choose the most appropriate sanction under the totality of circumstances. *Keefer*, 238 F.3d at 941. Given Complainant Nagel's repeated lack of candor and refusal to turn over the audio tapes concerning critical allegations of interference and discrimination alleged in his Complaint, I concluded that Respondent could not receive a fair hearing in this matter and I cancelled the hearing.

Finally, Complainant was warned in advance that dismissal would be a likely sanction for continued noncompliance with my discovery orders to provide copies of the tapes, absent good cause shown. As emphasized above, my October 18, 2010 written discovery Order Partially Granting [Respondent's] Motion to Compel Production of Recorded Conversations, specifically cited Commission Rule 59, thereby warning Complainant that failure to comply with my order compelling discovery may result in dismissal of his case. Thereafter, during conference calls on October 18 and 20, 2010, when Complainant Nagel promised to overnight the tapes and then reneged on his agreement, Mr. Nagel was made aware that dismissal would be a likely sanction for continued non-compliance. Thereafter, during the conference call on October 21, 2010, I issued an oral Order to Show Cause why this proceeding should not be dismissed. On October 22, 2010, I issued my written Order to Show Cause why this proceeding should not be dismissed for failure to produce audio tapes concerning alleged acts of interference and discrimination as ordered by the Court. Accordingly, the procedural requirements for dismissal of this proceeding as a discovery sanction were satisfied.

Thereafter, Complainant submitted his explanation for cause arguing that the parties were still in discovery, that he had 30 days to appeal my Order compelling production of the tapes, and that if the Court would uphold its laws, Complainant Nagel would not have to do the Court's job

for it. Complainant Nagel then failed to participate in the final conference call with this tribunal.

Having carefully reviewed Complainant Nagel's submission, I find that his explanation does not constitute good cause under Rule 59, which provides that for good cause shown, the Judge may excuse an objecting party from complying with the discovery request. I find no good cause to excuse Complainant Nagel from complying with the discovery request for the audio tapes. First, contrary to his contentions, discovery has ended. Complainant has simply failed to comply with my repeated rulings to turn over the tapes because he seeks review before the Commission. Second, as Respondent correctly points out, Complainant inappropriately relies on Rule 70 concerning petitions for discretionary review of final case disposition from the judge, as opposed to petitioning under Rule 76 for interlocutory review of my discovery orders.

In sum, based on the totality of circumstances, dismissal is a just and appropriate sanction for Complainant's repeated failure to comply with my discovery Orders and for his repeated lack of candor with this tribunal, which has interfered with the judicial process and precluded Respondent from obtaining a fair trial. Complainant's noncompliance with my discovery orders was repeated and deliberate. Complainant repeatedly failed to respond to two of Respondent's interrogatories until two business days before trial, despite being ordered on several occasions to do so. In addition, Complainant admitted in his motion to strike deposition testimony that he incorrectly stated the number of tapes in his possession. Most importantly, Complainant refused to comply with multiple discovery orders to produce the tape recordings, despite repeatedly promising to do so. His lack of candor with this tribunal was willful and deliberate. Since the tapes concern events surrounding critical allegations of interference and discrimination alleged in Complainant's section 105(c)(3) complaint, Respondent was prejudiced significantly by not having an opportunity to review the tapes before trial and adjust its defense strategy or settlement posture. Complainant's conduct interfered with the judicial process and forced cancellation of the hearing. Complainant was warned times in advance that dismissal would be a likely sanction for his repeated noncompliance with my discovery orders and failure to honor his agreements with this tribunal and Respondent. Given the subject matter of the tapes, which strike at the core of this case, lesser sanctions are inappropriate.

In light of the foregoing, **IT IS ORDERED** that Respondent's Motion to Dismiss is hereby **GRANTED** and the case is **DISMISSED**. Complaint Nagel has 30 days to file his petition for discretionary review pursuant to section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(i), and the Commission's Procedural Rule 70(a), 29 C.F.R. § 2700.70(a), consistent with the Commission's November 23, 2010 Direction for Review and Order.


Thomas P. McCarthy
Administrative Law Judge

Distribution:

Justin Nagel, P.O. Box 182, Rathdrum, ID 83858

Hillary N. Wilson, Esq., Newmont Mining, 1655 Mountain City Hwy., Elko, NV 89801

Donna Vetrano Pryor, Esq., Mark Savit, Esq., Patton Boggs LLP, 1801 California Street, Suite 4900, Denver, CO 80202

/cp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5266/FAX 303-844-5268

January 10, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-586
Petitioner	:	A.C. No. 12-02394-189223 VPX
	:	
v.	:	Docket No. LAKE 2010-162
	:	A.C. No. 12-02394-201219 VPX
	:	
BLANKENBERGER BROS., INC.,	:	Mine: Oaktown Fuels Mine No. 1
Respondent	:	

DECISION

Appearances: Nadia Hafeez, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for the Petitioner
Joseph Hensley, Safety Director for Blankenberger Bros., Cynthiana, Indiana for Respondent.

Before: Judge Miller

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Blankenberger Bros., Inc., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The case involves two violations in Docket No. LAKE 2009-586 with a penalty of \$724.00 and two violations in Docket No. LAKE 2010-162 with a \$363.00 penalty. The citations were issued by MSHA under section 104(a) of the Mine Act at the Oaktown Fuels Mine No.1. The parties presented testimony and documentary evidence at the hearing held on December 2, 2010 in Evansville, Indiana.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Blankenberger Bros., Inc., (“Blankenberger” or “Respondent”) is a contractor who builds slurry ponds and lakes at various mines, including the Oaktown Fuels Mine No. 1 (the “Mine”) located in Cynthiana, Indiana. The Respondent agrees that it is subject to the jurisdiction of the Mine Safety and Health Administration and that the Administrative Law Judge has jurisdiction to issue this decision. (Tr. 5-6); Jt. Stip. 3, 4. In May and September of 2009, MSHA inspector Phillip Herndon conducted regular inspections of the Mine and its contractor, Blankenberger. As a result of the inspection, the four violations contested herein were issued. At hearing, the Secretary and the Respondent agreed to resolve the issues as to one of the citations. The

settlement agreement is incorporated below. Following the testimony and presentation of evidence, a decision was issued on the record. The decision is set forth below includes necessary edits.

A. Docket No. LAKE 2009-586

This docket includes two citations, both issued by Phillip Herndon on May 19, 2009. Herndon has been a mine inspector for four years and has 28 years total mining experience. As a result of his inspection, he issued two citations, one of which is subject to a settlement agreement. The second citation, discussed below, was issued for an alleged failure to shield a welding operation.

i. *Citation No. 8415385*

The citation described the violation as follows:

Welding operations shall be shielded and the area shall be well-ventilated. There was unshielded welding being performed by Onyett Fabricating on the BBI Co. No. E32, Hitachi excavator located along the overland belt access road while work was being performed in the immediate area by other contractors and mine employees.

The standard cited by Herndon, 30 CFR § 77.408 provides that “[w]elding operations shall be shielded and the area shall be well-ventilated.” Herndon determined that it was reasonably likely that the violation would result in a serious injury, that the violation was significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$362.00 has been proposed for this violation.

Herndon credibly testified that, while observing the welder working on the bucket of the equipment, he could see the welding flashes from his location. Moreover, the flashes could be seen by those operating heavy equipment near the location where the welding activity was taking place. Blankenberger’s welder testified that he was welding in the bucket and no one was close enough to him to suffer a flash burn or be blinded by the flash. I credit Herndon’s testimony and find that the area was not properly shielded. The flash posed a hazard to equipment operators, and any other individuals, that were nearby.

A significant and substantial violation is described in section 104(d)(1) of the 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. A violation is properly designated S&S if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). I find that the facts of this violation clearly lead to a finding that it was significant and substantial. First, as discussed both above and below, the Respondent violated a mandatory standard when welding was done without any shielding. Next, the safety hazard created by the violation, i.e., the bright flash created by the welding activity, is reasonably likely to cause an injury by blinding, or temporarily blinding, equipment operators or other individuals in the area. Finally, that injury will be serious.

The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial 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, 135-136 (7th Cr. 1995).

[First,] citation number 841585 issued on May 19 by Inspector Herndon for a violation of 77.408, Inspector Herndon testified credibly that he observed a welder working on a bucket in an area where the flash could be seen by people[.] . . . [H]e counted at least ten contractors in the area who could see the flash of light as the welder was welding. There was no barricade, no blocking of the light from anyone. Anyone could approach the welding equipment and the welder and be subject to a flash burn . . . or the drivers on the roadway could see the flash, which would hinder their ability to drive. The primary hazard here is the temporary blinding of equipment drivers. They can see the flash up to 100 yards away, driving heavy equipment down a road nearby. There were contractors working directly across the road, at around 50

yards away. [The area where the welding was taking place] was not blocked or fenced. It was easily accessible. I find that the inspector has shown a violation of the standard. The operator contends that because the welder was inside of the bucket that shielding is not necessary. I don't find that argument to be persuasive. As long as someone can approach the welding area or it can be seen from any distance, it needs to be shielded, as the standard requires. The inspector designated this as a significant and substantial violation. I find that there is a violation and that there is a measure of [danger to] safety to the other workers in the area, particularly those who may be blinded by the flash while they are driving or walking in the area[.] . . . [In addition, there is] the possibility that someone might get close and suffer . . . a flash burn. Therefore, I agree with Inspector Herndon that this is a significant and substantial violation and I assess the penalty as proposed by the Secretary.

(Tr. 52-53).

ii. *Citation No. 8415383*

The citation describes a violation of 77.404(a) for an accumulation of oil on the excavator. The operator has agreed to withdraw its contest and pay the originally proposed penalty of \$362.00.

B. Docket No. LAKE 2010-162

This docket includes two citations issued by Inspector Herndon in September of 2009.

i. *Citation No. 8421060*

On September 3, 2009, Herndon issued a citation for a violation of 30 C.F.R. § 77.1605(k), which requires that “[b]erms or guards shall be provided on the outer bank of elevated roadways.” The citation describes the violation as follows:

The sub soil storage pile located along the overland belt area was not provided with a berm along the elevated dumping area. The area measured approximately 6 feet to 35 feet above the ground and was inclined for a distance of approximately 300 feet. Tire tracks were evident approximately 7 feet along the unconsolidated edge. Haulage was stopped immediately by the operator.

Herndon designated the violation as significant and substantial with one person affected, and moderate negligence. A penalty of \$263.00 has been proposed by the Secretary.

Blankenberger objects to this violation and opines that berms are not needed in this area. The Respondent provided photographs of a finished reclamation area that shows more gentle slopes than those observed by Herndon. Blankenberger asserts that it routinely builds this type of reclamation area. Further, it argues that, while tractors and vehicles drive up and down the slopes, the slopes are not roadways and there is no area where it could be reasonably expected that a vehicle would go over the edge. I credit the testimony of Herndon and his observations on the day of the inspection.

In *U.S. Steel Corp.* the Commission held that “the adequacy of a berm . . . under section 77.1605(k) is to be measured against the standard of whether the berm . . . is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by the standard.” 5 FMSHRC 3, 5 (Jan. 1983). MSHA generally requires an adequate berm to be at least 50% of the height of the wheel, i.e., mid-axle height, of the largest vehicle to travel the roadway. I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard at issue would have recognized that the safety standard required a berm that was at least mid-axle height of the vehicles that traveled along and dumped on this elevated roadway.

For the next citation issued September 3, 2009 by Inspector Herndon, citation number 8421060, cited for an elevated roadway that did not have berms. This particular standard requires that berms or guard shall be provided on the outer bank of elevated roadways. Inspector Herndon credibly testified that this was indeed an elevated roadway, that articulated dump trucks used it regularly, as did scrapers and other equipment. He also indicated that he measured the roadway to be 35 feet above the other grade, and it went from 0 to 35 feet, which is[, by definition,] an elevated roadway . . . [and therefore] is required to have a berm. He also testified that these trucks were driving in an unconsolidated [soil] area, [with a] four to one slope, with cracks that were visible, making this a [particularly] hazardous area for someone to . . . back up and dump. I find that this is an elevated roadway, that it is required to be bermed and that the inspector has credibly testified as to all the facts in his citation and the violation is affirmed. The inspector also indicated that this was a significant and substantial violation. It is certainly something that inspectors, as he indicated, hear and see [frequently] in fatalgrams that someone has gone over the edge either backing up or driving on an elevated roadway, and those accidents do result often in fatalities, especially in big equipment. I understand that the operator indicates that he does not believe there is any danger of overturning in this, that the articulated trucks go up and down, as do the scrapers, and he

disagrees that this is a roadway. I find that it is a roadway and that it is a danger and a hazard. The storage piles for dirt do have a drop off, as the inspector testified to. There is a . . . [reasonable likelihood] of a vehicle overturning, and if it does, it would result in a fatal accident. Therefore, I find the violation to be significant and substantial and the penalty as proposed by the Secretary is affirmed.

(Tr. 53-54).

ii. *Citation No. 8421067*

On September 9, 2009, Herndon issued a citation to Blankenberger for an alleged violation of 30 CFR §77.1605(d) which requires that “[m]obile equipment shall be provided with audible warning devices. Lights shall be provided on both ends when required.” The citation alleges that “[a] Blankenburger (sic) Bros. Inc. contracted articulated dump truck, Co. No. MA11, located in operation at the spoil storage area was not provided with operational head lamps.” The operator agrees that the headlights were not working but argues that they do not need to be operational because the truck is not used at night and, therefore, the lights are not required.

Herndon designated the violation as unlikely to result in an injury with moderate negligence. A penalty of \$100.00 is proposed.

Finally, as to the last citation [8421067] issued September 9, 2009 by Inspector Herndon for a violation that requires all mobile equipment shall have lights. Lights shall be provided on both ends when required. The operator indicates that he does not believe that lights are required and therefore a violation did not occur. However, . . . the operator is confusing using the lights with being required. Any piece of mobile equipment that comes with headlights is intended to have headlights [This vehicle was] available for use at all times of the day, including during stormy weather, early in the morning, later in the evening, when lights are necessary. This piece of equipment, this dump truck, was required to have lights. Those lights are required to be maintained, and they are required to work at all times. Therefore, I find a violation as indicated by the inspector. He designated this as non S&S, and I affirm the penalty that’s been proposed by the Secretary in this case.

(Tr. 54-55).

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

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

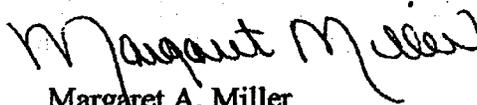
30 U.S.C. 820(i).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator’s size and ability to continue in business and that the violations were abated in good faith. The history shows the past violations at this mine, including citations for the standards discussed above. The size of the operator is large. I have discussed the negligence and gravity associated with each citation above and I accept the designations as set forth in each citation. I assess the following penalties:

<i>Citation No. 8415385</i>	\$ 362.00
<i>Citation No. 8415383</i>	\$ 362.00
<i>Citation No. 8421060</i>	\$ 263.00
<i>Citation No. 8421067</i>	\$ 100.00
Total:	\$ 1,087.00

II. ORDER

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. §820(I), I assess the penalties listed above for a total penalty of \$1,087.00. Blankenberger Bros. Inc., is hereby ORDERED to pay the Secretary of Labor the sum of \$1,087.00 within 30 days of the date of this decision.



Margaret A. Miller
Administrative Law Judge

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

Nadia Hafeez, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800,
Denver, CO 80202

Joseph Hensley, Safety Director, Blankenberger Brothers, Inc., 11700 Water Tank Rd.,
Cynthiana, IN 47612-9528

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5266/FAX 303-844-5268

January 13, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-513
Petitioner,	:	A.C. No. 12-02316-186352
	:	
	:	Docket No. LAKE 2009-631
v.	:	A.C. No. 12-02316-192274
	:	
TRIAD UNDERGROUND MINING, LLC,	:	
Respondent.	:	Mine: Freelandville Underground

DECISION

Appearances: Matthew Linton, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for the Petitioner
John Williams, Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, for Respondent.

Before: Judge Miller

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Triad Underground Mining, LLC, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The cases involve two violations in Docket No. LAKE 2009-513 with a total proposed penalty of \$54,518.00 and three violations in Docket No. LAKE 2009-631 with a total proposed penalty of \$12,924.00. The citations were issued by MSHA under section 104(a) of the Mine Act at the Freelandville Underground Mine. The parties presented testimony and documentary evidence at the hearing held on October 26, 2010 in Evansville, Indiana.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Triad Underground Mining, LLC, ("Triad" or "Respondent") is the owner and operator of the Freelandville Underground Mine (the "Mine") located in Knox County, Indiana. The Respondent agrees that it is subject to the jurisdiction of the Mine Safety and Health Administration and that the Administrative Law Judge has jurisdiction to issue this decision.

Stip 1-4. In April and June of 2009, MSHA inspectors conducted a regular inspection and spot inspections of the Mine. As a result of the inspections, the five violations contested herein were issued. At hearing, one citation was modified and the mine operator agreed to resolve the issues as to two of the citations. The settlement agreement is incorporated below.

A. Docket No. LAKE 2009-513

i. *Citation Nos. 8415816 and 8415820*

a. **The Violations**

This docket includes two citations, both issued by Inspector Glen Fishback on April 15, 2009. Fishback has been a mine inspector since 2007. He had 25 years mining experience prior to joining MSHA, and currently holds a number of certifications in mining. Fishback described the Freelandville Mine, located in Freelandville, Indiana, as an underground coal mine that uses the room and pillar method of mining. (Tr. 16-17). He has inspected the Mine a number of times and explained that a regular inspection normally takes about a month and half to complete. The Mine is subject to spot inspections due to the amount of methane that it liberates.

On April 15, 2009, Fishback traveled to the Mine to conduct a spot inspection, followed by a regular inspection. He was accompanied during the inspection by Mine's safety director, Sam McCord, and an MSHA inspector trainee. As a result of his inspection, Fishback issued two citations for failure to have directional markers on the lifeline in the primary escapeway.

A map of the Mine, submitted as Gov. Ex. 9, shows the primary escapeway where the lifeline was placed. The portal is shown on the lower right corner of the map, the working section in the upper right corner, and the green line is the primary escapeway. The working section is approximately four miles from the portal and, hence, the lifeline stretches for about four miles along the primary escapeway, while a second lifeline is in the secondary escapeway. The Mine utilizes a blowing ventilation system where all incoming air travels from the portal to the active section. Fishback was traveling the air course and examining the ventilation when he observed the alleged violations.

The two citations are identical in that they allege violations of the same mandatory standard and allege facts that are similar, i.e. that directional cones on the lifeline were missing for lengths of up to 300 feet. In each instance, Fishback believed that the Mine reused the lifeline by tying it together and failed to determine if the directional cones were properly in place once the line was reconnected.

Citation No. 8415816 describes the violation as follows:

The 2nd West panel primary escapeway lifeline was not equipped with directional indicators signifying the route of escape, placed at intervals not exceeding 100 feet. This hazard was observed between crosscut number 12 to crosscut number 17, approximately

300 feet, between crosscut number 17 to crosscut number 19 ½ approximately 150 feet and from crosscut number 19 ½ to crosscut number 23 approximately 150 feet.

Fishback determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial, that thirteen employees were affected, and that the negligence was high. A civil penalty in the amount of \$27,259.00 has been proposed for this violation. The Respondent does not dispute the facts as set forth by Fishback in both his narrative and his testimony as they apply to the violation, i.e. that the directional cones were not in place on the lifeline. Triad does dispute the findings of gravity and negligence. Triad Br. 2-3.

Citation No. 8415820 describes the violation as follows:

The 1st Main North off the Main West Number 2 primary escapeway lifeline was not equipped with directional indicators signifying the route of escape, placed at intervals not to exceeding (sic) 100 feet. This hazard was observed between crosscut number 23 to crosscut number 28, a distance of approximately 300 feet and from crosscut number 10 to crosscut number 13 a distance of approximately 150 feet.

Fishback determined that it was reasonably likely that the violations would result in a fatal injury, that the violation was significant and substantial, that thirteen employees were affected, and that the negligence was high. A civil penalty in the amount of \$27,259.00 has been proposed for this violation. Again, the Respondent does not dispute the underlying facts of the violation and agrees that the cones were not in place. Triad does dispute the negligence and gravity of the violation. Triad Br. 2-3.

The citations were both issued for a violation of 30 C.F.R. §75.380(d)(7)(v) which states as follows:

Each escapeway shall be . . . [p]rovided with a continuous, durable directional lifeline or equivalent device that shall be . . . [e]quipped with one directional indicator cone securely attached to the lifeline, signifying the route of escape, placed at intervals not exceeding 100 feet. Cones shall be installed so that the tapered section points inby[.]

Fishback testified as to the facts of the alleged violations as set forth in each of the citations. The directional cones were placed at intervals exceeding 100 feet. In Citation No. 8415816, he found cones missing for intervals of 150 feet in two areas, and missing for 300 feet in another area. In Citation No. 8415820, he found cones missing for intervals of 150 and 300 feet. Citation No. 8415820 was issued for violations found two hours after, and in an area

distinctly different from, the violations that were the subject of Citation No.8415816. (Tr. 21-23, 31-33).

Sam McCord, the safety director for the Mine, has been in mining since 1995, and is involved in training miners on the correct use of the escapeways at the Mine. He testified that this is a one unit mine with 13 men normally working on the section. According to McCord, it is roughly four miles from the portal to the working area, and the lifeline is roughly four miles in length. McCord observed the area addressed in Citation No. 8415816 and agrees that the cones were missing in that area. McCord did not observe the area addressed in Citation No. 8415820 and there is some disagreement about the exact location where the alleged violations existed. However, McCord does not dispute the lack of directional cones in both areas. Both Fishback and McCord testified that the mine operator reuses the lifeline by reconnecting the ends of the line with a knot, as opposed to using or adding a new line. As a result, the cones are often moved during reconnecting of the lifeline. Fishback saw nothing on the ground to indicate that directional cones had properly been in place but had fallen to the ground.

There is little, if any dispute, that the directional cones were missing. The standard clearly requires the cones to be located at a minimum of every 100 feet along the lifeline, which they were not. The violation is obvious. I conclude that the Secretary has met her burden and affirm the violation in each of the two citations.

b. Significant and Substantial Violation

A significant and substantial violation is described in section 104(d)(1) of the 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. A violation is properly designated S&S if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial 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, 135-136 (7th Cr. 1995). Inspector Fishback qualifies, without question, as an experienced MSHA inspector. He described the violation as significant and substantial and explained that, in the event a fire or other emergency were to occur at the Mine, the lack of the directional cones would likely lead to a serious injury. The reasoning and testimony is identical for both violations.

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). I find that the facts of this violation clearly lead to a finding that it was a significant and substantial violation. First, as discussed above, both violations as described in the citations are affirmed. Next, the safety hazard created by the violations, i.e., the inability to safely follow along the primary escapeway in the event of an emergency, will result in an injury to a number of miners. And finally, that injury will be serious.

Fishback testified that it is reasonably likely that a substantial injury would occur due to the number and types of hazards in the area cited. He has cited the Respondent numerous times for float dust, the presence of ignition sources, and low air quantities. He has also issued citations for accumulations, both on equipment and in along the belt, and, in some instances, the accumulations existed for great distances. Fishback explained that the working section is full of electrical equipment and many other possible sources of ignition. (Tr. 23-25).

Were a fire to break out, it is likely that the ventilation system would be breached and the primary escapeway would fill with smoke or gas, leaving the lifeline as the only means to assist in directing the miners out of the Mine. Miners often become disoriented in smoke and dust and don't recall which direction to travel. A miner may panic and take off in a different and dangerous direction. Miners are expected to be tied together as they travel the escapeway. If one miner tied to a group becomes disoriented, he could lead the entire group in the wrong direction. Pursuant to the facts of this case, a disoriented miner could potentially lead a group of miners up to 300 feet in the wrong direction, and then have to turn around and travel back the 300 feet to the next directional cone. Time is precious in an emergency, and having to travel an extra 600 feet would substantially affect the safety of the miners. Fishback explained that when miners panic, they often forget what is learned in training. This is especially true when there is little to no visibility and it is critical to find a quick route out of the mine. There were at least 13 miners on the working section. In addition, there were more miners working in other areas of the Mine who would be required to use the escapeway and the lifeline to evacuate the Mine.

Triad argues that it is unlikely that there will be an explosion or other event at the Mine that would necessitate the use of the primary escapeway. Even if there were such a need, the miners are well trained on the escape protocol and the missing directional cones would not hinder their quick escape. Hence, the Respondent argues that the violations are not S&S.

I first address the issue of the likelihood of an explosion, fire or other emergency. There are a number of mandatory standards that are designed to protect miners in the event of an emergency. Among those standards are the escapeway regulations and, as pertinent to this analysis, the requirement that lifelines be installed and directional cones be placed on those lifelines. I agree with the Secretary that, for purposes of the S&S analysis, this regulation must be evaluated in terms of an emergency, i.e. assume that an emergency will occur and evaluate the likelihood of a reasonably serious injury in that context. To do otherwise would mean that all emergency regulations would rarely be found to be S&S, which would be "inherently illogical" and inconsistent with the Mine Act. *See Consolidation Coal Co.* 824 F.2d 1071, 1086 (D.C. Cir. 1987). In order to properly evaluate the S&S designation of the missing cones on the lifeline, I conclude that I may assume the existence of an accident or emergency. However, I do not find such assumption necessary in this case.

The Commission has long held that a S&S designation must be based on the particular facts surrounding the violation, and viewed in the context of continued mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Thus, I address the likelihood of an emergency and, within the context of that emergency, whether the lack of directional cones for up to 300 feet creates a reasonable likelihood that the hazard will result in a serious injury. McCord described the emergency training that miners received at the Mine. Every 90 days there is a fire drill at the Mine and the management reviews the location of SCSRs and the lifelines. The miners are reminded where to meet in the event of an emergency and are instructed that no one is to be left behind. The miners meet at a predetermined location and, if they must walk out of the Mine, they tether together and calmly walk the escapeway using the lifeline and its directional cones to determine the correct route of escape. (Tr.77-80). The cones, depicted in Triad Exs. E and G, can dislodge from their location on the lifeline and slide down the line. In addition, the cones can be completely dislodged from the lifeline and fall to the mine floor, especially during the rock dusting process. (Tr. 80). McCord believes that if any injury were to be sustained, it would not be fatal given the type of employees at the Mine and the training they receive. He has a lot of confidence in the men and the training and argues that a few missing cones "are not going to deter them." (Tr. 87). According to McCord, the miners will know which direction to travel by feeling the air movement. However, while miners may be trained on procedure during an emergency, it does not take away from the fact that a fire or explosion could potentially occur, nor does it definitively determine what actions any miner will take when that explosion occurs.

Fishback addressed the likelihood of an accident or explosion when he testified that he has cited the Mine many times for extensive accumulations, including accumulations of coal dust and float coal dust. Fishback took into account the number of ignition sources he has found during his inspections and the number of ventilation issues, including low air quantities in some areas. Assuming the continued course of mining, the fact that this is considered a gassy mine, and the previous violations, I am persuaded that an emergency is reasonably likely to occur.

Once an emergency is established, the record supports a finding that the lack of directional cones on the lifeline in the escapeway is likely to lead to a serious injury. First, Fishback testified that there is no certainty that in an emergency the ventilation will stay intact and further,

if it is breached, it will cause added confusion about the direction of travel. Even well-trained miners panic in an emergency. The lack of directional cones will only add to the panic. Fishback explained that, based upon his experience and what has been learned in the mining industry over the years, when an emergency occurs a miner who is lost and disoriented may lose his life if he cannot hold onto a lifeline and quickly find his way out of a mine. Missing cones will further disorient the miner and waste precious time that needs to be spent trying to exit the mine. Even worse, a miner may be tied together with other miners and lead them in the opposite direction of safe escape. Each miner is different. Some may have medical problems, others may panic more readily, while some may lose their sense of direction easily. Rapidly finding their way through a mine during an emergency is difficult. The escapeway may be filled with smoke and fumes. Further, it is difficult to see the route when wearing a SCSR, and traveling along an uneven terrain filled with holes and water doesn't make it any easier. Time is important in an emergency or disaster. Fishback opines that, if miners are led in the wrong direction, there is a possibility that their SCSR would be exhausted by the time they realize their mistake, turn around, and reach the next station.

I credit the testimony of Fishback in determining that the violations are S&S. He correctly pointed out that the behavior of miners in an emergency is a large part of the process of an orderly escape. Not all miners can be counted on to avoid panic and disorientation. The hazard created by the missing cones on the lifeline is not being able to quickly and safely escape the Mine no matter what condition a miner may be in. The hazard will result in a fatality of one or potentially all of the miners in the area. I find that the Secretary has established that both lifeline violations are S&S.

c. Negligence

Fishback determined that both of the violations regarding the directional cones on the lifeline were the result of high negligence on the part of the operator. He based his determination on his belief that, due to the extent of the condition, the condition should have been discovered by the examiner and corrected. Further, nothing was noted in the inspection report, although it appeared to Fishback that the condition had existed for some time. Fishback believes that the reuse of the lifeline is the heart of the problem. The lifeline was retied and was not checked for missing cones along its length. Fishback testified that correcting the problem was simple and should have been done before the inspector arrived.

Fishback's negligence analysis relies heavily on the lack of any entry about the missing cones in the examiners' record book. In his inspection notes, he indicates that the examiner last entered a note about the lifeline on 4/13/09, i.e. three weeks before the violations were found by Fishback. Therefore, Fishback believes that the condition existed for the entire three weeks before his inspection, but had not been noted in the mine books. Further, he also relied upon his determination that the cones had been missing for weeks since he saw no cones on the ground, and no fallen roof material or other evidence that the cones had recently been knocked out of place or off the lifeline. McCord disagrees with Fishback and testified that the lifeline is examined in its entirety every week when the weekly escapeway examination is conducted. The lines are also examined each time they are moved or retied. McCord reviewed the examination

books for the escapeway and saw no record of any hazard or missing cones. (Tr. 86). Therefore, McCord assumes that the cones were not missing when the line was last inspected, and there was no need for an entry in the examination book.

I find that the Secretary has not demonstrated that the negligence was anything more than moderate in this circumstance. Fishback did not see any entry in the examiners books, and only assumed that the condition existed from the time of the last examination entry in the books. While the ground under the lifeline did not indicate that the cones had fallen recently, McCord credibly testified that the condition did not exist at the time of the last examination. The Secretary has not met her burden of demonstrating that the Respondent knew of the missing cones and failed to replace them, or that the mine examiner had observed the missing cones and failed to record the condition in the book. I find the negligence to be moderate and, therefore, adjust the penalty to reflect the lower negligence.

Finally, Triad argues that Fishback should not have issued two citations for a violation of the identical standard. I find that Fishback was justified in doing so. He found the violations in two separate and distinct areas, and determined that a number of cones were missing in each area. He grouped the violations that were in the same general area, but when he came to a second and somewhat distant area with more missing cones, he was well within his discretion to issue the second violation of the same standard. If he were not permitted to issue violations for the same standard during an inspection, it would greatly curtail his enforcement ability.

B. Docket No. LAKE 2009-631

i. *Citation Nos. 8415898 and 8415899*

At the hearing, the parties agreed to resolve two of the citations contained in this docket on the following terms:

Citation No. 8415898: The parties agreed no modification is made to the citation but the Secretary agrees to reduce the proposed penalty from \$7,578.00 to \$6,062.00.

Citation No. 8415899: The parties agreed that the citation will remain as issued but the Secretary agrees to modify the proposed penalty from \$3,689.00 to \$2,951.00.

ii. *Citation No. 6682723*

On June 18, 2009, inspector Charles Jones issued a citation to Triad for an alleged violation of 30 C.F.R. § 75.380(e) which requires that “[s]urface openings shall be adequately protected to prevent surface fires, fumes, smoke, and flood water from entering the mine.” The citation states that “[t]he mine has experienced flood water entering into the underground workings through the mine portals in the pit.”

Jones determined that the violation was unlikely to result in an injury, that fifteen employees were affected, and that the negligence was high. A civil penalty in the amount of \$1,657.00 has been proposed for this violation. For the reasons set forth below, I affirm the violation and the finding of high negligence, and increase the proposed penalty based upon the gravity of the violation.

Inspector Charles Jones has 42 years mining experience and was a mine inspector with MSHA for 5 years before ending his career as a roof control specialist in the Vincennes district office. He is currently an instructor at Vincennes University and holds a number of certifications in mining. He visited the Freelandville mine many times prior to the inspection he conducted in June of 2009.

On the day he issued the citation, Jones traveled to the Mine to follow up on a report of an inundation of water. The Mine is required to report such an incident within 15 minutes of its occurrence. Jones was assigned to investigate the emergency. Prior to leaving the MSHA office he had a discussion with the assistant district manager who informed him that the Mine had been put on notice the month before this incident about the importance of controlling the water entering through the portals. When Jones arrived at the Mine, he observed that the "mine was not adequately protected" because both portals had been flooded.

The morning of the incident, there had been heavy rain storms in the area which, in turn, caused flooding and flood water to enter into the portal entrances. When Jones arrived the power was off and the water was deep enough that Jones could not enter either portal. Water traveled from the surface into the underground area of the Mine as a result of a breach in a ditch and non-functional sumps and pumps. In Jones' view, the Mine was not adequately protected since the water was not kept out of the Mine. As a result, he issued a citation for what he determined was a violation of section 75.380(e). (Tr. 59-61). The Respondent agrees that the portals were flooded. McCord testified that, on June 18, 2009, the Mine, prior to the rain storm, lost power at 7:35 a.m. The miners were removed from the Mine beginning at 7:40 a.m. and were out of the Mine when the torrential rain began. McCord stated that there were two storms, the first of which dropped two and a quarter inches of rain, and a second at 9:10 a.m. that dropped an additional two inches of rain. The water began to run into the Mine around 8:45 a.m. The Mine has two sump pumps at the portal. Due to the loss of power, neither sump pump was operational. However, a diesel pump remained in operation but could not handle the flood of water. The water ran over the sumps and into the portals. The portals became filled to the point that they were impassable. (Tr 89-92).

The mandatory standard is clear that surface openings, i.e. the portals, shall be adequately protected to prevent flood water from entering the mine. Here, after the first rain, the flood water entering the Mine made it impossible to enter or exit through the portals. The Secretary argues that when flood water enters a mine in a quantity that makes a portal impassable there is sufficient evidence that the portal is not adequately protected. The Respondent agrees that the portals were flooded as described by the inspector but argues that there is no violation because the regulation is silent on the meaning of "adequate protection" against the flood water. The Respondent also argues that the plans in place to prevent the flood water from entering the Mine

are enough to satisfy the requirement of the regulation. The plan, identified as Triad Ex. I and dated May 2002, was developed in response to a request by MSHA to explain what steps would be taken to "prevent any future flooding." The plan includes sumps and enlarged, cleaned ditches. There is also an undated plan, Triad Ex. K, that includes the pumps, the diesel pump, and maintenance of ditches. Triad points out that MSHA did not require diesel pumps or a generator (to be used in the event of power loss) in the initial plan. The Mine also has a plan for notification in the event of rising water at the Mine entrance. Triad Ex. L.

I conclude that, although the plans are useful in setting forth the procedures for protecting the portals from flooding, they do not substitute as a means to comply with the standard. Implementing the plan, in the event it is a useful plan, may assist in protecting against flooding. However, in this case, the plan or plans were not able to be implemented since the pumps were not working and the ditch had been breached. Having a plan in place is of little value, and offers little protection, when it does not work to keep the water from entering the mine.

The standard requires that portals be adequately protected against flood water. Adequate protection includes making certain that the Mine is prepared, and adequate measures are in place to prevent water from entering the portals to the extent found by Jones. Webster defines "adequate" as "satisfactory or acceptable" and "protection" as an action taken to "keep safe from harm." In this case, the harm is the water in the portals that, due to its depth, will prevent the miners from traveling out of the Mine. The acceptable way to keep the water out of the Mine is to have functioning pumps, or other safety measures, that will prevent the water from entering the portals in any situation, including large rain-generating storms. Jones expressed the Secretary's position when he testified that, because the portals were flooded, there was not an adequate means of keeping the water out, i.e. of protecting the portals. I conclude that the Secretary's interpretation of the standard is reasonable and, consequently, I find that the Secretary has met her burden of proving the violation. The regulation is not ambiguous and, as such, the Secretary's interpretation of her own regulations is generally entitled to substantial deference so long as it is reasonable and consistent with its purpose. *Martin v. OSHA*, 499 U.S. 144 (1991). I conclude that the interpretation of the regulation is based upon its plain meaning and is reasonable:

In a similar case, a Commission Judge found a violation of §75.380(e) based on rising water levels in an open strip pit. The water level threatened to inundate an adjacent underground coal mine. The violation was determined to be S&S and resulted from "unwarrantable failure." There the inspector testified that water and saturated mud had collected in the pit in front of the portals and water was already flowing into the underground mine. *Georges Colliers Inc.*, 20 FMSHRC 296 (Mar. 1998) (ALJ). The ALJ found that the water and mud that was beginning to collect in front of the portals was enough to demonstrate that the portals were not adequately protected from water. In addition, a non-functional pump did nothing to take away from the ALJ's determination that a violation occurred, even with a plan in place.

Jones did not mark this violation as significant and substantial because, in his view, the miners had already been removed from the Mine due to the power failure which occurred before the Mine became flooded. All miners had been evacuated by the time Jones arrived but, had

they not been brought out at that time, the water would have prevented them from leaving through the portals and, consequently, they would have been trapped in the Mine. This Mine has up and down rises and, as described by Jones, areas would fill with water to a point that miners could not escape the Mine. The Mine, in this instance, was fortunate that the power outage occurred far enough in advance of the storm that there was enough time to evacuate the Mine prior to the water rising. Had the Mine not been evacuated earlier, the miners would have been trapped due to the flooded portals. Therefore, I find the gravity of the violation, for purposes of penalty, to be greater than that determined by Jones.

Finally, Jones designated the violation as high negligence. He understood that the Mine had been put on notice just one month earlier as to the issue of flood waters inundating the portals and the Respondent's failure to adequately control such from recurring. McCord agrees that the Mine had a similar inundation the month before the citation issued by Jones. After the May inundation, the Respondent spoke to Mary Jo, the MSHA assistant district manager, and she provided suggestions about how to deal with the water problem. However, McCord testified that she didn't "insist" on anything after the incident in May. (Tr. 95). The Mine had a water control plan in place in May 2002. However, there is no evidence that the plan was changed, or any additional precautions taken, after the portals flooded in May, i.e. just one month before the incident at issue here. Therefore, I agree with Jones that the negligence of the operator is high.

In order to terminate the citation, the Mine submitted a new plan in an effort to make certain that the portals did not flood in the future. The new plan included the installation of additional pumps, a generator for the pumps in the event power was lost, and cleaning of the sump and ditches. The plan also addressed the diversion ditch which was breached and contributed to the flood cited by Jones. The fact that the assistant district manager did not "insist" on these changes prior to the water inundation in June does not relieve the operator of its responsibility to keep the portals free from water.

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

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the

person charged in attempting to achieve rapid compliance after notification of a violation.

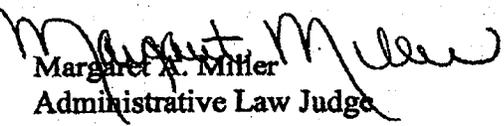
30 U.S.C. 820(i).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. The history shows the past violations at the Mine, including citations for the standards discussed above. The size of the operator is large. I have discussed the negligence and gravity associated with each citation above, and I accept those designations for the three citations that are subject to the settlement agreement. I assess the following penalties:

<i>Citation No. 8415816</i>	\$ 22,000.00
<i>Citation No. 8415820</i>	\$ 22,000.00
<i>Citation No. 8415898</i>	\$ 6,062.00
<i>Citation No. 8415899</i>	\$ 2,951.00
<i>Citation No. 6682723</i>	\$ 2,000.00

III. ORDER

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. §820(I), I assess the penalties listed above for a total penalty of \$55,013.00. Triad Underground Mining LLC, is hereby **ORDERED** to pay the Secretary of Labor the sum of \$55,013.00 within 30 days of the date of this decision.


Margaret A. Miller

Administrative Law Judge

Distribution: (Certified U.S. Mail)

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January 20, 2011

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf	:	Docket No. KENT 2010-535-D
of CHAD ALEX GREEN,	:	Case No. BARB-CD-2010-01
Complainant	:	
	:	
v.	:	Mine ID: 15-18182
	:	
D & C MINING CORPORATION,	:	Mine: D & C Mining Corporation
Respondent	:	

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf	:	Docket No. KENT 2010-536-D
of WILLIAM DONNIE SMITH,	:	Case No. BARB-CD-2010-02
Complainant	:	
	:	
v.	:	Mine ID: 15-18182
	:	
D & C MINING CORPORATION,	:	Mine: D & C Mining Corporation
Respondent	:	

DECISION

Appearances: Schean G. Belton, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner

Wesley Addington, Esquire, of Whitesburg, Kentucky, and Tony Oppeward, Esquire, of Lexington, Kentucky, for the Complainants, Chad Alex Green and William Donnie Smith

Elsie A Harris III, Esquire, of Norton, Virginia, for the Respondent

Before: Judge Harner

Statement of the Case

These cases are before me based upon Complaints and Amended Complaints¹ of discrimination filed by the Secretary of Labor (“Secretary”), alleging that Complainants Chad Alex Green (“Green”) and William Donnie Smith (“Smith”) were discriminated against by D & C Mining Corporation (“Respondent”) in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. §801, et seq. (“the Act”). The Complaints and Amended Complaints specifically allege that employees Green and Smith were laid off on September 21, 2009, because they were engaged in protected activity under the Act. In its Answers, Respondent denies any unlawful discrimination and asserts that the two employees voluntarily quit work. Pursuant to notice, these cases were heard before me on November 3, 2010, in Big Stone Gap, Virginia.

In its Complaints and Amended Complaints, the Secretary seeks orders of reinstatement for Green and Smith to their former or substantially similar jobs. At the time of the hearing, both Green and Smith had been reinstated to their former jobs at Respondent. Smith was reinstated on November 16, 2009, and Green was reinstated on January 6, 2010, following a settlement reached at a temporary reinstatement hearing held before Judge Weisberger on January 5, 2010, under the provisions of Section 105(c)(2). At the hearing before me, the parties stipulated to the amount of backpay that is owed to the complainants if the Secretary’s discrimination complaints are upheld. It was agreed that Green’s backpay is \$13,303 and Smith’s is \$5,644, exclusive of any interest.

Legal Principles

Section 105(c) of the Act prohibits discrimination against miners for exercising any protected right under the Act. Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator’s agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or

¹ The Complaints were filed with the Commission on January 28, 2010. On February 18, 2010, the Secretary filed Amended Complaints with the Commission seeking to add civil penalties of \$10,000 in each of the cases. Respondent filed its Answers to the Amended Complaints on February 23, 2010.

applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

A complainant alleging discrimination under the Act establishes a prima facie case of prohibited discrimination by presenting evidence to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal, Co.*, 2 FMSHRC 2786, 2799 (1980), rev'd on other grounds sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 12112 (3rd Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-818 (1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Robinette*, 3 FMSHRC at 818, n. 20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* At 817; *Pasula*, 2 FMSHRC at 2799-2800; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Where the operator is mistaken in his belief that the complainants engaged in protected activity, the complainant establishes a prima facie case of prohibited discrimination by proving that the operator suspected that the complainant engaged in protected activity and the adverse action was motivated in any part by such suspicion. *Elias Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1480(1982); *Secretary of Labor on behalf of Michael L. Price and Joe John Vacha and United Mine Workers of America v. Jim Walter Resources*, 24 FMSHRC 589, 592-593 (2002)(ALJ). The operator may then rebut the prima facie case in the same manner as described above. *Elias Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1480(1982).

Factors to be considered in assessing whether a prima facie case exists include the operator's knowledge of the protected activity, hostility or "animus" towards the protected activity, timing of the adverse action in relation to the protected activity, and disparate treatment. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 2 FMSHRC 2508 (1981).

Chronology of Events²

² The facts herein are based on the record as a whole, which includes the official transcript, and my careful observation of the witnesses throughout their testimony. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, the inherent probabilities in light of other events, corroboration or lack thereof, and consistencies or inconsistencies with each witness' testimony and between the testimonies of witnesses. In evaluating the testimony of each witness, I have relied specifically on his or her demeanor and make my findings accordingly. I note that apart from considerations of demeanor, I have taken

The Respondent operates an underground coal mine (Mine ID No. 15-18182) in Harlan County, Kentucky, where Smith and Green were employed.³ The mine operates with a first and second shift producing coal and for approximately the last half of the second shift, maintenance activities at the mine are carried out. At relevant times up to September 18, 2009, Smith was employed as a belt man on the first shift by the Respondent, where he had worked since September 2007. Green was employed by the Respondent for about six years and worked on the second shift as a bridge operator and as an extra bolt man. Smith and Green are brothers-in-law, as Green's wife (Angela) is Smith's sister. Smith and Green are also next door neighbors.

On Friday, September 18, 2009⁴, the entire first shift (9-10 men), including Smith, reported to work as usual. Between 11 a.m. and 1 p.m., water started leaking from around a seal in the mine. This seal closed off an unused section of the mine where coal had been previously mined. As is common when seals are used in mining operations, water and methane gas accumulate behind the seal. A purpose of the seal is to protect miners from these hazards. When the water was detected, it began to rise quickly and the catch basin could not hold it.⁵ First shift foreman Darrell Middleton instructed everyone working to start pumping the water out. Smith was instructed to watch the pump at the seal. Middleton left the mine and went to the office to check the elevation on the mine maps as he was concerned that the water level would increase and run into the operating section of the mine, thereby trapping miners. Apparently he was concerned that the sealed off area was at a higher grade than the active working area and water could trap miners if that were the case.

Despite the employees' efforts, the water from behind the seal kept coming and the pumps were not making any progress in decreasing the water level.⁶ At end of the first shift, Smith and the other employees left the mine and when they got outside, Middleton was present with the first shift employees and some of the second shift employees and he discussed with them the seriousness of the water situation. During this discussion, Green was present as Smith told him to be careful before Smith left the site and went home. At the hearing, Middleton testified that Smith told him he was afraid of water and he would rather be laid off and that

into account the above-noted credibility considerations in all cases and any failure by me to detail each of these is not to be deemed a failure on my part to have fully considered each witness' testimony.

³ Although the Respondent also operates a surface mine at the same approximate location, none of the facts herein relate to that part of the Respondent's mining operations.

⁴ All dates hereinafter refer to 2009, unless otherwise indicated.

⁵ When noticed, water had risen to within only 8-10 inches from the mine roof. Smith testified that the height of the coal seam was 50-54 inches.

⁶ Mine Superintendent Barry Rogers attributed the water problem to the unusually heavy rainfall in the area in mid-2009.

Middleton told Smith that he was afraid of water too.⁷ When Green reported for work on the second shift, Middleton told him there was a water issue and it was a “mess”. When Green asked Middleton how much water was in the mine, Middleton replied that it was just about “roofed out”. This conversation occurred in the office as Middleton was trying to reach Mine Superintendent Rogers to apprise him of the situation.⁸ Green stayed around until management decided its course of action and then elected to go home as his father was ill and he needed to help his mother. At the time Green left to go home, none of the second shift employees had gone to work yet. Mine superintendent Rogers testified that second shift foreman Richard Fair told him that Green had gone home because his father was sick.

On the evening of September 18, both Federal and Kentucky State Mine inspectors arrived at the mine to assess the situation. It is not entirely clear how these inspectors became aware of the water issue at Respondent, but it is clear that MSHA inspector William (Craig) Clark and two inspectors from the Kentucky Office of Mine Safety and Licensing arrived at the site in the evening.⁹ After inspecting the seal and mine, and noting that the water coming from the seal has almost roofed out, MSHA inspector Clark issued a “K” order shutting down the mine except for water removal operations.¹⁰ Foreman Middleton was still at work when the inspectors arrived at the mine, but Rogers did not arrive at the mine until after the “K” order was issued and the inspectors had apparently left the site. The effect of the “K” order was that the Respondent had to remedy the water problem before it could resume its normal operation of mining coal.

At the hearing there was various testimony regarding the Respondent’s knowledge of how the inspectors came to visit the mine site. Foreman Middleton testified that Superintendent Rogers told him on Friday, September 18, that a Federal inspector had told him that the inspectors “were there on a complaint”, but he did not indicate to Middleton who made the complaint (TR 136). Rogers testified that in the week following September 18, he ascertained from the State inspectors that Tony Oppeward had telephoned in a complaint about the water (TR

⁷ Middleton also testified that the mining engineer told him at some point the active portion of the mine was safe because its elevation was higher than the leaking seal, but he never reported that to Smith or Green (TR 133-134).

⁸ Rogers was apparently not at the mine site when the water was first noticed and did not arrive there until the evening.

⁹ One of the State inspectors was Todd Middleton, who is a nephew of foreman Darrell Middleton.

¹⁰ Section 103(k) of the Act provides, in pertinent part:
In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to...return affected areas of such mine to normal.

173-174). He further testified that although he did not initially know who Mr. Oppegard was, he began to ask questions and became aware that Mr. Oppegard was an attorney who represented miners.

The mine did not operate on Saturday and Sunday, and as a result the water continued to accumulate. Superintendent Rogers testified that because the pumps were not “doing too good of a job”, the “water gain[ed] on us more” over the weekend (TR 148).

On Monday, September 21, the entire first shift reported to work. Donnie Smith was told by Darrell Middleton, after talking to Rogers, that there was no work, and that he should go home as the inspectors were not letting anyone beyond the seal. Middleton testified that on Monday, 6-7 men worked laying pipe a distance of 2000 feet from the seal area to outside the mine. Also bigger capacity pumps were installed and eventually larger diameter piping. Smith did not work (as he was sent home), but Middleton claimed he had no role in the selection process of who worked and who didn't (TR 124). Green also reported to work on the second shift on Monday, but he, too, was sent home.

In the next few days, both Smith and Green made repeated efforts, either by visiting the mine or by telephone, to ascertain when they were to return to work. They were repeatedly told that there was no work yet. Finally they were told that they may as well sign up for unemployment compensation benefits. Both of them did so on Wednesday, September 23 when they visited the unemployment office.¹¹ The next day, Thursday, both Smith and Green went separately to the mine site during the day shift to pick up their pay checks. According to their testimony, all the first shift employees' vehicles were in the parking lot and they concluded that “something was up”.¹²

On October 19, Billie Smith, Donnie Smith's wife, telephoned Barry Rogers at the mine office. She knew Rogers socially and had talked to him on the phone 20 or more times. Rogers took the call and when Billie said she wanted to speak to him, he told her to come to the office and speak to him personally. She went to the office that same day and asked him why Donnie wasn't working. According to Billie Smith, Rogers replied, “Well what the fuck did Donnie and Chad call the fucking inspectors on me for?” According to Mrs. Smith, Rogers went on to say that the State inspectors had told him that Tony Oppegard called the State inspectors after Donnie or Chad had called him and told Oppegard that water was getting ready to flood the mine and the inspectors needed to get there before someone got hurt (TR 92-93). In his testimony, Rogers admitted to having a conversation with Billie Smith and his testimony did not really dispute Mrs. Smith's version of the conversation as he testified that he told Billie Smith that Tony Oppegard had something to do with “it” and that Chad and Donnie were behind it. He also admitted using the word “fucking” at least once during his conversation with Mrs. Smith (TR 174-175). In his

¹¹ Unemployment records submitted into evidence by the Respondent indicated that both Smith and Green last worked on September 18 and the reason given for the claims were “Lay Off with Definite Recall”.

¹² Two other employees, Mark Cain and Anthony Goins had signed up for unemployment, but they were recalled to work.

testimony about this conversation, Rogers explained that he asked Billie Smith “why they called the effin’ inspectors, ‘cause I mean, you have inspectors every two or three days anyway, and *when you get an inspectors* (sic), and you’re already trying to take care of the job that’s happening and what’s happening, *it just interrupts you from doing ... your job*” (emphasis supplied) (TR 175).¹³

On October 27, Smith and Green filed discrimination complaints with MSHA against the Respondent alleging that they had not been recalled because of their protected activities. The case was assigned to Special Investigator Guy Fain. Mr. Fain took the complainants’ statements that day and then he traveled to the mine site to interview Superintendent Rogers. When Fain arrived at the site to talk to Rogers that day, he informed Rogers that he was investigating a 105(c) complaint on behalf of Smith and Green. According to Fain, Rogers replied, “Well, that doesn’t surprise me a D-A-M bit.” (TR 28) Fain asked Rogers what he meant by that and Rogers replied that they had called the “damn inspectors in on me.” (TR 28) When Fain asked him how he knew that, Rogers said that the State inspectors told him. At that point Rogers stated that he did not want to talk about the situation until he had his attorney present.¹⁴ On November 10, Fain again met with Rogers and Respondent’s attorney. During this meeting, Fain took a written statement, which is not part of the record herein, in which Rogers admitted hearing from the state inspectors that Tony Opegard had something to do with filing the complaint on September 18. At the hearing, Rogers testified that, although he did not know who Tony Opegard was on September 18, the State inspectors told him during the next week that the water complaint was made by Mr. Opegard; that he asked inspectors about him and found out he was representing Smith’s mother (TR 179)¹⁵; and that based on everything, he figured that Smith and Green were involved in the complaint.

Following this meeting with Mr. Fain, Respondent reinstated Smith to his job on November 16. In order to tell Smith to report to work, Superintendent Rogers called the home of Green and spoke with Angela Green, Chad’s wife. (Mrs. Green was Smith’s sister.)¹⁶ Mrs.

¹³ I fully credit Mrs. Smith’s testimony as it was more complete as to the substance of the conversation.

¹⁴ Rogers did not testify as to this conversation with Fain.

¹⁵ Donnie’s father had been killed at the mine in June 2009 and Opegard was representing her in a suit against the mine.

¹⁶ The Respondent does not dispute this call and Rogers did not testify about it. The Respondent did present the testimony of Billy Jeffrey Copeland, its bookkeeper. Copeland, who does not work at the mine site but at a facility 45 minutes away, testified that he was asked by Barry Rogers to contact both Smith and Green for the purpose of telling them to report to the mine office to talk to Rogers. At first he testified that Rogers told him to call in mid-October but, on cross-examination, changed his testimony on the timing of the calls to shortly before Smith returned to work on November 16. He also testified that he probably called each of them 2 times but on each occasion, there was no answer, that there were no answering machines and that

Green also credibly testified that she is a stay at home mom because of small children, that she received no other calls from the Respondent before November 16 or after that date, and that she has had the same telephone number for about 3 years.¹⁷ The Respondent did not reinstate Green until January 6, 2010, following a settlement obtained at the hearing for temporary reinstatement under the Act held the previous day (See Exhibit 1).

After MSHA issued the “K” order on the evening of September 18, the Respondent was obligated to remedy the water problem before it could resume mining coal. To do so, the operator had to run additional pipe lines and install larger pumps, following additional visits by MSHA inspectors to modify the plans to abate the water problem (TR 145, 148). Eventually the water issue was taken care of to the point that coal production resumed.¹⁸ Rogers testified that coal production resumed in about two weeks following the September 18 incident (TR 144), which would have been early October. During that interim “clean-up” period, Rogers further testified that if any miner wanted to work, the mine let them work rather than be laid off (TR 153). Even after the “K” order was terminated, second shift production did not begin immediately and it was November before this shift began producing coal (TR 146). Nevertheless, between September 21 and November, Rogers testified that the second shift employees were performing “dead work” or maintenance work as “the equipment was getting old” and “*the inspectors were staying with us pretty heavy*, and we had to try to keep up the mines better” (emphasis supplied) (TR 146). Copeland, the Respondent’s bookkeeper, testified that the Respondent hired a new belt man on the first shift before Smith was recalled on November 16.

Legal Analysis

When considering the legal principles with the facts particular to this case, it is clear that the Respondent violated Section 105(c) of the Mine Act by discriminating against the Complainants for the mistaken belief that they had called the inspectors into the mine. Although the Complainants may not have engaged in protected activity, it cannot be denied that the Respondent believed they did so based on its belief that the inspectors came to the mine because of a complaint made by Opegard after the Complainants contacted Opegard. The fact that the Complainants were laid off in retaliation for their protected activities goes directly to the heart and purpose of the antidiscrimination provisions of the Act. In passing this legislation, Congress recognized the intent to protect miners against “*any possible discrimination which they might*

the phones just rang and rang. Neither Copeland nor Rogers attempted to contact Smith or Green by mail or in person.

¹⁷ I note that the telephone number that she testified to having is the same number as on the Respondent’s records for Smith and Green (See Exhibits A and B).

¹⁸ According to Rogers, production of coal did not resume on a full basis immediately, but gradually increased.

suffer as a result of their participation.” S. Rep. No. 95-181, 95th Congr., 1st Sess. 36 (1977) reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 623 (emphasis added). This protection was recognized to extend to those situations where the employer only believed that the employee engaged in protected activity as this could have an even greater chilling effect than discrimination against those who had actually acted. *Elias Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1480 (1982). The testimony at hearing demonstrated that the Respondent believed that the Complainants had “something to do with” the inspectors being called and laid them off and refused to timely recall them as a result of this belief. The testimony of the meetings between Rogers and Mrs. Billie Smith and between Rogers and Fain establishes this.

The Complainants here have also suffered adverse action. Both men were repeatedly told there was no work for them and then laid off from the mine. Further, even assuming that the Respondent had a legitimate reason to briefly lay them off due to the Respondent not being able to mine coal, an argument that I do not find persuasive, it failed to recall them in a timely manner. Although the Respondent initially argued in its Answer to the Amended Complaints that Smith and Green voluntarily left their jobs and it believed that they had quit, the facts show otherwise. There was un rebutted testimony that the Complainants continued to call for several days after the leak to ask whether there was work to do. It is also significant that the Respondent did not raise the “quit” defense at hearing.¹⁹ Further, and most telling, when the Complainants filled out their applications for unemployment benefits, they characterized their unemployment as a “lay off with definite recall,” after being told by the Respondent to write this on the applications for benefits. Respondent’s assertion in its Answers that the Complainants had quit is not supported by its own evidence adduced at the hearing, including the testimony that Respondent did not contest the Complainant’s unemployment benefits.

The motivation for the Respondent’s actions appears to have been its belief, real or mistaken, that the Complainants engaged in protected activity. Knowledge of the protected activity is one of the most important factors in determining whether the Respondent was motivated by the protected activity. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC at 2510 (citing *NLRB v. Long Island Airport Limousine Serv.*, 468 F.2d 292, 295 (2nd Cir. 1972)). Because subjective factors are involved, knowledge can be proved by circumstantial evidence and reasonable inferences. *Id.* The evidences and inferences here tend to demonstrate that the Respondent had knowledge of the protected activity. First, Respondent agents knew that someone had engaged in protected activity by alerting MSHA and Kentucky State inspectors to the water in the mine, as the inspectors arrived at the mine site on the evening of September 18 despite the fact that the Respondent had reported the leak and the flooding around 11:30 that morning.²⁰ Further, one of the State inspectors who visited the mine

¹⁹ When consistent with the totality of the evidence, shifting defenses may be further evidence of a violation. See *Bay State Ambulance Rental*, 280 NLRB 122 (June 1986).

²⁰ Smith and Middleton both testified that the water leakage was noticed about halfway through the first shift shift, which ran from 7:00 a.m. to 3:00 p.m.

that evening was the nephew of foreman Middleton. This inspector would have known who had made the call and it is reasonable to believe that he told Rogers that Oppegard had reported the leak.²¹ The fact that Oppegard was representing Smith's mother in an unrelated law suit against Respondent would lead Rogers to believe that Smith and Green, who were brothers-in-law, had contacted Oppegard. In his testimony, Rogers admitted that, although he initially did not know who Oppegard was, he quickly ascertained from the State inspectors that Oppegard was an attorney who represented miners and that Oppegard had been responsible for filing the complaint that resulted in the inspectors coming to the mine on the evening of September 18.

Second, the Respondent's behavior toward the Complainants shows blatant animus and hostility toward the protected actions. Rogers admittedly resorted to cursing when discussing the activity with Mrs. Smith and Inspector Fain. When speaking to Mrs. Smith on October 19, Rogers said "Well, what the fuck did Donnie and Chad call the fucking inspectors on me for?" Later, when approached by MSHA special investigator Fain, Rogers said that the discrimination complaint did not surprise him a "D-A-M" bit, and that it was the Complainants who called the "damn inspectors." It cannot be stressed enough that Rogers testified to the truth of these conversations at hearing. He also testified that inspectors were basically an interruption to regular mining work being completed. Not only did Mr. Rogers use harsh and aggressive language, but his words more than implied that he was disapproving of the protected activity. Further, it has been established that the more animus is directed specifically towards the protected activity, the more probative weight it carries. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC at 2511.

Third, the timing of the lay-off could not be any more suspicious. See *NLRB v. Long Island Airport Limousine Serv.*, 468 F.2d 292, 295 (2nd Cir. 1972)(When the employer received knowledge of protected activity and fired employee on the same day, the timing of the adverse action was "stunningly obvious.") The water problem began on September 18, and that same day the MSHA inspector issued a "K" order shutting down the mine except for water remediation. The very next workday, Monday, September 21, both Complainants were told that there was no work for them to do, even though other miners were helping to lay pipe in the mine.²² This continued for two more days, before the men eventually were told to file for unemployment benefits. Further, all of the other first shift employees were working at the mine on Thursday, September 24, when the Complainants went to the mine to pick up their paychecks.²³ Given that

²¹ Middleton's testimony supports this.

²² Significantly, Rogers testified that he allowed whoever showed up for his shift to work. Clearly this was not the case for Smith and Green, both of whom reported for work on September 21 and on the next two days attempted to ascertain when work was available. Also Middleton testified that he had not "chosen" the employees who were to work on Monday; but Rogers had done so.

²³ Green testified that Jamie Hanes had not been called back to work either, but Rogers testified that Hanes did not want to work, creating the inference that he had been asked to return.

the Complainants were told not to work the workday immediately following the inspection and subsequent "K" order, the timing of Respondent's actions in telling Smith and Green there was no work is highly suspect.

Finally, disparate, or inconsistent, treatment is indicative of discrimination and there was definitely disparate treatment among the miners here. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC at 2512 (citing *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). Smith and Green were the only two miners who were not recalled to the mine when coal production resumed. Although two other employees also filed for unemployment, they were called back to work almost immediately. Further, while the Respondent testified that it let anyone work who wanted to work, the Complainants were told that there was no work for them and that they should go home.²⁴ No work-related or performance issues were raised by the Respondent to provide a nondiscriminatory explanation for the disparate treatment of the Complainants.

Based on the above, I find that that the Secretary and the Complainants have established a prima facie case of discrimination under Section 105(c) of the Act. Having established a prima facie case, the Respondent can rebut the prima facie case by showing that either no protected activity occurred or that it was in no way motivated by the protected activity. The Respondent has not argued that no protected activity occurred either in the pleadings or at hearing. To the contrary, as noted above, protected activity occurred in that a dangerous condition existed at the mine and inspectors were alerted to this condition. Further, the Respondent believed that Smith and Green were behind the complaint to MSHA and/or the State over the condition.

The Respondent's defenses seem to be that, first, Smith and Green voluntarily chose to be laid off and collect unemployment benefits; second, Respondent tried to recall the Complainants but could not reach either of them; or, third, the Complainants should have kept in contact with the Respondent if they wanted their job back. None of these arguments are persuasive and none are supported by the credible evidence. In the case of the first defense, both Smith and Green visited the mine and then repeatedly called the Respondent to ascertain if work was available and were told that there was no work for them to do at that time. When Smith told Middleton that he needed money and would have to consider filing for unemployment, Middleton responded by telling him that it was a good idea to do so.²⁵ When Smith arrived at the mine to pick up his last paycheck on Thursday, he realized for the first time that everyone was back to work except for

²⁴ The Complainants cited "lack of work" as the reason for the layoff. Copeland testified that the Respondent did not contradict this statement or contest for unemployment benefits.

²⁵ Smith testified that when he told Middleton that he had to do something to keep money coming in, Middleton responded by saying, "Well, I, if I wasn't over here, I would have done been signed up on unemployment." Before actually signing up, Smith again asked Middleton who said, "Yeah, go ahead. Go on and sign up." Green was also encouraged to sign up by Rogers when he called to obtain the address of the mine.

Green and himself. He confronted Middleton, but was told that he would have to "take it up with Barry [Rogers]." These actions are not indicative of men choosing to be laid off and collecting unemployment benefits. Continuing to call the mine throughout the first week, double-checking before signing up for unemployment, and confronting the foreman at the mine site would all indicate that the men wanted to return to work and were upset that the others had been called back when they had not.

The second defense claimed by the Respondent falls flat as well for several reasons. Although the Respondent claimed that it tried to call the Complainants but received no answer or answering machine, Mrs. Green testified, credibly, that their telephone number had been the same for approximately three years, that they had an answering machine, and that she was a stay at home mom. Moreover, the Greens' phone number is the same phone number found on paperwork kept by the Respondent.²⁶ In fact, Respondent telephoned Mrs. Green when it wanted to recall Smith to work on November 16. Although the Respondent presented the testimony of its bookkeeper to demonstrate that it attempted to contact both of them by telephone prior to Smith's recall, it admitted that no letters were sent to the Complainants to inform them that they could come back to work. Further, Foreman Middleton drove past the Complainants' houses everyday on his way to and from work. If the Respondent had wanted to reach the Complainants, Middleton could have easily taken a moment to stop by their houses.

The third defense claimed by the Respondent, *viz.*, that employees on layoff must maintain contact with an employer if they want their job back, is a novel and unusual concept. Not only is this a ludicrous position, but it is even more so given the facts herein that Respondent repeatedly told the Complainants that there was no work for them and they should file for unemployment, while at the same time allowing all other employees to work. I note that it is customary for an employer to contact employees that it has laid off as work becomes available with any precondition that the employees keep in touch. It is not the responsibility of the employee to continue to contact the employer to establish if conditions for recall are present. (this information is in the purview of an employer). Second, the facts establish that the Complainants asked the Respondent whether they could return to work multiple times and were told each time that there was still no work available for them.

I reject all of the Respondent's defenses as each is without merit. Therefore, I find that the Respondent has not rebutted the Secretary's and Complainants' prima facie case.

In conclusion, the overwhelming weight of the evidence establishes that the Respondent violated Section 105(c) of the Act by discriminating against the Complainants based on its belief that they engaged in protected activity. All the evidence adduced at the hearing fully supports this, including significantly the testimony of Rogers wherein he essentially admitted to the discrimination in his conversations with Mrs. Billie Smith and MSHA special investigator Fain.

²⁶ See Respondent Exhibits A and B. Smith's telephone number on Respondent's records is the same number as Green's.

Therefore, I conclude that Chad Alex Green and William Donnie Smith are entitled to backpay in the amounts of \$13,303.00 and \$5,644.00, respectively, plus interest calculated until the date of payment in the manner required by the Commission.²⁷

Civil Penalty Assessment

The Secretary has proposed a total penalty of \$20,000.00 for the Respondent's violations of the Act. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in Section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Secretary on behalf of Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 555 (April 1996).

The Respondent has a long and significant history of violations. The Assessed Violation History Report for the two years preceding the Respondent's discriminatory action shows that the operator was cited for 418 violations, including ten citations under Section 104(d) of the Act.²⁸ From this, I find that the Respondent has a serious history of prior violations.

The Respondent's actions toward Smith and Green were at best highly negligent. Indeed, Respondent's actions were willful and evidenced a reckless disregard for the protections afforded miners under the Act. Not only do the facts show that Smith and Green were laid off and refused timely recall because the Respondent believed that they engaged in protected activity, but the Respondent essentially admitted to both Smith's wife and the MSHA special investigator that it did not recall Smith and Green because Respondent believed that they had been responsible for the MSHA and State inspectors coming to the mine to investigate the water situation. Then, at hearing, it asserted that it believed that both men had chosen to quit and sign up for unemployment, even after the men called several times to ask if there was work for them to do.

It is a generally accepted principle that the penalty assessed should be appropriate to the size of the operator. *Douglas R. Rushford Trucking*, 22 FMSHRC 1127, 1127 (Sept 2000) (ALJ). The credible evidence shows that the operator employed approximately twenty (20) men, including the shift foremen and supervisor at the particular mine.²⁹ When combining this

²⁷ The proper method of calculating interest on backpay is: **Amount of interest = The quarter's net back pay x number of accrued days of interest (from the last day of that quarter to the date of payment) x the short-term federal underpayment rate.** *Secretary on behalf of Bailey v. Arkansas Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (Nov. 1988).

²⁸ As archived by the MSHA Mine Data Retrieval system. See also Complainants' Exhibit 2.

²⁹ All of which are considered "miners" under Sections 3(g) and 3(h)(1) of the Act.

information with the other criteria, I conclude that \$10,000.00 per violation is appropriate for an operator of this size.

The Respondent made no argument either in the pleadings, at hearing or in its brief that it would be unable to pay the penalties as assessed.

The Secretary argues that the Respondent's action against the Complainants supports a finding of the highest gravity. I agree. The fact that the Respondent laid off and refused to timely recall the Complainants because it believed that they engaged in protected action goes directly to the heart and purpose of the anti-discrimination provisions of the Act. Moreover, this could reasonably create an even greater debilitating effect than discrimination based on overt actions because miners could fear even the appearance of being engaged in protected activities. *Elias Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1480(1982).

Finally, I find that the Respondent did not demonstrate good faith in abating this violation. It only brought Smith back to work after speaking to the special investigator following the filing by Smith and Green of discrimination complaints with MSHA. Further, Green was not reinstated until the Respondent was forced to do so following a hearing for temporary reinstatement order. Finally, as stated above, the Respondent essentially admitted at hearing that it had refused to recall the Complainants because it believed that Smith and Green "had something to do" with the inspectors being called.

Taking all of the above factors into consideration, I conclude that the Secretary's assessed civil penalty of \$20,000.00 is more than warranted in this case. This, along with the stipulated \$18,947.00 in backpay, serves two main purposes. These are "to further the purposes of the Act by deterring retaliatory actions, and to put an employee into the financial position he would have been in but for the discrimination." *Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 (Jan. 1982).

ORDER

Accordingly, having previously found that D & C Mining Corporation discriminated against Chad Alex Green and William Donnie Smith by laying them off and refusing to timely recall them, it is **ORDERED** that:

1. The Respondent **PAY** Chad Alex Green **\$13,303.00** and William Donnie Smith **\$5,644.00** in backpay, as stipulated, within thirty (30) days of the date of this decision with interest using the *Arkansas-Carbona/Clinchfield Coal Co.* method.
2. The Respondent **EXPUNGE** any reference to the discriminatory actions from Green and Smith's personnel files or any other records maintained by the Respondent.

3. The Respondent **POST** this decision at all of its mining properties located in Harlan County, Kentucky, in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of sixty (60) days.³⁰
4. The Respondent **PAY** a civil penalty in the amount of **\$20,000.00**, for its violation of Section 105(c) of the Act, within thirty (30) days of the date of this decision.

It is also **ORDERED** that the Regional Solicitor has the responsibility to ensure full and complete compliance with this decision and to take the appropriate action should the Respondent fail to fully comply.



Janet G. Harner
Administrative Law Judge

Distribution: (Certified Mail)

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William Donnie Smith, 4089 S. Hwy. 3001, Cawood, KY 40815-5007

³⁰ This remedy is warranted because of the chilling effect Respondent's actions could have on other miners.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

January 20, 2010

SECRETARY OF LABOR, MSHA	:	DISCRIMINATION PROCEEDING
on behalf of HARRY LEE BECKMAN,	:	
Complainant	:	Docket No. WEVA 2009-1526-D
	:	Case No. MORG-CD-2008-10
v.	:	
	:	
METTIKI COAL (WV), LLC,	:	Mountain View Mine
Respondent	:	Mine ID: 46-09028

DECISION

Appearances: Samuel Lord, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainant; Willa B. Perlmutter, Esq., Crowell & Moring, LLP, Washington, D.C., for the Respondent.

Before: Judge Feldman

This case is before me based on a June 3, 2009, discrimination complaint filed against Mettiki Coal (WV), LLC (“Mettiki”) pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (2006) (“the Act”), by the Secretary of Labor (“the Secretary”) on behalf of Harry Lee Beckman. The complaint alleges that Mettiki violated the provisions of section 105(c)(1) of the Act,¹ 30 U.S.C. § 815(c)(1), when it discharged Beckman on September 15, 2008, following a September 9, 2008, diesel locomotive accident.

The hearing was conducted in Oakland, Maryland, from July 21 through July 23, 2010. The parties have filed post-hearing briefs and replies that have been considered in the disposition of this matter.

¹ Section 105(c)(1), provides, in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to [the Act], including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because of the exercise by such miner . . . of any statutory right afforded by [the Act].

I. Statement of the Case

Beckman was the operator of a diesel locomotive when a serious accident occurred on September 9, 2008. The Secretary asserts that Beckman's September 15, 2008, discharge following this accident, was motivated, at least in part, by his protected activity. The protected activity relied upon is Beckman's long term participation in mine inspections as a miners' representative during his 28 years as a Mettiki employee. In addition, the Secretary relies on safety related complaints, principally concerning watery track conditions, communicated to mine management on April 17, 2007, and March 18, 2008.

Mettiki maintains that its sole reason for discharging Beckman was Beckman's loss of control of a multi-ton diesel locomotive that collided with another track vehicle. The accident resulted in injuries to two miners, one of whom required hospital treatment.

Mettiki's claimed justification for terminating Beckman because of his involvement in a serious accident is not implausible. The record fails to reflect that Mettiki harbored resentment or animus towards Beckman's long term participation as a miners' representative, or towards his two safety related complaints that occurred during the 17 month period prior to his discharge. Thus, the Secretary has failed to present adequate evidence that Mettiki's decision to terminate Beckman was motivated, in any part, by his protected activity. Consequently, Beckman's discrimination complaint must be denied.

II. Findings of Fact

a. Background

Mettiki operates the Mountain View Mine ("Mountain View"), an underground coal mine in Tucker County, West Virginia, where Beckman worked until his September 2008, termination. At the time of Beckman's discharge, Mountain View was mining longwall panels as well as continuous mining units. The day and midnight shifts are production shifts, and the afternoon shift is a maintenance shift. (Tr. 926-27).

Mettiki also operates several surface facilities in nearby Maryland. The surface facilities include a strip mine, acid mine drainage facilities, a coal preparation plant, stockpiles, and unloading and loading facilities for both rail and truck. Most of Mettiki's coal goes to the preparation plant, although some raw coal goes to a nearby power station. (Tr. 922-23). In calendar year 2008, the year Beckman was terminated, Mettiki produced over 5 million tons of raw material, and 2.8 million tons of clean coal. (Tr. 924-25).

Beckman is a 53-year-old coal miner who had been employed by Mettiki for over 28 years. (Tr. 985). In 2005, Beckman was transferred to Mountain View where he worked as a general laborer on the afternoon shift until his discharge in September 2008. (Tr. 251, 287, 482).

Mettiki has stipulated that, generally speaking, Beckman was a satisfactory employee. Specifically Mettiki stipulated that, with the exception of Beckman's operation of diesel locomotives, "in the past [Beckman] had not been insubordinate and he had performed adequately or more than adequately." (Tr. 985).

b. Beckman's Miners' Representative Activities

In September 2008, there were 19 registered miners' representatives at Mountain View. Beckman was one of the 19 registered miners' representatives, having been for many years a representative at both of Mettiki's mines in Maryland and at Mountain View. (Tr. 86-87; Stip. Nos. 3, 5; Gov. Ex. 3). Mettiki used a rotation system to determine who would accompany an inspector as the miners' representative on a given shift. If the next available miners' representative declined to travel with the inspector, and no other miners' representatives volunteered, the mine inspector traveled alone.

Richard Show, a former colleague of Beckman who testified on his behalf, worked for Mettiki as a miner from 1978 until he began his career as an MSHA inspector on April 1, 2005. (Tr. 53). Show served as a miners' representative during his tenure with Mettiki. (Tr. 89-90, 101). Show's testimony concerning his view of Mettiki's tolerance for the activities of miners' representatives was contradictory. Show initially testified that Mettiki was "open to people traveling with inspectors." (Tr. 85). Show also testified that he did not personally experience any retribution from the company for his activities as a miners' representative. (Tr. 85, 93).

However, Show also attempted to diminish Mettiki's enthusiasm for the role of miners' representatives by opining that Mettiki neither encouraged nor discouraged their participation. (Tr. 85). Coming full circle, Show subsequently implied that Mettiki interfered with the miners' right to participate in inspections because Mettiki did not actively recruit a substitute for a miners' representative who had declined to travel with an inspector. (Tr. 86-87).

Any suggestion by Show that Mettiki interfered with miners accompanying inspectors was undermined by Beckman. Beckman testified, in essence, that Mettiki permitted a registered miners' representative to volunteer as a substitute if the next available miners' representative declined. (Tr. 256). In this regard, Beckman testified that he frequently traveled with MSHA inspectors when other miners' representatives declined. Beckman testified that he also frequently accompanied inspectors from the state of West Virginia. (Tr. 255-56). The Secretary asserts that Beckman's frequent participation as a miners' representative was a motivating factor in his termination. Beckman testified:

Mr. Lord: So let me ask you again, would you say that when an inspector came to the shift, would you typically travel with the inspector?

Beckman: Well, I'd go ask everybody and see who wanted to go. And if nobody wanted to go, then I would go, yeah.

Mr. Lord: When you say you asked everybody, are you talking about other miners on the list?

Beckman: I'd ask all of the miners' reps if any of them wanted to go. And if they didn't want to go, then I'd go.

(Tr. 256).

c. Beckman's April 17, 2007, Safety Complaint

In April 2007, Beckman was assigned to operate a track locomotive hauling setup supplies to a new longwall panel area. (Tr. 268). This required Beckman to travel on a section of track between the No. 2 Butt and the No. 3 Butt. (Gov. Ex. 12). For approximately three days prior to his safety complaint, Beckman observed an area of high water around the track in the vicinity of the No. 3 Butt. (Tr. 268). The locomotive's sanders clogged when Beckman traversed this area. The sanders are used to apply sand to the tracks to increase traction for braking. Beckman decided to inform upper management about this condition because the water had been accumulating for several days. (Tr. 269).

On April 17, 2007, approximately 17 months prior to his termination, Beckman informed Mountain View's Safety Director, Terry Savage, about the water accumulation that was interfering with the operation of track equipment. (Tr. 759-63; Joint Stip. 6; Gov. Ex. 12). Savage testified that he considered Beckman's complaint to be valid. (Tr. 762). Savage testified that it was the company's policy to send e-mails to all concerned members of management summarizing safety complaints so that safety problems could be addressed. (Tr. 760-62).

Consequently on April 17, 2007, Savage e-mailed Al Smith, Frank Sanders, Dave Blythe, Larry Johnson, and Jody Theriot to inform them of Beckman's concern. (Gov. Ex. 12). At that time, Smith was the manager of underground operations; Sanders was a foreman; Blythe was a maintenance superintendent; Johnson was a longwall coordinator; and Theriot was manager of safety and human resources.

Savage's April 17, 2007, e-mail stated:

Harry Beckman stopped in the office today to voice a safety concern. Harry said that the track between 2-Butt and 3-Butt [h]as water accumulations over the rail that is causing the sanders on the locomotives to plug. Harry said the remainder of the rail inby and outby this location is in good shape.

(Gov. Ex. 12).

As previously noted, Beckman worked the 3:00 p.m. to 11:00 p.m. maintenance shift. The condition Beckman complained of was not addressed during the maintenance shift on April 17, 2007. When Beckman reported to work the following day on the April 18, 2007, Perry Mercure, the maintenance shift foreman, assigned Beckman and a contractor employee to remedy the high water condition. (Tr. 285-87). The condition was corrected by jacking up the rail above the water line and placing blocks underneath the tracks for support. (Tr. 270).

Beckman testified that although he sometimes operated a locomotive, he was not classified as a designated motorman. Rather, he was classified as a general laborer. He conceded that track repairs generally are assigned to general laborers. In fact, he admitted that, in the past, he occasionally had jacked-up rails to alleviate water conditions on the tracks. (Tr. 342).

The Secretary's brief asserts that Savage's e-mail was intended to intimidate and deter Beckman from making further safety complaints. The Secretary also asserts that Beckman's assignment to fix the subject track condition during the next maintenance shift was a further attempt to dissuade Beckman from making future safety related complaints. (Sec'y Br. at 16-17).

d. Beckman's March 18, 2008, Complaint to Kreiser

On February 5, 2008, during an MSHA inspection, Show observed several track hazards including high water along the track at two different locations. Show issued notice of Safeguard No. 7112585 pursuant to section 314(b) of the Act, 30 U.S.C. § 874(b), that included prohibiting water from accumulating above the rails. (Gov. Ex. 5). The safeguard notice noted that the mine had steep grades that contributed to the hazardous conditions.

Approximately one month later, on March 8, 2008, Beckman accompanied Show as a miners' representative during a mine inspection. At that time, Show observed water above the rails for a distance of ten feet, as well as a nearby locomotive with clogged sanders. (Tr. 150). Show issued citations for both conditions. Specifically, Show cited the track water as a non-S&S violation of 30 C.F.R. § 75.1403 because it violated recently issued Safeguard No. 7112585; and an S&S violation of 30 C.F.R. § 75.1725(a) due to the clogged sanders because Mettiki had not maintained mobile equipment in safe operating condition as required by the standard. (Gov. Exs. 7, 8).

One week later, on March 15, 2008, Show returned to Mountain View and observed an additional high water condition on the rails for a distance of twelve feet. Show issued another citation citing a 30 C.F.R. § 75.1403 violation of Safeguard No. 7112585. (Gov. Ex. 6). Similar to the initial safeguard violation, Show also designated this safeguard violation as non-S&S. The Secretary does not allege that Show issued the notice of safeguard or the subsequent violations, including both safeguard violations in March 2008, as a result of complaints by Beckman. (Tr. 152).

On March 15, 2008, during a recess in an annual refresher training session, Beckman spoke to Dwight Kreiser, Vice President for Mettiki's Northern Appalachia Operations. Krieser had previously been General Manager at Mettiki mines, including Mountain View, where Beckman had worked. In his previous capacities, Krieser had addressed non-safety related concerns raised by Beckman.

Having recently accompanied Show on March 8, 2008, when Show issued a safeguard violation for water on the tracks, Beckman complained to Kreiser about muddy and wet track conditions.² Beckman also complained about the need for ballast on the No. 5 and No. 6 Butt tracks. Ballast is used to provide a firmer track bed to avoid derailments.

Beckman told Krieser that, in the future, he would not report violations or hazardous conditions because "nothing's being done." (Tr. 222). Kreiser testified that he believed Beckman was complaining about ongoing conditions at the mine. (Tr. 229). Kreiser was also concerned about Beckman's allegation that safety complaints were not being addressed.

In view of Beckman's complaints, Kreiser contacted Savage and Sanders, both of whom are subordinate management officials. (Tr. 234-35; Gov. Ex. 11). Savage told Kreiser that Beckman had complained about water on the track "over a year ago." Savage left Kreiser with the impression that Beckman's complaint was addressed and there was nothing further to be done. Savage did not tell Kreiser that a notice of safeguard and a non-S&S safeguard violation recently had been issued at Mountain View. (Tr. 227; Gov. Ex. 11). Kreiser conveyed Beckman's ballast concerns to Sanders who assured Kreiser that additional ballast was being applied as needed.

On March 19, 2008, Kreiser sent Beckman a memorandum summarizing the results of his inquiry into Beckman's complaints. Kreiser was also concerned about Beckman's expressed reticence to inform management about hazardous conditions. Kreiser's memorandum to Beckman states:

² Beckman was unaware of the second safeguard violation for watery track conditions that Show had issued on the same day Beckman was attending refresher training on March 15, 2008.

To: Harry Beckman

From: Dwight Kreiser

Subject: Response letter to Mr. Harry Beckman[’s] comments directed to me on Saturday March 15, 2008 at our annual retraining classes.

Mr. Beckman confronted me about the following issues on March 15, 2008 regarding safety concerns at the Mt. View Mine.

- 1) Mr. Beckman said he went to Terry Savage regarding water and mud on the West Mains track, and said Mr. Savage told him to fill out a safety concern sheet.

I investigated this [accusation] and found out that Mr. Beckman did go to Terry Savage concerning this matter over a year ago. Terry advised me that he did tell Harry to fill out a safety concern and took immediate action to remedy the complaint by bring[ing] it to the attention of the manager underground. Due to the amount [of] time that has elapsed there is no f[u]rther action necessary.

- 2) Complained that 5 Butt and 6 Butt tracks needed more ballast add[ed] to them.

I communicated this with the operation management at the mine and they conveyed to me that ballasting of the 5 Butt track is performed frequently as needed and that the 6 Butt track is ballasted as it is installed. Underground management response reiterates the statements made by a fellow hourly worker conveyed when you brought this to my attention.

- 3) Mr. Beckman made the following statement “I don’t report hazardous condition[s] anymore, because nothing is done about it[.]”

My response to this is [that] safety is [of] the utmost importance to the company. The company relies on the hourly workforce to inform management of these conditions, and [to] correct any violations or practice that exposes our employees. I also take offense to this statement in that **it’s your obligation as an employee and fireboss to report any hazardous conditions that exist.**

(Gov. Ex. 11) (emphasis in original).

There is no evidence that Kreiser's response to Beckman was disingenuous with respect to Krieser's belief that Beckman's high water complaint was more than one year old, and that it had promptly been addressed. There is also no reason to question the sincerity of Kreiser's admonishment of Beckman in response to Beckman's statement that he would no longer report hazards to management. Beckman continued to periodically accompany MSHA inspectors as a miners' representative without incident after his communication with Kreiser. Beckman's last trip with an inspector prior to his termination occurred on August 5, 2008. (Gov. Ex. 4).

e. The September 9, 2008 Accident

I. Locomotives at Mountain View

At Mountain View, diesel locomotives, or "motors," are used to haul shields and other equipment during longwall moves, and to haul supplies at other times. (Tr. 490). The locomotives are massive pieces of equipment that run on permanent rails underground. Mettiki uses two different kinds of locomotives: 15-ton Jeffreys and 30-ton Brookvilles. (Tr. 424, 428). A Brookville is one foot wider and ten feet longer than the less powerful Jeffrey. The operator cab of a Brookville is eight to nine inches lower than the operator cab of a Jeffrey locomotive. (Tr. 491-92).

A Jeffrey locomotive has three brakes: a hand brake, that operates on air pressure and is routinely used during normal operation; a wheel brake, used when the motor will be parked for an extended period; and an emergency brake, which automatically engages if air pressure to the brakes drops below 50 pounds per square inch ("psi"). When the Jeffrey is traveling, its operator must maintain at least 50 psi pressure to prevent the emergency brake from engaging. (Tr. 630).

In addition, the Jeffrey and Brookville locomotives are equipped with sanders that rely on air pressure to function. The sanders apply sand on the track to create traction for effective braking, particularly when the multi-ton locomotives are traveling down a grade. (Tr. 149, 304, 633). The operators must "rev" the locomotive engines before moving the locomotive. This ensures that there will be adequate air pressure to operate the hand brake and the sanders, and to prevent the emergency brake from automatically engaging. (Tr. 443, 632).

Locomotives are paired and work in tandem, in a three unit train, to haul longwall shields. Pairing locomotives is necessary because a longwall shield is too heavy to be pulled by a single locomotive. During longwall moves, the shields are carried on a lowboy trailer that is attached as the third unit of the train. (Tr. 65). Thus, a train consists of a Brookville, a Jeffrey and a lowboy, or, two Jeffreys and a lowboy.

The comparative size of each locomotive dictates its particular function. When a Brookville is paired with a Jeffrey, the Brookville is identified as the "lead" or "helper" motor. The Brookville is used to pull the Jeffrey and lowboy when it is the front car, and to push the Jeffrey and lowboy when it is the rear car when the train travels in the opposite direction.

(Tr. 422-23). When necessary, the Jeffrey can be throttled to assist the Brookville in pulling or pushing. However, the Jeffrey's primary function, when the multi-ton train loaded with shields gains momentum traveling down a grade, is to serve as a supplemental brake system that assists the operator of the Brookville in controlling the speed of the train. (Tr. 503-05).

Because of the Brookville's larger size, its operator controls when and how the motors move. (Tr. 675, 858). The Brookville operator is responsible for making certain that the Jeffrey has built up sufficient air pressure, and that it is ready to move, before engaging the throttle of the Brookville. (Tr. 542-44). As the operator of the lead motor, the operator of the Brookville is responsible for ensuring that the rail ahead of the motors is clear. (Tr. 428-29). To ensure the path is clear, the Brookville operator relies on the locomotive's headlights that were described as being brighter than the high beams on a car. (Tr. 544-45).

ii. The Teardown Track

Upon completion of a longwall panel, routine operations cease and all personnel participate in the dismantling and movement of the longwall equipment for development of the next panel. (Tr. 497-98). As noted, the longwall is moved, shield by shield, to the next location via locomotives and lowboys. The two motors and the lowboy, coupled together, transport the shields on the teardown track to the setup location for the next longwall panel. (Tr. 288).

The teardown track is a straightaway, divided by three cross-cuts ("chutes"). The chutes are consecutively numbered from the No. 1 to No. 3 chute. The teardown track has a gradual downhill grade in the direction from the No. 1 to the No. 3 chute. (Tr. 510-11, 606-07; Gov. Ex. 1). Utility equipment called "mules" use the chutes to transport the dismantled shields from the longwall area to the lowboy that is situated at the intersection of the chute and the teardown track. The locomotives pull the lowboys carrying the shields beyond the No. 3 chute where the trains exit to go to the next setup location. (Gov. Ex. 1; Tr. 64-65).

The distance between each of the three chutes where they intersected with the teardown track was approximately 150 feet. (Tr. 866). Fluorescent lights were hung at each chute. (Tr. 545-46, 866). Afternoon shift foreman James Bateman, who participated in the accident investigation, testified that the fluorescent lighting and the headlights from the Brookville enabled a person standing at the No. 1 chute to see clearly to the No. 3 chute. (Tr. 511, 513, 613). Although Beckman disputes that the entire teardown track was visible, he testified that he could at least see the No. 2 chute from his Brookville when it was situated at the No. 1 chute, a distance of approximately 150 feet. (Tr. 435-36).

Locomotive operators must be particularly vigilant of the safety of others during longwall moves because of the speed at which the longwall move progresses. (Tr. 208, 498-99). At such times, all personnel involved in dismantling and moving the longwall shields are exposed to the potential hazard posed by the increased rail traffic of multi-ton locomotives transporting multi-ton shields to the next setup area. (Tr. 498-99, 866).

iii. The September 9, 2008, Collision

On September 9, 2008, Mettiki was moving the longwall after it had completed the E-3 panel. (Tr. 65; Gov. Ex. 1). Beckman, operating a Brookville, and Mike Harvey, paired with Beckman and operating a Jeffrey, were assigned to operate their locomotives in tandem on the afternoon shift. Their locomotives were to be used to transport shields from the teardown area to the next setup area. (Joint Stip. 7, 8). Beckman had been assigned to operate the heavier, more powerful Brookville because he had more experience as a locomotive operator. (Tr. 423).

Immediately prior to the accident, Beckman was in the operator's compartment of the lead Brookville that was coupled to Harvey's Jeffrey. Attached to the rear of Harvey's Jeffrey was a lowboy carrying a longwall shield that had been loaded at the No. 1 chute. (Tr. 422-23; Joint Stip. 9, 10). Beckman and Harvey were operating the third pair of locomotives on the teardown track. In front of them, in the vicinity of the No. 2 chute, were Russ Knox and Willie Welch, who were both operating Jeffreys that were pulling an empty lowboy. (Tr. 656, 514). In front of Knox and Welch, were the first pair motors, both of which were Jeffreys, located in the vicinity of the No. 3 chute. These Jeffreys, operated by James Beavers and Randy Sisler, were pulling a lowboy loaded with a longwall shield. (Tr. 656).

The plan was for Beavers and Sisler to leave the teardown area to transport their shield to the longwall setup area for the next panel. (Tr. 660, 663). Knox and Welch were to leave the teardown area behind Beavers and Sisler, at which time they would travel a full circuit for return to the teardown area to pick up another shield. (Tr. 660, 663). Beckman and Harvey were to follow Knox and Welch out of the teardown area to take their shield to the mine hoist, where it would be taken to the surface for maintenance. (Tr. 656).

Before the planned movement of the three pairs of locomotives, Harvey exited his Jeffrey, leaving Beckman who remained in the Brookville. Harvey traveled on foot to find a "boomer" to use to secure the longwall shield to the hoist for its transport to the surface. (Tr. 656-58). After Harvey exited the Jeffrey, the Beckman/Harvey train was blocking a mule on the No. 1 chute that was attempting to cross the teardown track. Consequently, Beckman, acting alone, moved the Brookville approximately 15 feet in the direction of the No. 2 chute pulling the Jeffrey and the lowboy so that the lowboy cleared the No. 1 chute allowing the mule to cross. (Tr. 356).

Shortly after Beckman had moved the Brookville forward to clear the No. 1 chute, as Harvey was re-entering the Jeffrey, Anthony Fitzgerald, the teardown supervisor, instructed Beckman and Harvey to exit the teardown track by following the motors in front of them. The usual practice was for a motorman to use hand signals to ensure that his partner was ready to move. However, Beckman throttled the Brookville, starting the train in motion without first obtaining confirmation from Harvey that he was ready. (Tr. 302). Beckman testified that he believed that Harvey was ready because he saw Harvey release the hand brake that frees the Jeffrey's wheels in preparation for forward movement. (Tr. 301-02).

However, Harvey maintains that he did not indicate to Beckman that he was ready. Harvey testified:

Harvey: After I spoke to Anthony, I climbed up the motor, closed the door and went to sit down. Before I could sit down, the motors took off. The motors were moving. I [sat] down quickly, caught neutral, because it has to be in neutral to start. I caught neutral, started it . . .³

Court: So you got in the cab and it started to move?

Harvey: Yes . . . So I put the motor in neutral, and I started it. Once it started, because we were moving, I released my hand brake. That's not normal for me. Normally I don't release the hand brake until I get air pressure. But the motors were already moving.

Ms. Perlmutter: Then why did you release your hand brake?

Harvey: So the wheels wouldn't be sliding. Hopefully they would be turning, you know. If you're sliding, that gives you very little control . . . And so I released my hand brake, the motor was still in neutral, and I had the throttle, trying to build the air pressure. I don't recall; the air pressure hadn't dropped to zero. It was above 50, but it wasn't at full capacity. But in that scenario, with that many people, you know, the motor's moving, I need air pressure. I'm on a grade. I can't throttle and be in gear. I mean, if I'm throttling it in gear, you know, you're creating speed, and that's the last thing I wanted to do.

Court: Okay. So you wanted to raise the air pressure by keeping it in neutral and racing the engine. Was that, what, for the sanders?

Harvey: That was to raise the rpm so I could safely use the sanders. I don't know how fast it would actually drop the air pressure if I used the sanders without raising the rpms. But I didn't want to take a chance, if I did it and the wheels start sliding, then that creates a whole other problem.

Court: Because if you dropped the air pressure, the automatic brake would engage?

Harvey: If I got to 50 pounds, yes, sir. . . .

³ The locomotive is left in gear when not in use to prevent free-wheeling. (Tr. 666-67). Thus, when the Jeffrey began to move, Harvey shifted out of gear and into neutral before revving the engine. Harvey testified that the Jeffrey remained in neutral until the collision. (Tr. 682).

Ms. Perlmutter: And you said that would create a whole other problem.

Harvey: When the wheels are sliding, you have no control. I mean, it's hard to stop a sliding motor.

(Tr. 665-69).

In sum, Harvey testified that his goal was to release the hand brake to prevent the Jeffrey's wheels from locking so that it could be better controlled. In addition, he proceeded to keep the Jeffrey in neutral in an attempt to raise the psi by revving the engine. This would ensure adequate pressure for the sanders, as well as prevent the emergency brake from automatically engaging if the air pressure fell below 50 psi.

Beckman began moving his Brookville forward without first ensuring that Harvey was ready. Consequently, Beckman did not have the benefit of the braking assistance provided by a Jeffrey that had sufficient psi pressure to utilize sanders and to normally operate the hand brake. While the Brookville train was proceeding down the grade, unbeknownst to Beckman, Beaver and Sisler had stopped in the vicinity of the No. 3 chute, at the bottom of the teardown track, to pick up pneumatic hoses for the longwall shields. (Tr. 679-81). Welch and Knox, who were traveling immediately behind them, stopped safely between the No. 2 and No. 3 chutes. Beckman, however, lost control of the motors, and was unable to stop before crashing into the empty lowboy attached to the Jeffreys of Welch and Knox. Apparently angered because he believed Harvey had not helped him to brake the paired locomotives, Beckman exited his Brookville and yelled to Harvey, "do you think that's fucking fast enough?"⁴ As a result of the collision, Beckman's Brookville landed on top of the empty lowboy. (Tr. 311).

Both Welch and Knox were injured in the collision. (Tr. 681-82). Knox sustained shoulder injuries, but was not hospitalized. Welch, who was situated in the second Jeffrey closer to the lowboy that was struck, experienced the brunt of the collision. (Tr. 524). Welch was taken to the hospital for treatment, although the record does not reflect that his injuries were serious. (Tr. 516-17).

⁴ Mettiki believes Beckman's excited utterance evidenced a cavalier attitude towards the accident. Obviously, crashing into the lowboy was neither an intentional act, nor a pleasant experience. A fair reading of this statement is that Beckman was expressing his displeasure with Harvey because of his belief that Harvey failed to assist him in controlling the locomotives. In fact, Mike Burch, Mettiki's general manager, conceded that Beckman's utterance was motivated by Beckman's belief that, "Harvey in the Jeffrey didn't give him any assistance in slowing down." (Tr. 951).

iv. Mettiki's Investigation

Mine management conducted an investigation to determine the cause of the September 9, 2008, collision. Immediately after the accident James Bateman, the afternoon shift foreman, observed the track conditions in the teardown area. Bateman determined that, with the exception of 15 feet of shiny rail just beyond the No. 1 chute, "there was no wet or muddy conditions. . . . [T]he track was dry and well sanded." (Tr. 517-18). Bateman initially testified that this shiny rail corroborated Harvey's story that Beckman dragged him when the train first started moving until Harvey released his brake. However on cross-examination, Bateman acknowledged that the shiny rail could also have been created when Beckman moved the train forward to let the mule pass through the No. 1 chute. (Tr. 528-29, 561-62).

At the end of the afternoon shift, Bateman began collecting statements from the locomotive operators who had been working at the time of the accident. Bateman interviewed eight of the nine motor operators who were on duty. (Tr. 523). The only motor operator who was unavailable was Welch who was at the hospital. (Tr. 523-24).

Harvey told Bateman that after he had just returned to the Jeffrey, after looking for a boomer to attach to the hoist, the motors started moving before he was positioned in the operator's compartment. As a consequence, Harvey related to Bateman that he immediately had to start the Jeffrey motor in order to release the brake. (Tr. 524). Beckman told Bateman that he thought Harvey "was ready to go" although he now realized that Harvey "was not ready to go." (Tr. 525). Beckman told Bateman that the collision occurred because "they were going too fast," although Beckman did not express an opinion regarding who was at fault. (Tr. 525-26).

Bateman completed his interviews during the early morning hours of September 9, 2008. At trial, Bateman was requested to explain his conclusion regarding the cause of the accident. Bateman testified:

Bateman: My conclusion was that Mr. Beckman did not wait for Mr. Harvey to get in his motor before – or his motor was in motion before Mr. Harvey was ready to go. They dropped down off of the grade and struck the lowboy that was parked between No. 2 and No. 3 chute.

Ms. Perlmutter: Is there anything that Mr. Harvey could have done differently?

Bateman: Been ready to go.

(Tr. 540).

Bateman provided his investigation notes to Frank Sanders, manager of underground operations. Sanders and safety director Terry Savage continued to investigate during the next five days. They reviewed the Brookville's maintenance records and concluded that the accident was not caused by a mechanical malfunction. They also determined that the Jeffrey had no mechanical problems that contributed to the accident. (Tr. 782, 867).

Together Sanders and Savage conducted approximately ten additional interviews, questioning some individuals more than once. (Tr. 771-72, 882-83). The day after the accident, during the afternoon shift on September 10, 2008, Savage and Sanders interviewed numerous miners including Bateman, Fitzgerald, Beckman, Harvey and Knox. (Tr. 771-72). They also interviewed eye witnesses who were near the teardown track who observed the motors moving before Harvey was fully in the operator's deck of the Jeffrey. (Tr. 861). They also learned that some motor operators were uncomfortable working in tandem with Beckman because he did not give them enough time to check their equipment before getting started.

Savage testified that Knox, in particular, expressed his desire not to be paired with Beckman because of his conduct on the rail. (Tr. 772-73). Sanders testified that in addition to Knox, Harvey and Welch also complained about Beckman running at high rates of speed, and Beckman's refusal to stop for sand to refill the sanders. (Tr. 860). As a result of their interviews, consistent with the procedures outlined in Mettiki's Employee Handbook for a major offense,⁵ Beckman was suspended pending completion of Mettiki's investigation. (Resp. Ex. 3, p.7).

An investigation committee was created to determine Beckman's fate. (Tr. 957). The committee consisted of Mike Burch, the general manager, Sanders, manager of underground operations, Savage, safety director, and Horace Joseph ("Jody") Theriot, III, manager of safety and human resources. Savage summarized the committee's conclusion with respect to the cause of the accident. Savage testified:

Yeah, late in the investigation. I mean I don't know exactly what day it was out of those five days. It was sometime during that investigation, we determined that what had happened was, Harry was running the lead motor. He was in charge of that trip. He took off before Mr. Harvey was ready. Actually before the Jeffrey locomotive was even started, the engine was started on it, it started to move. The distance it traveled gave very little time for Mr. Harvey to react. By the time Harry figured out what was going on, it was little time for him to stop it. And there was already 11 tons of steel, rolling stock steel, going down the rail that was – couldn't stop.

(Tr. 774).

⁵ "A major offense is a violation of the Rules of Conduct or the law which may directly and seriously affect safety or the operations. . . . A major offense can result in termination even if it is a first offense." Among the examples of a major offense is: "[u]nsafe acts or practices which endanger life or property." (Joint Stip. 10, 11; Resp. Ex. 3, p.6) (emphasis in original).

As noted above, Bateman who performed the preliminary investigation, also concluded the cause of the accident was Beckman's failure to make certain that Harvey was ready before Beckman moved his Brookville forward. (Tr. 540). Although Bateman stated that "it was not my decision to make," he apparently believed that termination was too harsh of a sanction. (Tr. 568-79). However, Bateman did not believe that Beckman's longstanding participation as a miners' representative, or past safety complaints, influenced the company's conclusion that Beckman's misjudgment was the underlying cause of the accident. (Tr. 548-49).

The investigation committee ultimately recommended the termination of Beckman. Savage summarized the reasons for the committee's recommendation:

It was a very hard recommendation for all of us to make. There was a lot of thought that went into that process. It got down to Harry's conduct at the time of the accident, leading up to the accident, the way he'd acted and interacted with the other motor operators, and his response at the end of the accident, where he jumped off the locomotive and said, is that fast enough? And he didn't take – he acted in disregard of people's safety. He took off before Mr. Harvey was ready. He wasn't remorseful at the end of the accident. Only to say was that fast enough? He didn't take consideration that maybe someone was hurt, and there were two individuals that were injured at that time. Just those facts alone right there, that he was not remorseful for what he'd done, and he never took responsibility during the whole course of the interviews, that he'd done anything wrong. . . . Harry said that he thought he was being pushed. He didn't know why he couldn't stop. He didn't know what Mr. Harvey was doing. But he never checked with Mr. Harvey to see what he was doing, or never asked Mr. Harvey if he was ready to go.

(Tr. 775-76).

Consistent with the committee's recommendation, Beckman was terminated on September 15, 2008. The reason given for Beckman's termination was that he committed a major offense under the Code of Conduct. (Joint Stip. Nos. 15, 16). Consistent with Bateman's opinion, both Savage and Sanders testified that neither Beckman's service as a miners' representative nor his safety related complaints were factors in Beckman's discharge. (Tr. 548-49, 774, 777, 867-68).

III. Further Findings and Conclusions

a. Analytical Framework

Section 105(c) of the Mine Act prohibits discriminating against a miner because of his participation in safety related activities. Congress provided this statutory protection to encourage miners “to play an active part in the enforcement of the Act” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 95-181, at 35 (1977), *reprinted* in Senate Subcomm. on Labor, Committee on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). It is the intent of Congress that, “[w]henver protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made.” *Id.* at 624.

The Secretary has the burden of proving a *prima facie* case of discrimination. In order to establish a *prima facie* case, the Secretary must establish that Beckman engaged in protected activity, and that Beckman’s September 15, 2008, discharge was motivated, in some part, by that activity. See *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

Mettiki may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or, that Beckman’s termination was not motivated in any part by his protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Mettiki may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity, *i.e.*, Beckman’s accident, and that it would have taken the adverse action for the unprotected activity alone. See also *Jim Walter Resources*, 920 F.2d at 750, *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission’s *Pasula-Robinette* test).

The Secretary contends that Beckman’s protected activities were a motivating factor in Mettiki’s decision to terminate Beckman immediately after his involvement in the September 9, 2008, locomotive accident. The protected activities identified by Beckman that allegedly influenced Mettiki’s decision are: (1) Beckman’s longstanding participation as a miners’ representative; (2) his April 17, 2007, complaint concerning high water encroaching track rail that rendered sanders used for traction and braking inoperative; and, (3) his subsequent March 15, 2008, complaint reiterating his concern for the hazard posed by high water on tracks, as well as the need for additional track ballast.

While Mettiki freely admits that it had knowledge of these protected activities, it contends that they played no role in Beckman’s discharge. Rather, Mettiki asserts that its

accident investigation that revealed Beckman was at fault, and Beckman's reticence to accept responsibility, are the sole motivating factors that influenced its decision.

b. Mettiki's Claimed Business Justification

Beckman was terminated immediately following the September 9, 2008, locomotive accident. The Secretary, in essence, contends that Mettiki's claimed rationale for terminating Beckman is an insincere attempt to hide its discriminatory motive. Alternatively, the Secretary argues that, even if Mettiki was motivated by Beckman's role in the accident, Mettiki was also motivated, at least in part, by Beckman's protected activity. Nevertheless, the September 9, 2008, accident was serious in that it resulted in the injury of two miners, one of whom required hospital treatment.

The parameters for analyzing a claimed business justification for disciplining a miner who has brought a discrimination claim before this Commission are well settled. In this regard, the "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990) (citations omitted).

The Commission has addressed the proper criteria for considering the merits of an operator's asserted business justification:

Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgement our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities.

Sec'y of Labor o/b/o Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2516-17 (Nov. 1981) (citations omitted), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The Commission subsequently further explained that, while a proffered business justification must be facially reasonable, it is not the role of the judge to substitute his or her judgement for that of the mine operator. The Commission stated:

[T]he reference in *Chacon* to a “limited” and “restrained” examination of an operator’s business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgement or a sense of “industrial justice” for that of the operator. As we recently explained, “Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they would have motivated the particular operator as claimed.”

Haro v. Magma Copper Co., 4 FMSHRC 1935, 1938 (Nov. 1982) (citations omitted).

Mettiki has stipulated that, other than Beckman, no miners have been suspended or terminated for safety violations since the Mountain View Mine opened in July of 2005. (Tr. 907). Thus, the Secretary seeks to rely on Mettiki’s failure to impose disciplinary sanctions for other accidents at Mountain View to demonstrate that Beckman was the victim of disparate treatment as a consequence of his protected activities.

The Secretary relies on two locomotive accidents, both involving similar facts, that occurred before and after Beckman’s discharge. The first accident, involving Beckman, occurred during the afternoon shift on June 6, 2008. (Gov. Ex. 14). On that day, Jason Kelly operating a trailing Brookville, and Beckman operating a paired Jeffrey with two empty ballast cars in tow, were assigned to transport the ballast cars to the surface via the hoist track. At the bottom of the hoist track, Kelly and Beckman decided to decouple the Brookville locomotive. They attempted to push the empty ballast cars with the Jeffrey up to the middle of the hoist track where the hoist coupler was located.

While traveling up the track, the Jeffrey locomotive broke traction and stopped. Kelly exited the Jeffrey to hand sand the outby rail. The Jeffrey again lost traction and traveled back down the hoist track colliding with the Brookville that had been decoupled. The collision resulted in the derailling of both ballast cars and one end of the Jeffrey locomotive. During the June 9, 2008, accident investigation, Beckman stated that he had previously experienced a runaway locomotive when a motor broke traction and traveled to the end of the hoist track. (Gov. Ex. 14). Despite Beckman’s involvement in the accident, and a prior similar incident, he was not disciplined in any way as a result of his runaway Jeffrey. (Tr. 421).

A second similar accident, involving Josh Surguy, occurred subsequent to Beckman's discharge. On May 7, 2009, Surguy lost control of his locomotive as it broke traction climbing the elevated hoist track. (Tr. 810-11; Gov. Ex. 16). Although both accidents involved collisions, the Beckman and Surguy hoist track accidents did not result in injuries.

Neither Beckman nor Surguy were disciplined because it was determined that it was not uncommon for locomotive operators to attempt to climb the hoist track to reach the coupling device that had failed to descend from the flat area of the track. After the Surguy accident, additional weight was added to the hoist line to provide inertia that prevents the line from becoming stuck at the flat portion of the elevated hoist track. (Gov. Ex. 15).

The Secretary also relies on an incident involving Doug Lewis. The incident occurred on September 5, 2007, when Doug Lewis was observed by a mine inspector welding pieces of a continuous miner ripper head while he was exposed to the elevated boom. As a result of this incident, Citation No. 6602799 was issued citing a violation of the mandatory safety standard in 30 C.F.R. § 75.1726(b) that prohibits working under machinery that has not been securely blocked. (Gov. Ex. 17). Lewis was not disciplined as a result of this incident.

The Secretary seeks to infer that Beckman's discharge constitutes disparate treatment because no one had been previously discharged as the result of an accident at Mettiki's Mountain View Mine. However, to be successful, a claim of disparate treatment requires a showing that another employee who was guilty of the same or more serious offense escaped the disciplinary fate suffered by the complainant. *See Dreissen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 332 n. 14 (Apr. 1998) *citing Schulte v. Lizza Indus., Inc.* 6 FMSHRC 8, 16 (Jan. 1984); *Chacon*, 3 FMSHRC at 2512.

In other words, analysis of the claimed justification for disciplinary action against a miner who was involved in an accident, who now is claiming discrimination, must be viewed in the context of the particular circumstances surrounding the accident. Put another way, apples must be compared to apples. Thus, the Secretary's attempt to equate the hoisting accidents, and Lewis' exposure under unblocked equipment, to Beckman's collision on the teardown track is an exercise in futility.⁶

⁶ The Secretary also relies on Show's testimony that there were additional incidents of runaway locomotives that did not result in disciplinary actions. (Tr. 163-64). However, no evidence concerning the details of these accidents was presented. Consequently, these reported incidents do not constitute evidence of disparate treatment.

Beckman's accident resulted in injuries. Although reasonable people may differ as to whether it was Beckman or Harvey who was primarily responsible for the accident, the company asserts that its investigation revealed that Beckman was at fault. The company's conclusion was based on information provided by Beckman and Harvey, as well as the observations of eye witnesses. As previously noted, this Commission does not have the authority to act as an arbitration or grievance board. *Chacon*, 3 FMSHRC at 2516-17. Thus, in the absence of any evidence of bad faith, the conclusions reached by Mettiki as a result of its investigation are not subject to review in this proceeding.

Rather, the narrow focus is on whether the mine operator's claimed justification is credible, and, if so, whether the adverse action would have been taken by the company regardless of whether the complainant had engaged in protected activity. *Id.* Consequently, the only issue for resolution is whether Mettiki's claim that it discharged Beckman because of his role in the September 9, 2008, accident is sincere, rather than an attempt to mask discrimination. The fact that Beckman was the first person to be terminated after an accident at Mountain View, alone, does not provide an adequate basis for concluding that the company's claimed justification is a disingenuous attempt to conceal a retaliatory motive.

c. Hostility Towards Protected Activity

Having concluded that Mettiki's claimed business justification is plausible, the focus shifts to whether Mettiki was also influenced, in any way, by Beckman's protected activity. The Commission recognizes that mine operators sometimes attempt to mask their retaliatory motives by purportedly relying on activity or events unrelated to the Mine Act as the sole justification for the adverse action complained of. *Chacon*, 3 FMSHRC at 2516-17. Direct evidence of a discriminatory motive is rare. Thus, in determining whether Mettiki's decision to terminate Beckman was also based, in any part, on a hostility towards Beckman's protected activities, the Commission looks to indirect or circumstantial evidence of discrimination. In this regard, the Commission has stated:

[D]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'

Chacon, 3 FMSHRC at 2510 (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 8th Cir. 1965). Some of the more common circumstantial indicia of discriminatory intent are knowledge of the protected activity, coincidence in time between the adverse action and the protected activity, hostility or animus towards the protected activity, and disparate treatment of the complainant. *Id.*

I. Knowledge of Protected Activity And Coincidence in Time

In this case, the only material circumstantial indicia clearly demonstrated by the Secretary, which Mettiki admits, is Mettiki's knowledge of both Beckman's participation as a miners' representative, and his April 17, 2007, and March 15, 2008, safety related complaints. With respect to coincidence in time, the lynchpin of many discrimination complaints, there is an insufficient nexus between the relied upon protected activity and the adverse action. The Secretary relies on Beckman's longstanding participation, during his 28 years as a Mettiki employee, as a representative of miners at both of Mettiki's mines, including his accompaniment of mine inspectors in the months prior to his termination. Specifically, the Secretary, in her post-hearing brief, notes that Beckman served as a miners' representative seven times during the period from November 2007 until his last participation on August 5, 2008. (Sec'y Br. at 10).

However, to demonstrate that there is indirect evidence of a discriminatory motive with respect to coincidence in time requires a rational connection between Beckman's participation in inspections and his termination. *See Garden Creek Pocahontas*, 11 FMSHRC 2148, 2153 (Nov. 1989) *citing Mid-Continent Resources, Inc.*, 6 FMSHRC at 1132, 1138 (there must be a rational connection between the evidentiary facts and the adverse action complained of). Frequent participation as a miners' representative, alone, does not give rise to a coincidence in time inference of discrimination when the representative is terminated immediately after engaging in unprotected activity. In such cases, an inference of discrimination requires credible evidence of hostility towards the complainant's role as a miners' representative. Here, there is no credible evidence of hostility towards Beckman's activities as a miners' representative. By his own admission, Beckman had been a miners' representative for many years. Moreover, Mettiki permitted Beckman to substitute as a miners' representative when other miners declined to travel with inspectors.

Nor are Beckman's April 17, 2007, and March 15, 2008, complaints circumstantial evidence of a discriminatory motive with respect to coincidence in time. These complaints, having occurred approximately seventeen months and six months prior to Beckman's termination, without evidence of any material intervening hostility, are too remote in time to reflect a causal connection. *Id.* Consequently, the Secretary has failed to demonstrate a coincidence in time between Beckman's protected activities and his discharge that constitutes indirect evidence of discrimination.

ii. Animus

With regard to Mettiki's alleged animus toward miners' representative participation, the Secretary has presented nothing more than speculation without evidentiary support. For example, in her brief, the Secretary questions the propriety of Mettiki's miners' representative rotation system that consisted of 19 registered miners' representatives. These representatives were supposed to accompany inspectors on a rotating basis. It was not

uncommon for these representatives to decline to accompany an inspector. Consequently, the Secretary infers that Mettiki “recruit[ed] miners’ representatives who they knew would decline to travel [with inspectors], but whose inclusion on a shift’s roster of miners’ representatives would reduce the frequency with which bona fide miners’ representatives could travel.” (Sec. Br. 13). There is no record evidence to support such speculation.

Richard Show, currently an MSHA inspector, last worked for Mettiki on April 1, 2005. Show’s testimony concerning Mettiki’s attitude towards miners accompanying inspectors was equivocal. Show testified that Mettiki management was “open to people traveling with inspectors,” but he also opined that Mettiki neither encouraged nor discouraged miners’ representative participation. (Tr. 85). Show initially testified that other miners’ representatives were not asked if they wanted to accompany an inspector when the scheduled representative declined to travel. However, on cross examination, Show testified that the representatives decided among themselves who would travel when an inspector arrived at the mine. (Tr. 87, 169-70).

Moreover, Show’s contradictory testimony that substitutes were not encouraged is belied by Beckman’s testimony that he frequently accompanied inspectors when others declined. (Tr. 256). In fact, Beckman testified that he traveled with both state and federal inspectors, sometimes as often as three days in a row. (255-56). Thus, there is no evidence that Mettiki had a policy of interfering with the rights of miners to accompany an inspector.

The Secretary also relies on Show’s testimony to suggest that Mettiki has a history of discriminating against miners who were representatives. However Show could offer no meaningful evidence of past discrimination. In this regard, Show testified that, in the past, several individuals who were miners’ representatives were terminated by Mettiki. However, Show did not provide the names of these individuals. Moreover, Show admitted that their terminations were not necessarily motivated by their activities as miners’ representatives. In fact, Show conceded that there were “a lot of circumstances [behind their terminations] that [I didn’t] know about.” Finally, Show testified that he did not experience any discrimination as a result of his role as a miners’ representative while employed by Mettiki. (Tr. 85-93). Significantly, even Beckman conceded that he never experienced any tangible discrimination as a result of his miners’ representative activities, alleging “[i]t was just, you know, the expressions they made” (Tr. 263-64).

Finally, it is noteworthy that Beckman’s previous hoist track accident occurred on June 6, 2008, after Beckman’s safety complaints to Savage and Krieser. Beckman was not disciplined as a result of this accident. Mettiki’s failure to discipline Beckman, when it had the opportunity, seriously undermines the Secretary’s assertion that Mettiki harbored animosity towards Beckman because of his role as a miners’ representative or his history of safety complaints.

In fact, the Secretary's counsel concedes that there is no significant evidence of animus in this case:

I'll just come right out and say, there's not a lot of evidence of animus in the case. There is some evidence of animus in this case. Evidence of animus is not required. In fact, the direct evidence of animus is expressly recognized as very rarely encountered in retaliation cases. What we're looking at is the totality of the circumstances here, whether or not – and I'm sure we'll have an argument in a little bit about whether or not we've made our prima facie case. And I can reserve all of this until then.

(Tr. 280; Sec'y Br. at 42).

The Secretary's reliance on inference is misplaced. In effect, the Secretary attempts to infer animus in response to protected activity, rather than demonstrating evidence of animus to support an inference of discrimination. Thus, the Secretary has impermissibly bootstrapped an unsubstantiated inference of animus to infer Beckman was the victim of discrimination.

The Secretary seeks to assume a company animus towards Beckman because he engaged in protected activity. The Secretary further seeks to use this unsubstantiated inference of animus to arrive at an inference of a discriminatory motive. The Secretary's approach begs the issue. Contrary to the Secretary's assertion, evidence of animus is required. As the proponent bearing the burden of proof, the Secretary must establish the presence of animus by material evidence before animus can serve as indirect evidence of discrimination. The Secretary has failed to do so as an unsupported inference of animus will not suffice.⁷

iii. Disparate Treatment

The Secretary asserts that Mettiki's responses to Beckman's safety related complaints evidence disparate treatment because they were "punitive" in nature and "revealed [a] disdain for safety related complaints." (Sec'y Br. at 43). To support this assertion the Secretary relies on the following: (1) Savage's April 17, 2007, e-mail to mine management identifying Beckman as the source of a track water complaint; (2) the assignment of Beckman, with the assistance of a contract employee, to remove the subject water hazard during the next maintenance shift on April 18, 2007; and (3) Krieser's March 19, 2008, written response to Beckman's track water and ballast complaints.

⁷ The Secretary's reliance in her brief on *Sec'y o/b/o Garcia v. Colorado Lava*, 24 FMSHRC 350, 354 (Apr. 2002) for the proposition that it is permissible to infer an operator's animus because of protected activity is misplaced. (Sec'y Br. at 42). The Commission, in *Colorado Lava*, merely reiterated its longstanding view, articulated in *Chacon*, that discrimination can be shown through indirect evidence such as disparate treatment, animus and coincidence in time, all of which are lacking in this case. *Id.* at 354. Thus, indirect evidence of discrimination must be shown and may not be presumed.

It is not uncommon for mine operators to keep written safety related records that identify potential hazardous conditions that require remedial action. These records, such as pre-shift inspections of equipment, and pre-shift and on-shift examination reports of underground conditions, routinely contain the names of the individuals who seek corrective measures. Savage testified, without contradiction, that it was company policy to provide written notification to all concerned members of management summarizing safety complaints and their origin to ensure that all complaints were adequately addressed. (Tr. 760-62). Such written notification to management containing the nature and source of safety complaints, alone, is not facially discriminatory.

As a general proposition, assigning the miner who identified a hazardous condition to remedy the condition does not constitute disparate treatment provided that the assignment is consistent with that miner's routine job duties and the work assignment is not part of an ongoing pattern of retaliation. Here, Beckman has conceded that track maintenance was within the scope of his job duties in that he had remedied track conditions in the past. (Tr. 342). There is no evidence of a continuing pattern of undesirable job assignments or other facts that would suggest that Beckman was the victim of retaliatory disparate treatment. Consequently, the timely assignment on the next maintenance shift of Beckman, a maintenance worker, to remedy the water conditions that were the subject of his complaint, without more, is not indirect evidence of a retaliatory motive.

Nor is Kreiser's March 19, 2008, written response to the safety issues raised by Beckman, concerning track water and ballast, evidence of disparate treatment. Rather, Kreiser's response demonstrated that Beckman's complaints were taken seriously, and, Krieser encouraged Beckman to inform management of any future safety related conditions that may concern him.

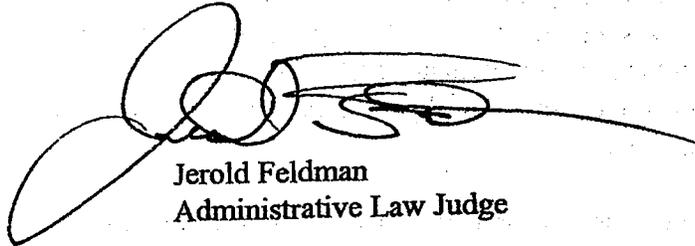
Significantly, Bateman testified that neither Beckman's longstanding participation as a miners' representative, nor his past safety complaints, influenced Mettiki's accident investigation that determined that Beckman's misjudgment was the underlying cause of the accident. (Tr. 548-49). Bateman's opinion is entitled to great weight in that he is, in essence, a friendly witness who apparently believed that Beckman's termination was too harsh of a sanction. (Tr. 568-79).

Mettiki has stipulated that, with the exception of Beckman's negligent operation of locomotives, it considered Beckman's work performance to have been more than adequate. (Tr. 985). While Beckman's discharge after 28 years of Mettiki employment may be unfortunate, the scope of this discrimination proceeding is narrow. As previously noted, the issue is not whether Mettiki's disciplinary action was just or wise. *Chacon*, 3 FMSHRC at 2516-17. Rather, the only issue is whether Mettiki's asserted motivation for discharging Beckman, for unprotected conduct alone, is as claimed.

In the final analysis, to prevail, the Secretary must present adequate evidence demonstrating that Mettiki harbored resentment towards Beckman's safety related activities that influenced, at least in part, Mettiki's decision to discharge Beckman. However, there is an absence of meaningful evidence that Beckman was the victim of disparate or hostile treatment during his long term participation as a miners' representative, or, during the approximate 17 month period between his initial April 2007 complaint and his September 2008 discharge. Consequently, the Secretary has failed to demonstrate that Mettiki's decision to terminate Beckman immediately following his September 9, 2008, locomotive accident was motivated, in any part, by Beckman's protected activities.

ORDER

In view of the above, **IT IS ORDERED** that the discrimination complaint filed by the Secretary of Labor on behalf of Harry Lee Beckman **IS DENIED**. Accordingly, **IT IS FURTHER ORDERED** that Docket No. WEVA 2009-1526-D **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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January 25, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2008-751
Petitioner	:	A.C. No. 46-01433-143260
	:	
v.	:	
	:	
	:	
CONSOLIDATION COAL COMPANY,	:	Loveridge No. 22
Respondent	:	

DECISION

Appearances: John Strawn, Esq. and Jennifer Klimowicz Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Petitioner; Todd C. Myers, Esq. and Rebecca J. Oblak, Esq., Bowles Rice McDavid Graff & Love LLP, Lexington, Kentucky and Morgantown, West Virginia, respectively, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the petition for a civil penalty filed by the Secretary of Labor (“Secretary”) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq. (the “Act”) charging Consolidation Coal Company (“Consol”) with seven violations of mandatory standards and seeking civil penalties of \$49,600.00 for those violations. The general issue before me is whether Consol violated the cited standards as charged and, if so, what is the appropriate civil penalty to be assessed for those violations. Additional specific issues are addressed as noted below.

Order Number 7099399

This order, issued pursuant to section 104(d)(2) of the Act, alleges a “significant and substantial” violation of the standard at 30 C.F.R §75.400 and charges as follows¹:

¹ Section 104 (d) of the Act provides as follows:

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he

Combustible materials in the form of loose coal, coal fines and coal dust is allowed to accumulate on the mine floor and along the coal ribs of the 9-South, 058-0 MMU section from SS# 3/115 to SS# 3/116. The combustible materials are powder dry. The combustible materials measured as follows: (1) The accumulations along the right rib of the #3 entry measured 6 to 12 inches deep by 18 to 24 inches wide by 165 feet in length. (2) The accumulations along the left rib of the #3 entry measured 6 to 14 inches deep by 23 to 44 inches wide by 165 feet in length. (3) The accumulations along in the haulroad from SS# 3/115 to SS# 3/116, located in the #3 entry, measured 1 to 6 inches deep by 165 feet in length. This condition is obvious, extensive and the preshift examiner should have known of this condition. The mine operator was previously put on notice for the same type of condition. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

The cited standard provides that “[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be

also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1) a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.”

On October 24th, 2006, Inspector Ronald Postalwait of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) inspected Respondent’s Loveridge No. 22 Mine as part of a five day spot inspection for methane pursuant to section 103(i) of the Act. The mine is a large underground coal mine and, at the time of inspection, released in excess of one million cubic feet of methane each day. Upon arrival, Postalwait reviewed the preshift examination book to ascertain the conditions recorded by the examiners. He then entered the mine at approximately 8:00 a.m. and traveled to the 9 South Mains section accompanied by United Mine Workers of America (“UMWA”) Safety Committee representative Tanya James and by Respondent’s safety representative Wayne Conaway.

Once on the section, Postalwait proceeded to the faces to conduct spot checks for methane. While traveling between the No. 1 and No. 3 entries, he observed what he considered to be an accumulation of coal in the No. 3 entry. The No. 3 entry was used as a haul road by shuttle cars transporting coal mined at the face by the continuous miner to the permanent belt. The material had not been recorded in the preshift book. Postalwait determined that the accumulation against the ribs had been created by the initial mining process rather than by rib sloughage or spillage from shuttle cars. The coal had not been cleaned up and was left stacked against the ribs.

According to Postalwait, the accumulation consisted of loose coal, coal fines, and coal dust and was dry and black. Along the right rib he found the accumulation measured 6 to 14 inches deep, 23 to 44 inches wide, and 165 feet in length. In the center of the entry in the haul road, he found the accumulation to be from 1 to 6 inches deep for 165 feet. James assisted Postalwait in measuring the accumulation. I find that these observations by Inspector Postalwait to be fully corroborated by James, and that this has established by a preponderance of evidence that a substantial coal accumulation existed in the No. 3 entry and that the Secretary has sustained her burden of proving the violation as charged.

In reaching this conclusion, I have not disregarded Respondent’s claim that the accumulation was not as large as the inspector described. However, neither the section foreman, Brandon Simpson, nor Conaway protested to Inspector Postalwait at the time he issued the order that they disagreed with his observations. Indeed, when Postalwait showed Simpson the accumulation, and stated that he was issuing an order, Simpson did not dispute the existence of the accumulation or that it was a violation. Simpson said only that he would have the accumulation cleaned up. Moreover, both Respondent’s witnesses conceded at trial that in fact there was an accumulation in the area cited and Conaway admitted that he could not dispute the inspector’s measurement of the length of the accumulation.

The Secretary argues that the violation was also “significant and substantial.” A violation

is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commissioner explained:

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

See also Austin Power Co. v. Sec'y, of Labor 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *see also Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

The credible testimony establishes a reasonable likelihood of a fire occurring because the coal accumulation was extensive and ignition sources were present. As previously noted, an accumulation of coal extended 165 feet in the No. 3 entry along both ribs and in the haul road in the center of the entry. The ignition sources present in the accumulation were the trailing cables of the electric face equipment and the electric and battery powered shuttle cars operating in the haul road.

Damage to the electrical components of the cables or the shuttle cars could cause them to ignite the coal. The 995 volt trailing cable for the continuous miner was laying in the accumulation and was covered by the coal for approximately half its length. The 600 volt trailing cable for the loading machine was also laying in the accumulation and was covered by the coal for approximately half its length as well. Shuttle cars on the roadway traveled directly through the accumulation. They could create sparks either from their own trailing cables, if AC powered, or from their batteries if DC powered.

As noted, the evidence shows that damage to the electrical components could occur in several ways. The trailing cables could be damaged by being pulled tightly around corners or by being run over by mobile equipment such as shuttle cars. The ensuing damage to the internal conductors is not

always apparent from looking at the external cable jacket. Damaged internal conductors can cause an arc which creates sparks and heat sufficient to ignite coal accumulations. Indeed, Postalwait had seen coal ignited by arcs created by trailing cables. Batteries in DC powered shuttle cars can also be damaged or simply have a component fail and create sparks which can ignite coal.

The characteristics of the coal in the accumulation also heightened the risk of a fire. Postalwait took samples of the material in the accumulation which were analyzed and found to have a very high combustible content, *i.e.* only 22% to 25% incombustible content. Moreover, the accumulation was composed largely of dry fine coal, which the record shows is easier to ignite.

The likelihood of a fire occurring was also increased because of the time the condition was allowed to exist. According to the credible testimony of Postalwait and James, the accumulation existed for more than one shift and had not been reported in the preshift examination. No one was attempting to clean up the coal when it was discovered by the inspector. In the course of continuing mining operations it may reasonably be inferred that the accumulation would have remained in place with the ignition sources present and that a fire was therefore reasonably likely to occur. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997); *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988).

The fourth prong of the *Mathies* test requires the Secretary to establish that the injury from an occurrence will be of a reasonably serious nature. The extensive accumulation of coal cited herein presents a significant amount of fuel for a fire. The Loveridge No. 22 Mine is a gassy mine and a fire could result in an explosion. It may therefore be inferred that serious injuries such as from smoke inhalation would be reasonably likely to occur. The record shows that during normal mining, 10 miners would be exposed to serious injuries including two roof bolters, the miner operator, ventilation tube man, loader operator, shuttle car operators, and others who worked in by the accumulation and would be forced to evacuate in the event of a fire. It may reasonably be inferred that miners attempting to fight a fire would also be exposed to serious injuries.

In reaching these conclusions, I have not disregarded Respondent's argument that a fire was less likely to occur because its ventilation plan provides for watering roadways as they are used by mobile equipment and that its preshift/onshift reports show watering was performed in Entry No. 3. However, Respondent was apparently not following its plan in Entry No. 3 because records show that it was dry when Postalwait and James first observed it. They both also testified that the accumulation was dry throughout its entire depth. Furthermore, Respondent's preshift/onshift reports do not specify where the Respondent watered in the Entry No. 3 or even how close they came to the accumulation. Finally, Respondent has demonstrated a pattern of failing to water its haul roads in that it had been previously cited for failing to water its haul roads. James also testified credibly that the union had previously reported to management to complain that the haul roads were not being watered down.

The Secretary further maintains that Respondent's negligence was high and its violation was an "unwarrantable" failure to comply with the regulation. Unwarrantable failure involves aggravated conduct constituting more than ordinary negligence. *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (quoting *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987)). This Commission has held that an unwarrantable failure may be established by showing that a violative condition or practice was not corrected prior to the issuance of a citation or order because of "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Buck Creek*, 52 F.3d at 136; *Emery Mining*, 9 FMSHRC at 2003-04. In analyzing an unwarrantable failure violation, the Commission looks at all the facts and circumstances to see if any aggravating factors exist. The Commission has held that the length of time that the violation existed, the extent of the violative condition, whether the operator was 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 are all relevant to an operator's aggravated conduct. *IO Coal Company, Inc.*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001).

I find that the credible evidence in this case demonstrates that Respondent in fact engaged in aggravated conduct and high negligence. The credible evidence shows that the coal accumulation was obvious, extensive, and posed a high degree of danger to miners. It had also existed for a significant length of time and despite being on notice to prevent such violations from occurring, Respondent took no step to address the accumulation.

The testimony at trial established that the coal accumulation was obvious and extensive. Postalwait and James could see the accumulation before they reached it. The accumulation was black and stood out from the white rock dusted ribs. The loose coal, coal fines, and coal dust also extended over 165 feet along both ribs in Entry No. 3 and in the center of the roadway.

The inspector also determined that the accumulation had existed for some duration. When coal is initially mined it is wet or damp. The accumulation, however, was dry throughout to the mine floor. According to the inspector, it would have taken at least two shifts to have dried out to that extent. James corroborated Postalwait's determination and stated further that the accumulation could not have formed in one shift.

Respondent had also been placed on notice that greater efforts were required to comply with the regulation. Postalwait had previously cited Respondent for violations of 30 C.F.R. § 75.400 in the same section and had also admonished Respondent's management about the need to make greater efforts to comply with the regulation. The record shows that Respondent had 108 violations of the cited regulation which became final orders in the 12 months prior to the issuance of the subject order.

The accumulation also posed a high degree of danger to miners because of the threat of a mine fire. Despite that danger, no one was cleaning the accumulation when Postalwait first observed it and the condition had not even been reported in the preshift examination. *See Consolidation Coal Co., 23 FMSHRC 588, 594 (June 2001); Windsor Coal Co., 21 FMSHRC 997, 1001-04 (Sept. 1999).*

Within the above framework of credible evidence, I find that the Secretary has met her burden of proving that the violation was the result of Respondent's unwarrantable failure and high negligence.

Order Number 7099401

This order, also issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. §75.360(a)(1) and charges as follows:

The pre-shift examination for methane and hazardous conditions that was conducted on October 24th, 2006, for the day shift crew on the 9-South, 058-0 MMU is inadequate in that the following conditions were observed by this inspector. Refer to the following violations for the conditions found: (1) Violation number # 7099399 issued on October 24th, 2006. (2) Violation# 7099400 issued on October 24th, 2006. The listed conditions would be obvious to any prudent person especially an examiner charged with the responsibility of conducting an examination of the mine. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard. Eleven violations have been issued under section 75.360(a)(1) of the 30 CFR at this mine since July 10th, 2006.

The cited standard, 30 C.F.R. § 75.360(a)(1), provides as follows:

Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8 hours interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

Inspector Postalwait opined that the preshift examination for the day shift on October 24th, 2006, was inadequate because it failed to record hazardous conditions *i.e.* a large accumulation of coal of over 165 feet in the roadway and along both ribs of the No. 3 Entry in the 9 South Mains section of the mine. As previously discussed in connection with Order No. 7099399, the incombustible content of the accumulation was also low and there were potential ignition sources

present.

The preshift examination for this area was performed between 5:00 and 7:00 a.m. on October 24th, 2006, by Rod Cummings, the section foreman on the preceding midnight shift. Cummings had called out his report to the surface at 7:20 a.m. before he exited the mine. Simpson, as the oncoming shift foreman, received the call. The day shift began at 8:00 a.m. and there was no production on that shift prior to the order being issued. The preshift report does not list any of the hazardous conditions described in the order.

It may reasonably be inferred that the accumulation existed at the time of the preshift examination based on Inspector Postalwait's observations during his inspection and the admissions by Respondent's witnesses. Postalwait found that the coal was dry throughout the accumulation to the mine floor and, based on his experience, opined that it would have taken at least two shifts to have dried to that extent from its initial mining. He further opined that the accumulation was created in the initial mining process and not by spillage from shuttle cars or rib sloughage. Union Representative James agreed with Postalwait that the accumulation had existed for more than one shift and added that an accumulation of that magnitude could not have been formed in one shift.

The testimony of Respondent's witnesses at trial also establishes that the accumulation was present during the preshift examination. Company representative Conaway testified that Foreman Simpson told him that he was aware of the accumulation when he informed Simpson of the order. In addition, Simpson himself testified that the miner could advance 25 feet in a shift. Based on that distance, it would have taken several shifts for the miner to create the cited 165 feet of accumulation. Under the circumstances, I find that the violation has been proven as charged.

In reaching this conclusion, I have not disregarded Respondent's argument that since there is no dispute that a preshift examination was conducted for the day shift on October 24th, 2006, there was no violation as charged. It is arguing, in effect, that a preshift examination meets the requirements of the cited standard even if the examiner overlooks or ignores extant hazardous conditions. Such an "examination" would, of course, be useless or worse than useless because it would create a false sense of safety.

Indeed, the Commission has determined that preshift examinations are fundamental in assuring a safe work environment for the miners. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997); *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). "The preshift examination is intended to prevent hazardous conditions from developing." *Id.* The preshift examiner must look for all conditions that present a hazard. *Id.* at 14. Given the obvious nature of the violation herein, I find that a reasonably prudent person, familiar with the mining industry and the protective purpose of the safety standard herein, would have recognized that this hazard needed to be recorded in the preshift examination book. *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990) *aff'd* 951 F.2d 292 (10th Cir. 1991). Accordingly, I find Respondent's argument herein to be without merit.

The Secretary maintains that the violation was also "significant and substantial." I find that

the miners were exposed to a serious hazard due to Respondent's failure to record the accumulation in the preshift examination. The miners on the oncoming day shift were not alerted to the presence of the dangerous accumulation. As previously discussed, the coal accumulation was located in the roadway and along the ribs with several ignition sources present, *i.e.* the trailing cables of the electric face equipment and the electric and battery powered shuttle cars operating in the haul road.

The risk of a mine fire was also heightened because of the high combustible content of the accumulation, the small coal particle size, and its dryness. The likelihood of a fire occurring was further increased due to the length of the time the condition was allowed to exist. If mining operations were allowed to continue, the accumulation would have remained in place unreported with the ignition sources present. A fire was reasonably likely to occur under the circumstances with the reasonable likelihood of serious injuries. The violation was therefore "significant and substantial" and of high gravity.

The Secretary also argues that the Respondent's failure to record the hazards constituted an unwarrantable failure to comply with the regulation, noting that Respondent's examiners are its agents and their failure to report the accumulation is properly imputed to Respondent. The accumulation was certainly obvious because of its size. It also presented a high degree of danger to miners because of the threat of a mine fire. Most significantly, Conaway testified that foreman Simpson admitted to him that he was aware of the accumulation when he informed him that the order had been issued.

I find that Respondent was also on notice that it had to improve on its preshift examinations. Respondent was cited for 11 violations of 30 C.F.R. 75.360(a)(1) in the three months before the issuance of the subject order. In addition, eight violations of the regulation became final orders in the 12 months prior to the order being issued. Further, I find that Respondent's examiners should have exercised a heightened vigilance to find and report accumulations based on the number of prior 30 C.F.R. § 75.400 violations. Respondent had 108 violations of 30 C.F.R. § 75.400 which became final orders in the 12 months prior to the issuance of the subject order. Significantly, Inspector Postalwait had previously cited Respondent for 30 C.F.R. § 75.400 violations in the same section and had also admonished Respondent's management about the need to make greater efforts to comply with the regulation and that they might be subject to "section 104(d)(2)" orders for future violations. Under the circumstances, I agree that the violation was the result of Respondent's unwarrantable failure and high negligence.

Order Number 7100170

This order, also issued pursuant to section 104(d)(2) of the Act, as amended, alleges a violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

An investigation was conducted on November 20, 2006 pertaining to a 103(g) complaint filed by miners. The allegation is that the

14CM12 miner, approval #2G-3737A, operating on the 058-0 MMU, 9 South Mains Section has the oil tank leaking and was placed back into service prior to the leak being repaired. An inspection of the miner reveals that hydraulic oil is leaking from the hydraulic oil tank compartment on the inside of the conveyor. Four holes in the right side wall of the conveyor decking indicate that oil is leaking from the hydraulic oil tank into the conveyor. Oil was also flowing in a steady stream from the hydraulic manifolds for the satellite frame on both sides of the miner. The vertical 3/8" covers on the right side near the hydraulic pump motor are hot to the touch. Hydraulic oil is also leaking from the hydraulic cross-over hose from the valve bank in the operator's compartment to the opposite side of the machine. These conditions have created an accumulation of combustible material in the form of hydraulic oil covering areas beneath the covers on both sides of the machine, and along the cat frame and vertical covers along both sides of the machine and in the operator's compartment. These conditions were brought to the management's attention and management stated that the leak would be repaired before the miner is put back into service. The miner was returned to service on the Day Shift on Thursday November 26, 2006. Maintenance records indicate that repairs have been made to correct hydraulic leaks, but efforts have not been effective. This is an unwarrantable failure to comply with a mandatory standard, and constitutes more than ordinary negligence, by placing the miner into service prior to repairing the leaking oil tank.

On November 9th, 2006, MSHA Inspector Jeremy Ross inspected the left side of the 9 South Mains section of the subject mine, as part of a regular quarterly inspection. UMWA walkaround representative Timothy Cox and Respondent's representative Wayne Conaway accompanied Ross on the inspection. The continuous miner for the left side of the section was tagged out of service for oil leaks and repairs on the left side cutter drum. Ross saw that oil had leaked down both sides of the continuous miner, around the bolters, inside the operator's compartment, and on the deck. The continuous miner operator on the section, Richard Barnhart, told Ross that the miner had been "leaking oil pretty bad." Barnhart also stated that Respondent would put the miner back into service without correcting the leaks because there was a hole in the hydraulic tank which was a difficult repair. Conaway and Nathan Pratt, chief of maintenance and a second-level supervisor, assured Ross that Respondent would repair the leaks before putting the continuous miner back into service.

On November 17th, 2006, a "section 103(g)" anonymous complaint was called in to MSHA's hotline. The caller reported that the left side continuous miner's oil tank was leaking and that it had been put back into service "last night" without being repaired. The complaint also stated that

“maintenance told Ross it would be fixed before they put it back into service.” Ross testified that the allegations in the hotline complaint were consistent with the statements made by Barnhart on November 9th.

On November 20th, 2006, MSHA Inspector Maxwell traveled to the mine to investigate the condition reported in the hotline complaint and to continue the mine’s quarterly inspection. Robert Smith, who was an inspector trainee at the time, UMWA walkaround representative Timothy Cox, and Respondent’s representative Wayne Conaway accompanied Maxwell on the inspection.

Maxwell and Smith testified that, as they arrived at the 9 South Mains working section, they immediately saw that the continuous miner was leaking a large amount of hydraulic oil. A steady stream of oil approximately a foot wide and 1/8 of an inch deep was cascading down each side of the continuous miner and had collected into a large pool on the mine floor. According to Maxwell, the oil flowing down the sides of the continuous miner was clear, indicating it had been in the system only briefly before leaking out. Oil was also leaking directly into the operator’s compartment and had formed a pool on the compartment floor. Maxwell opined that the oil that had accumulated inside of the operator’s compartment had been there for more than one shift as it had begun to coagulate into a thick sludge. In addition to the three obvious leaks on the outside of the continuous miner, oil was leaking from four holes in the hydraulic tank into the conveyor. According to Maxwell, the hydraulic oil used in the continuous miner is combustible but the temperature at which it is combustible was not known. He described potential ignition sources as the electric cables and components on the continuous miner.

When the inspection party arrived at the 9 South Mains working section, the continuous miner was in operation at the face and had already mined approximately four feet of coal. No one was working to correct the leaks. When the inspectors asked the operator to back the continuous miner into the entry so they could inspect it, it ran out of oil before they could get it out of the face.

Within the above framework of evidence, I find that the violation at issue has been proven as charged. However, the level of gravity has not been established by the Secretary. She conceded that injuries were “unlikely” and, since the evidence shows that the hydraulic oil at issue was of a slight flammability class, I can find but little gravity.

The Secretary maintains that the violation was the result of Respondent’s high negligence. Based on the credible evidence that Respondent allowed obvious and extensive leaks on the continuous miner to go uncorrected for an extended period of time and allowed large amounts of hydraulic oil to accumulate, I must agree. Indeed the credible evidence shows that Respondent was aware that this continuous miner had multiple extensive leaks, yet failed to make reasonable efforts to correct the condition until after the current order was issued. Indeed there is no dispute that a large

amount of oil was “pouring” out of both sides of the continuous miner and into the operator’s compartment.

Credible evidence also shows that the leakage had continued through at least one onshift and preshift examination after it had been returned to service on Friday, November 17. Statements made to the inspectors by several miners working at the face during the November 20th inspection confirm that the continuous miner had been in service for several days prior to the inspection, despite the extensive leaks. The miners also told the inspection party that the continuous miner had been using an unusually high quantity of oil since being returned to service.

More particularly, Joe Jimmie reported to the inspection party that he operated the continuous miner on Friday, November 17th, 2006, the day it was put back into service. He stated that he put six to eight cans of hydraulic oil into the continuous miner, but was only able to mine 40 feet before it ran out of oil. Jimmie also stated on November 20th, that the continuous miner was “pretty much the same as it was last week” when he ran out of oil. Chuck Haught, section mechanic, also stated to Inspector Maxwell that they had been replacing hoses periodically, but there were two major leaks that they had not repaired before returning the miner into service - one in the hydraulic tank, and one in the operator’s compartment. These statements at the time of the November 20th inspection are consistent with the allegation in the “section 103(g)” complaint, made at midnight on Friday, November 17th, that the continuous miner had been put back into service without being repaired.

Both inspectors and Cox testified that the employees also stated they had reported the ongoing oil leaks to mine management. Nathan Pratt, Respondent’s chief of maintenance, also testified that the continuous miner had been using more oil than normal and had leaks for a little more than a month prior to the issuance of the order at bar. Based on this credible evidence, it is clear that mine management therefore knew that the left side continuous miner had been leaking large amounts of oil for an extended period of time but failed to correct the leaks.

This evidence of Respondent’s repeated failure to correct an obvious and extensive condition of which it was aware clearly justifies unwarrantable failure and high negligence findings. In reaching these conclusions, I have not disregarded Respondent’s argument that reliance on the hearsay statements of miners is misplaced. However, I find that the alleged hearsay testimony in this case to have been reliable and probative. See *Mid-Continent Resources*, 6 FMSHRC 1132 at 1136 (May 1984). In this case, the statements made by the various miners during both the November 9th and November 20th, inspections and the “section 103(g)” complaint are consistent. They were also based upon each miner’s personal knowledge of the condition of the continuous miner. The miners are also not parties to this litigation and it has not been shown that they have a direct stake in the outcome. Furthermore, the miners’ statements were made in front of management witnesses. Respondent had every reason to challenge an inaccurate statement by the miners at the time but did not do so. Finally, the number of witnesses who heard the out-of-court statements and the fact that some had notes recording the statements, further adds to the accuracy of the statements.

Respondent also argues that this violation should not be designated as an unwarrantable failure because it engaged in a good faith effort to fix the continuous miner when it took it out of service prior to November 9th. However, even assuming, *arguendo*, that Respondent made a good faith effort to repair the continuous miner between November 9th and November 17th, this would not excuse running the miner for six shifts between November 17th and November 20th when it was leaking large quantities of oil without repairing it. Moreover, the evidence shows that Respondent did not make a good faith effort to fix the continuous miner prior to putting it back into service.

Respondent claims it knew the miner was leaking, but did not know where the leaks were coming from, despite their best efforts. However, Barnhart told Ross on November 9th, there was a leak in the hydraulic tank. The "section 103(g)" complaint called in on November 17th, also stated there was a leak in the hydraulic tank. Haught also stated to Maxwell that they were aware there was a hole in the hydraulic tank that they had not repaired when they returned the miner to service. In addition, when Inspector Maxwell terminated the order on November 22nd, it was after Respondent finally welded the hydraulic tank.

Order Number 7100364

This order, also issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

Combustible materials in the form of loose coal, coal fines and coal dust is allowed to accumulate along and under the 7-D longwall conveyor belt take-up roller at the inby end of the take-up storage unit to approximately 180 feet outby. The following conditions were found by this inspector: (1) Combustible materials along both sides of the inby end stationary take-up roller measured 20 to 22 inches deep by 3 feet wide by 6 feet in length. (2) Thirteen out of 18 bottom conveyor belt rollers are turning in combustible materials. The listed combustible materials range from 3 feet to 6 feet in width by 15 to 20 inches deep by 2.5 to 6 feet in length, these rollers are located in an area 180 feet in length. (3) The bottom conveyor belt is also turning in the listed accumulations. The listed combustible materials range from damp to powder dry, and the accumulations around the belt rollers are powder dry. This condition is obvious from the travelway along each side of the listed conveyor belt take-up storage unit. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

On December 3rd, 2006, Inspector Postalwait returned to the subject mine as part of the regular quarterly inspection. He was accompanied by Respondent's representative Eric Ernest, the oncoming foreman for the December 3rd, 2006, midnight shift, and by UMWA Safety Committee

representative Karen Hooper. Postalwait testified that as soon as he entered the area of the conveyor belt drive, he immediately saw accumulations of combustible materials along 180 feet of the belt from the take-up storage unit outby. According to Postalwait the accumulations could be seen easily from both sides of the belt. He testified that he touched the coal and found it to be dry where it was packed around the bottom rollers and where the belt had been running in the accumulation. Postalwait initially observed the condition from the "tight side" or the "off side" of the belt, the side closest to the rib. After walking back along the walkway he found the accumulations to be even more obvious.

According to Postalwait, there were 19 separate piles of coal, around the takeup unit and 18 bottom belt rollers over the 180 feet of belt. He testified moreover, that the stationary takeup roller had up to 22 inches of coal accumulations around it and on either side of the storage takeup unit. He testified that of the 18 conveyor belt rollers along the 180 feet of belt, all had accumulations of coal underneath them. The coal measuring from three to six feet wide, two and one half to six feet in length, and 15 to 20 inches deep, some of which was packed around 13 of the bottom rollers. The 13 rollers had been turning in the coal and the bottom belt conveyor had also been running in the accumulations. Postalwait thought the scraper had not been working properly and allowed small particles of coal residue to remain on the bottom of the belt. The coal particles were being knocked off the belt where they contacted the bottom rollers and they had accumulated over an extended period of time. I find Postalwait's testimony credible and that his observations clearly support a violation as charged.

Respondent has argued that the only accumulation underneath the longwall conveyor belt was mud and water. With Postalwait's 19 years of underground mining experience and his additional experience with MSHA, I am satisfied that he has the expertise to know the difference between coal and non-coal material. I therefore give his testimony the greater weight and find that Respondent, indeed violated 30 C.F.R. § 75.400 by allowing combustible materials to accumulate under the longwall conveyor belt.

The Secretary maintains that the cited accumulations of coal along and underneath 180 feet of the 7-D longwall belt constituted a "significant and substantial" violation of the cited standard. I find that the first and second prongs of the *Mathies* test are both easily met. As noted, the extensive accumulations cited by Postalwait were a violation of the cited standard. I further find that the credible evidence demonstrates that this condition contributed to a discrete safety hazard in the form of a belt fire hazard on the 7-D longwall belt. I find that the Secretary has also established that there was a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature under continued normal mining operations. As previously noted, I have found that there were extensive accumulations of combustible materials at 19 separate points along 180 feet of the 7-D longwall belt. Moreover, I find that these accumulations were in direct contact with multiple ignition sources. The bottom conveyor belt was running in the accumulations and 13 out of the 18 bottom rollers had accumulations packed around them. Friction between these potential

ignition sources and the accumulations had already heated and dried out several inches of the coal fines and coal dust in contact with them. Respondent does not dispute that rollers turning in accumulations are a hazard, and should be corrected immediately. Indeed, its expert witness, Dr. Pramod Thakur, testified that a defective roller or misaligned belt could cause an ignition of a coal accumulation.

The expert deposition testimony of Michael Hockenberry also fully corroborates the testimony of Inspector Postalwait that there had been enough frictional heating between the coal accumulations and the rollers and belt to dry out the contacted accumulations. Hockenberry further opined that the longer the frictional heating continued, the greater the likelihood of a fire. Hockenberry also agreed that accumulations composed of fine particles of coal also increased the likelihood of a fire because small particles are easier to ignite.

Within this framework of credible evidence, including the extent of the accumulations, the numerous ignition sources from the 13 encased rollers, the belt running in coal and frictional heating by drying out the accumulations nearest to the rollers and belt, it is clear that a belt fire was reasonably likely to occur. See *Mid-Continent Resources*, 16 FMSHRC 1218, 1222 (June 1994).

The fourth prong of the *Mathies* test requires that the Secretary show that the injuries expected to result from the hazard will be of a reasonably serious nature. *U.S. Steel*, 6 FMSHRC at 1574. In this regard, there can be little dispute that a belt fire would expose miners to serious injuries, including burns and smoke inhalation. Emergency responders and the miner stationed at the take-up would also be exposed to such injuries. I find that the violation herein was therefore clearly “significant and substantial” and of high gravity.

The Secretary also maintains that Respondent’s negligence was high and the violation was the result of its unwarrantable failure to comply with the cited regulation. First, I credit the testimony of Postalwait that the cited accumulations in the 7-D longwall conveyor belt entry were obvious and in plain view. He observed the accumulations from both the “tight side” of the belt and the walkway and they were obvious from both vantage points. He was even able to see from the walkway that the accumulations were tightly packed around the rollers. As the inspector noted, the accumulations were obvious because they were so extensive. The accumulations were present under every bottom roller along 180 feet of belt and around the belt takeup storage unit. Moreover, 13 of the rollers were packed in coal and the bottom belt was riding in coal. Indeed, to abate the order, Respondent had multiple miners working three hours to clean the belt and the takeup storage unit. I also accept the credible testimony of Postalwait that Respondent allowed the accumulations to exist for a substantial amount of time without ever correcting or even reporting the hazard. Indeed Postalwait credibly opined that the accumulations had existed for a minimum of six shifts. The accumulations also posed a high degree of danger to miners. As previously noted, the coal was packed around thirteen rollers and the belt was riding in it.

Finally, Respondent was on notice that it needed to make greater efforts to prevent combustible materials from accumulating. Respondent had received 100 citations and orders for violations of the standard at issue which became final orders in the twelve months prior to the issuance of the order at bar. Indeed, Postalwait himself had previously cited Respondent for such violations on belts, including the belt here at issue. Within the above framework of evidence, I find that the Secretary has met her burden of proving that the violation herein was the result of Respondent's unwarrantable failure and high negligence.

Order Number 7100365

This order, also issued pursuant to section 104(d)(2) of the Act, also alleges a "significant and substantial" violation of the standard at 30 C.F.R § 75.360(a)(1) and charges as follows:

The pre-shift examination for methane and hazardous conditions that was conducted on December 3rd, 2006, for the midnight shift crew on the 7-D longwall 062-0 MMU section is inadequate in that the following conditions were observed by this inspector. Refer to the following violations for the conditions found: (1) violations# 7100364. The listed conditions would be obvious to any prudent person especially an examiner charged with the responsibility of conducting an examination of the mine. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

The order was subsequently modified on May 31st, 2007, to read as follows:

It is not reasonably likely that all of the conditions would occur, such as a fire, reversal of air on the belt, and injuries to all of the men on the section. It is reasonable to expect injuries of some of the men on the section and the belt involved in fighting the possible fire. As a result of this conference, the gravity in item 10(d) is changed to four men affected (Order Number 7100364 was similarly modified).

Postalwait determined that Respondent violated the cited standard regarding the preshift examination performed between 9:00 p.m. and 10:00 p.m. on December 3rd, 2006, for the oncoming midnight shift. The inspector found that the preshift was inadequate because it failed to report the accumulation described in Order No. 7100364.

Respondent's mine examiner, Anderson, was the section foreman for the afternoon shift on December 3rd, 2006. He performed the preshift for the oncoming midnight shift between 9:00 p.m. and 10:00 p.m. and called it out before the inspection party went underground at approximately 10:00 p.m. Postalwait reviewed the preshift book before going underground and recorded the conditions Anderson reported. There is no dispute that the coal accumulations that were the basis for Order No. 7100364 were not listed in the preshift record. While the inspection party was underground, Anderson traveled to the surface and added "mud + water" at the "take-up" as a "violation." This belated addition to the preshift report would not in any event have helped the oncoming shift foreman, Eric Ernest. When Anderson had earlier called out the preshift results, they were received by Ernest who then proceeded underground with Postalwait and the inspection party.

I find from the credible evidence that the coal accumulations cited by Postalwait were present at the time of the preshift examination. Indeed, the belt had been idle for the three preceding shifts while Respondent was preparing to resume production and activate the belt and there had been no production since the belt had been last shut down. Since there was no production to add to the accumulations and since Respondent did not assert that it had performed any cleaning while the belt was idle, it is clear that what Postalwait observed and what the examiner saw should have been reported. The failure to have reported the conditions in the preshift report was therefore a violation as charged. I note that Respondent again argues herein that since it is undisputed that a preshift examination was in fact conducted (on the afternoon shift of December 3rd 2006) there was no violation as charged. For the reasons previously articulated under the discussion regarding Order Number 7099401, I likewise find this argument to be without merit.

The Secretary maintains that the violation was also "significant and substantial." As a result of the violation, the oncoming shift would have been ignorant of the hazardous conditions that existed along the 7-D longwall belt. No one was working to clean the accumulation when it was cited and it may therefore reasonably be inferred that it would not have been cleaned before the belt was restarted. As previously discussed, thirteen rollers and the bottom belt was running in coal and the coal was made up of fine particles. The coal in contact with the rollers and belt had already dried out, indicating that frictional heating had been ongoing. In the course of normal mining operations fire and smoke were therefore reasonably likely. Accordingly, miners working on the belt, inby toward the face, or attempting to extinguish the fire, risked serious injuries from burns and smoke inhalation. Within this framework of credible evidence, I must agree that the violation was "significant and substantial" and of high gravity.

The Secretary further maintains that the violation was the result of Respondent's high negligence and unwarrantable failure to comply with a mandatory safety regulation. In this regard, I find that Respondent was on notice that greater efforts were necessary to ensure adequate preshifts were being performed. Respondent had received nine citations and orders for violations of the cited standard in the twelve months preceding the issuance of order at bar. Moreover, Respondent had received 100 violations of 30 C.F.R. § 75.400 which became final orders in the 12 months prior to

Order Nos. 7100364 and 7100365 being issued. Under the circumstances, Respondent's examiners should therefore have had a heightened vigilance for belt accumulations. As previously noted, I have also found that the accumulations were obvious and had existed over several shifts.

Under all the circumstances, it is clear that Respondent engaged in aggravated conduct beyond ordinary negligence in failing to report the belt accumulations. The violation was therefore the result of its unwarrantable failure and high negligence.

Order Number 7100380

This order, also issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.403 and charges as follows:

The incombustible content does not appear to be maintained to at least 65 per centum in the #2 intake entry on the 7-D longwall panel, 062-0 MMU section from #19 1/4 block to #20 block including connecting crosscuts at #20 block. The mine floor in the listed area is powder dry and (Black in color). The listed area also in the main intake (primary escape way). The miners travel through this area to reach the long wall face in that #20 block is the last line of open crosscuts. This condition is obvious in that dust is suspended into the mine air as miners travel through the effected area by foot travel. Three spot samples were collected by this inspector to support this violation. (1) Sample 1-A-1 was collected at 28 feet outby SS24+79 located in #2 entry at Sample 1-C-1 was collected approximately 60 feet in the #1 to #2 crosscut from the #2 entry at #20 block. The mine operator was previously put on notice. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

The cited standard, 30 C.F.R § 75.403, provides as follows:

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return air courses shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dust shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively of incombustibles are required.

On December 19th, 2006, Postalwait returned to the subject mine as part of the regular quarterly inspection. He was accompanied by then MSHA trainee Aaron Wilson, UMWA walkaround representative Richard Harrison, and Respondent's representative Jeffrey Taylor. Postalwait reviewed the preshift examination book to note the conditions recorded by the mine examiners before proceeding underground. While heading toward the 7-D longwall face, Postalwait observed that the entry was black from coal dust between the No. 19 and No. 20 Blocks in the No. 2 Entry and the No. 1 to No. 2 Crosscut. He testified that the coal dust covered the mine floor from rib to rib in both the entry and the crosscut. The coal dust was dry, black, and powdery. It was three to nine inches thick with the deepest portion in the center of the entries and in the ruts left by scoop tires. In walking through the coal dust on the mine floor, the inspection party placed coal dust into suspension. The mine floor was covered with coal dust for a distance of approximately 137 to 150 feet between the No. 19 and No. 20 Blocks and for approximately 100 to 150 feet in the No. 1 to No. 2 Crosscut. Indeed, Respondent's representative, Mr. Taylor, agreed at trial with the inspectors and UMWA representative Harrison that there were accumulations present and that the mine floor was black and the coal dust dry.

Postalwait also took three "representative" samples of the coal dust to test for incombustible content. The laboratory analysis showed that the coal dust samples had 19.5%, 30.6% and 36.8% incombustible content- well below the regulation's requirement of 65% incombustible content for intake entries. Respondent stipulated to the accuracy of the laboratory analysis. The violation is therefore proven as charged.

The Secretary also maintains that the violation was "significant and substantial". The credible testimony establishes that there was an extensive accumulation of combustible coal dust in the cited area that presented a fire or explosion hazard. It is clear that the coal dust was highly combustible because it was dry, made up of very fine particles of coal and lab testing showed it had a high combustibility content. Ignition sources were also present from scoops, face ignitions, the coal conveyor belt the scoop battery charging stations, sump pumps and the power center. According to Postalwait, scoop batteries arc, have the battery posts blown off, and have the battery leads blown off, each of which can ignite a coal dust fire. The credible evidence shows that scoops traveling through the cited area would likely send coal dust from the mine floor into suspension as they traveled through the area. Coal dust in suspension in the ventilation air current would travel inby to the longwall face creating another potential ignition source. An ignition of methane at the longwall face could propagate back to the cited area and become a larger explosion due to the coal dust in suspension. Face ignitions of methane can occur when the longwall shear strikes hard rock intrusions in the coal seam called "sulfur balls" which cause sparks that can ignite a pocket of methane. The subject mine has also had face ignitions in the past.

I also find that the injuries expected to result from the hazard would be of a reasonably serious nature. A fire or explosion in the cited area in the No. 2 Entry and the No. 1 to No. 2 Crosscut would be critical because the area includes portions of the primary and secondary

escapeways. The ventilation air current would carry smoke from a fire in the cited area to the face. Miners also use the cited area to get to and from their work station at the longwall face every shift. Miners therefore are exposed while working at the face and while walking through the cited area. The likely injuries would be serious and include burns and smoke inhalation. Under the circumstances, I find that the Secretary has met her burden of proving the violation was "significant and substantial" and of high gravity.

The Secretary also argues that Respondent was highly negligent and that the violation was the result of its unwarrantable failure to comply with a mandatory safety regulation. The Secretary maintains that Respondent allowed an obvious and hazardous accumulation of coal dust to exist and failed to correct it, danger it off, or even report it, despite being on notice that it had to exert greater efforts to comply with the regulation.

As previously found, the credible evidence shows that, the coal dust accumulation in the cited area was indeed obvious. The ribs and floor were black, the material was extensive and it could be seen 1½ blocks away. Indeed, that evidence showed that in Entry No. 2 between No. 19 and No. 20 blocks the accumulation was approximately 137 to 150 feet long and in the No. 1 to No. 2 Crosscut was approximately 100 to 150 feet long. Moreover, the evidence shows that Respondent brought all 10 miners on the face crew to water and rock dust the cited area and it apparently took about four hours to abate the cited condition.

In addition, the credible evidence shows that the accumulation had existed for at least several shifts. The inspectors and Harrison corroborated each other's testimony in agreeing that the coal dust had been produced by rib sloughage and would have taken several shifts to reach the state that they observed. According to these experts, the coal ribs had to slough; then the pieces of coal rib had to dry out; then the scoops traveling in the area had to pass over the sloughage to grind it into powder; and, finally, the coal dust had to build up to the depth they observed.

It is clear that Respondent was also on notice that it had to make greater efforts to comply with the cited standard. Ten violations of the that standard became final orders in the 12 months prior to the subject order. In addition, according to the credible testimony of Postalwait, he had discussed with Respondent the need to comply with that standard and to deal with problems in rock dusting the mine floor and ribs on several occasions, and as recently as a week before the subject order was issued. Harrison also confirmed that these discussions with mine management did occur.

Finally, there is credible evidence that Respondent had actual knowledge of the extensive coal dust accumulation. Two foremen for each shift had to walk through the coal dust in the cited area to reach the longwall face and to leave at the end of their shift. Respondent's longwall coordinator, Brian Delloma, was at the face when the subject order was issued, saw the condition and admitted to Inspector Postalwait that it was a violation and should have been remedied earlier.

Under all the circumstances, I find that the Secretary has met her burden of proving that the violation herein was the result of Respondent's unwarrantable failure and high negligence.

Order Number 7100381

This order, also issued pursuant to section 104(d)(2) of the Act, also alleges a "significant and substantial" violation of the standard at 30 C.F.R. §75.360(a)(1) and charges as follows:

The pre-shift examination for methane and hazardous conditions that was conducted on December 19th, 2006, for the day shift crew on the 7-D longwall 062-0 MMU section is inadequate in that the following conditions were observed by this inspector. Refer to the following violations for the conditions found: (1) Violations # 7100380. The listed conditions would be obvious to any prudent person especially an examiner charged with the responsibility of conducting an examination of the mine. The mine operator was previously put on notice for the same type of conditions. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

The Secretary maintains that this order was issued because the preshift report for the day shift on December 19th, 2006, did not include the hazardous coal dust cited in the No. 2 Entry and the No. 1 to No. 2 Crosscut cited in Order No. 7100380 issued above. Respondent lost the preshift examination book prior to trial and the only record of its contents is from the notes of Inspector Postalwait.

There is no dispute that the preshift examination for the cited area was performed between 5:00 a.m. and 7:00 a.m. Postalwait issued the first of the subject orders at 9:25 a.m. and miners were then already working at the face. It may reasonably be inferred that the accumulation was present during the preshift examination performed 2 ½ to 4 ½ hours earlier because the credible evidence shows that it took several shifts to develop. As previously noted, the coal ribs had to slough, dry out, and be ground into powder before they were in the state observed by the inspection party. Both Wilson and UMWA representative Harrison agreed with Postalwait's conclusions in this regard. Accordingly, since the accumulation had not been reported, I find that the Secretary has met her burden of proving the violation as charged. I note that Respondent again argues herein that since it is undisputed that a preshift examination was in fact conducted there was no violation as charged. For the reasons previously articulated under the discussion regarding Order Number 7099401, I likewise find this argument to be without merit.

The Secretary also maintains that the violation was "significant and substantial" because of

a reasonable likelihood of lost work days or restricted duty. She notes that 10 miners were exposed to the hazard of a mine fire or explosion because they were not alerted to the cited coal dust accumulation. The first and second prongs of the *Mathies* test have already been established. Respondent's failure to record the hazardous condition cited by Postalwait in Order No. 7100380 was a violation of 30 C.F.R. § 75.360(a)(1). This condition contributed to a discrete safety hazard in the form of a fire or explosion hazard in the No. 2 Entry and the No. 1 to No. 2 Crosscut. As discussed above, the third prong of the *Mathies* test is also satisfied. No one was working on the accumulation when it was cited and it is reasonable to infer that it would not have been corrected considering continued normal mining operations. I find it unlikely that Respondent would have cleaned, watered, rock dusted or dangered-off the accumulation, since a number of examiners had already failed to report it and Respondent continued to ignore the condition. Finally, the evidence establishes that miners working at the face risked serious injuries such as burns and smoke inhalation from the failure to have reported the hazardous condition. I find therefore, that the Secretary has met her burden of proving that the violation was "significant and substantial" and of high gravity.

The Secretary further maintains that Respondent's negligence was high and that the violation was the result of its unwarrantable failure to comply with the cited standard. As previously noted, it may reasonably be inferred from the credible evidence that several examiners failed to report the hazardous coal dust in the cited area based on the length of time it had existed. Since the mine floor and ribs were black and the accumulation extended for well over 200 feet in the No. 2 Entry between No. 19 and No. 20 blocks and in the No. 1 to No. 2 Crosscut, it could hardly be missed. Since the hazardous conditions had existed for several shifts but were not reported, miners were thereby exposed over these shifts to a fire or explosion.

In addition, Respondent had been placed on notice having been cited for similar violations of the cited standard. Respondent had received nine violations of the cited standard which became final orders in the 12 months prior to the subject order. Accordingly, Respondent's examiners should have had a heightened awareness for coal dust accumulations. Respondent had also been cited previously for violations of the standard at 30 C.F.R. § 75.403 and admonished to improve its rock dusting of the mine floor and ribs. Indeed, Mr. Harrison was present for Postalwait's most recent discussion with management a week before the subject orders. Respondent was issued 10 violations of 30 C.F.R. § 75.403 which became final orders in the 12 months prior to the subject order.

Finally, the credible evidence shows that Respondent's managers had actual knowledge of the coal dust accumulation. Two foremen on each shift had to walk through the cited area with their crews and Respondent's longwall coordinator was at the face when the orders at bar were issued. Indeed the longwall coordinator admitted that it was a violation and that they should have taken care of it sooner. Under all the circumstances, it is clear that Respondent engaged in aggravated conduct beyond ordinary negligence in failing to report the coal dust accumulation.

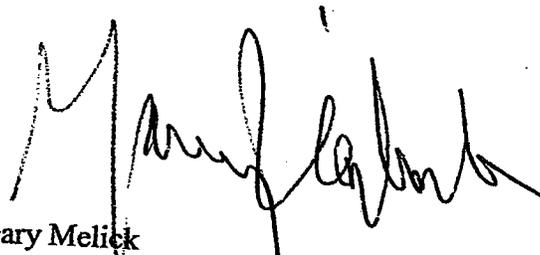
Civil Penalties

Under section 110(i) of the Act, in assessing civil monetary penalties, the Commission and its judges must consider the operator's history of previous violations, the appropriateness of the 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 the violation. In addition, under section 110 (a)(3)(B) of the Act a minimum penalty of \$4,000.00 is mandated for orders issued under section 104(d)(2) of the Act.

In this regard, the parties stipulated to four of the six penalty criteria as follows: (1) the size of Respondent's business should be considered as large based on the fact that Respondent produced 45,599,304 tons of coal in 2005, including 6,359,281 tons at the subject mine; (2) Respondent's violation history should be based on the fact that, in the 24 months immediately preceding the issuance of the orders in this case, it was assessed a total of 966 citations based on 768 inspection days prior to Order Numbers 7100364, 7100365, 7100380 and 7100381; 927 citations based on 751 inspection days prior to Order Numbers 7099399 and 7099401; and 940 citations based on 753 inspection days prior to Order Number 7100170; (3) Respondent demonstrated good-faith in attaining compliance after the issuance of the orders at issue herein and (4) payment of the total proposed penalty of \$49,600.00 would not affect Respondent's ability to continue in business. The two remaining penalty criteria, gravity and negligence, have previously been evaluated within the discussion of each order.

ORDER

Orders Number 7099399, 7099401, 7100170, 7100364, 7100365, 7100380 and 7100381 are hereby affirmed. The Consolidation Coal Company is hereby directed to pay the following civil penalties (totaling \$48,800.00) within forty (40) days of the date of this decision: Orders Number 7099399-\$7,500.00, 7099401-\$7,500.00, 7100170-\$4,000.00, 7100364-\$6,300.00, 7100365-\$6,300.00, 7100380-\$9,700.00, 7100381-\$7,500.00.



Gary Melick

Administrative Law Judge

202-434-9977

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WASHINGTON, D.C. 20001
(202) 577-6809

January 28, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. CENT 2009-588- M
Petitioner	:	A.C. No. 29-02269-189438
	:	
v.	:	Docket No. CENT 2009-757- M
	:	A.C. No. 29-02269-189806
	:	
MAINLINE ROCK & BALLAST, INC.,	:	Torrance Quarry
Respondent	:	

DECISION

Appearances: Tina D. Juarez, Esq., Office of the Solicitor, Dallas, Texas for Petitioner;
Christopher G. Peterson, Esq., Jackson Kelly, Denver, Colorado

Before: Judge Moran

On April 21, 2009 miner Edelberto Avitia was pulled into a return roller of the grizzly conveyor at Respondent Mainline Rock and Ballast's Torrance Quarry ("Mainline"). Mr. Avitia received significant injuries and was evacuated via helicopter from the mine to a hospital. He was fortunate to have survived the event.¹ Subsequently, the Mine Safety and Health Administration ("MSHA") conducted an investigation of the incident, resulting in these civil penalty proceedings brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act").

MSHA alleges two violations arising out of this event.

¹As later described by plant superintendent Mike Harris, Avitia was indeed lucky not to have been fatally injured. This is because Harris estimated the space between the return roller and the bottom of the conveyor where Mr. Avitia got caught to have been "roughly seven inches." Tr. 258-259. The arrangement consisted of the roller and the belt on top of that return roller and there is a cross member piece of two-inch angle iron and there was about seven inches between that space, creating a pinch point. Tr. 260.

First, it contends that the Respondent violated 30 C.F.R. § 56.14107(a). That section, entitled, "Moving machine parts," provides that:

Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.²

Second, MSHA contends that Mainline violated 30 C.F.R. § 50.10. That section, entitled, "Immediate notification," provides that:

The [mine] operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving: (a) A death of an individual at the mine; (b) An injury of an individual at the mine which has a reasonable potential to cause death; (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or (d) Any other accident.³

For the reasons which follow, although the Court does *not* find that this incident occurred in the manner contended by MSHA, it still affirms both violations and increases the penalty for the notification violation.

I. Findings of Fact and Conclusions of Law

A. Failure to guard moving machine parts; the alleged violation of 30 C.F.R. § 56.14107(a)

Miner Edelberto Avitia ("Avitia") was working as a loader man at Mainline's Torrance Quarry,⁴ a position he had held for about two or three years. Tr. 34. His duties were varied but, as pertinent here, they included shoveling accumulations of dirt from around the grizzly conveyor. In fact, the parties do not dispute that Avitia's duties included cleaning up such accumulations around the area of the jaw crusher and the grizzly conveyor.

²The same standard, at § 56.14107(b), provides that "Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces." Neither side has claimed that this provision applies.

³ For purposes of this citation, the term "accident" is defined in section 50.2(h) as "[a]n injury to a miner which has a reasonable potential to cause death." 30 C.F.R. § 50.2 (h)(2).

⁴The operation provides ballast for application alongside railroad tracks. Tr. 531.

In order to fully appreciate the circumstances of this accident, one needs to have the following exhibits for viewing along with this written description: Gov. Ex P 4,⁵ and Respondents Exhibits R 11 and R 7. Exhibit P 4, a photograph, shows the grizzly conveyor with Plant Superintendent Mike Harris standing in front of the approximate location of the return roller in which Avitia got caught. In the photograph, three guards are behind Mr. Harris; there is long, "rectangular" guard immediately behind him and he is standing approximately in the middle of that guard. To the left of that guard is what appears, at least in P 4, as a "square" shaped guard which is much shorter than the rectangular guard. R 11 shows a different perspective of that "square" guard. That is the view of the square guard if the person in R 6 were to walk towards the square guard and then go behind it. Thus, one sees that the "square" guard is actually a box shaped guard surrounding the tail pulley.⁶

Although Mr. Avitia testified⁷ that he became caught in the pulley at a location some distance to the right of the individual in P 4 and that this occurred while he was shoveling accumulated dirt under the conveyor at that point, the Court finds that is not the way the accident occurred. On the basis of the preponderance of the reliable testimony, the Court finds that Avitia became ensnared in the return roller which, as noted, is right behind Mr. Harris, in P 4. Further, this accident did not occur through Mr. Avitia shoveling dirt accumulations from beneath the conveyor at the location where Mr. Harris is standing. Avitia maintained that he was digging while on his knees, shoveling as far as he could reach under the conveyor, but asserting that he was *outside* the conveyor frame, just as Mr. Harris is shown to be outside the conveyor in P 4.

⁵ Respondent's Ex R 6, is the same photo, but with different markings on it.

⁶The 'third' guard in P 4 is near the end of the right side of the rectangular guard but *below* the supporting metal frame. Mr. Avitia marked "EA," his initials, on P 4, which is near the location of that third guard. That third guard is not significant to the issues in this case.

⁷ An interpreter translated the questions and answers to and from Mr. Avitia, translating them into English. However, one should not conclude that Avitia was completely unable to speak and understand English. Both from the Court's observations during Avitia's testimony, including nodding when English was spoken, and testimony from Respondent's witness, Mr. Olsen, it was clear that for the most part Mr. Avitia's ability to understand and respond in English were sufficient for communication. Thus, the Court agrees with Dwayne Olsen, Mainline's lowdown superintendent at the Torrance Quarry, in his assessment that Mr. Avitia's command of English seemed passable. Observing him during the course of the hearing, the Court noticed that Mr. Avitia seemed to be understanding the communications in the proceeding quite apart from any assistance from the translator. Therefore, the Court finds that Mr. Olsen's statement that he always spoke to Mr. Avitia in English, that he seemed to understand things that were said to him and that Olsen used Avitia as a *translator* for communicating with other Spanish speaking employees with less command of English, (Tr. 515-516) are all reasonable conclusions to make about his command of English.

Avitia stated that only his hands and arms were extended under the conveyor and consequently he was reaching under the conveyor but only up to his shoulders. Thus, by Avitia's recounting he would have been kneeling at some location outside the I beam framework, just as Mr. Harris is shown to be outside that framework.

However, the Court finds that is not what occurred. Instead, Mr. Avitia went *underneath* the metal support frame and was thus *under* the conveyor belt when the accident occurred. This action on his part was prompted by a rock or some sort of material having become lodged between the belt and the conveyor I beam frame.⁸ R 5, though it has some acknowledged errors⁹ in its depiction of the conveyor at the location of the injury, is still useful to understanding the location and point where Mr. Avitia became caught. In any event, while under the conveyor at that location, and while trying to free a lodged piece of rock or other material, Mr. Avitia's shovel got caught between the belt and the return roller and, in an instant, that action caused Mr. Avitia to become drawn into it before he could release his grip on the shovel.¹⁰ In fact, while there was some disagreement about the exact location where Avitia started his digging work, there is no conflict about where he ultimately became lodged, as he agreed that the conveyor belt was over his back and the roller was against his stomach. Thus, the bold black arrow in the bottom drawing of R 5 shows the point where Avitia became lodged.

Although Jeremiah Carpio was next called as a witness, the Court concludes that his testimony was not valuable to the determination of the facts in this case.¹¹

⁸Avitia himself stated that dirt could accumulate and "turn into like a rock and it would make the band stop or the belt stop." Tr. 57.

⁹Exhibit R 5 was conceded to be inaccurate in that the cross member shown in the upper drawing is actually not as depicted in that drawing. Harris agreed there are inaccuracies in R 5, the drawing of the grizzly conveyor. Further he had no input to its creation. Tr. 404. Harris drew the correct location for this in the bottom drawing on R 5, using a red pen. Tr. 349. Another exhibit, R 7, shows the correct location of the cross member in relation to the roller where the accident occurred.

¹⁰On P 4, Avitia marked his initials and the number 1 to show where he had been shoveling accumulations from under the tail pulley *before* the accident occurred. R 11, also has the initials "E. A." and the number 1, showing the same area he shoveled before the accident, but from a different perspective. Both P 4 and R 11, also mark where Avitia contended he was located when he became ensnared by the return roller. Again, the Court finds that Mr. Avitia is incorrect about this recollection.

¹¹Jeremiah Carpio began his employment for the Respondent initially as a laborer, then worked as a haul truck loader and after that he became the plant operator. Tr. 120-122. In that last job, he runs "the plant, the quarry, the crusher." Tr. 121. In several aspects of his testimony Mr. Carpio was not a credible witness. For example, in describing his job as the plant operator

he stated: "We walk the plant and inspect it, you know, have to start the generators *and make sure everything's guarded* before I get it running." Tr. 121. (emphasis added). His supervisor is Mike Harris, the plant superintendent. Tr. 122. Mr. Carpio stated that, in getting the plant up and running each day, he walks the plant and he "check(s) all the guards, make sure they're still up, they haven't fell . . ." Tr. 124. Mr. Carpio described Mr. Avitia's job in April 2009 as an "oiler." Tr. 125. Although that job involved greasing bearings, when Avitia was done with that, Carpio agreed, "he would dig." Tr. 126. By that, Mr. Carpio meant that Mr. Avitia would shovel piles of dirt that would fall from the conveyors and off the rollers. Tr. 126.

Mr. Carpio maintained that although he saw Mr. Avitia shovel dirt near conveyors that were running, this occurred only where they were guarded. Tr. 127. He also asserted that there were guards on every conveyor part that moved. Tr. 127. Consistent with that assertion, he maintained that all parts of the grizzly conveyor were guarded. Tr. 127. However, in using that description he meant by 'guarded' that term included 'guarded *by location*,' which he expressed as "at least three feet from the ground, where your hands can't get under them if you stand right by them." Tr. 127-128. Carpio thus believed that, if there was only three feet or less between the ground and moving machinery, there is no need to have a guard. Tr. 129. Despite that stance, he stated that no one told him guards were not needed in such situations and he could not explain how he came to know of his 'three foot rule' for guards. Tr. 130. In addition, he asserted that the grizzly conveyor *was* guarded but only in the sense that the conveyor frame (or "channel") constituted a "guard," so that, in his view, one could not access the roller. Tr. 148.

Carpio was present on the day of the accident and he asserted that Avitia told him that he would be digging under the jaw and the grizzly that day. According to Carpio, he told Avitia not to dig there but that Mr. Avitia insisted that he would dig there anyway. Tr. 132-133. Thus, according to Mr. Carpio, Mr. Avitia, defied his warning. Unbelievably, Mr. Carpio maintained that he said nothing else in response to Mr. Avitia's alleged defiant response. Tr. 134. Adding to the lack of believability of this assertion, Mr. Carpio, when then asked if, pursuant to his conversation with Mr. Avitia, that he understood that Mr. Avitia was going to be digging by the grizzly conveyor, he responded "no" because he "strictly told [Avitia] not to dig under the grizzly." Tr. 134. Later, Mr. Carpio, added without a question prompting him, that he was not Avitia's boss at the time he told him not to dig under the grizzly. Tr. 136. This was apparently volunteered to explain his silence in response to Avitia's alleged defiance.

Carpio did advise that the purpose of digging under the conveyors is to clean the ground below, so that dirt doesn't hit the bottom of the conveyor belt. Tr. 135. Mr. Carpio stated that while people dig under other conveyors, he has never dug under the grizzly conveyor, nor has he ever seen others do that. Tr. 140. Although Carpio stated that he had dug under the jaw conveyor and seen others do that too, he expressed this was acceptable because it is guarded and that all the rollers are guarded on the under jaw. Tr. 147.

Importantly, Mr. Carpio asserted that there *had* been expanded metal on the roller where

Mr. Avitia got caught, but that "it had fallen off" before his accident. Tr. 150, 151, and the top photo in Exhibit P 9. The guard, consisting of expanded metal, protects so that "nobody sticks their hand up in it." Tr. 151. Mr. Carpio believed that the guard had fallen off that day, before Mr. Avitia's accident. Tr. 151. Although Mr. Carpio stated the accident still would have occurred, even had the guard been present, he based this on his view that Mr. Avitia's coveralls would have "got stuck in there." Tr. 152. However, this does not seem likely, because the witness agreed that Mr. Avitia would have had to go through the expanded metal too. Tr. 153. Mr. Carpio stated that he has observed others dig underneath the overland conveyor but that not all the rollers under that conveyor are guarded as those "below three feet aren't." Tr. 154. It was his position that one can't get to such unguarded rollers unless one crawls into such areas. Tr. 154.

Placing emphasis on his statement that the return roller which caught Avitia was guarded, Mr. Carpio marked on Exhibit R 6 the location of the guard depicted Ex. P-9. Carpio stated he knew the location of that guard because *he* was the person who installed it. Tr. 165. This was, according to Carpio, the roller in which Mr. Avitia was caught and it was the same area that he told Avitia not to dig. Tr. 165. Although in his earlier testimony Carpio stated there was no guard there at that time, later he speculated that perhaps Avitia "busted" the guard when he went through it. Carpio based this revised claim on the assertion that the expanded metal guard was on the ground. Tr. 165. However, the record contains no photographic evidence of such a guard and Carpio was the only witness who claimed there was such a guard present.

Carpio also maintained that Avitia twice admitted to him that upon seeing a rock stuck in the roller he tried to remove it with his shovel and that both his shovel and coveralls got caught up by the roller. Tr. 168. He maintained that Mr. Avitia regretted trying to remove the rock without shutting the equipment down first. Tr. 170. He further asserted that Mr. Avitia expressed regret over his actions and that he recognized that he should have called to have the conveyor shut down. Tr. 172. Mr. Carpio also stated that the mine had a lock out, tag out policy and that there was a meeting about that policy in February or March that year. The conveyor and grizzly would be shut off and the equipment locked and tagged out if a rock became stuck and this practice was also done for maintenance reasons.

Mr. Carpio reiterated his view that "guarded by ground" refers to applying where the height is 36" or less, in which cases no guard is needed. Tr. 176. He maintained that the company's training manual provided that one is not to get under the conveyor where the height is 36" or less, though no exhibit was offered to support that claim either. He also asserted that, while shoveling under the belt to deal with accumulations can occur, the belt would first be shut down, at least in those locations where there was no guard present and it was considered guarded by location. Tr. 178.

When the Court revisited Mr. Carpio's assertion that he specifically warned Mr. Avitia

Plant Superintendent Mike Harris, whom the Court found to be a credible and forthright witness, stated that Mr. Avitia's duties as an 'oiler' are to grease, oil, and do clean-up work and maintenance. Tr. 237. Avitia's clean-up duty includes spills, places on the rock crusher where dirt will accumulate. In general, Harris described this as shoveling, "keeping the plant side clean." Tr. 238. Spills, he agreed, can include rocks. Tr. 238. Mr. Harris also agreed that an oiler would need to use a shovel to dig out spills. An oiler would use a shovel to clean up accumulations that are under a conveyor. Tr. 241. It is important, Harris agreed, to keep the plant cleaned up as, if piles were allowed to build up, and get under the belt, "pretty quick [the] plant would be buried" and the belts would stop running. Tr. 241-242.

that he was not to shovel in the area where the accident later occurred, he reaffirmed that he told Mr. Avitia not to dig at the scene of the accident, although his specific concern was that Mr. Avitia not be injured from rock falling under the grizzly. Tr. 181. Mr. Carpio's version of this event is not credible for many reasons including his admission that, though he had known Mr. Avitia for ten years, this was the only time such a conversation had occurred. Thus, according to Carpio, in all those years he had no previous occasion in which he had warned Avitia not to do something. The one warning happened to occur on the day of the accident. Tr. 181-182.

Mr. Carpio's explanation for his understanding that there was no need for a guard, that is, that it was guarded "by location," if the distance between the between the ground and the moving part was 36 inches or less, was similarly questionable in that he first stated that the safety coordinator did not describe such a distance and that he knew it was 36 inches "because that's the distance from our conveyor." Tr. 183. The "conveyor" he was referring to was the location of the accident. As with his alleged warning to Avitia, Mr. Carpio stated that the safety coordinator had identified the "three feet" rule one time in five years, although he then backed away from that claim. Tr. 185. The pattern of conflicting answers continued when the Court inquired about other locations at the plant where the distance between a roller and the ground is less than 36 inches and whether those locations have guards. While at first stating that such areas did not have guards, he then stated that *some* return rollers did have guards, even if the space was less than 36 inches. Tr. 189. The Court, trying to figure out Mr. Carpio's statements on this issue, asked how it was determined to put a guard in some locations with less than 36 inches clearance but not others. Mr. Carpio responded: "I mean, we don't dig on spots that are dangerous. I don't know." Tr. 188. The Court accepts at least the last part of Mr. Carpio's statement: he doesn't know.

In the Court's estimation, Mr. Carpio was trying to support his company's position but he did not do this credibly. Based on the entire record, the Court concludes that the credible evidence is that the roller in issue *was not* guarded at the time of the accident and that Carpio *did not* warn Avitia that he was not to dig in the location of that roller. Further, the Court does not find credible Carpio's assertions that Avitia admitted to him the circumstances of the accident. Beyond those findings, it is noted that Carpio's claim that the roller in issue *was guarded* seriously undercuts the Respondent's claim that guarding by location applied to that circumstance.

When Harris first arrived at the accident scene Mr. Avitia had been freed and was on the ground. Tr. 247. Harris stated that when he asked Avitia what happened, he responded : “I [messed up] guero.” Tr. 256.¹² Harris later restated that Avitia admitted to him that he was trying to free a rock stuck against a belt. Tr. 406-407.¹³ The Court accepts Harris’ position that access to the return roller where Avitia was caught would only occur through a deliberate act such as to dislodge a rock. Tr. 366.¹⁴

Apart from whether Mr. Avitia exercised poor judgment, photographs 5 and 6, within Ex P 8, are an attempt made by the Respondent to show where Mr. Avitia’s body was caught within the small space between the roller and the belt. Tr. 278. Harris, who is the person in those photos, positioned himself to show how Avitia was pinned between the roller and a piece of angle iron, described as a “cross member.” Tr. 279-280. A clearer depiction of the same recreation of the point where Avitia became trapped by the roller is R-7, which is an enlargement of the same area shown in photos 5 and 6 within P 8.¹⁵

Harris agreed that the roller where Avitia was caught had no expanded metal guard on it. Tr. 294, 297. The Court finds that the return roller in issue did not have a guard. Ex P 9, shows, but not very clearly, photos of the expanded metal guard that was placed around the return roller after the event. Tr. 296, 364. Harris described the installed guard as “pretty much a standard return roll guard.” Tr. 297. That guard, as installed for abatement, was about 51 inches in length and 3 to 4 inches tall and it covered the 5 inch roller. Tr. 298-299. However, Harris maintained that the same accident could occur, even with the guard that was placed over the roller to abate the citation. Tr. 299. This, the Court finds, was a bit of an overstatement. Harris stated that some contact could still occur as one could still touch the bottom of the front of the roller but he conceded that the expanded metal guard would prevent contact in the area it

¹² Actually, the ubiquitous and all purpose “f” word was, according to Harris, employed by Avitia, not the tamer “messed up” description substituted by the Court.

¹³ On redirect, the Solicitor’s Counsel tried to have the witness concede that as Avitia was in pain and on medication, his statement about the stuck rock was likely unreliable. Tr. 416. The Court rejects that contention and notes that the government did not recall Avitia to rebut the contentions made by the Respondent’s employees.

¹⁴ Harris asserted that Avitia should have simply radioed about the stuck rock and the grizzly belt conveyor would have been shut down for the removal of the rock and that the rock removal would only have taken minutes. Tr. 367-368.

¹⁵ These photographs, particularly R 7, starkly display how fortunate Avitia was to have survived the event.

covers.¹⁶ Tr. 427-428. If one were caught in the remaining unguarded gap, it was Harris' position that the expanded metal would "tear up" the person caught worse than if no guard was present. Tr. 300. Despite that concern about the effectiveness of the guard that was installed after Avitia's accident, Harris admitted that MSHA did not tell him to use an expanded metal guard to abate the citation and that it was the Respondent that came up with the guard design. Tr. 301.

Harris also stated that the company's policy does not require a lockout/tagout if one is shoveling beneath a conveyor.¹⁷ Tr. 304. Further, he agreed that using a shovel to remove dirt accumulating from beneath a conveyor is a common activity. However, Harris distinguished that action from physically getting underneath the conveyor. Tr. 304.

Harris noted that some rollers are guarded at the site while others are not. He cited the overland conveyor's return roller as an example where there is no physical guard. Tr. 305. However, he noted that a "snubber roll[er]" is guarded and two rollers forward of that are guarded too, as both are accessible and therefor not guarded by location. Tr. 305.

Regarding the location where Avitia became caught, Harris agreed that R 6 depicts several guards on that tail pulley. As noted earlier, the left most guard covers the tail pulley and there is the long rectangular guard right behind Harris in the photograph. There is also a 'drop

¹⁶ Although, as noted, Harris believed that the guard that was installed on the return roller after Avitia's accident would not completely prevent one from getting caught up in the pinch point because the guard must still leave some space between it and the moving conveyor, that contention only demonstrates that a guard's protection is not absolute but it does not speak to the requirement for a guard. Tr. 361. A similar argument was advanced by Harris in contending that guards can sometimes create problems, as by trapping dirt. However, Harris himself rebutted the import of that assertion by acknowledging that there is still a need for guards to protect against incidental contact. Tr. 363.

¹⁷ R17, a multiple page exhibit, represents Avitia's training records. Tr. 370. It shows that Avitia had lockout/tagout training, which applies to lockout procedures for electrical components. Tr. 371-376, 512. Respondent's Ex 19 was identified by Olsen as the Company's lockout/tagout policy. Tr. 517. Olsen added that he would provide "site specific" training, identifying various hazards at the mine. Tr. 518-519. However, any argument that lockout/tagout applies is misplaced. The operator was cited for a guarding failure. There is no authority for an affirmative defense claim that a failure to follow such lockout tagout procedures impacts the alleged violation. Further, the operator did not present reliable evidence that it specifically required the shut down of equipment in the event of lodged material in its conveyor system. Nor was there evidence that lock out tag out applied where employees were cleaning up spillage from conveyors. Last, no signs or warnings were present advising employees not to work under conveyors.

guard,' which is below the right end of the long, rectangular guard.¹⁸ Tr. 318. All three of those guards were in place on the day of the accident. Tr. 319. Also, as previously noted, the return roller, where the accident occurred, is right behind Harris' legs, in R-6. Tr. 319. Harris noted that seven "troughing rollers" that is, rollers form the belt into a "U" shape, and which are on top of the conveyor belt, are guarded. They are guarded because they present a pinch point and they are guarded by the long rectangular guard shown in R-6.

In contrast, the return roller which ensnared Avitia is on the bottom side of the belt. Its function is to keep the belt from sagging onto the ground. The return roller in issue is depicted in R 5 right above the 33" marking on the exhibit.¹⁹ Harris described the return roller's location as "inside the frame bracket ... it's located up inside the frame ... the bottom of the roll is relatively flush with the bottom of the frame of the conveyor." Tr. 324. The 33 inch measure in R 5 records the distance from the bottom of the roll to the ground. Tr. 323. There is no dispute that the return roller in issue did not have a physical guard on it at the time of the accident. Tr. 325.

Representing the Respondent's central contention in this case, Harris considered the roller to be guarded by location because there is no "access" to it in the sense that one has to intentionally go that location to gain access. Incidental contact, in his view, could not occur. Tr. 326. Harris expressed his understanding of guarding by location as circumstances where "there's no way to access it or accidentally fall into it." Tr. 326. In support of this view, he noted that there are several other rollers that are low to the ground, meaning rollers located 36 inches or less from the ground and he asserted that such rollers have always been considered guarded by location. Tr. 327. Thus, Harris viewed guarding by location to apply to situations where one would have to take deliberate action to gain access. Tr. 327.

The Court agrees and finds as a fact that if one were to trip or fall in the area where Mr. Harris is standing in the photograph, R 6, no contact with the return roller could occur. As noted, it also rejects the Department of Labor's assertion that Avitia was shoveling dirt from the *outside* of the grizzly conveyor and only reaching as far under that conveyor as his shovel permitted, that is up to his shoulders, when he became caught by the return roller. Only Mr. Avitia's version supports the contention that he was working from outside that conveyor but the Court, upon consideration of Mr. Harris' testimony and others, concludes that scenario is incredible.²⁰

¹⁸This is the guard which is hard to discern in the photos but, as noted, its presence does not play a direct role in the determination of the alleged violation which concerns only the return roller that ensnared Avitia.

¹⁹Harris drew a red arrow and added his initials to identify the return roller in issue. Tr. 324.

²⁰Even Avitia did not exactly how it was that he was caught by the conveyor. He could not say whether it was his clothing or his shovel that contacted the conveyor. Tr. 62-65. It is far

Although Harris contrasted the accident location with working under the location of the tail pulley, as shown in R 11; and noted that Avitia *had* shoveled dirt from under there, it is worth noting that the access height to the area under the tail pulley is about the same as the site of the accident. Yet, it is significant to note that the tail pulley *is* completely guarded underneath it. In contrast the roller where Avitia was caught up was not so completely guarded.

Harris did not consider the rollers at the tail pulley as guarded by location because one “could duck your head down and walk underneath there, pick your head up. You could accidentally get into that, and that’s why they’re guarded.” Tr. 332. The Court finds this reasoning to be flawed, or at least inconsistent, because one could also duck under at the location where Avitia was injured and that is exactly what the Court finds that he did. Once under the conveyor frame, as shown by R’s Ex R 7, one could pick up his head and be subject to the roller’s action, as happened to Avitia. In the Court’s view, the Respondent’s own exhibits, R 5, 6 and 7, undo its claim that the return roller was guarded by its location. R 6, with Mr. Harris standing at the point of Avitia’s access, shows that the metal frame is at the top of his legs. That frame, as reflected in R 5, leaves a 33 inch access space but, of more significance than the measurement,

R 7 shows how easily one can gain access to the return roller.²¹ That same photo also shows the relative positions of Harris’ buttocks and the conveyor I beam frame and it demonstrates that, while access would have to be intentional, it would require little effort to achieve such access by

more likely that Avitia was trying to dislodge a piece of rock or some other lodged material when the accident occurred, as Harris noted that there was no dirt under the roller at the time of the accident. Tr. 339. The photographs don’t make this absolutely clear, but in contrast to R 11, there is no pile apparent in R 6. In contrast, at least based on the photograph in R 7, rocks do accumulate under the roller, as shown by the pile of rocks on the left side of that photograph. Harris also stated that when he arrived at the accident scene and the conveyor belt had been cut as part of the effort to free Avitia there was “a rock on the bottom side of the belt, which that rock would have been stuck against the return roll and either the frame of the conveyor or a cross member in the conveyor.” Thus, based on his experience and knowledge with the arrangement, Harris concluded that Avitia was “probably trying to free [a] rock while the conveyor was in motion.” Tr. 343. All of this supports the Court’s conclusion that Avitia had gone under the conveyor and was not outside of it and that his motive was to free a rock or some other material which had become lodged on the belt.

²¹ Harris stated that it would be about 30 inches from the bottom of the frame of the conveyor at the location where he is standing in Ex. R 6. Tr. 403. The Court noted that R 5 shows, by that drawing, that it is 38” to the pinch point. Tr. 405. Harris felt it was more like 35” though he agreed that the drawing indicates 38”. Tr. 406. As anyone can confirm with a ruler, an opening or space of 38 inches is a considerable height which would not pose a significant obstacle to easy access for most people.

merely bending at the waist.²² Ironically, the same photograph, R 7, shows guarding is present in the foreground, underscoring both the need for and the absence of guarding at the return roller.

Regarding the general assertion of guarding by location, Harris stated he considers “something that’s way up in the air or way low to the ground . . . [as] guarded by location.” Tr. 351. He deemed those locations as not requiring a guard because “you cannot access that. You know, there’s no reason to access that.” Tr. 352. However, the Court notes that *ability* to access a location is different from having a *reason* to access a location and that Harris seemed to blur the ability to access from having a reason to access an area. In this instance, Avitia had both a comparatively easy ability to access the return roller by simply bending at the waist. In terms of a reason to access the location, the Respondent has provided the most likely reason for Avitia’s accessing it.

Although Harris maintained that there is some variation among the MSHA inspectors in terms of their view whether a guard is needed or not and that some inspectors would require guarding if a situation “might be accessible,” in the Court’s view, such variations in interpretation only potentially impact the penalty not the fact of violation.²³ Harris also conceded that at times it is simply a situation where a fresh set of eyes sees a guarding issue where others did not. Tr. 353-354. In one guarding citation instance described by Harris, the Respondent was cited where an employee, if he had long enough arms, could reach from a catwalk and get caught in the head pulley. Tr. 356. Harris noted that in that instance there was a guard present, but that it did not extend out far enough. In an attempt to show inconsistency on MSHA’s part in applying the guarding standard, Harris stated that an unguarded return roller along the overland conveyor has never cited by MSHA. This location was identified in the background of R 7 and Harris stated that the conveyor height at that location was 32 inches. Tr. 358. Further, Harris estimated that there must be 15 such rollers along the overland conveyor that are similarly guarded by location. Tr. 359. Again, the Court views such inconsistencies as a distraction from the issue of whether the return roller in this case required guarding. Inconsistent application of the guarding requirement to other rollers is relevant, at most, only to the assessment of any penalty if a violation is found.

²²As Harris noted, one can shovel under the tail pulley because it “is completely guarded,” as there is a guard *on the bottom* of the tail pulley. Thus, as shown in R 11, there is a complete box around the tail pulley. Tr. 333.

²³In the same vein, Harris also claimed that when an MSHA inspector appeared at the accident scene the next day, the inspector expressed disbelief that anyone would go under the conveyor where Avitia did. Tr. 440. He also stated that the inspector agreed the area was guarded by location. Tr. 440. He further claimed that the area “was obviously in a location that wasn’t accessible.” Tr. 441. Still Harris was told that a citation would likely be issued, but with ‘low negligence’ attributed to it because of its inaccessible location. Tr. 442. These claims, even if assumed to be true for the sake of argument, have no impact upon the Court’s task of determining if the standard was violated.

Manuel Torres, a loader operator at the mine, was also called as a witness for the government.²⁴ Tr. 193. He estimated once or twice a day, it is necessary to dig around the crusher, the jaw and the belts. This occurs when dirt falls from the belts and it requires digging under the tail and head pulleys so that the dirt doesn't pile up too close to the belts. Tr. 195-196. Such spillage also occurs around the return rollers. Tr. 196. He stated that in the past he has seen workers cleaning close to the belts, but he added that "nobody is supposed to be under the belts." However, he added that one can use a shovel and clean piles under the belt while the belts are running and this can be done safely. Tr. 200.

Accordingly, the testimony of Harris, Torres, and even Mr. Carpio, support the finding that shoveling around and under conveyors is a necessary task at this operation. Certainly, Avitia was doing that work around the tail pulley and around the return roller on the day of the accident although the specific activity that caused him to become ensnared by the return roller came about as a result of his effort to dislodge a rock or some other material which had become lodged between the belt and the roller.

The government also called Benny Lara as a witness. Lara was the supervisor for the Albuquerque field office at the time of the accident at the Respondent's mine and it was he who assigned Mr. Cisneros to conduct the MSHA investigation of the accident.²⁵ Tr. 540-541. Lara's testimony was limited in its scope. Chiefly, he testified about the guarding standard in issue, 30 CFR 56.14107(a), noting that the only exception in that standard is for moving machine parts above seven feet, and, emphasizing that point, he noted that there is no corresponding exception within the standard for moving machine parts that do not need a guard because they are too low.²⁶ Tr. 544.

Aaron Fitting was called as a witness for the Respondent. Fitting is the operations manager for Mainline Rock, which is a subsidiary of Yukon. Tr. 568. Regarding the moving machine part violation Fitting could offer little about the accident itself, because he did not arrive at the scene until the day after the accident. Further, the Court has already determined, on the basis of testimony from those who were there that day, what happened. Apart from the exact

²⁴ Mr. Torres was the first to arrive at the accident scene. Tr. 203, 224. This was prompted when he noted that the belt had stopped. He then called to have the power shut down. Tr. 201. When he arrived at the accident scene, he found Mr. Avitia "trapped in between the roller and the belt." Tr. 202. Mr. Torres marked on Ex R-6 the approximate location where he found Mr. Avitia, indicating the location with his initials, "MT." He added that Mr. Avitia was found just to the left of the man in the photograph, which is Ex. R-6. Tr. 212. Later, Mr. Torres stated Mr. Avitia was "directly behind" the person in the photograph. Tr. 214. Thus, Torres' account supports Harris' testimony as to the location where Avitia became ensnared.

²⁵ Lara testified because Cisneros had since retired. Tr. 533.

²⁶ Respondent elected not to conduct any cross-examination of Mr. Lara. Tr. 557.

circumstances of the accident, Fitting was able to offer some useful information about guarding at the Torrance Mine.

Fitting stated that he built the crusher at the Torrance mine. Tr. 571. The arrangement however is not fixed in the sense that, as mining progressed, conveyors would be added as the hole in the ground grew. Tr. 573. His work included installing guards. The decision to install guards is based in part on written information and in part on experience. Tr. 574. As Fitting expressed it, "Like tail pulleys have to have guards, B belts have to have guards, drive belts have to have guards, flywheels have to have guards. Anything that a person can - - incidental contact, get to, we guard." Tr. 574 (emphasis added).²⁷

Fitting also stated that the decision to guard does not take into account whether a miner could stick something, such as a tool, into a pinch point. Rather, the focus is upon whether one could trip or fall and make contact through such an event. Tr. 593-594. Yet, Fitting stated he was aware that miners would clean underneath conveyors using a shovel or a rake to pull dirt out from under a conveyor and that the task was sometimes done from a kneeling position. Tr. 594. However, Fitting did not believe such contact could occur 'accidentally' while performing those cleaning tasks such as with a shovel. Tr. 595.

Accordingly, on the basis of the findings above, the Court concludes that 30 C.F.R. § 56.14107(a) was violated. The return roller in issue was a moving machine part of the type covered by the standard. Indeed the Respondent does not contend that the standard does not apply to such rollers but instead that it does not cover intentional or deliberate action and that it was guarded by its location. However the Court finds that it was a normal part of Avitia's duties to clean up and shovel material which would be deposited around the conveyors. Such deposits occur continually and as an inevitable part of the mining process. It was also not uncommon for rocks or accumulated debris to become caught in the conveyor system and some sort of blockage occurred here. That blockage prompted Avitia to make the unwise decision to free the stuck rock or material using his shovel, with the ensuing accident.²⁸ The critical point however is that the

²⁷ Fitting stated that the determination whether to add a guard is based on experience and through MSHA inspections and talking with those inspectors. Tr. 573. He also made claims that MSHA would always issue such a citation when an accident occurs but such comments are simply a distraction from the Court's task of determining how the accident occurred and whether the standard was violated. For the same reason, Fitting's particular understanding of guarding by location, and that the standard protects only against accidental or inadvertent contact, is not relevant to determining whether there was a violation. He did not deny that such rollers can pose a hazard, agreeing that MSHA fatalgrams have noted that miners have been pulled up into return rollers. Tr. 584.

²⁸ Using R 6 as a reference, Harris stated that where he is standing in that photo, at the location of his legs, is the point where Avitia would have been when he got caught in the roller. Of course, he would have been underneath the beam frame at that time, under the belt. Harris

return roller was easily accessible and certainly did not require “crawling” to gain access to it. As the Court has noted, the Respondent’s own photos show both the relative ease of access and the very hazardous nature of that moving part. There is in fact, in terms of ease of access, only relatively minor differences between the fully guarded tail pulley and the return roller which ensnared Avitia. Even if there had been a written policy advising that conveyors were to be shut down when material became lodged, the issue of required guarding would be the same because, as the Commission has noted in *Thompson Bros. Coal Co.*, inadequate guarding issues must be resolved on a case-by-case basis, which is to include “all relevant exposure and injury variables” which includes “the vagaries of human conduct.” 6 FMSHRC 2094, 2097 (Rev. Comm. 1984). Here, Avitia responded in a manner that would not be difficult to predict. He was working in the area, performing the directed clean up activity around the grizzly conveyor, when the rock or other material became lodged and he chose the expedient means to try to solve the problem by sticking his shovel at the lodged material in an attempt to free it. The impediment to access the return roller was minimal and insubstantial; simply bending over at the waist, not crawling, afforded access. Once within the conveyor frame, as Respondent’s photos show, one was then able to stand erect or nearly so to access the return roller. Like the nearby tail pulley, which the same photo shows was guarded, the return roller needed a similar style guard.

It is true that Fitting believed that guarding by location can exempt the need for installation of a physical guard, and on that basis expressed the view that, as here, a “roller [] sucked up inside [a] frame,” is one such example, because [i]t’s not visible, unless you crawl under the belt,” [and therefore] [y]ou couldn’t fall onto it. It’s not a travelway. You couldn’t stand up into it with your head. If you trip, there’s no way to get to it. . . .you can’t fall down it. [One] can’t walk by and lean on it. It’s guarded up inside by the frame.” Tr. 604-605. There are several problems with this view. Notably, the standard only provides an exception where the exposed moving parts are at least seven feet away from walking or working surfaces. The Respondent has not claimed nor is there any evidence that the seven foot rule obtains here. Further, as noted, one *would not* need to crawl in any sense of that word, to gain access to the roller and, again as Respondent’s own photos show, one *could*, and indeed Mr. Harris did, stand up once having moved under the conveyor frame.

Harris conceded that there are no signs warning employees not to work in front of the

stated that it would not have been possible to have been caught up in the roller at some point to the right of his position in R 6. That is, the only location where the accident could have occurred is at the point where he is standing in that Exhibit. Tr. 410. Harris’ explanation of the point of entry is the only one that makes sense. Therefore the Court finds that Avitia did get snagged in the pulley at the location as Harris described and not at some point to the right of that location. The reason for this is that, as Harris pointed out, if Avitia had somehow entered at an earlier point he would have been on top of the belt and he would have ended up at the tail pulley with fatal consequences. Tr. 411-412.

grizzly conveyor nor other forms of notice to stay away from the area.²⁹ Tr. 422. The Court finds that digging around conveyors was a common and necessary practice and that the operator did not have any signs or barriers warning employees walking or working near exposed moving parts to stay seven feet away from them.

Although the Respondent has contended in its Post-Hearing Brief³⁰ that the standard in issue, 30 C.F.R. § 56.14107(a), does not apply to conveyor belt rollers, part of its effort to make this claim rests upon improperly describing an MSHA Program Policy Manual (“PPM”). In this regard, Respondent asserts that the PPM “specifically states the ‘similar moving parts’ language of § 56.14107(a) does not apply to conveyor belt rollers. It then quotes from that PPM, advising that it provides: “Conveyor belt rollers are not to be construed as ‘similar exposed moving machine parts’ under the standard . . .” R’s Br. at 6. In the Court’s view, this description was misleading.

As the Secretary points out in her Reply Brief, Mainline truncated its quote of the PPM. The very important full quotation provides:

Conveyor belt rollers are not to be construed as ‘similar exposed moving machine parts’ under the standard and cannot be cited for the absence of guards and violation of this standard where skirt boards exist along the belt. However, inspectors should recognize the accident potential, bring the hazard to the attention of the mine[] operator, and recommend appropriate safeguards to prevent injuries.

²⁹ Harris maintained that Avitia was specifically warned not to work in the accident area. Tr. 423-424. The Court finds that while Harris was an credible and honest witness, such a statement indicates an awareness of the ease of access to the dangerous moving machine parts. Harris also admitted to a disincentive to install such guards as they tend to trap the inevitable material which falls from the conveyor. This works eventually to clog the conveyor instead of the guardless situation where the material falls directly to the ground. A guard, in short, can hinder production because of its tendency to collect the falling material within it. That means, periodically the conveyor would need to be shut down, and the accumulated material removed from within the guard. As noted earlier, it is important, Harris agreed, to keep the plant cleaned up as, if piles were allowed to build up, and get under the belt, “pretty quick [the] plant would be buried” and the belts would stop running. Tr. 241-242.

³⁰Respondent elected to stand on its initial brief and not file a response brief.

Secretary's Reply at 2.

It is undisputed that no skirt boards were present at the location where Avitia became ensnared by the return roller. Accordingly, Respondent's Counsel is reminded that there is an obligation of candor toward the tribunal.³¹

The Respondent also asserts that, as the return roller is not one of the eleven listed specified components in the standard, the standard is ambiguous as to such application. On that premise, that there is ambiguity, it continues that, under such circumstances, to be supported, the Agency's interpretation that a non-listed part is included must be reasonable. Referring again to the PPM and to the text of the standard itself, Respondent asserts that it is not reasonable. R's Br. at 6-7. Citing *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Rev. Comm. 1984)³² and the PPM yet again, the Respondent notes that the PPM also states:

This standard is to be cited when a guard at conveyor locations does not extend a distance sufficient to prevent any parts of a person from accidentally getting behind the guard and becoming caught, or in those instances when there is no guard at the conveyor-drive, conveyor-head, conveyor-tail, or conveyor take-up pulleys.

R's Brief at 8 (emphasis inserted by Respondent).

With those contentions in mind, Respondent cites *Sangravl Company, Inc.*, 30 FMSHRC 1111 (ALJ 2008) where the administrative law judge vacated the citation upon finding that the chance of inadvertent contact was extremely unlikely as there was no evidence that the roller was worked on while it was running.³³ Here, however, the Court notes that the accident occurred and

³¹ See, for example, *Harrington v. City of Albuquerque*, 222 F.R.D. 505 (2004) in which counsel was criticized for omitting the introductory clause of a sentence quoted in its brief. The truncated quote there was taken out of context and therefore was misleading. Whether intentional or unintentional, misleading or selective quotations are not helpful to any court. *Unitherm Food Systems, Inc. v. Cooper & Co.*, 2010 WL 2347040 (N.D. Okla. 2010).

³² In the Court's view, *Thompson Bros. Coal Co.* does not assist the Respondent's contentions. As Respondent notes, the Commission stated that the standard applies where there is a reasonable possibility of contact and that assessment of that is to include "ordinary human carelessness." Further, the Commission stated that inadequate guarding issues must be resolved on a case-by-case basis, which is to include "all relevant exposure and injury variables" which includes "the vagaries of human conduct." R's Br. at 7, quoting *Thompson Bros.*

³³ Administrative Law Judge decisions have no precedential effect and are useful only to the extent that the underlying reasoning is adopted by another administrative judge in the case

there is uncontroverted evidence that work was performed at the roller while it was running. Although the Court agrees that the roller was inaccessible to accidental contact, it still concludes, for the reasons stated within, that the standard applies in this case. Similarly, while arriving at a different conclusion from the Respondent as to the standard's applicability, the Court finds that Avitia purposefully stuck his shovel near the moving roller in order to remove a rock. This is because the moving machine part, the return roller here, was of the class of such moving parts that, when not guarded, can, and in this case did, cause injury. In fact, the very PPM that Respondent would have the Court pay heed to, can be fairly construed to instruct that such belt rollers are exempt from the standard only when there are skirt boards present.

It also seems that the Respondent interprets the PPM too liberally when it asserts that it "states specifically that 30 C.F.R. § 56.14107(a) is intended to address the prevention of accidental contact with moving machine parts." The portion of the PPM Respondent refers to actually provides that:

This standard is to be cited when a guard at conveyor locations does not extend a distance sufficient to prevent any parts of a person from accidentally getting behind the guard and becoming caught, or in those instances when there is no guard at the conveyor-drive, conveyor-head, conveyor-tail, or conveyor take-up pulleys.

Two observations are made about the PPM in this regard. First, the return roller, it has been found, was not guarded at the time of the accident. Therefore, the PPM language about "accidentally getting behind the guard" is applicable. Second, as it was not guarded, the second part of the quoted language, next above, only cites examples of unguarded pulleys. In contrast, the standard itself is not so limited as it protects against moving machine parts that can cause injury by requiring guards to protect persons from contact with such moving parts.

Respondent alternatively submits that the citation should be vacated because it was not provided with adequate notice that a guard was required for the cited roller. Under this argument Respondent asserts that the standard in issue is so vague, incomplete, indefinite or uncertain that people are left to guess as to its meaning and application. To support this claim, Respondent notes that no MSHA inspectors believed that the return roller required guarding. Respondent points to the testimony of Harris that an MSHA inspector had advised him that a different return roller on the Quarry's Overland conveyor was guarded by location as it was close enough to the ground so as to be inaccessible. Respondent contends that the testimony of Aaron Fitting and MSHA supervisor Lara support this contention as well. As Mainline would have it, the prior identification by MSHA inspector Gutierrez of some 20 to 30 locations where he identified a need for guards should be the last word on the locations where guards were needed at the mine.

In connection with its claim of lack of notice, Respondent cites *Alan Lee Good d/b/a Good Construction*, 23 FMSHRC 995 (Sept. 2001) ("*Good Construction*") for the test to be applied in

being litigated.

determining whether a reasonably prudent person would have notice of a standard's requirements. Applying that test, Respondent maintains that such notice was not provided. R's Brief at 12.

In sum, Respondent maintains that the standard is vague and broadly worded, that the PPM provisions contradict the Secretary's position in this litigation and that MSHA had not issued any prior violations for unguarded bottom rollers in its previous inspections. All of this adds up, in Respondent's view, to a lack of fair notice. For the reasons set forth in this decision, the Court rejects those contentions.

The Court agrees with the Secretary that the citation issued for the violation of 30 C.F.R. § 56.14107(a) applies to the return roller in issue and that the violation was significant and substantial. The Court has determined that the violation occurred and clearly the absence of the guard for the return roller contributed to the discrete safety hazard of Avitia's being caught in the return roller. Serious injury not only would be likely in such an event, but also the facts of the accident confirmed that to be the case. Avitia was extremely fortunate to have survived the event.³⁴

Turning to the issue of negligence, the Court concludes that the operator knew or should have known of the violative condition or practice and that no mitigating circumstances were

³⁴ Respondent asserts that the Secretary failed to introduce evidence regarding the size of the Respondent and the mine's violation history. R's Br. at 18. Given that the administrative law judge must consider the Section 110(i) penalty criteria in assessing any penalty and, consistent with that, make findings of fact and conclusions of law as to each of the statutory penalty criteria, it is Respondent's argument that the absence of any evidence of those two penalty criteria means that the Secretary failed to establish a prima facie case supporting the imposition of a civil penalty and that, as a consequence, the civil penalty assessment must be dismissed.

In response, the Secretary notes that the parties agreed at the hearing that it would supplement the record with a certified mine history report post-hearing and that this occurred on December 16, 2010, with that report designated as Exhibit P 1. As to the size of the mine operator, Exhibit A was included as part of the civil penalty petition. That Exhibit A listed the mine hours and the controller hours and it reflects the points assigned for those. Last, it is noted that the Respondent did not deny the listed mine hours, controller hours, nor the points assigned to either based on size. This should not be surprising, the Secretary notes, as the mine is the source of this information which is provided to MSHA. The Court agrees and rejects the Respondent's claim regarding penalty criteria.

present.³⁵ The Court agrees that, relevant to this issue, is the fact that the Respondent was advised about two months before the accident of the need to guard some 20 to 30 return rollers.³⁶ Tr. 600. The record supports the conclusion that the configuration of the conveyors was changed after that, but even if that had not occurred, MSHA's identification of specific rollers in need of guards does not insulate an operator from the duty to assess the need for guards at every location where moving machine parts may be contacted and cause injury.

The Court does not subscribe to the claim that MSHA has permitted guarding "by location" as applying to circumstances such as those that obtained here. The standard itself speaks to the only recognized exception, the situation where exposed moving parts are at least seven feet away from walking or working surfaces.³⁷ There is neither a contention nor evidence of record to support the application of the exception here. Indeed one would be hard pressed to explain how it was clear that the tail pulley so obviously needed to be guarded but yet the return roller, with nearly the same access, did not.³⁸ Again, the Respondent's own photographic exhibits make this plain.

Nor would any contention that because MSHA had identified a number of rollers in need of guards, those not so named would not need them. It is the operator's, not MSHA's, responsibility to identify such moving machine parts.³⁹ Given the testimony that conveyor belt clean up is a routine and continuing task, the operator's negligence is properly characterized as high.

On the basis of the entire record, the Court affirms the appropriateness of the \$60,000.00

³⁵Though not present here, if the conveyor frame had been significantly lower so that an employee such as Avitia would need to crawl under it to gain access, whether there was a violation would have been in issue and at a minimum mitigating factors would need to be addressed in such circumstances.

³⁶Respondent believes the prior identification helps its position. The Court does not as such an estoppel theory does not obtain.

³⁷Thus, there is no "three foot" rule exemption to this guarding standard.

³⁸Indeed, were it not for the other incredible claims made by Respondent's employee, Mr. Carpio, having the effect of discounting his testimony overall, his claim that the return roller *was* guarded would establish that the Respondent knew there was a need to guard that roller.

³⁹Accordingly, it is unnecessary for MSHA to show that the operation's conveyor configuration had changed since the time the Agency had identified certain rollers in need of guards.

penalty, as specially assessed⁴⁰ for this section 104(a) citation. The violation, per the standard set forth in *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), was significant and substantial. The Court has found that the cited standard was violated, that the absence of the guard presented a distinct safety hazard contributed to by the violation, that the hazard in fact contributed to the resulting injury and that the injury was of a serious nature. In addition, there was high negligence here, as the Respondent was aware of the hazard, knew that clean up was necessary around the conveyors and knew that material becoming lodged in the conveyor was a common and expected problem endemic to the operation and had guarded similar rollers and guarded the adjacent tail pulley.⁴¹

B. Failure to Notify MSHA; the alleged violation of 30 C.F.R. § 50.10.

Essentially, MSHA established this violation through the testimony of Dwayne Olsen. Olsen is Mainline's lowdown superintendent at the Torrance Quarry. He also handles compliance issues and paperwork at the Torrance Quarry. Tr. 453. He was at the site on the day of the accident. He drove his truck to the accident site, which was only a minute away. Tr. 459. When he arrived there, Avitia was on the ground being attended to by two employees. Olsen remained at the scene for only a few minutes before leaving. Tr. 460. He left because he was one of the individuals who had to make telephone calls. Tr. 461. Based on his quick view of Avitia, Olsen did not think Avitia had been seriously hurt, even though he understood that he went through the return roller. Tr. 462. He then drove to the mine office to make the calls. Although he stated that his first call was to 911 and that, after that, his call sheet directed that calls be made to the sheriff or state police, it was pointed out to him that, in his deposition, Olsen stated he first tried to contact corporate officials Mike McKinney and Vern Scoggin⁴² to inform them of the accident and to advise them that they were getting a helicopter for Avitia. Tr. 465-

⁴⁰ MSHA's Lara also noted that there was a 'special assessment' for this violation, and that such assessments come about where the violation is of a 'serious nature' and where operator negligence may be involved. As an example, Lara stated that where an employer knew that an employee was working around an unguarded moving machine part, a special assessment may be made. Tr. 545. Lara stated that the investigating MSHA inspector would make a determination of the negligence involved, and incorporate that in the citation that was issued. Tr. 546. Lara later reviewed the investigator's recommendation that there be a special investigation and concurred with that conclusion. Tr. 547.

⁴¹ Strictly as a procedural matter, it is noted that Exhibit P 11 was mistakenly included with the transcript provided by the court reporter, but that exhibit was withdrawn by the Secretary, as that document refers to idler rollers, not the return roller in issue here. Tr. 552.

⁴² Olsen remembered that, as he could not reach Scoggin, he called McKinney. Tr. 470. McKinney is the Respondent's in-house counsel. Scoggin is the company's compliance officer in Spokane, Washington. Tr. 473.

466. So, Olsen in fact first called the corporate office. Tr. 467. Yet, at the time he called the corporate office, Olsen was aware that Avitia needed medical attention. Tr. 468. He also called 911 informing them of the accident and the need for an ambulance. Tr. 468. By Olsen's own estimate, all of his calls took less than 30 minutes. Tr. 472.

Subsequently Scoggin returned Olsen's call and he asked if Olsen had called MSHA. Olsen told Scoggin that he had not made that call because he didn't feel there was a need to do so at that time, in that the criteria to require such a call had not been met. Tr. 474. He based this on the fact there had not been a death, he did not feel death was imminent, and the injured had not been trapped for 45 minutes. Tr. 475. However in the 30 minutes that then elapsed Olsen made no further inquiries as to Avitia's condition. Tr. 476, 479. He then called the owners of the property, that is, the lessors of the land to the Respondent. Tr. 476. Olsen also received a call from Brian Deatly, the mine owner. Mr. Deatly asked if Olsen had called MSHA, and also advised Olsen to make that call. Tr. 478. But, Olsen did not make the call to MSHA after concluding his call with Deatly. Tr. 481. Olsen did not make the request for a helicopter for Avitia but he conceded that once he learned a helicopter was on the way, he knew that the matter was more serious. Tr. 480-481.

Eventually Olsen did call MSHA at about 2 p.m. or 2:35 or 2:37. He could not recall exactly the time of the call. Tr. 482. This call was made *after* the helicopter had departed. Tr. 482. Olsen continued to maintain that he did not feel the criteria to make the call within 15 minutes had been met. Tr. 483. Yet, he did not feel his call could wait until the next day because "an individual [had been] hurt." Tr. 484. According to Olsen it did not dawn on him about the seriousness of Avitia's condition until the helicopter EMT told him that Avitia was in "tough shape."⁴³ Tr. 485. Ex P 10 is an MSHA form that Olsen filled out, which documents the date he completed it. Tr. 488. Under questioning by Respondent, Olsen was directed to Exhibit R 12, which reflect his notes, made the night of the accident. Tr. 491. Olsen agreed that, once he became aware of the extent of Avitia's injuries, he did place the call within 15 minutes of that. Tr. 493. He reiterated that, when he first saw Avitia, his believed that his injuries were not life threatening. Tr. 494. The only location for calls to be placed reliably was at the mine office. That office is really a storage container that was converted to serve as an office. Tr. 495. While at that office, making calls, he did receive a call from an employee who was with Avitia and who inquired when the ambulance would be arriving. Tr. 496. But, Olsen maintained that he did not inquire how Avitia was doing when the employee called. Tr. 497. Still, while he knew an ambulance was on the way, he did not consider the situation life threatening. At any rate, Olsen maintained that he did not know of the seriousness of the situation until the paramedic with the

⁴³ The Court accepts Mr. Olsen's testimony that he did not *intentionally* wait to call MSHA until after he had called corporate heads. Tr. 523-524.

helicopter so advised him. Tr. 498.⁴⁴

Aaron Fitting's testimony⁴⁵ was informative as to the violation stemming from the failure to report the accident to MSHA. Fitting stated that on the day of the accident he received a call from Dwayne Olsen and during that call he inquired if Olsen had called MSHA. Tr. 569. Although Fitting testified that Olsen told him that he didn't think there was anything wrong with Avitia and thus there was no need to call MSHA, Fitting told him he should still call MSHA. Tr. 569. After that, Fitting stated that it was his understanding that Olsen then talked to the paramedics and after that, called MSHA. Olsen then called Fitting again to report that he had called MSHA. Tr. 570. Fitting agreed that when he heard from Mr. Harris the first time about the incident he could have, but did not, direct that MSHA be called. Tr. 586. On re-direct, Fitting, in attempting to explain his failure to make a call to MSHA, agreed he wasn't at the site so his knowledge of Avitia's condition was very limited. Tr. 599.

Regarding the alleged violation of 30 C.F.R. § 50.10, as set forth in Citation No. 7885927, Respondent acknowledges that, pursuant to that section there are specific types of accidents that must be reported immediately, that is, within 15 minutes of the accident. R's Br. at 13-14. Respondent cites *Newmont USA Limited*, 32 FMSHRC 391, (2010), an administrative law judge decision, in support of its position that the event in this case did not have a reasonable potential to cause death. Of course, the particular facts in *Newmont* are entirely different from this matter, so the value of citing that case is minimal. Certainly the Court agrees with the Respondent's contention that an injury, by itself, does not trigger the reporting requirement. Rather, the key determinant is when the injury presents a "reasonable potential to cause death." Nor does the Court take issue with Respondent's contention that the particular circumstances and conditions at the accident site control the outcome and that, in fairness, there must be "a degree of discretion" afforded to the operator's determination of the need to report any given accident. R's Br. at 16. Still, as the Respondent observes, the Commission has stated that the while the operator must have a reasonable opportunity for its investigation of an event, that must be "carried out . . . in good faith and without delay and in light of the regulation's command of prompt, vigorous action." *Id.* at 16, citing *Consolidation Coal Company*, 11 FMSHRC 1935, 1938 (Rev. Comm. 1989).

Examining the particular facts, Respondent asserts that Olsen called 911 within minutes of the accident "and took action to implement Mainline's procedures to provide Mr. Avitia with

⁴⁴ R 12, Olsen's August 13, 2009 memo to Mainline's Counsel was admitted into the record. Tr. 511.

⁴⁵ Fitting, as noted earlier, is the operations manager for Mainline Rock.

the best post-accident care he could.”⁴⁶ Respondent maintains that Olsen acted reasonably, deciding that MSHA did not need to be notified immediately “based on [Olsen’s assessment of] the condition of Mr. Avitia a few minutes after he was injured.” R’s Br. at 17. Further, Respondent contends that “once Mr. Olsen learned the nature of Mr. Avitia’s injuries, [he] notified MSHA within 15 minutes.” *Id.* At bottom, Respondent contends that Respondent was not aware of the severity of Avitia’s condition until the EMT informed Harris and Olsen of that. R’s Br. at 18.

The Court realizes that it would not be fair to simply look at the facts months later and then pronounce what the proper response should have been and it does not do so here. On the other hand, it is fair to characterize Olsen’s behavior as remarkably non-inquisitive about Avitia’s condition and injuries. Based upon all of the facts known to Olsen at the time and those facts he could have developed with minimal additional inquiry, it is clear that a reasonable person would have concluded that the call was required at the time Olsen viewed Avitia at the accident scene. One does not have the discretion to remain uninformed about the circumstances of the accident and then assert that the reasonable potential for the accident to cause death was unknown.⁴⁷

Accordingly, based on the above findings and discussion, the Court finds that the cited standard was violated and that the time starting the obligation to call MSHA began when Olsen first arrived at the scene of Avitia’s accident. Thus, the Court finds that at least an hour and a half elapsed after the time for the required call to MSHA had passed. The negligence under these circumstances was high, not moderate. Because the negligence was high, not moderate, the Court modifies the citation to reflect that and increases the penalty to \$6,000.00.

Civil Penalty Assessment

Based on the findings above, the Court assesses a civil penalty in the total amount of \$66,000.00.

⁴⁶While the call was made to 911, the claimed other action Olsen ‘took [] to implement Mainline’s procedures to provide Mr. Avitia with the best post-accident care he could.’ is not supported in the record.

⁴⁷The Respondent asserts that MSHA’s preamble to the final rule for the 15-minute notification requirement supports its position. In this regard, it cites that preamble’s discussion of the situation where one had to choose between saving a miner’s life and calling MSHA and the Agency’s acknowledgment that such a choice would constitute extenuating circumstances for enforcement purposes. The problem with that reference is that no such dire choice was present in this case. Ultimately, the Court agrees that the determination whether the call is required is to be “based on what a reasonable person would discern under the circumstances.” R’s Br. at 18, citing Preamble to notification rule’s reference to the Commission’s decision in *Cougar Coal*, 25 FMSHRC 513 at 521 (September 5, 2003).

ORDER

Within 40 days of the date of this decision, Mainline Rock and Ballast, Inc., Respondent, **IS ORDERED** to pay a total civil penalty of **\$66,000.00** for the violation of 30 C.F.R. 14107(a), as set forth in Citation No. 7885926 and for the violation of 30 C.F.R. 50.10, as set forth, and as modified by the Court, in Citation No. 7885927. Upon payment of the civil penalty, this proceeding **IS DISMISSED**.

William B. Moran

William B. Moran
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5266/FAX 303-844-5268

February 1, 2011

ALLGEIER MARTIN & ASSOCIATES, : CONTEST PROCEEDING
Petitioner, :
 : Docket No. CENT 2009-531-RM
 : Citation No. 6471439; 06/11/2009
 :
 : Mine: Carthage Crushed Limestone
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent. :
 :
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner, :
 :
v. : CIVIL PENALTY PROCEEDING
 :
 : Docket No. CENT 2010-50-M
 : A.C. No. 23-00028-191940 CKP
ALLGEIER MARTIN & ASSOCIATES, :
Respondent. : Mine: Carthage Crushed Limestone

DECISION

Appearances: Sarah White, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for the Petitioner.
Jack Slate , Safety Manager, Carthage Crushed Limestone, Allgeier Martin & Associates, Joplin, Missouri for Respondent.

Before: Judge Miller

These cases are before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Allgeier Martin & Associates, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The case involves one violation alleging a failure to provide appropriate training to three contractors, employed by Allgeier Martin and working at the Carthage Crushed Limestone mine. The citation was issued by MSHA under section 104(a) of the Mine Act. The parties presented testimony and

documentary evidence at the hearing held on January 11, 2011 in Denver, Colorado. A number of witnesses appeared by telephone.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Allgeier Martin & Associates, (“Allgeier” or “Respondent”) is a contractor who conducts underground surveying activities at the Carthage Limestone mine (the “Mine”) located in Jasper County, Missouri. The Respondent agrees that it is subject to the jurisdiction of the Mine Safety and Health Administration and that the Administrative Law Judge has jurisdiction to issue this decision. (Tr. 9-10); Stip. 1- 4. On June 11, 2009, MSHA inspector Keith Markeson conducted a regular inspection of the Mine and its contractor, Allgeier. As a result of the inspection, the violation contested herein was issued. Following the testimony and presentation of evidence, a decision was issued on the record. The decision is set forth below and includes necessary edits.

A. Order No. 6471439

On June 11, 2009, Inspector Markeson issued an order withdrawing three miners employed by Allgeier Martin, the contractor at the Carthage Crushed Limestone Mine, in Carthage, Missouri. The parties have stipulated that the mine and Allgeier Martin are subject to the provisions of the Mine Act and are miners as defined by the act and that the administrative law judge has jurisdiction in this matter.

Inspector Markeson cited a violation of 30 CFR 48.5, which requires miners to have new miner comprehensive miner training before working underground. The parties agree that the three miners listed in the citation had not received comprehensive training, instead they had received hazard training only. The question is then are they required to have the comprehensive training.

Inspector Markeson's citation, [number] 6471439 reads, "Three contractor miners working in the mine had not received the required MSHA 40-hour new miner training prior to performing surveying duties underground. The contractor was aware of the Part 48 training requirements but believed it was unnecessary for the type of work being done. All three miners had no previous mining experience. The operator is hereby ordered to withdraw Christopher Ackerson, Jeremy Stovall, and Shane Powell from the mine until they

have received the required training. The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to himself and others." This was the citation -- the order, [] was issued under 48.5(a), a significant and substantial violation of [a] 104(g) order.

The [] issue in this case is whether or not these three men were miners as identified under the Part [4]8 training provisions of the Mine Act, and in particular, [whether they qualify as miners pursuant to the definition of a miner at 30 CFR 48.2. The transcript has various references to an (a)(1) miner [and to] an (a)(2) miner. [Those references stem from] 30 C.F.R 48.2(a)(1) [which explains when] a miner [] is required to have comprehensive training. 48.2(a)(2) [on the other hand, sets forth when] a miner is required to have hazard training [only]. So the question is which of these categories do these three miners fit into.

I will note that Allgeier has worked at Carthage for a minimum of 17 years, providing surveying services, and it was the understanding of Allgeier that the hazard training under [] 48.2(a)(2) is what was required, [not the comprehensive training provided by 48.2(a)(1)].

Inspector Markeson issued the citation based on his conversation with the three surveyors. Markeson [credibly] testified that he learned that the three surveyors traveled into the mine in their own pickup, that they used their own manlift to lift up to the roof in order to drill, place spads or dowels. They also told Markeson that if they saw loose material, they scaled it down. The miners had no previous mining experience. He did not observe the mining activities, but issued his order based upon what he learned from talking to the three men.

Mr. Stovall testified on behalf of the Respondent. He was on the survey crew, and he testified that as a surveyor he sets points for grid mapping, he stays out of the production areas, [and] that the surveyors are always escorted by a professional miner. He testified that the [surveyors] ask [for assistance].

if they see hazards that may need to be removed. He drills, places spads, and in his view is not part of the mining process.

The key [to] Mr. Stovall's testimony is that he could not refute what Mr. Markeson testified to. He does not recall what was asked by Markeson nor does he recall what he told Markeson. It is his recollection that Markeson talked only to him, not to the other [two surveyor] miners, but I credit the testimony of Inspector Markeson and find that he indeed credibly testified to [the facts he learned by speaking to] all three miners and did learn the facts as presented in this case.

[]. Stovall did confirm that there was a pickup truck driven underground by the surveyors, that they used the manlift underground, as Markeson indicated, and he did -- Stovall did testify that the surveyors, or at least one of them, received training in the operation of the manlift from the rental company.

Mr. McKay, who testified, works for Carthage as a laborer. He testified that the mine areas are examined once each shift, that Carthage Mine examines the areas prior to surveyors doing their work, and, in fact, it is required by the Mine Safety and Health Act that these areas be examined at the beginning or during each shift. Mr. McKay also testified that Allgeier employees are escorted throughout the mine and are not allowed into certain areas underground. The mine has a policy for identifying and dealing with hazards at the mine. McKay was not present when Markeson spoke with [the three Allgeier] surveyors and could not testify about any escort at the time of the citation. He could not refute Markeson's remarks or be specific about the incidents that occurred at the time the citation was issued. He did testify that the examination of the roof is done visually each shift.

Finally, Mr. Sears testified on behalf of [Allgeier Martin]. He explained that he lines out the work for the surveyors at Allgeier Martin, that Allgeier has been surveying and

producing maps for Carthage for 17 years, and that the policy is that Allgeier employees are told to stay with the miners' representative and in the area as the mine directs. Allgeier does not direct mining.

Based upon all of the testimony and taking into consideration that the mapping is done infrequently, once a year, with some other updates, and that the workplace is examined each shift by the mine, also that the surveyors are mapping and using hand or hammer drills and then hammer or pound in spads or dowels, and that [] they are at the mine for no longer than five days at a time based on Respondent's Exhibit A; taking all of this into consideration, I find that the Secretary has shown a violation of the mandatory standard, primarily because the workers have stepped outside of the limited role of a surveyor.

Mr. Weaver, the education and training supervisor, [for MSHA] agrees that the activities of the miners, [and not the title given to their job], is what subjects them to comprehensive training provisions. Markeson and Weaver credibly testified, and I agree, that the basis for requiring the comprehensive training is not based upon the job title but on the activities done.

The activities that place these men within the meaning of a miner who is required to have comprehensive training are that they operate mobile equipment underground, they drive their own pickup underground into the mining environment, they use a manlift; according to what they told Mr. Markeson, they find loose roof when they're drilling, they scale it down, and the guides that they place are used in the normal mining activity, not just for mine mapping. These men fit the definition of a miner under [30] CFR 48.2(a)(1). They are engaged -- 48.2(a)(1) [further explains] that a miner means [] any person working in underground mines who is engaged in the extraction and production process. I find that the activities of these miners do, indeed, cause them to be engaged in the production process.

The definition [of miner] continues on to [include in the definition] that it also applies to anyone who is regularly exposed to mine hazards, and I understand that the program policy manual says regularly exposed means more than five days. However, someone who is exposed every day for five days, I find to be regularly exposed to the hazards of the roof in the underground mine and the hazards of using this heavy equipment -- associated with using the heavy equipment. Therefore, the miners fit the definition of 48.2(a)(1). They are engaged in production or regularly exposed to mining hazards. Once they fit under the definition, they must have the comprehensive training.

Inspector Markeson also designated this citation as a significant and substantial violation. As he says in his citation and as the commission has often noted, the Mine Act [] acknowledges that an untrained miner is a hazard or a danger to himself and to others. A training violation is a very serious violation. Untrained miners who are operating a manlift to the top of the roof and then drilling and hammering are being exposed to the hazards of falling roof. They are also exposed to the hazards of operating equipment underground in a mine. Exposure to those hazards will result, as Inspector Markeson explained, [in an accident causing event that will result in] lost workday injuries or worse.

I [find that] an untrained person is a hazard to others as well as to himself. Markeson also testified that an injury would occur due to the lack of training. Injury would be, as I noted, lost work injuries or it could be worse. The surveyors are exposed to loose rock, bad air quality, even to the ability to escape in the event of an accident. All would result in an accident-causing event, and that accident-causing event would result in a serious injury to the miner.

As Inspector Markeson indicated, the mine demonstrated moderate negligence in this circumstance. [I agree with that designation.]

[It is] the commission judges who [determine the appropriate] penalty, [in a case such as this based upon the criteria delineated in section 110 of the Act]. The Secretary has proposed a penalty of \$112. I find that the Allgeier Martin is [] a small contractor working at a medium-sized mine. The ability -- the payment of a penalty would not hinder its ability to continue in business.

I have reviewed the history of the mine, which is Government Exhibit 1. I find that there are really no -- there's really no history of this particular contractor receiving citations -- there are two on there, both in contest -- that [] terminating the citation was removing the men from the mine, and all of those are considered in assessing a low penalty. The gravity of this violation is serious, and as I noted, the negligence is moderate.

Normally, I would assess a penalty of at least a thousand dollars in a training violation, probably more. However, given the fact that this mine, I believe Allgeier Martin had a good-faith belief that they were doing the right thing, that they had policies in place, and that they were following what they thought to be the law, and that is that their surveyors were required only to have hazard training and not comprehensive training [and therefore the negligence is less for purposes of the penalty]. The mine [did not understand] that [it is the] activities of the miners, not their designation as a surveyor, but their activities, [that] subjected them to a higher standard of training in this instance.

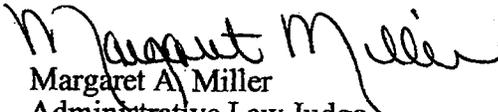
So based upon all of those factors, I assess a \$200 penalty in this case.

(Tr. 122-129).

II. ORDER

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. §820(I), I assess a penalty of \$200.00 for the violation as discussed

above. Allgeier Martin & Associates, is hereby ORDERED to pay the Secretary of Labor the sum of \$200.00 within 30 days of the date of this decision.


Margaret A. Miller
Administrative Law Judge

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

Sarah White, Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202

Jack Slates, Safety Manager, Americold Logistics LLC, 1331 Civil War Rd., P.O. Box 1086, Carthage, MO 64836

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th Street, Suite 443
Denver, CO 80202-2500
303-844-3577/FAX 303-844-5268

February 1, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2009-22-M
Petitioner	:	A.C. No. 04-00196-163109
	:	
v.	:	Docket No. WEST 2009-101-M
	:	A.C. No. 04-00196-166068
LEHIGH SOUTHWEST CEMENT CO.,	:	
Respondent	:	Tehachapi Plant

DECISION

Appearances: Andrew J. Schultz, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Brian Bigley, Safety Manager, Lehigh Southwest Cement Company, Tehachapi, California, and Tim King, Safety Coordinator, Lehigh Southwest Cement Company, Redding, California, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Lehigh Southwest Cement Company ("Lehigh") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Bakersfield, California, and filed post-hearing briefs.

Lehigh operates a limestone quarry and cement plant in Kern County, California. This facility employed an average 126 people in 2008. These cases involve ten citations issued under section 104(a) of the Mine Act and two orders issued under section 104(d). The Secretary proposes a total civil penalty of \$43,356 in these cases.

**I. DISCUSSION WITH FINDINGS OF FACT
CONCLUSIONS OF LAW**

A. Order No. 6440388

On June 26, 2008, MSHA Inspector David Reynolds issued Order No. 6440388 under section 104(d)(2) of the Mine Act alleging a violation of 30 C.F.R. § 56.17001, as follows:

The lights located inside the quarry locker room were not being maintained. One of the lights was missing a light bulb and the other light failed to function when tested. This condition was reported to the quarry supervisor and had been written up in the quarry message board for over a week. Bret Marrow, quarry supervisor, stated that he was aware of this condition and failed to correct the hazard. This condition creates a trip and fall hazard that could result in an injury. The quarry operates a night shift and this locker room is accessed on all shifts.

(Ex. G-2). The inspector determined that an injury was unlikely but that if an injury did occur it would result in lost workdays or restricted duty. He determined that the violation was not of a significant and substantial nature (“S&S”) and that the company’s negligence was high. Section 56.17001 provides that “[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairs, switch panels, loading and dumping sites, and work areas.” The Secretary proposes a penalty of \$4,000 for this order.

Inspector Reynolds testified that the room in question was a combination break room and locker room. He noticed that there was a notice on a white board at the quarry that the lights were not working in the break room. When he tried to turn on the lights at the entrance to the room, nothing happened. (Tr. 15). He said that there were two ceiling fixtures in the room. There was some ambient light from a television that was on in the room. (Tr. 15, 21). There were also some windows, but they did not let in much light. There were chairs, a recliner, and benches in the room that created a trip hazard. The quarry supervisor told him that he was aware that the lights were out, but he did not feel it was a priority item to get corrected. (Tr. 16).

Inspector Reynolds determined that the cited condition violated the safety standard because miners change their clothes in the room between shifts, take breaks in the room, and store their work clothes and hard hats in the room. He considered the room to be a work area at the mine because miners use it to put on work clothes and safety equipment. (Tr. 34-35). At the time the order was issued, the quarry operated an evening shift that ended after dark. (Tr. 18). The inspector did not use a meter to measure the amount of light in the room and he does not believe that MSHA has issued any guidelines concerning the amount of light that is required. (Tr. 36). There was also an electrical panel in this room. (Tr. 21). The inspector believed that it was unlikely that the violation would contribute to an injury. He believed that the operator’s negligence was high, however, because management was aware of the condition. Reynolds’ supervisor accompanied him during this inspection, and Reynolds testified that a miner told the supervisor that the message about the lights in the break room had been on the white board for weeks. (Tr. 19). The message was then erased and then rewritten a few days later, according to this miner. A few miners also told Inspector Reynolds that the lights had been out for several days. (Tr. 40). Based on what was written on the white board, he assumed that the lights had been out for about two weeks. *Id.*

The inspector determined that the violation was the result of the operator's unwarrantable failure because management knew about the condition and did nothing to fix it despite the fact that there are electricians employed by the operator. (Tr. 19). Safety Supervisor Brian Bigley told Inspector Reynolds that the miners who use the break room could have easily gotten a fresh light bulb if they wanted more light in the break room. (Tr. 19). The inspector believed, although he was not present at the time, that in addition to new light bulbs, at least one light fixture needed to be repaired by an electrician. (Tr. 20).

Brian Bigley testified that the room cited by the inspector was not a work area but was a break room. (Tr. 60). There are a few chairs, a recliner, and a picnic table in the room. Miners want the room dark when they take their breaks and often unscrew the light bulbs so that the lights cannot be turned on and wake them. (Tr. 61). Bigley testified that there was plenty of light in the room to see. An open doorway to an adjacent lighted room and an outside door with a window allow light to enter the room. Bigley testified: "I wouldn't want to read a book in that room, but for the purpose of that room, basically watching TV and sleeping, lighting is just about perfect for them." *Id.*

Both Inspector Reynolds and Brian Bigley took photos of the break room. The inspector's photos were taken with a flash but Bigley did not use a flash in most of his photos. He testified that photo 39 was taken with ambient light and photo 40 was taken with a flash. (Tr. 62; Exs. R-39 & R-40). Both photos are of an NFL calendar that is taped to a locker. Bigley testified that mine management generally gives miners "pretty lenient free run" in the break rooms "in order to make it comfortable for them." (Tr. 63). Bigley testified that he talked to the miner who spoke with the inspector about the white board. The miner told Bigley that the message said "[n]eed light bulbs." (Tr. 64). Bigley testified that he has seen miners unscrew the light bulbs slightly when they want it dark and tighten them back in when they want more light.

Bigley testified that another citation was issued because the cover of the junction box for one of the light fixtures was not secure. Once that condition was fixed, new light bulbs were installed in the two ceiling fixtures. (Tr. 65-66). Bigley testified that no auxiliary lighting was brought in by the electricians to do this repair work because there was enough light in the room for them to safely work. *Id.*

The Secretary argues that the order should be affirmed as written by Inspector Reynolds. Lehigh management knew about the violative condition for some time and did not take reasonable steps to correct it. Lehigh argues that the order should be vacated because (1) the safety standard does not apply to the break room because it is not a "work area" as that term is used in the standard; and (2) the lighting in the room was more than adequate for the room. The subjective opinion of an MSHA inspector is insufficient to establish a violation. Inspector Reynolds did not use a meter to measure the amount of light in the room.

I find that this order should be vacated. The safety standard requires that "[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures,

paths, walkways, stairs, switch panels, loading and dumping sites, and work areas.” Although the cited area may not be a “work area,” I find that it was a “surface structure” as that term is used in the safety standard. Sufficient illumination must be provided in all surface structures. The question is whether the illumination was sufficient to “provide safe working conditions.” I hold that one must take into consideration the work being performed in the cited area when analyzing whether the Secretary established a violation. *Capitol Aggregates, Inc.*, 3 FMSHRC 1338 (June 1981). The room cited by Inspector Reynolds primarily functioned as a break room for the miners rather than as a working area. I credit the testimony of Bigley that miners often unscrew the light bulbs in the room so that the room is not too bright. Natural light enters the room from a doorway and windows. The television also provides some light. The photographs show that the room is not so dark that it presented a significant hazard to miners, especially considering the purpose of the room. The plant is located in a desert climate that is very hot and dry in the summer. The inspector did not see the conditions in the room at night and I cannot speculate as to whether the conditions would violate the safety standard after the sun sets. See *W.S. Frey Company, Inc.*, 16 FMSHRC 975, 1008-09 (April 1994) (ALJ). This order is vacated.

B. Order No. 6440389

On June 26, 2008, MSHA Inspector Reynolds issued Order No. 6440389 under section 104(d)(2) of the Mine Act alleging a violation of 30 C.F.R. § 56.20011, as follows:

The entrance to the level #-1 bench located in the quarry was not barricaded and posted to prevent entry. The bench is located next to the haulage road where mobile equipment travels. The unprotected bench was approximately 250-ft across and was 40-ft to the working level below. This condition creates a hazard to the miners traveling in this area.

(Ex. G-3). The inspector determined that an injury was reasonably likely and that if an injury were to occur it would be fatal. He determined that the violation was S&S and that the company’s negligence was high. Section 56.20011 provides, in part, that “[a]reas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded or warning signs shall be posted at all approaches.” The Secretary proposes a penalty of \$17,301 for this order.

Inspector Reynolds testified that he inspected a bench where miners had previously been working. (Tr. 22). There was no berm on the “open face of the bench.” *Id.* He was advised that work had been performed on the bench earlier in the shift and he observed fresh tire tracks in the area. Some of the tracks were very close to the edge of the bench. The drop-off to the next level was about 35 to 40 feet. There was nothing to prevent anyone from entering the bench and the inspector believes that there were maintenance personnel in the area at the time of his inspection. He did not observe any equipment near the edge of the bench. (Tr. 44). Inspector Reynolds believed that there was a significant risk that someone operating a vehicle or other mining

equipment could get too close to the edge and fall down to the next level. There were no signs or barricades warning miners of the danger. (Tr. 25).

Reynolds further testified that it is not a common practice in the mining industry to leave benches open. Lehigh had been cited for the same type of violation in the recent past. (Tr. 26). The hazard was not obvious. Given the topography of the area, it is not easy to see the edge of the bench and the conditions change as mining progresses. A heavier truck could get close enough to the edge of the bench that the ground could give way even if the truck were not right at the edge. (Tr. 28).

Inspector Reynolds determined that the violation was S&S because it was only “a matter of time before somebody . . . either drove off that [edge] or got out on loose ground or weak ground and the possibility was there for an injury.” (Tr. 30). The negligence was high because the mine had been cited for a similar violation on March 13, 2008. The supervisor advised Reynolds that he was not aware that the area had been “left unattended.” (Tr. 32).

Mr. Bigley testified that the hazard would be obvious to anyone who works at the quarry. (Tr. 66). Miners are well aware that, during the process of mining, Lehigh is “tearing the mountain down” and that there will be drop-offs on benches. *Id.* Nobody, including contractors, is allowed to travel to the benches without authority from the quarry manager. Contractors are escorted to the bench by an experienced person. Nobody drives close to the edge of the bench and the miners have a “mental map” of the benches as mining progresses. (Tr. 70). Miners are frequently trained to be aware of this hazard. Warning miners that there is an edge to a bench is like “warning someone that there might be water in the ocean.” (Tr. 71). Installing signs will not improve safety at the quarry. (Tr. 82). If any unauthorized person drove up to a bench, the quarry manager or his designee would call the vehicle on the radio and ask what he was doing there. Work is not performed on the benches after dark because there is no lighting on the benches.

The Secretary argues that there were no warning signs or barricades for the cited bench. The hazard was not obvious because it was difficult to see the edge of the bench due to the topography. The area was open and accessible to all vehicles. It is not a common practice in the industry to leave benches open. The violation was S&S because it was reasonably likely that the lack of a barricade or warning sign would cause someone to drive off the bench or get too close to the edge. The violation was the result of Lehigh’s high negligence because it had been recently cited for a similar violation.

Lehigh argues that the hazard was immediately obvious to anyone in the mining industry, including its own employees. The unsubstantiated opinion of the inspector is insufficient to enter a finding that the hazard was anything but obvious. In addition, warning signs were posted at the mine warning anyone that hazards were present at the mine. Lehigh’s negligence was not high because the miners were all well trained and the supervisor was not aware that the bench posed a hazard. Finally, the likelihood of an injury was quite low.

I find that the Secretary established a violation but that she did not establish that the violation was S&S or the result of the unwarrantable failure of Lehigh to comply with the safety standard. I find that a safety hazard existed on the cited bench that was not immediately obvious to employees. I credit the testimony of Mr. Bigley that employees do not randomly enter the bench and that those employees who need to work on the bench are generally aware of the edge. It must be kept in mind, however, that the Commission interprets safety standards to take into consideration “ordinary human carelessness.” *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). In that case, the Commission held that the guarding standard must be interpreted to consider whether there is a “reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness.” *Id.* Human behavior can be erratic and unpredictable. For example, someone might enter the bench to perform minor maintenance on a piece of equipment without paying close enough attention to his surroundings. A warning sign may help him remember to be more aware of the edge of the bench. “Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . .” *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). I agree that putting up a warning sign or barricade is not foolproof, but it may prevent someone from placing himself in danger.

The second sentence of the safety standard provides that “[w]arning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required.” The signs referenced at the hearing by Lehigh are legible but they do not in any way display the nature of the hazard. They are general warning signs telling people that the area of the quarry is restricted and that mine hazards are present. (Ex. R-17, R-18).

An S&S violation is described in section 104(d)(1) of the 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.” A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

I find that the violation was not S&S. The evidence establishes that it was highly unlikely that anyone would get close to the edge of the bench. Inspector Reynolds admitted that the tracks he observed that were close to the edge, including the tracks which seemingly went over the edge of the bench, could have been made before the most recent blast and excavation of the material. (Tr. 50, 55). There is no proof that anyone has driven or will drive a vehicle near the edge of the bench. It is significant that Inspector Reynolds was particularly concerned that a miner could enter the bench without authorization in order to take a break or hide from his supervisor. I credit the testimony of Bigley that the benches are closely monitored by quarry management, that Lehigh has administrative controls in place to keep people away from benches when work is not being performed, and that Lehigh frequently trains its employees on the hazards present. It was not reasonably likely that anyone would sustain an injury as a result of this violation.

I also find that Lehigh’s negligence was moderate and was not the result of Lehigh’s unwarrantable failure to comply with the standard. The term “unwarrantable failure” is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the

violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC at 353.

Although the quarry had been cited at least once in the past for a similar violation, the violation had not existed for a significant length of time, the violation did not pose a high degree of danger, the violation was not obvious, and the quarry supervisor was apparently unaware of the condition. I find that the conduct of Lehigh's managers did not rise to the level of reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care.

For the reasons set forth above, Order No. 6440389 is modified to a section 104(a) citation with moderate negligence and moderate gravity. A penalty of \$5,000 is appropriate.

C. Citation No. 6440386

On June 26, 2008, MSHA Inspector Reynolds issued Citation No. 6440386 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11002, as follows:

The walkway and access to the stairs leading down to the quarry maintenance shop was missing a section of the hand railing, measuring 11-ft on the right side. The drop off was estimated to be approximately 20 to 30-ft.

(Ex. G-1). The inspector determined that an injury was reasonably likely and that if an injury were to occur it would be permanently disabling. He determined that the violation was S&S and that the company's negligence was moderate. Section 56.11002 provides, in part, that "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails and maintained in good condition." The Secretary proposes a penalty of \$2,106 for this citation.

Inspector Reynolds testified that there was an area where employees park their cars and just beyond that area there was a drop-off of about 20 to 30 feet. (Tr. 93). There is a stairway leading down this hill to the maintenance shop. This stairway was equipped with handrails but the area on the edge of the drop-off was not protected at all. (Tr. 93-94; Ex. G-1). He testified that miners regularly walked along this edge between the parked vehicles and the edge. This area was a regularly-used walkway between the maintenance shop and the mine offices. (Tr. 84).

The violation was S&S because it was reasonably likely that someone would fall off the edge and sustain a reasonably serious injury.

Lehigh contends that, because the cited area was not a crossover, elevated walkway, elevated ramp, or a stairway, the safety standard did not apply. The cited area was simply flat ground located along one side of the parking lot. The application of section 56.11002 to this area unreasonably extends the meaning of the terms in the standard beyond their ordinary meaning. The walkway was not elevated as that term is reasonably used. The safety standard states that the elevated walkway must be of "substantial construction." Because the cited area is flat ground, how can it be of substantial construction? The cited area was not a structure. It was an area that was used for the parking lot.

I find that the safety standard does not apply to the cited area and that the citation should be vacated. As stated above, the safety standard provides that crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction and provided with handrails and maintained in good condition. The cited area was not a crossover, stairway, or an elevated ramp. The stairway that led down to the shop from the parking lot was of substantial construction. This stairway met all the requirements of the safety standard. People often walked along the edge of the parking lot to get between the maintenance shop and the mine office via these stairs. This area was at the top of a hill so there was a drop-off along the shortest path between these two points. I find it was not an elevated walkway, as that term is used in the safety standard. It is interesting to note that the title for the safety standard is "Handrails and Toeboards" and that the standard requires that toeboards be provided when necessary. This language makes clear that the standard was designed to apply to structural walkways that are elevated above the ground level. Although the parking lot was created by Lehigh at some time in the past, it was not an elevated walkway as that term can reasonably be understood in the standard. "Elevated" can be defined as "raised esp. above the ground or other surface." *Webster's New Collegiate Dictionary* (1979) at 365. The cited area was the ground. This citation is vacated.

D. Citation No. 6440390

On June 26, 2008, MSHA Inspector Reynolds issued Citation No. 6440390 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.3200, as follows:

The highwall located in the quarry at level #-2 had loose rock and unconsolidated material at the top of the face. This level had been worked earlier in the shift and was left unattended without warning signs and barriers being posted warning of the hazard.

(Ex. G-4). The inspector determined that an injury was reasonably likely and that if an injury were to occur it would be fatal. He determined that the violation was S&S and that the company's negligence was moderate. Section 56.3200 provides, in part, that "[g]round

conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area.” The Secretary proposes a penalty of \$4,689 for this citation.

Inspector Reynolds testified that the highwall at the level #2 bench had loose, unconsolidated material that posed a risk to miners working below the highwall. (Tr. 98). Bigley acknowledged that the area was being scaled down on the morning of the inspection but that the area had been left unattended. (Tr. 216). The violation was S&S because the failure to install a barrier against entry to the area under the highwall could contribute to a serious injury. A loader was parked in the area, but it was 10 to 20 feet back from the highwall. (Tr. 145). The area was barricaded to terminate the citation.

Lehigh argues that there was no showing that Inspector Reynolds has any particular expertise in highwall safety. He did not testify as to the structural components of the highwall, fault fracture patterns, or the propensity for face slumping. (Lehigh Br. 8). Lehigh offered evidence that two competent miners with over 50 years of experience between them had performed a workplace examination of the area and determined that no hazard existed. The objective evidence does not support the citation. In the event that it is found that the conditions created a hazard, Lehigh was in the process of taking down any rock that posed a hazard. Finally, there was no showing that unauthorized personnel would enter the area.

I find that the Secretary established a violation. Inspector Reynolds testified that there were several large rocks on top of the highwall that posed a danger of falling. (Tr. 98). The safety standard provides that “[g]round conditions that create a hazard to persons shall be taken down or supported *before other work or travel is permitted in the affected area.*” (Emphasis added).” The second part of the safety standard provides that “[u]ntil the corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.” I credit the testimony of Inspector Reynolds as to the condition of the highwall. He worked in mines between 1991 and 1998. He started working for MSHA in 2000. (Tr. 11). He estimated that he has inspected quarries 150 to 200 times.

The position of Lehigh is somewhat contradictory. On the one hand, Bigley testified that two of its employees inspected the quarry highwalls and determined that no hazard existed. (Tr. 188-89). These employees had 30 years and 20 years experience working in the quarry and Lehigh contends that I should credit their experience and judgment over that of the inspector who had less quarry experience. Thus, it argues that the cited area had been examined and that the highwall was safe. On the other hand, in its brief, Lehigh states that the “conditions were in the process of being taken down, per the standard, at the time of the inspection.” (Lehigh Br. 8). It further states that the “[o]ngoing work in the area was being done for the exact purpose of taking down the face wall and reducing the hazard, which is specifically allowable in the standard.” *Id.* I hold that, if the work of making the highwall safe for miners had not been completed, then posting or barricading was necessary until that work was finished.

I find that the violation was not S&S, however. The affected area was not large and I find that the evidence establishes that it was not reasonably likely that anyone would enter the hazardous area until the work of scaling highwall was completed. Lehigh's negligence was moderate. A penalty of \$2,000 is appropriate.

E. Citation No. 6440392

On June 26, 2008, MSHA Inspector Reynolds issued Citation No. 6440392 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.3200, as follows:

The old roadway below the working level #-2 located in the quarry was not posted or barriers put in place to prevent entry. This roadway was littered with large boulders and materials from the upper level and the roadway was completely buried at the far end. There were tire tracks on this roadway indicating that the roadway had been recently traveled.

(Ex. G-5). The inspector determined that an injury was reasonably likely and that if an injury were to occur it would be fatal. He determined that the violation was S&S and that the company's negligence was moderate. The Secretary proposes a penalty of \$4,689 for this citation.

Inspector Reynolds testified that the roadway below the second level had a lot of rock in it. (Tr. 101). The photos taken by the inspector show loose, unconsolidated rock above the roadway and rocks on the roadway itself. (Ex. G-5). He further testified that there were fresh tracks on the roadway suggesting that mobile equipment had been on the roadway. (Tr. 102). The inspector determined that the violation was S&S because an equipment operator may have been pushing rocks over the edge of the bench above the roadway, exposing anyone on the roadway to the hazard. (Tr. 104). There were no warning signs in the affected area.

Lehigh argues that the cited roadway was in an abandoned portion of the mine property and that there was no work-related reason for miners to ever enter the area. The road does not go anywhere and there were plants growing in the road, which demonstrates the lack of use. (Tr. 194-95; Ex. R-23). There were rocks along the side of the road that acted as a berm and would tend to block rocks from falling onto the road. (Tr. 193-94; Ex. G-24). The quarry is in a rainless desert with the result that tire tracks can last a long time.

Lehigh also argues that the Secretary's only evidence is the inspector's opinion that a hazard existed. It points to two decisions of the Commission's judges to support its contention that the Secretary "must do more than offer an opinion of a non-expert inspector." (Lehigh Br. 9). In *Shine Quarry, Inc.*, 17 FMSHRC 1397 (Aug. 1995) (ALJ), former Commission Judge Amchan vacated a citation alleging a violation of section 56.3200 for loose rock along a highwall. There were muck piles under the highwall that the operator alleged kept persons away

from the highwall. The judge held that, “[i]n view of what appears to be an honest difference of opinion as to the safety of Respondent’s quarry, the Secretary must do more than present the opinion of a non-expert inspector to meet its burden of proof under a general standard such as section 56.3200.” *Shine Quarry* at 1401. In *Edward Kraemer & Sons, Inc.*, 11 FMSHRC 1058 (June 1989) (ALJ), another Commission judge determined that the only evidence of record with regard to the existence of a violation consisted of the inspector’s testimony that he “observed loose unconsolidated material” on the highwall. *Kraemer* at 1059. The judge determined that, because this testimony did not provide any further detail as to the nature of the violation, it was “woefully inadequate to establish Petitioner’s burden of proving the existence” of the violation. *Id.*

Although I do not disagree with the analysis of the judges in those cases, I find that they do not apply here. There was no question that the roadway was open to traffic. It was not posted with a warning against entry and a barrier was not installed to impede unauthorized entry. The notes of Inspector Reynolds state that “large boulders and material littered this roadway.” (Ex. G-5). This fact would tend to limit the ability of equipment to navigate the road. I credit the testimony of Mr. Bigley that the roadway is not normally used. Nevertheless, the roadway was not blocked off with the result that equipment could travel down the road. The area above the road contained boulders that could easily fall onto the roadway. I credit the inspector’s testimony in this regard, which is supported by the photographs that he took. (Ex. G-5). Inspector Reynolds testified that rock is sometimes pushed over the side from the top above the road. (Tr. 103-04).

I find that the violation was not S&S because it was not reasonably likely that anyone would be injured by the cited conditions. The roadway was normally not used. It was a dead end that, according to the inspector, went about 400 to 500 feet before it became impassable. (Tr. 103). For the same reasons, the violation was not serious. Finally, I find that Lehigh’s negligence was low. The violation was not obvious because the company assumed, with good reason, that because the road was no longer regularly used it did not have to be maintained in the same condition as a regularly-traveled roadway. Lehigh maintained that it would have taken down any unsupported rock if it decided that it needed to use the roadway again. A penalty of \$2,000 is appropriate.

F. Citation No. 6440394

On June 30, 2008, MSHA Inspector Reynolds issued Citation No. 6440394 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14112(a)(1), as follows:

The guard located on the self-cleaning tail pulley of the B2-100 road rock stacker was not being maintained. The guard was damaged on the right side at the corner where it connects to the conveyor structure, exposing an area [that was] 4-inches high and 10-inches long

(Ex. G-6). The inspector determined that an injury was unlikely but that if an injury were to occur it would be permanently disabling. He determined that the violation was not S&S and that the company's negligence was moderate. Section 56.14112(a)(1) provides that "[g]uards shall be constructed and maintained to – withstand the vibration, shock, and wear to which they will be subjected during normal operations." The Secretary proposes a penalty of \$540 for this citation.

The Secretary argues that there is no dispute that the guard was damaged and that the tail pulley was exposed. (Tr. 106; Ex. G-6). The exposed area was large enough for someone's hand to fit through. The belt was not running at the time he issued the citation. (Tr. 107). The opening was about knee high. (Tr. 109). He was concerned that someone's hand or clothing could get caught in the self-cleaning tail pulley. The inspector determined that it was unlikely that anyone would be injured by the violation.

Brian Bigley testified that an hourly employee damaged the guard earlier in the shift with a Bobcat. (Tr. 195). The inspector's notes state that both management and an hourly employee told him that the guard had been damaged earlier in that shift. (Tr. 153).

This citation is vacated. The Secretary did not establish that the guard was not constructed or maintained to withstand the vibration, shock, and wear to which it was subjected during normal operations. The belt was not operating and an employee hit it with the tongue of his Bobcat during cleaning operations. This was not a normal occurrence. Any guard will become bent if someone hits it with mobile equipment.

G. Citation No. 6440395

On July 1, 2008, MSHA Inspector Reynolds issued Citation No. 6440395 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.4102, as follows:

The hydraulic pump rake drive located on the reclaimer deck had a spillage of hydraulic fluid on top of the pump tank and an accumulation of fluid on the walkway.

(Ex. G-7). The inspector determined that an injury was unlikely but that if an injury were to occur it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that the company's negligence was low. Section 56.4102 provides that "[f]lammable or combustible liquid spillage or leakage shall be removed in a timely manner or controlled to prevent a fire hazard." The Secretary proposes a penalty of \$162 for this citation.

The Secretary argues that there is no dispute that hydraulic fluid had leaked from a pump onto the deck near the reclaimer. (Tr. 110). The inspector was unable to determine if the fluid was present because of leakage or whether the fluid had been spilled. This hydraulic fluid would contribute to a fire hazard. If there were a fire in the area, the hydraulic fluid could help spread the fire. (Tr. 112). He determined that the violation was not S&S and that the gravity was low.

He also determined that the company's negligence was low because the oil looked fresh. The inspector believes that hydraulic fluid is highly flammable. (Tr. 113). He did not know the flashpoint for hydraulic fluid. Lehigh argues that the hydraulic fluid was not tested for combustibility and the Secretary only offered the inspector's opinion that the material was combustible.

I find that the citation should be vacated. The Secretary defines "combustible liquids" as "liquids having a flash point at or above 100° F." The Secretary defines "flammable liquids" as a liquid that has a flash point below 100° F." Thus, almost any liquid is covered by the standard except water. The safety standard requires that flammable and combustible liquid spillage or leakage be "removed in a timely manner." In *Lopke Quarries*, 23 FMSHRC 705, 715 (July 2001), the Commission stated that "[w]hether [an] operator fail[s] to correct [a] defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." In *Lopke*, the Commission affirmed the administrative law judge's finding that no evidence existed to determine whether a defect had been corrected in a timely manner. *Id.* Inspector Reynolds testified that he "couldn't determine when [the spillage] had occurred." (Tr. 113). He went on to say that "[h]ad that oil been there for a long period of time, it would have soaked into the [fine powder on the floor] pretty fast." For this reason, he did not believe that a "supervisor would have known [about the spill] unless there was a problem there." If the hydraulic fluid spill had not existed very long and, as a result, it was unlikely that management would have known about it, then it cannot be said that management failed to remove it in a timely manner. For these reasons, I vacate the citation.

H. Citation No. 6440396

On July 1, 2008, MSHA Inspector Reynolds issued Citation No. 6440396 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11012, as follows:

The feed chute located on the reclaimer inside the clinker dome was not adequately guarded to prevent persons from falling into the chute. The chute is at ground level and the opening measured 30-feet across. There were three chains attached to either side of the opening and the lower chain was broken.

(Ex. G-8). The inspector determined that an injury was reasonably likely and that if an injury were to occur it would be fatal. He determined that the violation was S&S and that the company's negligence was moderate. Section 56.11012 provides, in part, that "[o]penings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers." The Secretary proposes a penalty of \$5,961 for this citation.

Inspector Reynolds issued this citation because he determined that the feed chute on the reclaimer operating inside the clinker dome was missing part of its chain guard to help prevent a person from falling into the feed chute. (Tr. 114-15). The chute had been modified to allow for

manual feeding of the chute in the event the reclaimer broke down. He believed that the ground around the opening was unstable and someone could easily slip and fall. (Tr. 116). An employee could be in the area to lubricate the pivot area or to check to see how full the chute is. (Tr. 117). He considered the area to be a travelway because it was "one way that they can travel to get to the one side from the other to the reclaimer." (Tr. 157-58). He said that he did not know of any other way to walk around the reclaimer. (Tr. 162-3). He did not believe that the existing chains placed across the area would prevent anyone from falling through the opening. (Tr. 159; Ex. G-8 photos). Inspector Reynolds was concerned that the loader operator would get out of his equipment and look into the opening to see how much material was there. (Tr. 161).

Mr. Bigley testified that the only reason to be near the feed chute is to check on the "auto lubers" that are installed on the stacker pivot. (Tr. 196). The "auto lubers" are devices that automatically lubricate equipment. He testified that the employees who service the auto lubers do not have to walk by the opening. (*Id.*; Ex. R-50 & 51). Bigley said that the area around the cited opening is not a travelway. He also testified that, during a previous inspection, another MSHA inspector told him that a guard was not required in that location because it was not a travelway. (Tr. 198). A different MSHA inspector recommended that chains be installed across the opening and Lehigh complied with his request. *Id.* The loader operator who dumps material down the opening is never close enough to the opening to create a hazard. He does not get out of the loader and walk around in the area. *Id.* The loader operator does not have to look down into the opening to see how much material is there. There are automatic sensing devices that provide a warning if material is hung up or if too much material is present. (Tr. 199). No employee ever hand-shovels material into the opening.

Most of the material that is processed at the clinker dome is automatically fed through the system using the reclaimer. Only a small portion of the total material processed is fed into the chute with the use of the loader. (Tr. 200-02). There is clearly an opening in the cited area. (Ex. G-8 photos). The opening was not protected by railings, barriers, or covers. *Id.* The only question is whether the opening was near a travelway. The Secretary defines the term "travelway" as a "passage, walk, or way regularly used and designated for persons to go from one place to another." This is a rather narrow definition. The walk, way, or area must be regularly used and designated for persons to go from one place to another. I find that, based on the evidence presented, the cited area does not qualify as a travelway. The evidence establishes that miners do not regularly walk the area. I credit the testimony of Mr. Bigley on this issue. My finding is consistent with decisions of other administrative law judges. *See Blue Circle, Inc.*, 10 FMSHRC 990, 1010-13 (Aug. 1988) (ALJ); *APAC - Mississippi, Inc.*, 26 FMSHRC 811, 812 (Oct. 2004) (ALJ). Consequently, this citation is vacated. It must be stated, however, that the opening at issue in this case would present a rather serious hazard to an employee who walked near the opening. If miners do begin walking around or near the cited opening either to get from one place to another or for any other purpose, then the requirements of this safety standard would apply and a railing, barrier, or cover would be required.

I. Citation No. 6440397

On July 1, 2008, MSHA Inspector Reynolds issued Citation No. 6440397 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14100(b), as follows:

The brake lights located on the Komatsu WA-600 front end loader working inside the clinker dome were not being maintained. The brake lights failed to function when tested.

(Ex. G-9). The inspector determined that an injury was unlikely but that if an injury were to occur it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that the company's negligence was moderate. Section 56.14100(b) provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent creation of a hazard to persons." The Secretary proposes a penalty of \$362 for this citation.

The Secretary contends that the front-end loader operated both inside the clinker dome and outside the dome near other vehicle traffic. (Tr. 121). The brake lights are standard equipment on the loader and are necessary to alert other vehicles that the loader is stopping. The defect was not corrected in a timely manner. The loader operator told the inspector that he knew that the brake lights were not working that day, yet he chose to operate the equipment rather than have the defect repaired.

Lehigh first argues that the Secretary failed to provide any evidence that the cited standard requires that brake lights be in working order. Lehigh maintains that the Secretary did not produce sufficient evidence to sustain this citation in part because the inspector did not take any photographs of the condition. Lehigh also argues that the brake lights were stuck in the "on" position so that the loader's brake lights were continuously operating. (Tr. 203). As a consequence, if another vehicle came up behind the loader, the operator would naturally be very careful because he would believe that the operator of the loader was slowing down. As a consequence, a safety defect was not present. Finally, there is no showing that this condition was not corrected in a timely manner. The loader operator was operating in an area without other vehicles so he chose to wait until the end of the shift to have the condition corrected. Other vehicles would have been parked by that time and the condition would not have presented a hazard.

It is well established that an agency's interpretation of its own regulations should be given "deference . . . unless it is plainly wrong," as long as it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function." *General Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir 1995) (citations omitted); *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 234 (February 1997). In addition, the legislative history of the Mine Act states that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977). The Secretary

has consistently interpreted the safety standard to require brake lights on mobile equipment and the Commission's judges have affirmed this interpretation.

An inspector is not required to take photographs to establish a violation. There is no dispute that the brake lights were not functioning properly. I find that failure of brake lights to work properly is a defect that affects safety, even if the lights become stuck in an on position. If someone in another vehicle is following a loader with brake lights, he will likely rely on the lights to warn him to stop. The driver of a vehicle following a loader with brake lights that are always on may become complacent and not notice that the loader is stopping because the brake lights are always on. Thus, inoperable brake lights are a defect that affects safety.

The chief issue is whether this defect was "corrected in a timely manner to prevent creation of a hazard to persons." Inspector Reynolds testified that the loader operator told him that he knew that the brake lights were not working that day. (Tr. 122). I credit this testimony. I find that the Secretary established a violation.

I find that the violation was not serious. The loader was operating in the clinker dome where other vehicles do not normally operate. Lehigh's negligence was moderate. A penalty of \$362 is appropriate.

J. Citation No. 6440408

On July 10, 2008, MSHA Inspector Reynolds issued Citation No. 6440408 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14107(a), as follows:

The guard located on the G-2-239 cooling fan #5 was not adequate to prevent persons from contacting the moving machine parts. The back side of the guard when it fits around the motor drive shaft had an opening measuring 3 X 5 inches, and the pulley drive end had an opening around the shaft measuring 4 X 6 inches. These conditions created an entanglement hazard to the miner accessing this cooling fan.

(Ex. G-10). The inspector determined that an injury was reasonably likely and that if an injury were to occur it would be of a permanently disabling nature. He determined that the violation was S&S and that the company's negligence was moderate. Section 56.14107(a) provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parties that can cause injury." The Secretary proposes a penalty of \$2,976 for this citation.

Inspector Reynolds testified that he issued this citation because a portion of the guard was missing around the motor drive shaft of the cooling fan. (Tr. 124). The missing guard exposed

the keyed shaft that the pulley is attached to. An exposed keyed shaft can grab someone's loose clothing and pull that person into the moving machine parts. The unguarded area was large enough for a person to stick his hand in and there was a place where lubrication was applied in the vicinity. (Tr. 125-26, 172).

Mr. Bigley testified that Lehigh uses a heat gun to make sure that the bearings on the cooling fan are not overheating. (Tr. 205). An employee can take this temperature from a distance of ten feet. Lubrication is provided by an "auto luber" so there is no need for any employee to get close to the cited opening in the guard. *Id.* When the auto luber is replaced or when any maintenance is performed in the area, the unit is shut down and locked out. He further testified that a person would "have to be a contortionist" to get his hand into the opening cited by Inspector Reynolds. (Tr. 206). Bigley admitted that he has disciplined employees for working on equipment without locking it out first. (Tr. 229).

Lehigh argues that there was no work-related reason for any employee to be near the cited opening. The existing guard provided sufficient protection for miners who might be in the area. The mere fact that it was physically possible for someone to force his hand through the opening is not sufficient to establish a violation. If a violation is found it should be designated as non-S&S because it was unlikely that anyone would be injured by the condition. Finally, Lehigh argues that since the condition has existed for 25 years, its negligence was low. Many MSHA inspectors have inspected the area and a citation has never been issued for the cited condition.

I find that the Secretary established a violation. I find that the openings were sufficiently large for a miner to accidentally get his hand in and contact moving machine parts. As stated above, the Commission interprets the guarding standard to take into consideration "ordinary human carelessness." *Thompson Bros. Coal*, 6 FMSHRC at 2097. Lehigh has disciplined miners for failing to abide by its requirement that equipment be shut down and locked out before work is done.

I find that the chance of a miner inadvertently coming in contact with the motor drive shaft or other moving parts, while not impossible, was extremely unlikely. I credit the testimony of Mr. Bigley that there was no reason for Lehigh's employees to get near the cited area. I find that the violation was not S&S because it was unlikely that the violation would contribute to an injury. I find that Lehigh's negligence was low because this condition has existed for a long time and it was reasonable for the company to believe that it was complying with the safety standard. A penalty of \$1,000 is appropriate.

K. Citation No. 6440417

On July 16, 2008, MSHA Inspector Reynolds issued Citation No. 6440417 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.4102, as follows:

The lube and pump building located between the coal mill and the raw mill has an oil leak that had spilled onto the travelway on the north side of the building. This spillage was approximately 36 X 42 inch area. This condition creates a fire hazard to the miners accessing this building.

(Ex. G-11). The inspector determined that an injury was unlikely but that if an injury did occur it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that the company's negligence was moderate. The Secretary proposes a penalty of \$285 for this citation.

Inspector Reynolds issued this citation because he found spilled hydraulic fluid in the lube and pump building. (Tr. 128). Reynolds stated that the spilled material was the same as he cited in Citation No. 6440395, discussed above. He further testified that the condition of the spill area demonstrated that this was a recurring spill or leak rather than a one time event. (Tr. 130). He believed that the hydraulic oil had "wicked into" the wall. (Ex G-11, photos). Lehigh makes the same arguments as it did with respect to Citation No. 6440395.

As stated above, the safety standard provides that "[f]lammable or combustible liquid spillage or leakage shall be removed in a timely manner or controlled to prevent a fire hazard." MSHA defines virtually any liquid, except water, as being either flammable or combustible. The Secretary defines "combustible liquids" as "liquids having a flash point at or above 100° F." The Secretary defines "flammable liquids" as a liquid that has a "flash below point 100° F." Thus, hydraulic fluid is one of the two. The standard requires timely cleanup. I credit the testimony of Inspector Reynolds, as supported by the photographs, that hydraulic fluid has leaked at this location more than once. It is difficult to determine how long this particular spill had been present. It does not appear from the photographs that the most recent spill had "wicked up" into the surface of the walls.

The issue with respect to this citation is whether the Secretary established that Lehigh failed to clean up the leakage of the hydraulic fluid in a timely manner. As stated above, it cannot be determined when the spill occurred or when it should have been spotted by Lehigh. The fact that hydraulic fluid had seeped into the area in the past does not establish a violation. I find that it cannot be determined that Lehigh failed to clean up the fluid in a timely manner. The citation is vacated.

L. Citation No. 6440418

On July 16, 2008, MSHA Inspector Reynolds issued Citation No. 6440418 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14100(b), as follows:

The windshield wipers located on the Chevrolet flat bed truck #409 were not being maintained. The wiper on the driver's side was

missing. This condition creates a visibility hazard to the driver of this mobile equipment.

(Ex. G-12). The inspector determined that an injury was unlikely but that if an injury did occur it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that the company's negligence was moderate. The Secretary proposes a penalty of \$285 for this citation.

The Secretary maintains that there is no dispute that the wiper blade was missing as set forth in the citation. Inspector Reynolds testified that rust on the end where a wiper blade would attach indicates that the wiper had been missing for a long time. (Tr. 132). The missing wiper blade affected safety and was in violation of the standard.

Lehigh contends that the alleged defect did not affect safety. The Secretary failed to produce any evidence of a requirement that off-road vehicles be equipped with windshield wipers. The inspector testified that the windshield was clean and free of any obstructions to visibility. (Tr. 175). At the time of the inspection, the weather was hot and dry. The truck was not operating and there was no hazard presented by the cited condition. When the truck was used, the driver would have alternate methods of cleaning the windshield.

I find that the Secretary established a violation of this standard. Quarries and cement plants are inherently dusty and it takes only a little moisture to cause the dust to stick to the windshield and obscure the operator's vision. (Tr. 131-32). Water trucks operate to control the dust at this facility and these trucks spray water on everything in their path. I credit the testimony of the inspector that this condition had existed for a long time. As a consequence, although the truck was not operating at the time of the inspection, I find that the evidence shows that it is highly unlikely that a wiper blade would have been installed before the truck was put back into service. A pre-operational exam would not have uncovered the defect because the operator did not consider the condition to present a hazard.

I find that the defect affected safety because the driver's field of vision could easily become obscured by dust sticking to the windshield. Although the quarry is in a desert, a little moisture would create a mess on the windshield. This condition could develop very quickly and the truck driver could run into another vehicle or a stationary object before he had a chance to stop the truck to clean the windshield off with a rag. Other Commission administrative law judges have affirmed citations for this same condition.

I find that the violation was neither serious nor S&S. Lehigh's negligence was moderate because it had operated the truck without wipers for some time. A penalty of \$285.00 is appropriate for this violation.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Lehigh had over 100 paid violations at the Tehachapi Plant during the 24 months preceding the dates of these inspections. Lehigh is a medium-sized operator, but it is owned by a large operator (Heidelberg Cement AG). The Tehachapi Plant employed about 126 people in 2008. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Lehigh's ability to continue in business. The gravity and negligence findings are set forth above.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2009-22-M		
6440386	56.11002	Vacated
6440390	56.3200	\$2,000.00
6440392	56.3200	2,000.00
6440394	56.14112(a)(1)	Vacated
6440395	56.4102	Vacated
6440396	56.11012	Vacated
6440397	56.14100(b)	362.00
6440408	56.14107(a)	1,000.00
6440417	56.4102	Vacated
6440418	56.14100(b)	285.00
WEST 2009-101-M		
6440388	56.17001	Vacated
6440389	56.20011	5,000.00
TOTAL PENALTY		\$10,647.00

For the reasons set forth above, the citations are **AFFIRMED, MODIFIED, and VACATED** as set forth above. Lehigh Southwest Cement Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$10,647.00 within 40 days of the date of this decision.¹ Upon payment of the penalty, these proceedings are **DISMISSED**.



Richard W. Manning
Administrative Law Judge

Distribution:

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RWM

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021

February 3, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2008-881
Petitioner	:	A.C. No. 01-01247-153621
	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC,	:	No. 4 Mine
Respondent	:	
	:	
JIM WALTER RESOURCES, INC,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. SE 2008-173-R
	:	Citation No. 7691861; 12/15/2007
	:	
v.	:	
	:	
	:	Docket No. SE 2008-268-R
	:	Citation No. 7693051; 1/22/2008
	:	
SECRETARY OF LABOR,	:	No. 4 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Thomas Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
David Smith, Esq. and John Holmes Esq., Maynard Cooper & Gale, PC, Birmingham, Alabama, on behalf of Jim Walter Resources, Inc.

Before: Judge Melick

This case is before me upon the petition for a civil penalty (consolidated with a related Contest Proceeding) filed by the Secretary of Labor ("Secretary") pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq. (the "Act") charging Jim Walter Resources Inc. ("JWR") with three violations of mandatory standards and seeking civil penalties for those violations. The general issue before me is whether JWR violated the cited standards as charged, and if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional specific issues are addressed as noted below.

At hearings, the Secretary filed a motion to settle Citation Nos. 7691858 and 7691861 for \$687.00 and \$308.00 respectively. I have considered the representations and documentation proffered in connection with the motion and find that the proposed penalties are acceptable within the framework of section 110(i) of the Act. Accordingly, an order directing payment of those penalties will be incorporated herein.

Citation Number 7693051

This citation, issued January 22, 2008, alleges a “significant and substantial” violation of the standard at 30 C.F.R. §77.1710(g) and charges as follows:

An accident occurred at the surface Clean Coal Loadout Building on December 4, 2007. An employee of O & O Services, a contractor working at the site, fell through an opening 21 inches by 48 inches, and landed on a concrete platform 25 feet below, resulting in life threatening injuries. The worker was not wearing a safety belt or other means of fall protection

The cited standard provides as follows:

Each employee working in a surface coal mine or in a surface work area of an underground mine and coal mine, will be required to wear protective clothing and devices as indicated below:
...(g) safety belts and lines where there is a danger of falling;....

The citation was subsequently terminated by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) on February 5, 2008 after JWR abated the alleged violation. MSHA agreed to abate the alleged violation after “management submitted to MSHA a statement indicating that a greater emphasis on the use of PPE will be related to contractors doing work on JWR No.4 property and during the process of hazard training will review recent accidents of contractor employees.”

JWR’s independent contractor O & O Services (“O & O”) was also charged, in Citation Number 7693049 on January 17th, 2008, with the same violation of the standard at 30 C.F.R. §77.1710(g) as JWR. That citation charges as follows:

An accident occurred when O & O Services employee, Tony Pierce fell through an opening in the Clean Coal Loadout Building at the Jim Walter Resources, Inc. No. 4 mine. The employee was working over an opening 21 inches by 48 inches and not wearing a safety belt or other means of fall

protection. He fell through the opening onto a concrete platform 25 feet below, resulting in life threatening injuries. The worker positioned over the open hole for an extensive period of time. A supervisor had knowledge that the worker was in a hazardous location where fall protection was needed and took no action. The supervisor was present at the time the accident occurred. The foreman engaged in aggravated conduct constituting more than ordinary negligence.(Exh. G-2).¹

For the reasons that follow, I find that O & O violated the cited standard as charged and that JWR, as the mine operator who contracted with O & O, is liable without fault for that violation and is therefore subject to civil penalties under the Act. This decision by the Secretary to charge JWR for the violation of its contractor is unreviewable. *Speed Mining Inc. v. FMSHRC et al.*, 528 F. 3d 310 (4th Cir. 2008).²

It is undisputed that JWR contracted with O & O on September 17th, 2007 to provide the labor and supervision for a project to replace a structure described as a cone used to funnel and load coal into trucks at the preparation plan loadout facility (Exh. JWR-32). In that contract, O & O agreed not only to provide supervision but also to comply with all safety regulations and to hold JWR harmless for any violations. (Exh. JWR-32). O & O's work on the project began on Sunday, December 2nd, 2007. On December 4th, 2007, work was delayed when the third segment (of eight) of the cone would not set into place. It was obstructed by finlike protrusions (stiffeners) on the metal plate upon which it rested (Exh. G-6).

According to O & O leadman Bobby O'Dell, he and O & O foreman Kris Gamble discussed how to cover the hole at the bottom of the cone after the obstructing metal plate would be removed. They discussed using a metal grate which would then provide a safe platform over the 21 inch by 48 inch hole so that work could continue on the cone. O'Dell testified that following the above discussion with foreman Gamble, they proceeded up to the room where the cone was being replaced. Gamble was standing at the doorway to the room and he (O'Dell) was standing behind him outside the doorway. According to O'Dell they were standing there five minutes, at most, during which time Gamble turned around and spoke to him twice as described in the following colloquy at hearings:

The Court: Were you talking with Mr. Gamble?

¹ A motion for approval of a settlement of this O & O citation has also been approved on this date. See Docket No. SE 2008-1033

² The Circuit Court in *Sec'y v. Twentymile Coal Co., et al.*, 456 F. 3d 151 (D.C. Cir. 2006) held that the Secretary's discretionary decisions in this regard are nevertheless "subject to constitutional constraint" including those "imposed by the equal protection components of the Due Process Clause of the Fifth Amendment." JWR has not however established in this case that a constitutional infirmity exists herein. Accordingly, the Secretary's decision to cite JWR is not reviewable by this Commission.

A. (Mr. O'Dell) Only the two conversations or the two statements that was made, Tony is trying to put it in place and then Tony had fell. My back was to him and I was not looking inside the door.

The Court: Did Mr. Gamble turn around to talk to you?

A. Yes.

Q. (By Mr. Grooms) That's when he told you that Kris was prying with a pry bar on the piece of wood; is that correct?

A. Yes. He told me he was trying to put this piece in place. Right. Then he turned back around and then that's when he said Mr. Pierce had fallen? That's right."

(Tr. 368 -370)

Kris Gamble testified that he was foreman for O & O during relevant times and started working on the cone replacement project on the day shift at 7:00 a.m. Monday, December 3rd, 2007. At that time he saw his employees working with fall protection. He testified that he was familiar with the MSHA regulations regarding fall protection and that JWR had always expected O & O's employees to tie off when working on heights. Gamble returned on Tuesday, December 4th, 2007 at around 6:30 a.m. At that time he met with JWR engineers to "line things up." The subject hole was then covered with a metal plate and was covered at all times when JWR employees were present. He observed that O & O's employees were still using fall protection that morning and in particular, he observed that the fall victim, Tony Pierce, was working on a ladder with fall protection. Gamble further testified that he had talked to Pierce that day and reminded him that he needed to wear fall protection unless he was working on the plate. Gamble further testified in a colloquy at hearings as follows:

Q. (Mr. Grooms) What happened after you and Bobby [O'Dell] discussed alternative means of covering the hole?

A. That's when me and him went up there to go look at it.

Q. What did you see when you got to the top of the stairs?

A. Well, I just saw people in there working. They were trying to lower a piece into place and everybody was just sitting there working, kind of sitting around the hole.

Q. How long were you there before Tony fell?

A. Well, Bobby was coming behind me. I think he stopped to say something to somebody for a minute. I mean, it couldn't have been long. It couldn't have been long, just a few minutes.

Q. In the brief time you were there, did you notice where Tony Pierce was?

A. He was standing up on top there where we had the plate.

Q. Did you notice that he was not tied off?

A. No, I didn't. I wasn't even paying attention to that. I was looking at the piece and stuff they were bringing in and I just didn't notice.

Q. Did you notice that he wasn't wearing fall protection?

A. No, I didn't notice.

Q. Did you look at what he was actually standing on?

A. The only time I ever noticed the board was when he stuck a pry bar in to pry the piece around and that's when the board shot out and he went down.

Q. Do you know how long Tony had been standing on the board before he fell?

A. I would have so [sic] say it would be some time after break, I guess.

Q. Did you know that he was standing on a board?

A. No.

Q. Before he fell?

A. No. I didn't see the board until he went to pry.

Q. Why didn't you stop him, Mr. Gamble?

A. I didn't notice.

Q. Yes. Now just for orientation, again Exhibit 28, that's the load-out

facility; correct?

A. Correct.

Q. From the outside. Now let me show you now Exhibit 20C. Have you got that, Mr. Gamble?

A. I do.

Q. Is that based on your recollection of that room where the cone was being installed? Are we looking from the door at that point?

A. Yes.

Q. How far would you say the door was from the cone facility, from the platform I should say?

A. From the center of the platform, maybe ten feet.³

Q. At the time that you entered the door and observed Mr. Pierce standing on the board, that's where you saw him right there. He would have been inside the cone essentially; right?

A. Yes, he was inside the cone.

Q. He is what, about six feet six tall?

A. Yes.

Q. And you saw him prying with the pry bar on the board; right?

A. Yes.

Q. You were there long enough to see him prying; correct?

A. Yes.

Q. And you had said you had never seen him on the board before?

A. No.

³ Contrary to this testimony, MSHA Inspector Womack estimated this distance as three to four feet (Tr. 72).

Q. And that didn't alarm you to see him standing there with the pry bar prying on the board over the hole?

A. When I seen him hit the board with the bar, there was no time to say anything.

Q. But you knew the hole was there; correct?

A. I knew there was a hole below this plate, but I did not know it was exposed as far as it was.

Q. So how long did you observe Mr. Pierce standing on the board without the fall protection?

A. I wasn't there long. I remember talking to some other people. I would say I might have been up there three to four minutes at the most maybe.

(Tr. 313-318)

Within this framework of evidence, I find that O & O employee Tony Pierce was working over the subject 21 inch by 48 inch hole standing only on a board lying across the hole (Exh. G-20 K and G-20 L) and not wearing a safety belt or other means of fall protection. When the board on which he was standing gave way, he fell through the opening onto a concrete platform 25 feet below. I further find that O & O foreman Kris Gamble was present and in a position estimated to have been between only three to ten feet away to observe Pierce for as long as five minutes working over the hole supported only by a 2 X 12 board and without fall protection. Under the circumstances, it is clear that O & O, through its agents, did not engage in specific and diligent enforcement of the safety belt requirement. *Sec'y v. Southwestern Illinois Coal*, 5 FMSHRC 1672 (Oct. 1983); *Sec'y v. Southwestern Illinois Coal*, 7 FMSHRC 610 (May 1985). The violation by O & O has therefore clearly been proven as charged. As previously noted, since the Secretary may charge the mine operator for violations committed by its independent contractors, JWR is also liable for the violation as charged in Citation Number 7693051.

The violation was also clearly "significant and substantial" and of high gravity. A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard - that is, a measure of danger to safety

- contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in injury and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury, *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); see also *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

Clearly, working without fall protection on 2 X 12 wooden board over a 21 X 48 inch hole with a 25-foot drop onto a concrete platform below, is a discreet safety hazard. Moreover, there can be no dispute that falling 25 feet onto a concrete platform would be reasonably likely to cause serious or fatal injuries. The record shows that Pierce survived his fall but suffered serious injuries including multiple broken bones.

Civil Penalties:

Under section 110(i) of the Act, in assessing civil monetary penalties, the Commission and its judges must consider the operator's history of previous violations, the appropriateness of the 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 the violation. JWR is a large business with a significant history of violations (considering only Exhibit A to the Secretary's Petition filed herein). There is no evidence that even the proposed penalties would affect its ability to remain in business. There is no dispute that the violation was abated promptly and in good faith. The gravity criterion has been previously discussed.

Negligence has been defined as conduct involving an unreasonably great risk of causing damage or conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm. *Prosser & Keeton, Law on Torts*, § 31 (5th Ed). The Secretary alleges in her "Narrative Findings for a Special Assessment", but without factual support, that JWR was moderately negligent. Issuing MSHA inspector, Steven Womack, found that JWR was moderately negligent for the reason that it did not do "everything they could" to see that its contractor was following Federal regulations. JWR argues in its brief however, that the Secretary has provided no notice as to what "everything they could" entails.⁴ JWR is arguing, in effect, that

⁴ The Secretary does not maintain that the standard of care required of JWR is the same as the standard required for proving violations committed by O & O under the

the Secretary has not provided notice as to the standard established by law that is required of JWR. The closest the Secretary has come to providing notice to JWR of the standard of care established by law was in the abatement she required for a prior violation of the same standard by JWR about one month before the incident herein and involving a fatal fall accident of an employee of a JWR contractor. The Secretary required JWR to abate that violation by providing only "additional training" and by installing an "adequate anchorage system" to secure personnel from falling (Exh. G-9).⁵

In this case, an anchorage system had indeed been provided by way of loops welded onto the cones (Exh. G-20 F). The record also shows that before work began JWR confirmed that the O & O employees had received all of the requisite training for the job. Indeed, the Secretary has not alleged that the O & O employees were not provided adequate training. In addition, the record shows that when JWR personnel were present they observed fall protection in use. Furthermore, there is no evidence that any JWR personnel were aware that Pierce was working over the open hole or that Pierce failed to wear fall protection. Finally, the record shows that O & O was an approved vendor with whom JWR had years of prior safe work experience, that it had never been cited for a violation of MSHA regulations, that it had a safety training program and that it had provided the necessary safety harness and anchorages for Mr. Pierce.

The Secretary suggests in her brief that JWR had a legal duty to take over from O & O the direct supervision of the cone replacement project because it "knew or could not help but know of the creation of a hole in the platform." The Secretary is, in essence, suggesting that JWR must maintain direct and continuous supervision over its contractor's employees because of the possibility that an employee may at some point in time be working without necessary fall protection. The Secretary fails to cite any legal authority and I find that there is no legal support for this suggestion. It is also noteworthy that no such requirement was a condition of abatement for either the prior citation or the current one.

Under the circumstances, I conclude that JWR in this case exercised the standard of care required by law and that it complied with the Secretary's required standard of care as stated in her prior abatement order to JWR. I further find that JWR exercised due diligence and could not reasonably have known of the violative condition created by an employee of O & O. Accordingly, I do not find that the Secretary has met her burden of proving negligence on the part of JWR. Considering the factors set forth in section 110(i) of the Act, I find that a civil penalty of \$500.00

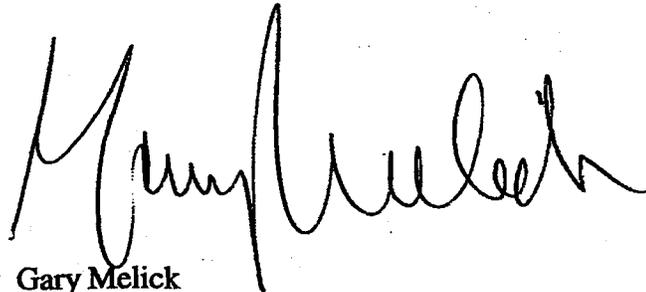
Southwestern cases .

⁵ It is also noteworthy that the only action the Secretary required to abate the instant citation was for JWR to submit to MSHA a "statement indicating that a greater emphasis on the use of PPE will be related to contractors doing work for JWR No. 4 property and during the process of hazard training will review recent accidents of contractor employees." Surely, if the Secretary is going to demand a more specific standard of care and one that is "established by law," she has a duty to provide specific notice of that to the operator.

for the violation charged in Citation No. 7693051 is appropriate.

ORDER

Citations No. 7691858 and 7691861 are hereby affirmed. Citation Number 7693051 is also affirmed as a "significant and substantial" violation and Jim Walter Resources Inc., is directed to pay civil penalties of \$687.00, \$308.00 and \$500.00, respectively, for the three violations charged therein within 40 days of the date of this decision. Contest Proceedings Docket Nos. SE 2008-173-R and SE 2008-268-R are hereby dismissed.



Gary Melick
Administrative Law Judge
202-434-9977

Distribution:(by first class mail)

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/to

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 4, 2011

SECRETARY OF LABOR, MINE	:	CIVIL PENALTY PROCEEDING
SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-1558
Petitioner	:	A.C. No. 46-08921-183472 K232
	:	
v.	:	
	:	
BECKLEY CRANE &	:	Mine: Surface Mine #7
CONSTRUCTION, INC.,	:	
Respondent	:	

DECISION

Appearances: Noah AnStraus, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner,
Eric Fry, Esq., Flaherty Sensabaugh Bonasso, PLLC, Charleston, West Virginia, for Respondent.

Before: Judge McCarthy

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Beckley Crane & Construction Company, Inc. (“Beckley Crane” or “Respondent”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”).

Respondent operates Surface Mine #7 in Boone County, West Virginia. This case involves one section 104(a) citation. An evidentiary hearing was held in Beaver, West Virginia on December 6, 2010. The parties introduced testimony and documentary evidence, although there was no motion for sequestration of witnesses. For the reasons set forth below, I find that the Secretary established a violation of the mandatory safety standard cited and that the violation was significant and substantial.

I. FINDINGS OF FACT

On March 16, 2009, MSHA Inspector Larry B. Woodie issued Citation No. 8078572 to Beckley Crane for an alleged violation of section 77.210(c) of the Secretary’s mandatory safety

standards for surface coal mines.¹ The citation states that:

The ground man was observed working at the powder storage area beside a suspended load. No tag line was being used to work clear of the load.

(G. Ex. 2). Inspector Woodie determined that an injury was reasonably likely to occur and could reasonably be expected to be fatal. Further, he determined that the violation was significant and substantial (“S&S”), that one person was affected, and that the violation resulted from moderate negligence. The Secretary proposed a penalty of \$392 for this citation.

A. Background and Summary of Testimony

1. The Witnesses

Larry Woodie has been a surface coal mine inspector with MSHA District 2 in Madison, West Virginia since May 2007. (Tr. 25). From 1976 to 2007, Woodie worked primarily for Eastern Associated Coal LLC (Eastern), a subsidiary of Peabody Energy, in various positions as underground miner, surface electrician, preparation plant supervisor, lead plant foreman, and manager, and coal preparation manager. (Tr. 26-27). Woodie has operated cranes on numerous occasions for low lifting and unloading. (Tr. 27-28, 52). He received formal training in crane safety from Eastern and from the MSHA Mine Academy. (Tr. 28-29). Although familiar with the importance of using a tagline to stabilize a suspended load, Woodie conceded on cross examination that loads move differently, that he is unfamiliar with the movement of suspended prail bins as a crane operator, and that the prail bin at issue is the only one he has ever witnessed being set. (Tr. 54-55). Moreover, this is the only citation he has ever written for failure to use a tagline. (Tr. 55-56).

William Nichols has been a surface mine specialist with MSHA since 2009. (Tr. 87). He has eleven years of mining experience, having worked as a truck driver, equipment operator, foreman, and supervisor for movement of heavy equipment. Although he has taken an MSHA, multi-day, crane operator class, he has never operated a crane. (Tr. 88).

Douglas E. Arthur has been a certified crane operator for about 25 years. He has set approximately 50 prail bins for Respondent over the last three years, has never had an accident operating a crane, and has never injured anyone nor seen anyone killed or nearly injured while installing a prail bin. (Tr. 96-97, 102-104).

2. The Events of March 16, 2009

On March 16, 2009, Inspector Woodie traveled with MSHA surface mine specialist William Nichols to Surface Mine #7 to conduct a required biannual inspection. (Tr. 31-32). Woodie could not recall the weather that day, although the un rebutted testimony of Arthur was

¹Section 77.210(c) requires that “[t]aglines shall be attached to hoisted materials that require steadying or guidance.” See also R. Ex. 1.

that it was a “pretty nice day” with no wind. (Tr. 72, 104).

Woodie testified that while traveling as a passenger in Nichols’ silver Chevy Blazer down a sloping haul road to inspect the powder bin storage area about 200 to 300 feet away, he observed a ground man holding the base of the leg of a hoisted powder bin at about chest height. (Tr. 32-33). Similarly, Nichols testified that as he drove down the gravel haul road toward the powder storage area, he had an unobstructed view of the ground man holding the bottom of a leg of the suspended bin at chest height while it was being moved or hoisted by crane from one location to the concrete pad for setting. (Tr. 89-90). The mutual observation lasted a short period of time, and the inspectors arrived at the bin less than a minute later. (Tr. 72, 90).² By then, the bin had been lowered real close to the ground. (Tr. 33). It is undisputed that no tagline was used during transport of the hoisted bin by crane for resetting in six to eight inch bolts on a concrete pad or slab about 40 feet away, a process that took five or six minutes. (Tr. 23, 34-35, 99, 111, 122).³

The multi-ton, cone-shaped bin was constructed of sheet metal and was used for storing ammonium nitrate. (Tr. 35, 54). It about 30 feet high from the base of the 12-15 foot H-beamed legs to the top of the bin. (Tr. 35, 100). Arthur testified that there were four chains or straps connected to the prail bin during the five or six minutes it took to transfer the bin to the set-up location. These straps had 12 and one-half ton shackles attached to the ends and bolted on all four corners. (Tr. 102) Each of the four straps was good for five times 12,900 pounds. The bin weighed 13,000-14,000 thousand pounds. (Tr. 119). On cross, Arthur testified that the possibility of a strap failing is zero because they are inspected before use, but he conceded that if a strap failed, the load could shift. (Tr. 119-120).

Woodie testified that when he observed the alleged violation, he anticipated issuance of a section 107(a) imminent danger order, but when he and Nichols arrived at the set-up location, the bin had been lowered and the imminence of danger removed. (Tr. 50-51). Upon arrival, Woodie immediately spoke to the ground man (lead man Joe Critchley) and the crane operator (Douglas Arthur) about the failure to use a tagline. (Tr. 37-38, 73-74) Woodie testified that a tagline was necessary to stabilize and prevent the suspended load from swinging or shifting, and to keep the ground man clear of the load as it was being moved to the point where it could be fastened down on bolts and stabilized. (Tr. 36-37). Woodie also testified, however, “in moving the load,” everyone was to “stay clear of the load until it’s in the location to be set.” (Tr. 41-42).

With respect to the citation written, Woodie testified that by grabbing the base of a leg of

²On cross, Woodie was asked how long he watched the prail bin “being moved?” He responded, a very short period of time, less than a minute.

³Woodie’s contemporaneous notes state that the ground man was observed working without a tag line beside the powder storage tank, which was suspended about four feet above the ground, and he was using his hands to steady the load. The notes further indicate in cryptic fashion that the lead man “knew.” They further indicate that the event lasted less than five minutes, and that and it was “reasonably likely the ground man guided the suspended load with his hands.” G. Ex. 1. The notes do not indicate that Nichols was present.

the suspended load at chest level without using a tagline, the ground man was exposed to a pinch point hazard should the suspended bin fall, topple over, or shift during crane operation.⁴ (Tr. 44-45). Woodie testified that such an event was reasonably likely to occur for a variety of reasons, including improper set up or rigging of the crane, mechanical failure of connections to the load, or operator error concerning movement or lowering of the load. (Tr. 39-43). Woodie further testified that given the size, location and weight of the multi-ton load, and the ground man's proximity to the pinch point he was holding, a fatal or crushing accident was likely to occur should the suspended bin fall, topple over, or suddenly shift and strike the ground man. (Tr. 39-46, 71; G. Ex. 2, box 10).

Woodie determined that the operator was moderately negligent because the ground man was exposed to the hazard and both the crane operator and ground man should have been trained to ensure that a tagline was used when "moving the bin." (Tr. 46, 50; G. Ex. 2, box 11). Woodie determined that mitigating circumstances existed that ruled out high negligence because the operator had never been cited previously for such a violation and Woodie had never spoken to the ground man or the operator about safe operation of the crane. (Tr. 72).

Crane operator Arthur testified that normally once he lifted a load off the ground and spun it around in the direction it needed to go, no one would guide the load. (Tr. 97).⁵ Arthur testified that he would then swing the load over nice and easy⁶ to the concrete pad where the ground man would have to hold on to the prail bin to "guide" it down over the bolts because the ground man could not control it with a rope [tagline] when standing away from it. (Tr. 97). Respondent's counsel then queried, are you guiding or just making sure it is in the right place. Arthur replied, just positioning to set it on the ground. Tr. 98. According to Arthur's understanding, a tagline (rope) is used to guide and control the suspended load, such as in windy conditions, or when working high off the ground, where the crane swings the load in and the rope

⁴On direct, Woodie testified that the ground man was exposed to a hazard by being "under" the suspended load and it was reasonably likely that a serious injury could occur. (Tr. 39). The citation and Woodie's notes, by contrast, indicate that the ground man was observed working "beside" the suspended load. On cross examination, Woodie conceded that ground man was holding the legs of the bin beside the suspended load, but still exposed to the pinch-point hazard. (Tr. 68-69).

⁵Arthur testified that he would usually raise the load an average of two or three feet off the ground depending on terrain, but since the bin was being moved 40 feet and uphill to the concrete pad at an elevation five to seven feet higher for set-up alignment with the bolts, he probably came up with the lift (cabled or boomed it up) to avoid hitting the ground. (Tr. 108-09, 111-112). Arthur admitted on direct, however, that after the lift, ground man (Critchley) spun the load around in the direction it needed for placement on the pad and then walked along the side of the bin to the pad and set the bin on the pad. (Tr. 99). Respondent's counsel then asked, so other than positioning it, did you need him to guide it or set it, and Arthur said no. (Tr. 99).

⁶On cross, Arthur admitted that just a slight movement of the lever inside the crane would have a big effect on where the prail bin was located. (Tr. 120).

can be held for positioning and lowering the load. (Tr. 98, 99-100, 116). In Arthur's opinion, a tagline was not necessary and served no purpose for what the operator was doing, namely, setting up or installing the prail bin. (Tr. 99-100, 103). While admitting that a tagline would have kept Critchley further away from the suspended bin, Arthur maintained that Critchley could not control the bin with a rope if he was standing away from it. Rather, he testified that Critchley had to physically hold on to the bin to ease it down to the bolts. (Tr. 97-99).

Arthur further testified, somewhat inconsistently, about the process of setting up a prail bin. He testified that he would hook onto the load, lift it up, and clear everyone out of the way until the load swings steady (plumb-bob).⁷ Then the ground man would walk over and "just spin it around a bit to get it in the direction we're going in." (Tr. 101). Given the size of the bin, the "little spin" was really a "good push." (Tr. 125). Then Arthur would swing the bin steady to the pad where the ground persons grab a hold of the bin and ease it down on the pad to line it up for bolting. (Tr. 101-102).⁸ During the transport, Critchley did not do anything with the bin. (Tr. 126), he just walked over to the elevated pad about 40 feet away. (Tr. 126-127).

On cross, and in response to my questioning, Arthur testified that at the concrete pad, the bin was grabbed and spun around again by the ground man to line it up and position it in the direction that it needed to be in prior to lowering it down for setting. (Tr. 112-13, 115, 126). At the pad, the ground man would take one of the legs and move the bin to the proper location to set it in line with the bolts. (Tr. 115). Also on cross, Arthur testified that the ground man had the strength to spin the suspended load by grabbing hold of one of the legs and spinning it. However, he also confirmed that the ground man [or ground persons for that matter] could spin the suspended load with a tagline. He further conceded that the purpose of spinning was to line it up (Tr. 114), but then maintained on questioning from the undersigned at the end of the hearing, that the tagline could not have been used to spin the bin to line it up to set it. (Tr. 127).

Judge: Could a tagline have been used to spin the bin?

A: Not to line it up to set it.

Judge: Could it have been used initially to spin the bin when you first picked it up?

A: I'm sure you probably could have used a tagline to spin when I initially picked it up.

Judge: Why wouldn't a tagline have been effective or be used to position the bin after you had moved it the 40 feet?

⁷Arthur testified that no one was near the bin when he lifted it up, because that is when the bin can move a little bit and slide one way or the other. But once the load was lifted and stopped swaying, he considered it safe, without possibility of swinging and hitting or injuring anyone. (Tr. 105-06). Arthur then testified that in his experience there was zero percent chance of the load swaying and swinging when moved plumb-bob. (Tr. 103). He admitted, however, that "it would take a pretty good gust of wind to move . . . a load of that size (Tr. 104).

⁸Arthur testified that normally there is more than one ground man, but Critchley was the only ground man present during the alleged violation. (Tr. 101).

A: Well, you got a small area to sit something that big down on using a rope. I mean, if you pull on that thing just a foot, it's going to take off spinning. And if you've got to go back down there and pull on it again it's going to spin it. There's no way. You got to physically get a hold of the bin to line it up and set it down that you're going to line it up because it's going to be moving around too much. If you pull on that rope ---.

Judge: So when you position the bin after you got up to the concrete pad, how far off the ground was the bin at that point?

A: As we set it on the slab --- I mean, when we set it on the slab it was down at the time.

Judge: Well, when Mr. Critchley spun it at that location, how high was it?

A: It was about probably two to maybe three feet.

Judge: Two to three feet?

A: Yeah. I'd say the ground was on like --- it was like a slope.

Judge: Was the prail bin still hoisted at that time?

A: When I first picked it up?

Judge: No, when you're at the end of the process and you're getting ready to place it into the bolts.

A: Yes, it's hoisted off the ground maybe 18 inches.

Judge: Did it require steadying or guidance at that point in time to place it into the bolt?

A: It had to be steadied to set down in the holes. But a tagline, you couldn't use a tagline to do that.

Judge: But I think you testified that you could have used a tagline to spin the bin when you first lifted it up?

A. Right.

(Tr. 127-129).

On the other hand, Arthur testified that the ground man could not guide the load because it was too heavy, and the crane was needed to move the load to the proper position. (Tr. 105) On cross, Arthur denied that spinning was guiding the bin to the location. He explained that the crane would have to be moving the load with the ground man traveling along with it for guiding to take place. (Tr. 114)

When inspector Woodie approached, Arthur testified that he had left the crane to join Critchley, who was bolting down the bin on the pad. (Tr. 106, 122).⁹ The suspended load was three to five inches off the ground at this point. (Tr. 108). The bolts extended six to eight inches above the concrete slab. (Tr. 108). According to Arthur, Woodie introduced himself and wanted

⁹Arthur did not see Nichols. (Tr. 107).

to know why Respondent was not using a tagline. Arthur asked, why do we need a tagline. (Tr. 123). At that point, Woodie pulled out his book and explained that all suspended loads shall have a tagline. (Tr. 107, 123). Arthur explained that “you almost have to have a hold of the bin to set it.” He asked Woodie if there was any difference if the load was several inches or several feet off the ground. According to Arthur, Woodie rejoined, “you got to use common sense.” (Tr. 107-108). Woodie then wrote the instant citation. (Tr. 124).

Arthur testified that the ground man had to physically hold the bin to set it over bolts on the pad. As noted, Arthur explained that one could not set the bin holding a tagline because “[y]ou can’t hold a rope and line something up like that.” (Tr. 116). He conceded, however, that if the bin was hoisted several feet above the ground, a tagline could be used to place the bin in the general location necessary so that the load could be lowered about six to eight inches off the ground, where final adjustments were made. (Tr. 117).

II. LEGAL FRAMEWORK AND CONCLUSIONS OF LAW

A. Significant And Substantial Principles

The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. As a general proposition, a violation is properly designated as significant and substantial (S&S) in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove:

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

6 FMSHRC at 3-4; *see also Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission explained its *Mathies* criteria as follows:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining*

Company Co., Inc., 6 FMSHRC 1866, 1868 (Aug. 1984) (emphasis in original).

The Commission subsequently reasserted its prior determinations that as part of any S&S finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Co.*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996). The Commission has explicitly rejected a finding of an S&S violation based on the “potential” that an injury could occur. *Texas Gulf, Inc.*, 10 FMSHRC 498, 500-01 (Apr. 1988); *Ziegler Coal Co.*, 15 FMSHRC 949, 953-54 (June 1993). However, the Secretary is not required to show that it is more probable than not that an injury will result from a violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSRHC 1541, 1550 (September 1996).

Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC at 1130. Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986). Furthermore, the question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texas Gulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). Furthermore, the Commission and courts have held that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 175, 178-79 (Dec. 1998); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.2d 133, 135-36 (7th Cir. 1995).

B. Civil Penalty Principles

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

The principles governing the Commission’s authority 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 “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. § § 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, “[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider” six statutory penalty criteria:

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

22 FMSHRC at 600, *citing* 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* at 294, *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

C. Application of Legal Principles to the Facts

1. The Violation

The cited safety standard requires that "[t]aglines shall be attached to hoisted materials that require steadying or guidance." 30 C.F.R. § 77.210(c); see also R. Ex. 1. I have found no reported Commission cases addressing this standard.

Although the Secretary's MSHA regulations do not define "tagline," Respondent relies on OSHA safety and health regulations for construction cranes at 29 C.F.R. § 1926.1401, which state that "[t]agline means a rope (usually fiber) attached to a lifted load for purposes of controlling load spinning and pendular motions or used to stabilize a bucket or magnet during material handling operations."¹⁰

It is undisputed that no tagline was attached to spin the multi-ton bin that was hoisted by crane operator for resetting in six to eight inch bolts on the concrete pad about 40 feet away. The issue is whether the suspended multi-ton bin required "steadying or guidance." I credit the mutually corroborative testimony of Inspectors Woodie and Nichols that ground man Critchley

¹⁰The Commission has held that in the absence of a regulatory definition of a word, the ordinary meaning of that word may be applied. See *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997). The dictionary defines "tagline" as "a cable running from a crane boom "to a bucket for steadying the bucket." *Webster's Third New International Dictionary* 2328 (1993). Given Respondent's reliance on the OSHA regulatory definition that specifically defines the term "tagline" in the context of safety standards for construction cranes, I find that definition appropriate here and generally consistent with the dictionary definition of tagline.

held the base of the leg of the hoisted bin at about chest height. I find that this occurred after the load reached the pad given that less than a minute transpired between the observation and the inspector's arrival at the storage bin area. I also note, however, that Arthur admits that Critchley spun the suspended bin immediately after it was lifted up by crane by grabbing a hold of a leg and giving it a good push. In addition, Arthur admitted that Critchley grabbed the leg of the bin to spin it for proper alignment with the bolts prior to lowering of the bin on the concrete pad below.

The dictionary defines "guidance" as "an act of guiding: the superintendence or assistance rendered by a guide: DIRECTION, LEADING." *Webster's Third New International Dictionary* 2328 (1993). As explained above, the record establishes that the hoisted bin needed spinning, and act of guidance, from the ground man for direction and alignment in the proper location under the bolts on the concrete pad prior to lowering the suspended load.¹¹ Thus, although both are not required, I find that the hoisted material required guidance *and* steadying by the ground man, both after initial hoisting and prior to actual setting, and a tagline was necessary. Since no tagline was used, I find the violation of section 77.210(c).¹²

2. Significant and Substantial (S&S) and Gravity

I find that the violation was S&S under the four *Mathies* criteria. See 6 FMSHRC at 3-4. As noted above, there was a violation of the mandatory safety standard as alleged by the Secretary for failure to attach a tagline to the hoisted multi-ton bin that required guidance. This was a serious violation, which contributed to a discrete safety hazard that the ground man would be crushed or otherwise killed at the pinch point should the suspended, multi-ton bin fall, topple over, or shift during crane operation.¹³ The effect of the hazard, if it occurred, would have been

¹¹Moreover, consistent with Arthur's testimony, it appears obvious that after such spinning, the large suspended load must be steadied to keep it from spinning too far and to line it up for setting. (Tr. 128-29).

¹²While I am somewhat sympathetic to Respondent's argument that as a practical matter the prail bin could not be set without grabbing a hold of the bin (Tr. 116; R. Br. at 4-5), section 101(c) of the Act provides that Respondent may request modification of the existing standard and MSHA may approve the requested modification if the alternate method proposed will guarantee no less than the same measure of protection afforded by the existing standard. Respondent presented no evidence that it sought such a modification here. Moreover, Arthur's testimony established that during the instant violation Respondent had departed from its "normal" practice to use more than one ground man (Tr. 101), who may have been able to set the prail bin effectively by each using a tagline.

¹³Although Woodie did not explain what he meant by a pinch point, I note that a pinch point can occur anywhere a part of the body can get caught between two objects. Thus, anywhere equipment is transmitting energy, there is a pinch point. Given the force of certain mining equipment and machinery, particularly the instant bin, a pinch point injury can be serious and

grave, indeed fatal.

With respect to the third element of the *Mathies* criteria, Inspector Woodie testified that such an event was reasonably likely to occur for a variety of reasons, including improper set up or rigging of the crane, mechanical failure of connections to the load, or operator error concerning movement or lowering of the load. I agree with the Secretary that during the continuance or normal mining operations, it was reasonably likely that the ground man would suffer a fatal injury through exposure to the pinch point by failure to use a tagline.

First, I note that Woodie qualifies as an experienced MSHA inspector specifically trained in safety procedures concerning suspended loads. I accord substantial weight to his opinion that the violation is S&S. *Harlan Cumberland Coal Co.*, 20 FMSHRC at 178-79; *Buck Creek Coal, Inc. v. MSHA*, 52 F.2d at 135-36.

Furthermore, the Commission interprets safety standards to take into consideration ordinary human carelessness. *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Consequently, the construction of mandatory safety standards, which involve miner behavior cannot ignore the vagaries of human conduct. See, e.g., *Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981). This analysis requires consideration all relevant exposure and injury variables.

Even a skilled crane operator such as Arthur, who has never had an accident, may suffer a momentary lapse of attentiveness from fatigue or environmental distractions, which results in slight, improper movement of crane controls and a corresponding large and unexpected movement of the multi-ton bin. Should such occur, there is a reasonable likelihood of injury to the ground man caught in the pinch point holding the hoisted load without using a tagline. Similarly, during the course of normal mining operations, the load is at ongoing risk of being rigged improperly, or the operator could just plain forget to inspect the straps, resulting in rigging or connection error, and injury should the load shift or topple over during the set-up process used by Respondent. In the words of the recent Lexus commercial, "Accidents don't announce themselves." See also Pet. Br. at 12 ("The history of mining is filled with casualties caused by operators thinking too highly of their skills and thus taking shortcuts. . . . Equipment fails all the time for reasons both expected and unexpected. . . . The lack of an accident in the past is no guarantee that the future will be accident free.")

In sum, the confluence of factors here, including the guiding and steadying of the hoisted load, the exposure to the pinch point hazard, the enormous size and weight of the load, and the ongoing vagaries of human behavior that could result in operator error or rigging failure, persuade me that during the course of normal mining operations, there is a reasonable likelihood that Respondent's continued practice of setting prail bins without use of a tagline will result in a pinch

disabling, and can cause amputations, or even death.

point injury to the ground man.¹⁴

Finally, with regard to the fourth element of *Mathies*, I agree with Inspector Woodie that given the size, location and weight of the multi-ton load, and the ground man's proximity to the pinch point hazard while holding the hoisted load, a fatal or crushing accident was likely to occur should the suspended bin fall, topple over, or suddenly shift and strike the ground man during the set up process.

3. Negligence

The Secretary's regulations at 30 C.F.R. § 100.3 (d) provide the following with regard to negligence under the Mine Act:

Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. This criterion accounts for a maximum of 50 penalty points, based on conduct evaluated according to Table X.

The Secretary's regulations categorize negligence as "moderate" when [t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3, Table X.

Inspector Woodie testified that he determined the Respondent to be moderately negligent because the ground man was exposed to the hazard and both the crane operator and ground man should have been trained to ensure that a tagline was used when moving the bin. Woodie ruled out high negligence and determined that mitigating circumstances existed because the Respondent had never been cited previously for such a violation and crane operator Arthur was not looking at ground man Critchley when Woodie observed the violation. I find that Woodie's negligence findings are consistent with the regulations and supported by the record. Accordingly, I affirm his finding of moderate negligence.

¹⁴As noted, Arthur testified that he set approximately 50 prail bins and a tagline was unnecessary and could not be used to set the bin. (Tr. 97, 99, 116). Thus, I infer that but for the instant citation, Respondent would have continued to set prail bins without the use of a tagline.

4. Appropriate Civil Penalty

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The parties stipulated that Respondent demonstrated good faith in the abatement of the citation; that the imposition of the proposed civil penalty of \$392.00 will have no effect on Respondent's ability to remain in business; that the appropriateness of the penalty to the size of Respondent's business should be based on the fact that Respondent worked 15,344 hours in 2008; and that Respondent was not assessed any citations in the 15 months preceding the instant citation. Given these criteria, my finding that the gravity of the violation was S&S, I conclude that the Secretary's proposal is appropriate, and I assess a civil penalty of \$392.00.

III. ORDER

For the reasons set forth above, Citation No. 8078572 is **AFFIRMED**, as written. Within 40 days of the date of this decision, Beckley Crane & Construction Company, Inc. is **ORDERED** to pay a civil penalty of \$392.00 for the violation found above. Upon payment of the penalty, this proceeding is **DISMISSED**.

Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

Distribution: (E-Mail and Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 4, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2007-32
Petitioner	:	A.C. No. 44-04856-112662
	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	Mine: Buchanan No. 1
Respondent	:	

DECISION

Appearances: Benjamin Chaykin, Esq., U.S. Department of Labor, Arlington, VA on behalf of the Secretary;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, PA; on behalf of Consolidation Coal Company.

Before: Judge Bulluck

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of her Mine Safety and Health Administration (“MSHA”), against Consolidation Coal Company (“Consol”), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Secretary seeks civil penalties totaling \$1,934.00 for two alleged violations of her mandatory safety standards.

A hearing was held in Kingsport, Tennessee. The parties’ Post-hearing Briefs are of record.¹ For the reasons set forth below, I **VACATE** the citations and **DISMISS** the Petition.

I. Stipulations

At hearing, the parties stipulated to the following:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding, pursuant to section 105 of the Federal Mine Safety and Health Act.
2. Consolidation Coal Company is the owner and operator of the Buchanan No. 1 mine.

¹The stipulations are enumerated in the Secretary’s Post-hearing Brief at pages 1-3.

3. Operations at Buchanan No. 1 mine are subject to the jurisdiction of the Act.
4. The maximum penalty which could be assessed for these violations pursuant to 30 U.S.C. § 820(a) will not affect the ability of Consol to remain in business.
5. Mine Safety and Health Administration Inspector David Fowler was acting in his official capacity and as an authorized representative of the Secretary of Labor when each of the citations involved in this proceeding was issued.
6. True copies of each of the citations that are at issue in this proceeding, along with all continuation forms and modifications, were served on Consol or its agent, as required by the Act.
7. Government Exhibit 1 is an authentic copy of Citation No. 6624105, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of the statements asserted therein.
8. Government Exhibit 2 is an authentic copy of Citation No. 6624108, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
9. The Secretary intends to offer other citations issued by the same inspector who issued Citation Nos. 6624105 and 6624108, specifically Citation Nos. 6624107, 6624106, 6624110, 6624115 and 6624111. By stipulating to the authenticity of such exhibits, Consol is not stipulating to the relevance of such exhibits or their admissibility.
10. Government Exhibit 3 is an authentic copy of Citation No. 6624107, with all modifications and abatements.
11. Government Exhibit 4 is an authentic copy of Citation No. 6624106, with all modifications and abatements.
12. Government Exhibit 5 is an authentic copy of Citation No. 6624110, with all modifications and abatements.
13. Government Exhibit 6 is an authentic copy of Citation No. 6624115, with all modifications and abatements.
14. Government Exhibit 7 is an authentic copy of Citation No. 6624111, with all modifications and abatements.

15. Each of the violations involved in this matter was abated in good faith.

16. Government Exhibit 8, the Violator Data Sheet, may be admitted into evidence, and accurately sets forth the size of Buchanan No. 1 mine in production tons and hours worked per year.

17. Government Exhibit 9, MSHA's Assessed Violation History Report, R-17 Report, accurately sets forth the history of the violations at the Buchanan No. 1 mine for the period specified, and may be admitted into evidence and used in determining civil penalty assessments for the alleged violations in this case.

18. Consol may be considered a large mine operator for purposes of 30 U.S.C. § 821(i), and Buchanan No. 1 can be considered a large mine.

II. Factual Background

Consol owns and operates Buchanan No. 1, an underground coal mine in Buchanan County, Virginia. Richard Perkins, a float foreman, was acting as the section foreman for the "O" panel longwall development section of Buchanan No. 1 on the midnight ("owl") shift beginning at 11:30 p.m. on November 1, 2006, and ending on the morning of November 2. Tr. 134. He provided an unrefuted account of the crew's activities during the first half of the shift. The "O" panel had two roof bolting machines and a continuous miner operating on the working section, and was accessed by four entries. Tr. 138, 140; Ex. G-10. Early in the shift, Perkins completed an on-shift examination of the "O" panel section. Tr. 144; Ex. R-1. The left side roof bolter, parked in the number 2 entry, was down for maintenance during the entire shift. Tr. 138. During Perkins' on-shift, he identified as a hazardous condition a wide place in the 2 left break, and corrected it by having a crib built and three timbers set. Tr. 144-46; Ex. R-1, R-2 at I. No other hazardous conditions were identified during Perkins' on-shift examination. During the first four hours of the shift, the crew performed maintenance tasks of cleaning coal accumulations from areas on the section, washing equipment, and completing permissibility and dust parameter checks on the continuous miner. Tr. 134-35. They rock dusted in the number 3 belt entry. Tr. 164; Ex. R-1.

The crew began producing coal at 4:05 a.m. Tr. 135. First, they mined in the crosscut between the number 2 and number 3 entries, and then they advanced in the face of the number 4 entry. Tr. 152-53. Perkins conducted a pre-shift examination of the "O" panel section from 4:30 to 5:15. Tr. 148. No hazardous conditions were identified or corrected as a result of his examination. Tr. 147-49; Ex. R-1. At some point after completion of Perkins' pre-shift exam, near the end of the shift, a roof fall occurred in the number 4 entry where the continuous miner was being operated. A conveyor lead was severed, a methane monitor was dislodged, and a methane sensor was damaged on the miner, resulting in a mining shutdown on the section. Tr. 25-27, 157-58. There were at least 16 inches of fallen rock covering the miner's monitor and sensors. Tr. 27. The crew's electrician temporarily spliced the damaged cable, in order to back

the miner out of its location to a safer place where it could be repaired. Tr. 157-59; see Tr. 103.

Supervisory MSHA Inspector David Fowler was assigned to conduct a regular inspection of Buchanan No. 1 in the latter hours of the shift, the morning of November 2. He had been conducting inspections of the mine since September 2000. Tr. 22-24. Fowler's employment at MSHA spans over 25 years, and has included experience as an accident investigator. Tr. 24. Subsequent to the subject November 2 inspection, he became the supervisor of the MSHA Field Office in Princeton, West Virginia. Tr. 22-24. Fowler was accompanied by MSHA inspector trainee, Garnee Deel, and Consol's then chief ventilation supervisor, Archie Ruble. Tr. 84-85, 201-02. The inspection team entered the mine at approximately 6:45, reached the "O" panel section at about 7:50, and remained on the section for roughly one hour. Tr. 25, 85. When they arrived on the section, the owl crew was in the process of rock dusting in the number 3 entry to the face in number 4, and the continuous miner was being repaired in the number 4 entry. Tr. 86-88, 185-86, 211-14.

As a result of his observations, in addition to the two citations at issue in this proceeding, Fowler issued several citations for hazardous conditions on the section: (1) Citation No. 6624107 for loose and hanging ribs on four inby corners located in the number 2 entry (Ex. G-3); (2) Citation No. 6624106 for inadequate air circulation (Ex. G-4); (3) Citation No. 6624110 for a loose light and improper splice of the conveyor cable on the continuous miner (Ex. G-5); (4) Citation No. 6624115 for a non-functioning methane monitor on the continuous miner (Ex. G-6); and Citation No. 6624111 for loose coal and hydraulic oil accumulations in and on areas of the continuous miner (Ex. G-7).²

III. Findings of Fact and Conclusions of Law

A. Citation No. 6624105

Inspector David Fowler issued Citation No. 6624105, alleging a significant and substantial ("S&S") violation of section 75.400, after observing two locations of allegedly hazardous accumulations on the section. The first accumulation was spotted in the number 3 entry under the shuttle cars, along the ribs, and around the feeder, and the second in the crosscut between the number 3 and 4 entries and further inby the number 4 entry.³ The Citation further alleges that the condition was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Consol's "high negligence." The "Condition or Practice" is described as follows:

²The penalties in Citation Nos. 6624107, 6624106, 6624110, 6624115, and 6624111, uncontested by Consol, were paid and became Final Orders of the Commission.

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

Loose coal and float coal dust with hydraulic oil leaked from the feeder was present beginning at the "O" panel tailpiece and extended in by approximately 150'. Loose coal was also present in the last open crosscut from No. 3 entry to No. 4 entry extending into the No. 4 entry intersection where survey station No. 24537 was installed. The accumulations were from 2" to 16" in depth. The accumulations were present in the first crosscut where the shuttle cars park to change out during transportation of coal to the feeder during production. The accumulations were present from rib to rib in some areas.

Ex. G-1.

1. Testimony

a. David Fowler

At hearing, using a diagram of the "O" panel section drawn by Perkins, Fowler identified the locations of equipment and energized cable, including a continuous miner, feeder, power center, roof bolting machine, and two shuttle cars. Ex. G-10; Tr. 26-32. He also identified the first of the two broad areas that he had cited, i.e., the intersection near the feeder in the number 3 entry, and opined why the accumulation existed:

The accumulations -- in this area right here's where the shuttle cars travel through during production, and they have a tendency to spill because they overload shuttle cars. Over along the rib line right here is where the shuttle cars trade out. I mean, they park and let the other one go and get loaded and then they'll go and empty and then they'll switch out. This particular corner right here -- like this corner over here -- is a problem area because it breaks off a lot. And instead of cleaning as they were operating, the third shift had continuously just run through the dust.

Tr. 61; Ex. G-10 at A, H. He stated that in some places the loose coal, float coal dust, and hydraulic oil accumulations were entry width (22 feet), while in others they were crosscut wide from rib to rib (20 feet), and inconsistently deep. Tr. 66; see Tr. 56-57. He estimated the depth of the accumulation at the feeder to be 16 inches, running a distance of 150 feet, and rock dusted. Tr. 66-67. According to Fowler, there was also an accumulation along the ribs in number 3 and under the shuttle cars. Tr. 59-60. Explaining the circumstances under which he cited the hydraulic oil leak, Fowler's testimony continued:

I saw the accumulations of hydraulic oil because, on previous days, I had discussed the machine leaking. The feeder was leaking. And maintenance told me they couldn't get it fixed because they couldn't get the part. So when we came back, I seen [sic] they still hadn't had the part, still hadn't repaired it. So, when I wrote the spillage of the coal, I included the hydraulic oil in order to get the part on the feeder fixed.

Tr. 63. Additionally, he described the hydraulic oil accumulation as "right there along the area that was from rib to the feeder and around toward the belt tailpiece." Tr. 59-60; Ex. G-10 at A. He also testified that a skiff of rock dust covered the roadways and section. Tr. 67-68. In response to being asked whether, from his observation, the hydraulic oil had been cleaned up, Fowler testified, "I can't answer." Tr. 63. He further discussed his observation of the accumulated float coal dust in the area of the hydraulic oil leakage by explaining that, because the tailpiece of the conveyor belt is situated under the feeder, that area tends to accumulate float coal dust. Tr. 64. Also, he testified, float coal dust is generated as equipment runs through the loose coal and pulverizes it. Tr. 68-69. In his opinion, the violation was reasonably likely to cause an injury resulting in "lost workdays or restricted duty" due to the presence of ignition sources, including cables and the feeder -- hot equipment that had operated during the night shift. Tr. 69-70.

The second area that Fowler identified in Citation No. 6624105, the last open crosscut between the number 3 and 4 entries and further in by the number 4 entry, he described in the following testimony:

This area from the crosscut over to the number 4 entry is an area where you have common spillage. And I have asked them and they have, in the past, cleaned this up during the shift so it wouldn't accumulate and be too deep. And just the way they load the shuttle cars and the way the design of the section is, it requires more maintenance than normal just to keep it clean.

Tr. 64-65; Ex G-10 at F. He approximated the upper accumulation of loose coal and float coal dust in the crosscut between the number 3 and 4 entries and near the continuous miner as crosscut width (20 feet), by 60 feet long. Tr. 68.

On cross-examination, Fowler testified that only Garnee Deel took inspection notes and that he, Fowler, initialed them as his own. Tr. 84. However, he acknowledged that he did not review Deel's notes in preparation for his testimony. Tr. 84-85. Fowler also testified that he took no measurements of the coal accumulations that he observed on the section, but "made measurements of approximation" based on "the habit of using my boots and heel height and stuff like that, you know, to tell me what I have when it's loose." Tr. 65.

Fowler also testified to having been concerned that other hazardous conditions that he observed on the section and cited, i.e., the loose light fixture, dislodged methane monitor and spliced cable on the continuous miner, inadequate air circulation in the number 4 entry face, and loose coal and hydraulic oil accumulations in and on electrical components of the continuous miner, increased the risk of ignition near the miner. Tr. 33, 36-39, 72-73, 76. He explained that he designated the violation S&S because, "accidents and injuries related to the fire can be very damaging in getting burned or possibly cause explosions and kill people." Tr. 72. When asked how long the accumulations had been present on the continuous miner, Fowler opined that they had existed for "at least, two or three days, four." Tr. 44-45. He testified that in the number 4

entry face area, he discussed with Perkins a ventilation issue, the condition of the continuous miner, and the float coal dust issue. Tr. 37, 121. Finally, Fowler stated that Consol has a history of the type of violations that he cited on November 2, and that he had been involved in numerous on-site safety talks with mine management about keeping the section free of accumulations. Tr. 58, 64-65, 73.

b. Richard Perkins

Section foreman Richard Perkins testified that, at the beginning of the shift before coal production had started, the crew had performed maintenance and cleaning of the section. A crib had been built and some timbers set to correct a wide open crosscut between the number 1 and 2 entries on the left side of the section. Tr. 137, 145-46. Additional block had been laid on a partially constructed brattice, also on the left side. Tr. 137. On the right side, the crew had cleaned all the way to the face. Tr. 185. They had washed the feeder in the number 3 entry early in the shift around 2:00, and the surrounding area had been shoveled and scooped. Tr. 191-92. Also in the number 3 entry, they had shoveled and scooped ribs, shoveled the ribs behind the cables where the scoop could not reach, then rock dusted. Tr. 137, 141-42, 164; see Ex. R-1. The continuous miner operator had cleaned the ladder, washed the miner, and performed his dust parameters. Tr. 137, 140-41. Perkins explained that Consol's policy requires washing equipment in the first two hours of a shift and, again, in the last two hours. Tr. 146. According to Perkins, the feeder had not been running while the crew was not producing coal, except for the limited purpose of dumping the rock that had come off the right-side continuous miner and any coal that had been cleaned up from the haulageways. Tr. 154, 192.

Perkins testified that, during his pre-shift examination, he did not notice any accumulation of hydraulic oil at the feeder or any coal accumulation along the rib line. Tr. 154-55, 176-77. He acknowledged that he had not been made aware of the oil leak or that a part had been ordered for the feeder, attributing the oversight to "bad communication" due to the fact that he is a float foreman. Tr. 153-54, 173-76. He testified that the shuttle cars were not parked in the number 3 entry, he described the mine floor as "real soft bottom," rutted by the back and forth operation of heavy shuttle cars, and opined that the ruts can be mistaken for coal accumulations. Tr. 155. He explained that the continuous miner was situated in the number 3 break (Ex. G-10 at D) and, thereafter, the roof was bolted where mining had taken place in the number 3 entry. The continuous miner was then moved, and mining had commenced in the number 4 entry after he had examined the area. Tr. 153. According to Perkins, the miner had been washed again before cutting had begun in the number 4 entry. Tr. 181-83. Perkins denied having observed any loose coal or float coal dust accumulations between the number 3 and 4 entries. Tr. 153. When asked to account for accumulations that may have been present behind the continuous miner, Perkins opined that they would have been caused by the "[n]ormal routine of mining. Could fall off shuttle cars. Off the ends, sides." Tr. 166-67.

Finally, contrary to Fowler's testimony, Perkins maintained that, while he had observed Fowler twice before he, Perkins, had left the section, he had had no conversation whatsoever

with the inspector. Tr. 160-62. He testified that being cited for an inadequate pre-shift exam, the first time in five years of mining, "really bothered" him and that, consequently, three days after the inspection, on November 5, he had made the diagram and narrative of the section's activities, in order to address his disagreement with Fowler and Deel. Tr. 133-34; see Ex. G-10, R-2.

c. Archie Ruble

General mine foreman Archie Ruble, a Consol employee at Buchanan No. 1 for approximately 21 years, with 31 years of experience in the mining industry, was the chief ventilation supervisor in November 2006, and had conducted many pre-shift examinations at Buchanan No. 1. Tr. 205. He traveled with Fowler during his inspection on November 2. Tr. 198-201. Ruble testified that, two days earlier on October 31, he had also accompanied Fowler on an inspection of the "O" panel section, and that Fowler had not issued any citations. Tr. 201. In Ruble's opinion, Fowler's placement of equipment and identification of locations on Perkins' diagram, except for the dinner hole, was inaccurate, i.e., advanced by one crosscut or 150 feet. Tr. 202-03, 252-53. Ruble testified that what he observed at the feeder was a combination of oil and water that measured about 8 to 10 feet long. Tr. 217, 225-26, 234. He gave a description of the cited area at the feeder:

The shuttle cars come through this area and dump. When they're dumping coal -- that's what it's made for. It's made to dump coal into. You're going to have spillage You heard in previous testimony from the guys. They talk about cleaning the feeder and cleaning the loading point. They'll come in -- say from this point inby and push up -- push this up -- even though they may have cleaned. All these roadways here may be good and may stay good for days on end, you're still going to end up cleaning this dumping point during the course of your day.

Tr. 219. In acknowledging that he observed coal accumulation at the feeder dumping point, Ruble was emphatic that it amounted to normal spillage, and estimated the dimensions at 10 feet wide, by roughly 20 feet long, by 0 to 6 inches deep -- an amount, he opined, equal to two shuttle cars worth of dumping; the problems arise, he concluded, "if you let it go for a shift or two" Tr. 220-21, 236. He placed the inspection team at the feeder around 7:55, after the section had been cleaned at the end of the shift, explaining that rock dusting forced the team to leave the number 3 entry and travel over to the dinner hole in the number 2 entry. Tr. 221-22, 240-42. Ruble was able to recall one of two shuttle cars parked in the intersection by the feeder, but was unable to speak to whether there was coal accumulated underneath. Tr. 224. He also testified that he did not recall observing a fallen rib at the right corner inby the feeder, and noted that no citation was issued. Tr. 225. When questioned generally about coal accumulations on cables and equipment, Ruble reported that what he observed was incidental to normal mining, pointing out that the crew had been cleaning for 4 ½ hours; "[t]hey hadn't been running coal that long." Tr. 225-26. Ruble also maintained that moisture in the number 3 entry and adequate rock dusting had controlled the float coal dust in the area. Tr. 227. Ruble's testimony was consistent with Fowler's testimony that the number 3 entry at the feeder was rutted:

This area was relatively damp also. This bottom conditions in these areas -- and I think that's some of the confusion with the accumulations -- it's very soft bottom in this high top area. It does squish out, and it looks black. But it's slate and shale. You know what I'm saying? And this type of bottom, typically, is very damp.

Tr. 227-28; see 234-35, 261-62. He further testified that the rutted bottom, caused by shuttle cars traveling with loads weighing 8 to 10 tons, can easily be mistaken for accumulated coal. Tr. 228, 261-62. On cross-examination, Ruble narrowed down the high-traffic rutted area to the intersection near the feeder where the shuttle cars change out. Tr. 235-36. He further testified that, directly behind the feeder and extending inby for the remainder of the 150 foot run, the accumulation had the appearance of "fresh run coal," and the span was damp, but not highly rutted. Tr. 237-38.

When questioned about his observation of the loose coal accumulation in the second area cited, the crosscut between the number 3 and 4 entries, Ruble noted that a "run through" check curtain was located there, which "drags" some coal off the shuttle cars coming from the face as they pass under the hanging curtain. Tr. 214-15. He reiterated the company's cleaning policy of mining coal, backing the miner out of the area, bolting top, then cleaning toward the face. Tr. 215, 240-241. In his opinion, the accumulation that he observed was not hazardous and amounted to "normal spillage you get by getting a cut of coal." Tr. 215. When asked to approximate the dimensions of the accumulation, he responded that "pull-off, or drag-off of the buggy" will typically stay within the confines of the car, about 8 to 10 feet wide, and that what he observed probably spanned a distance of 15 to 20 feet, and ranged from 0 to 6 inches in depth. Tr. 214-16. Ruble emphasized that there is no way to avoid drag-off when loaded shuttle cars pass under the check curtain, especially in "lower coal." Tr. 216-17.

2. Fact of Violation

In order to establish a violation of one of her safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1998) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

While the Commission has held that a violation of section 75.400 occurs when an accumulation of combustible materials exists, it has recognized that "some spillage of combustible materials may be inevitable in mining operations" and that "[w]hether a spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount." *Old Ben Coal Co.*, 1 FMSHRC 1954, 1958 (Dec. 1979) ("Old Ben I"). The Commission has also rejected the rule that evidence of depth and extent is a necessary prerequisite to establishing a violation of 30 C.F.R. § 75.400, holding that, subject to challenge before an administrative law judge, "an accumulation exists where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a

fire or explosion if an ignition source were present.” *Old Ben Coal Co.*, 2 FMSHRC 2806, 2807-08 (Oct. 1980) (“Old Ben II”). In pointing out the obviousness of the prohibition against permitting loose coal to accumulate, the Tenth Circuit has interpreted the mandate to require reasonably prompt clean up, “with all convenient speed.” *Utah Power & Light Co. v. Sec’y of Labor*, 951 F.2d 292, 295, n. 11 (10th Cir. 1991). The judgment of an MSHA inspector as to whether a violation existed is subject to review under “an objective test of whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the hazardous condition that the regulation seeks to prevent.” *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990), *aff’d*, 951 F.2d 292 (10th Cir. 1991) (citation omitted).

Inspector Fowler’s account of what he observed on the section is at odds with Ruble and Perkins’ observations, as well as Perkins’ account of the crew’s activities on the night owl shift. As a threshold matter, Consol challenges Fowler’s placement of equipment and locations of alleged violations on the diagram of the section, asserting that the inspector was off by one crosscut. Ruble corroborated Perkins’ layout of the section, diagramed by Perkins within a few days of the inspection. Moreover, Fowler had no recollection of having inspected the “O” panel section on October 31, contrary to the evidence. Because Fowler had not reviewed Deel’s notes prior to testifying and failed to recall the prior inspection just two days before, and because there is no other evidence of his version, I credit Consol’s account of the section layout. See Tr. 85-86, 201, 229. Applying the same reasoning to the discrepancy in the testimonies of Fowler and Perkins, that they discussed the alleged violations before Perkins and the owl crew left the section, I am not persuaded that any conversation took place based on Fowler’s recollection alone and, therefore, credit Consol’s account. I note that these findings, rather than dispositive of whether the accumulations were impermissible, go to the credibility of the inspector’s overall testimony, in light of the absence of notes to refresh his recollection or corroboration by other testimony.⁴

Going back to Fowler’s earlier October 31 inspection, during which Ruble also traveled with him, it can reasonably be inferred that the accumulations cited on November 2 had not been present because Fowler had not issued any citations. Perkins’ testimony that the crew cleaned the section and its equipment, including the feeder and continuous miner, during the first half of midnight shift in the early hours of November 2 is credible and, indeed, essentially unchallenged by the Secretary. Likewise, the Secretary has not refuted that, while the crew was cleaning and performing maintenance on the equipment, the feeder had only been run long enough to dump the coal and rock that had been cleaned off the section and machinery. When the inspection team arrived on the “O” panel section at about 7:50, the crew had been mining for less than four hours,

⁴Consol points to several instances in which Fowler acknowledged that his memory was not clear (see Tr. 85-86, 90-91, 97-98, 109). Resp. Br. at 24. I agree, as Consol points out, that given the absence of inspection notes and the Secretary’s election not to call inspector trainee Garnee Deel as a witness, Fowler’s testimony should be viewed with a critical eye. Resp. Br. at 15.

and the rock fall that caused the continuous miner to be shut down prematurely further minimized the active mining on the owl shift. I find, based on credible testimony of the crew's maintenance and cleaning activities, and Consol's policy of washing equipment in the first two hours and, again, in the last two hours of a shift, that when the owl crew began cutting coal at 4:05, the section and equipment were clean of coal and oil accumulations. Therefore, I further find that the accumulations at issue on the haulageways and equipment occurred between 4:05 and sometime prior to 7:50, rather than two, three, or four days earlier, as the Secretary suggests.

Fowler and Ruble both attested to having observed coal and oil accumulations in the cited areas, but gave significantly conflicting accounts of the nature of the accumulations. The Secretary holds the view that Fowler cited impermissible accumulations that had existed for several days, whereas Consol challenges Fowler's assessment of the extensiveness and duration, contending that the accumulations constituted permissible spillage incidental to the normal mining cycle on the midnight shift. Recognizing that the Secretary bears the ultimate burden of proof, and that the resolution of the issue in controversy involves a question of degree, the Secretary's evidence falls short of establishing that the accumulations were in violation of section 75.400.

Fowler took no measurements of the coal accumulations in any of the areas that he cited on the section, but made rough estimates. He was asked to describe in great detail, from sheer memory alone, except for review of the citation, itself, events that took place a year earlier.

When Perkins conducted his pre-shift examination of the section between 4:30 and 5:15, the crew had only been actively mining since 4:05. Given my finding that mining commenced on a clean section, Perkins' testimony, that he observed no coal or oil accumulations at the feeder or coal accumulated along the ribs or adjacent intersection, is reasonable and wholly credible. I also fully credit his testimony that the continuous miner had been washed a second time before being operated in the number 4 entry, that active mining did not commence in that entry until after his pre-shift exam had been completed, and that he observed no coal accumulations in the crosscut between the number 3 and 4 entries.

Perkins and Ruble's testimony establish that the section was damp from washing equipment during the owl shift, especially at the feeder where water tended to collect due to a slight grade in the number 3 entry. The shuttle cars tracked the water back and forth throughout the entry and, at least some of this very soft, rutted, black bottom could have been mistaken for coal accumulations, most notably at the feeder and the adjacent intersection where the shuttle cars change out. See Tr. 145, 155, 194-97, 227-28, 234-36. Even Fowler acknowledged that the soft bottom on the section can become rutted, and did not deny that it was comprised of dirt or rock, rather than coal. Tr. 92. He also acknowledged that shuttle cars traveling through the section during production tend to be overloaded and spill. Tr. 61. He also stated that feeders and miners "most always" have coal on them. Tr. 118. Furthermore, Fowler, himself, minimized the nature of the hydraulic oil accumulation, by admitting that he had included it in the citation in order to light a fire under Consol to get a previously ordered part that would fix the problem.

Tr. 63. Again, given the limited amount of mining that occurred that night, the fact that the Secretary has not refuted that a second cleaning and rock dusting occurred before the end of the shift, and because the area cited at the feeder -- soft, damp and rutted -- was the dumping point and change-out area for the overloaded shuttle cars coming from the face, I conclude that the coal accumulations in the number 3 entry amounted to permissible spillage incidental to the normal mining. Therefore, the Secretary has not established that an impermissible accumulation of coal and float coal dust was present on the section.

Likewise, Ruble's testimony respecting the crosscut between the number 3 and 4 entries and the loading point in the vicinity of where the continuous miner had been operating in the number 4 entry before the rock fall, and the drag-off caused by the loaded shuttle cars passing under the check curtain, was compelling and un rebutted. Fowler, himself, even testified that some of what he observed was spillage from loading the shuttle cars. Tr. 91. The owl crew had been producing coal immediately prior to the inspector's arrival on the section until the rock fall on the continuous miner. Tr. 111-12. The miner had been removed from the hazardous area and was in the process of being repaired. The evidence supports a conclusion that the coal was incidental to the normal mining cycle on the shift that night. Accordingly, I conclude that the Secretary has failed to prove by a preponderance of the evidence that an impermissible accumulation of combustible materials existed on the section at the time of inspection and, therefore, no violation of section 75.400 has been established.

B. Citation No. 6624108

Inspector Fowler issued Citation No. 6624108, charging an S&S violation of section 75.360, after observing several allegedly hazardous conditions on the section which had not been reported in the pre-shift exam book for correction.⁵ The citation further charges that the condition was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Consol's "high negligence." The "Condition or Practice" is described as follows:

⁵Notwithstanding Inspector Fowler's specification of section 75.360(f) as the subsection violated, the Secretary alleges a violation of 30 C.F.R. § 75.360(a)(1), which requires, in pertinent part, the following:

[A] certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

Sec'y Br. at 14; see Tr. 121.

An adequate preshift examination was not conducted on the "O" Panel section for the day shift on this date. The following conditions were observed on the working section with no corrective action being taken: [t]he coal ribs present in the No. 2 entry were not being adequately controlled or supported to prevent persons from hazards related to falls of rib in four different locations. The inby corners located in areas where battery charging stations were installed and where a stopping was being installed were loose and hanging. Persons were observed working in the vicinity of the loose coal ribs and no corrective action was being taken. In one area a temporary support that had been previously installed had been removed and was lying next to the loose and hanging rib. Dates, times, and initials were present in all areas to indicate a preshift examination of the areas had been conducted.

Accumulations of combustible material such as loose coal and float coal dust and hydraulic oil were present in areas cited on citation 6624105.

No record of the hazardous conditions was recorded in the preshift examination record book.

Ex. G-2; see Ex. G-3.

1. Testimony

a. David Fowler

Fowler issued Citation No. 6624108 based on Perkins' failure to report in the pre-shift examination record the coal, float coal dust, and hydraulic oil accumulations Fowler cited in Citation No. 6624105, and the adverse rib conditions for which he issued Citation No. 6624107. See Tr. 77-79. He testified about his observations and conditions he considered to be hazardous in the number 2 entry:

I observed loose ribs, a cracked rib. A lot of it had fallen off the areas that weren't supported within the required plan, but I didn't cite the plan. I cited not controlling the roof in these specific locations.

These locations are typical locations that I have discussed with mine management several times. There were problem areas.

The design of the pillar created a point on the pillar -- due to the massive weight and everything in the mine of -- these corners had a tendency to break and roll off. And it's a common place to look for areas where the ribs could be rolling off, or fractured, broken ribs.

Tr. 45-46. He further testified that four crosscuts were involved, that a miner was performing

maintenance on the left roof bolter in one area where temporary supports had fallen out and were laying on the mine floor, and that in the last crosscut, where the owl crew was in the process of constructing a stopping, one of the corners had a broken rib and the roof was sagging. Tr. 47-48. In his opinion, the adverse rib conditions had existed over an extended period of time because of tools, toolboxes and other items sitting atop the fallen material, old rock dust, and footprints that he attested to having observed in it. Tr. 47-49. According to Fowler, although the miner performing maintenance was unable to explain what had happened to the temporary supports, he told Fowler that they had been there most of the shift. Tr. 50-51. Fowler also stated that he thought that he may have asked Ruble why miners would be assigned to install the stopping under bad rib conditions. Tr. 51-52. Finally, Fowler explained that failure to report these conditions, with miners working in the area, amounted to an inadequate pre-shift examination, that the mine had a history of these violations, and that Consol had given additional training to its foremen in order to terminate several of them. Tr. 54-56. As to the coal and hydraulic oil accumulations Fowler attested to having observed in the number 3 and 4 entries, Fowler opined that they had been present at the time Perkins conducted his pre-shift exam, “[d]ue to the area involved and the quantity that was laying on the mine floor.” Tr. 79. He explained that he had designated the violation S&S because roof, rib, and fire hazards could reasonably be expected to cause severe injuries, i.e., “a broken bone, bruises, or whatever,” even death. Tr. 80. Fowler also testified that failure to at least alert the oncoming crew of the hazardous conditions was highly negligent. Tr. 81.

b. Richard Perkins

Perkins conducted his pre-shift examination between 4:30 and 5:15 on the morning of November 2. He testified that he started in the number 1 return entry, examined all four entries and crosscuts, and that he checked for “ventilation, good ventilation; CH₄, which is methane; and CO; and oxygen. And also . . . for hazards -- rough bolts that might be shot off, wide in places; bad ribs; bras-a-hanging.” Tr. 147-49. He stated that he did not observe any bad rib conditions on the section, particularly at the crosscuts where the crew was building a partial stopping, the dinner hole, or at the battery charger. Tr. 147, 149; Ex. R-2 at J, K, L. He further testified that he did not observe any timbers that had been knocked out. Tr. 150, 168; Ex. R-2. He explained that the owl maintenance crew was working on the left-side roof bolter, had removed three covers and propped them up against a rib, and that each cover measured 5 feet long, by 2 feet wide. Tr. 150-51. He acknowledged that he was unable to see the rib behind the roof bolter covers. Tr. 180-81.

Perkins’ description of his observations on the right side of the section, entries number 3 and 4, has been fully set forth respecting Citation No. 6624105. He asserted that he did not see loose coal, float coal dust, or hydraulic oil accumulations at the feeder and the adjacent ribs and intersection, or coal accumulations in the crosscut between entries number 3 and 4. Tr. 153-55, 184-85. He noted that no shuttle cars were parked in the number 3 entry while he was examining the entry. Tr. 155. The continuous miner was parked in the number 3 break when he passed through the number 3 entry, and mining had not yet begun in number 4. Tr. 153. He opined that

rib conditions on the section “could change in one minute.” Tr. 156; see Tr. 178-79, 194.

c. Archie Ruble

Ruble acknowledged that he observed the areas of bad ribs in the number 2 entry, as well as a fallen timber cited by Fowler in the area where the roof bolter was being repaired, although he could not say when the conditions had occurred. Tr. 203-05, 209. He stated that the covers had been put back on the roof bolter and that the crew was beginning to clean the area. Tr. 205, 248-51; Ex. G-10 at J. Ruble stated that no one was at the partial stopping when the inspection team came through the entry. Tr. 206, 251-52; Ex. G-10 at L. According to him, another corner cited, outby the block across from the battery charger, was wide from a permanent support and not very noticeable. Tr. 206-08, 247; Ex. G-10 at J. When asked whether he saw any bad ribs in the fourth location cited, a corner by the dinner hole, Ruble responded that he did not. Tr. 208; Ex. G-10 at B. He opined that normal air current in the entries can cause corner deterioration, as well as water pressure, contact from equipment, and roof pressure. Tr. 209-10. Ruble also explained that in high rib areas, such as where the partial stopping was located, rib conditions can change drastically and very quickly from one examination to the next. Tr. 210-11. Overall, he expressed his view that the rib conditions may not have existed during Perkins’ pre-shift examination, but if they were present, they were insignificant and not readily noticeable, especially in areas where men were working. Tr. 210-11, 231.

2. Fact of Violation

As previously stated, the Secretary must prove by a preponderance of the evidence that the operator violated one of her safety standards. *Keystone*, 17 FMSHRC at 1838.

A violation of section 75.360 occurs when hazardous conditions are not recorded in the pre-shift record book. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (Jan. 1997) (stating that section 75.360 “requires that a preshift examiner ‘examine for hazardous conditions.’”); *see also generally Nat’l Mining Ass’n v. MSHA*, 116 F.3d 520, 539-40 (D.C. Cir. 1997) (upholding the validity of 30 C.F.R. 75.360 and discussing the regulation’s emphasis on identifying current hazardous conditions). However, there is no violation where the hazardous condition did not exist at the time of the pre-shift examination. *Jim Walter Res., Inc.*, 29 FMSHRC 212, 226 (Mar. 2007) (ALJ).

The purpose of the pre-shift examination is to “prevent loss of life and injury” resulting from hazards at mines. S. Rep. No. 91-411, at 71 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 183 (1975). The Commission has long recognized that “[t]he preshift examination requirement ‘is of fundamental importance in assuring a safe working environment underground.’” *Enlow Fork*, 19 FMSHRC at 15 (quoting *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995)).

I have credited Consol's account of the "O" Panel section layout, and made findings that the section was clean of accumulations when active mining began at 4:05, and that any accumulations found on the section occurred between 4:05 and sometime prior to the inspection team's 7:50 arrival on the section.

The Secretary alleges that the hazardous rib conditions in the number 2 entry and coal and oil accumulations on the right side of the section were present during Perkins' pre-shift examination because of evidence that the conditions had existed prior to the midnight shift. Fowler's account of what he observed, however, without corroboration, is particularly suspect, because of inconsistencies in his ability to recall some important details of his inspection. His accounts of how long the accumulations had existed at the feeder and on the continuous miner were vague. Tr. 44-45. He could not remember the location of the water sprays on the feeder. Tr. 108-09. He was unclear as to whether the miner was energized while it was being repaired. Tr. 87-88. He was unable to recall where he took the air reading behind the line curtain in the vicinity of the continuous miner. Tr. 90. He had a problem remembering the location where the miner cable ran from the power center up the number 3 entry and into the crosscut between entries 3 and 4. Tr. 97-98. Even more troubling is his inability to recall having inspected the same section just two days prior, especially in light of his opinion that some of the alleged hazards pre-dated that prior inspection. Tr. 85-86. As was discussed fully above, Fowler did not have the benefit of actual measurements or his own inspection notes, and did not review Deel's inspection notes prior to testifying. Tr. 84-85. Also, as has been previously emphasized, Deel's notes and/or his testimony would have been helpful in establishing the circumstances surrounding the allegations.

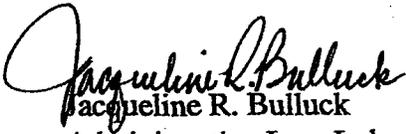
The evidence establishes that the active working section had been cleaned extensively prior to active mining, which had only begun 25 minutes prior to when Perkins began his pre-shift exam at 4:30. Perkins testified credibly that he examined the areas cited, and did not observe any bad ribs or fallen timber. This testimony is bolstered by Perkins' handling of a hazard that he had encountered during his earlier on-shift exam -- the wide place in the number 2 break -- for which he had a crib built and timbers set. It is reasonable to assume that he would have acted similarly had he encountered the rib conditions that he has been charged with overlooking. The Secretary has not rebutted that rib conditions can change suddenly and drastically, especially in very deep mines such as Buchanan No. 1. The evidence in its entirety only establishes that the rib conditions observed by Fowler and Ruble, some not readily apparent in Consol's view, existed at the time of inspection -- some three hours after Perkins' had completed his pre-shift examination -- but not that they were present when Perkins examined the number 2 entry. I am unwilling to conclude, without more, based on Perkins' failure to examine behind the roof bolter covers, that the ribs had rolled at that time, or that Perkins' overall pre-shift examination was lacking. The Secretary's account of events has simply not been supported by the evidence in its entirety.

The Secretary has also failed to prove that Perkins neglected to report coal, float coal dust, or hydraulic oil accumulations on the right side of the section or on its equipment as a result

of his pre-shift examination. Perkins gave credible testimony that he did not observe the alleged accumulations while he was conducting his pre-shift exam, and I credit Ruble's testimony that the accumulations observed during Fowler's inspection were fresh and appreciably less extensive than alleged by the Secretary. This conclusion is consistent with my finding that mining began at 4:05 on a clean section, as well as credible evidence that mining in number 4 did not commence until after Perkins had already examined the entry. Therefore, I find that coal and oil accumulations were not present during Perkins' pre-shift examination, and it must be concluded that no violation of section 75.360 occurred.

ORDER

Accordingly, it is **ORDERED** that Citation Nos. 6624105 and 6624108 are **VACATED**, and this case is **DISMISSED**.


Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

February 9, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. KENT 2008-312
	:	A.C. No. 15-17110-131880
	:	
	:	Docket No. KENT 2008-697
	:	A.C. No. 15-17110-140405
v.	:	
	:	Docket No. KENT 2008-875
	:	A.C. No. 15-17110-136530
	:	
ICG KNOTT COUNTY, LLC, Respondent	:	Calvary Mine
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. KENT 2009-517
	:	A.C. No. 15-17110-159591A
v.	:	
	:	
RANDY PACK, employed by ICG KNOTT COUNTY, LLC, Respondent	:	Calvary Mine
	:	

DECISION

Appearances: Christian P. Barber, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
John N. Williams, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, on behalf of Respondent, ICG Knott County, LLC.;
Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, Lexington, Kentucky, for Respondent, Randy Pack.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), 820(c). The petitions allege that ICG Knott County, LLC, is liable for three violations of the Secretary's Mandatory Safety Standards for Underground Coal

Mines,¹ and propose the imposition of civil penalties in the total amount of \$63,867.00. The Secretary also filed a petition against Randy Pack, an agent of ICG Knott County, LLC., charging him with a violation of a mandatory standard. That petition seeks the imposition of a civil penalty in the amount of \$1,500.00 against Pack, in his individual capacity. A hearing was held in Pikeville, Kentucky, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that ICG Knott County committed the violations, and impose civil penalties in the total amount of \$36,100.00. I also find that Pack committed the violation, as alleged, and impose a civil penalty in the amount of \$1,000.00 against him in his individual capacity.

Findings of Fact - Conclusions of Law

At all times relevant to this proceeding, ICG operated the Calvary mine, an underground coal mine located in Knott County, Pennsylvania.² The incident that prompted issuance of the violations occurred on September 13, 2007, in the 009 working section, when ICG cut into an adjacent bleeder area in order to establish a bleeder line for retreat mining. Water that had pooled in the bleeder entries flowed into the active workings. Equipment was moved to higher ground, the power center was deenergized, and the miners eventually left the mine. The following morning, ICG phoned the MSHA field office and reported the incident. MSHA's field office supervisor, Gregory Ison, and inspector, Roy Parker, traveled to the mine to conduct an investigation. In the course of the investigation, the contested citations and orders were issued. Following a special investigation, the mine superintendent, Randy Pack, was also charged with one of the violations. ICG and Pack timely contested the violations and assessed civil penalties.

The 009 section consisted of seven entries and was located at the inby end of a series of panels that had been mined alongside a pillared-out area. The worked-out area was immediately to the left of the active workings, which had been driven for a substantial distance. Once past the worked-out area, the entries made a 90 degree turn to the left, and continued alongside the worked-out area for a distance the equivalent of four to five breaks. The layout of the 009 section and part of the bleeder system are depicted on a portion of the mine map. Ex. G-3. The mine floor/coal seam in the worked-out area generally sloped down, in two planes, toward the corner around which the active entries had been driven. There was a slope from the pillared-out area downward toward the 009 section, and a slope roughly parallel to that in the 009 section entries, i.e., downward from the faces outby. The two outermost entries of the worked-out area adjacent to the 009 section were the travelable bleeder entries, and they extended into the corner. Water had accumulated in the bleeder entries, and because of the slopes, was pooled against the corner, primarily in the outermost entry.

The lay of the coal seam/mine floor in the 009 section was somewhat different than that

¹ 30 C.F.R. Part 75.

² MSHA's data base shows the mine's status as "Abandoned" as of November 11, 2010.

in the worked-out area. As noted above, the slope of the entries was roughly parallel to that in the bleeder entries. They sloped downward from the faces as they proceeded outby. However, the floor in the crosscuts sloped upward from the #4 entry to the #7 entry, opposite to the slope in the worked-out area. There was a low point, or dip, approximately 10-12 breaks outby from the 009 section faces, where the #8 conveyor belt connected at a right angle with the #7 belt.

Mining in the 009 section had proceeded only a little over four breaks past the corner of the worked-out area because the entries began to "rock out," i.e., the coal seam ended. The last open line of crosscuts was the third break past the corner. One additional crosscut, the fourth break, had been completed only between the #1 and #2 entries. ICG intended to prepare the 009 section for retreat mining. To create a bleeder for the retreat mining, it planned to cut through from the #1 entry into the adjacent bleeder entries.

Pack conducted the required weekly examinations of the bleeder entries.³ He traveled in the second outermost entry. The path traveled in the bleeder is depicted by a black line on the map. Tr. 91-92; Ex. G-3. Approximately five breaks from where that entry terminated at the aforementioned corner in the worked-out area there was a date board on which he recorded the dates of his examinations and initialed the entries. Prior to the cut-through there was standing water in the traveled bleeder entry. Pack testified that there was no more than 12-14 inches of water in the bleeders and that it had not changed in the year that he had been conducting the examinations. Tr. 222. He never got water in his transport vehicle, a three-wheeled "Johnson stinger," the seat of which was about 16 inches off the ground. Tr. 241. The pooled water extended from the corner up to the area of the date board. There was a dip down from the traveled entry to the outermost bleeder entry and, as a result, the water was deeper in that entry.

After the start of the second shift on September 13, Pack talked to Verlin Robinson, ICG's president and general manager, and a decision was made to make the cut-through from the 009 section into the bleeder system. Pack testified that he intended that the cut-through be made in the "last" crosscut, i.e., the most inby break between entries #1 and #2.⁴ Tr. 226. At approximately 7:00 p.m., he called down to David Gibson, the section foreman, and instructed him to make the cut-through. Gibson understood Pack to say that the cut-through was to be

³ Unsealed worked out areas must be examined at least every seven days. 30 C.F.R. § 75.364(a).

⁴ Pack had read and signed a statement prepared in the course of the subsequent special investigation, in which he stated that he instructed Gibson to make the cut-through in the "last open crosscut." Tr. 236-37; Ex. G-12. He also reaffirmed that statement at his deposition. Tr. 238-39; Ex. G-13. At the hearing he testified that the statement was in error, and that he first noticed the error in the course of the hearing. Tr. 239. I find that his original statement was accurate. However, I do not find the fact of the miscommunication, or that the cut-through may have been made in the wrong place, to be of particular significance in the analysis of the various issues.

made in the "last open" break, i.e., the last open line of crosscuts, which was the second break from the face in the #1 entry. Tr. 50. The difference was significant because it appears that the most inby crosscut was approximately one foot higher in elevation than the next crosscut outby.

The continuous miner made a cut, extending the line of open crosscuts 40-45 feet past the #1 entry toward the bleeder entries. That cut was bolted, scooped, and dusted. Some water was infiltrating through the coal into the area. Tr. 25, 66. The miner then started the second cut, and had loaded one shuttle car. On the next pass, between 8:00 p.m. and 8:30 p.m., the miner broke through into the outermost bleeder entry, and water that was pooled in that entry began flowing into the section. While it had been anticipated that some water would be encountered, more water came in than was expected. Tr. 60.

There were differing assessments of the magnitude of the influx of water. A shuttle car operator, Carl Duty, who was retired at the time of the hearing, testified that miners were concerned when water was infiltrating into the extended crosscut, prior to the actual cut-through, because "it didn't look good." Tr. 25. He related that, by the time the first cut had been bolted, the water was about one foot deep. Tr. 25. However, he did not explain how he came to that assessment. It apparently was not by actually standing in the water, because during the entire incident he did not get "the soles of [his] feet wet." Tr. 30-31, 38. He also did not think that the continuous miner got much water in it. Tr. 31. Duty testified that after the cut-through it was "scary" for a minute, that he had never seen as much water in his 34-35 years of mining experience, that it "kicked the miner around," and that the water "run us out of there." Tr. 27, 28, 32. However, he also confirmed that he and the other miners did not hurry out of the area. Tr. 39-40. Rather they followed Gibson's instructions and moved the equipment outby, and then boarded a mantrip and rode out of the section. Duty was on his way away from the water in "less than five minutes" after the cut-through was made. Tr. 38.

Gibson testified that the amount of water infiltrating into the crosscut was not unusual. Tr. 66. He was in the immediate area when the cut-through was made, and instructed the men to move the equipment out of the way. He assisted the miner operator in backing the miner up the crosscut line to the #5 entry, an area that remained dry. While handling the miner's cable, he was standing in the extended crosscut. The water was approximately ankle deep. Tr. 62. As noted in the discussion, *infra*, I find Gibson's description of the flow of water from the cut-through to be accurate.

Gibson then went to the power center and deenergized it, because he did not know if the water level would reach it. There was no water in the power center while the men were underground. Tr. 62-63. The water flowed outby down the entries, primarily the belt entry, toward the low spot where the #8 belt head drive was located. Gibson then rode outby with the crew to the area of the #8 belt head drive, where he got off. It took less than ten minutes to move the equipment and begin leaving the section. Tr. 69. The crew continued outby, parked, and

waited for further instructions.⁵ Gibson called outside and reported what happened. He then returned to the section to monitor the inflow of water. Tr. 60-61. Twenty to thirty minutes had elapsed following the cut-through by the time he returned to the section. Tr. 68-70.

When Gibson made his call, he told the outside man to call Pack and tell him that water was coming into the mine. Tr. 63. When Pack received the call at about 9:00 p.m., he was entering the parking lot of the mine, intent on helping the midnight shift move the 009 section to a new location.⁶ Tr. 242. He immediately concluded that the cut-through had been made in the wrong location, i.e., not in the most inby "last" break between entries #1 and #2, because if it had been made there, he believed that very little water would have been encountered. Tr. 231-32. He called Robinson and told him they had hit water. Robinson said he would call Stewart Bailey, the safety manager. Pack went underground and met the crew around the head drive for the #5 belt, about 2,000 feet from the section. Tr. 243-44. They were sitting on the mantrip, talking and laughing. Tr. 244. He inquired where Gibson was, and was told that he was up at the section. Pack told the men to stay where they were, and went to find Gibson. He parked his ride and walked up the belt line and across the section and looked at the cut-through. Water was running down the #1 entry, crossing over to the #4 entry, then down by the power center and to the area of the #8 belt head drive, which was located in the low spot. Tr. 246-47. He then called out on the mine phone and talked to Bailey, who had arrived at the mine. Tr. 245. He told the men to leave because there was nothing they could do at the time. Tr. 245. Pack and Gibson followed the crew out of the mine. They reached the surface around 10:30 p.m., and the men were sent home. Pack returned underground with a few of the third shift miners to set up pumps and deal with the water. Tr. 248.

The following morning, Pack, Bailey and Robinson conferred and it was decided that Bailey should call MSHA and report what happened. Bailey talked to Ison, who remarked that it

⁵ While waiting on the mantrip, the continuous miner operator, who was apparently drenched with water, related a "story" about having to hold his head up near the roof of the mine to breathe. Tr. 30-31. That story was fabricated. Gibson assisted him in backing the miner out of the cut-through, and the water was only ankle deep. The miner operator, and Gibson, got wet because the miner operator dropped the pan of the miner on a water line, causing them to be sprayed with water. Tr. 61-62.

⁶ Pack testified that he received the call about 9:30 p.m. However, I find that it was closer to 9:00 p.m. Stewart Bailey, ICG's safety manager, who was called by Robinson after talking with Pack, thought that he received the call about 9:00 p.m. Tr. 266. After Pack received his call, he called Robinson, entered the surface buildings, got dressed to go underground, traveled underground, checked on the men as he rode in, found Gibson, walked the belt line and around the section, came back to the area of the #8 head drive and called Bailey, proceeded with Gibson back to where the men were and followed them out of the mine. They had exited the mine around 10:30 p.m. It would have been extremely difficult for Pack to have accomplished what he did if he had received the call at 9:30 p.m.

sounded like something that should have been called in immediately, but that he would get back to him. Ison called Bailey back, and told him that MSHA was going to investigate. Ison and Parker met at the mine, examined the preshift books, met Bailey and went underground. They traveled to the low spot in the area of the #8 belt drive and the tailpiece of the #7 belt. There was a sharp dip near the tailpiece. The bottom belt was under water, the top belt was dry. Tr. 87-88. The water was well up on the sides of the #8 head drive. Water in the #5 and #6 intake entries in that low area was over 18 inches deep, too deep to permit use as the primary escapeway where a miner might have to be carried on a stretcher. Tr. 88-89. Ison used a yellow highlighter and marked on a portion of the mine map indicating where the water was pooled in the #4, #5 and #6 entries. Tr. 86; Ex. G-3. Pack confirmed that the water was where Ison indicated. Tr. 247. There was no water in the return entries, which were "basically dry." Tr. 90.

Parker went to the section faces, and Ison went into the bleeder system and traveled to the area where the cut-through had been made. He observed the date board near a measuring point about five breaks outby where the travelable bleeder entry terminated at the corner. Ison indicated the location of the date board by drawing a red circle on the mine map. Tr. 94-96; Ex. G-3. The most recent date entered on the board was September 7, indicating that the bleeder system had last been examined six days before the cut-through. Tr. 95. He observed water pooled in the outermost bleeder entry, extending about four breaks from the corner, and about half way up to the traveled bleeder entry. He indicated the area of pooled water by highlighting it in yellow on the map. Tr. 96; Ex. G-3. He observed what appeared to be a high water mark, like a "bathtub ring," at the date board. Tr. 96. While there was no water at the date board, he estimated that it had receded about 18 inches as a result of the cut-through. Tr. 98. He did not attempt to measure the amount of the drop, but characterized it as "18 as opposed to 24," or 18 "as opposed to 12." Tr. 98, 133, 158-59. However, he also stated that at the furthest stopping over, the water level had "dropped 12 inches."⁷ Tr. 98.

Ison walked down to the outermost bleeder entry, and traveled to his right, against the rib of the pillar, to a point across from the cut-through. The water got progressively deeper as he moved, and he had to steady himself by holding onto the rib of the pillar. Mining height was approximately 50-52 inches. When he was across from the cut-through, he talked to Parker and could see his through the opening. Tr. 96, 130. He did not attempt to cross that outermost entry to reach the actual cut-through because the floor dipped down toward the section, and he was not

⁷ The surface of the water pooled in that corner of the bleeder could not have dropped 18 inches in one area and 12 inches in another. I give more credit to Ison's estimate of a 12-inch drop at the furthest stopping. It would have been very difficult to accurately estimate the vertical drop from a high-water mark at the date board to the water's surface which was, according to his depiction on the mine map, over 120 feet away down one break and over one break. Ex. G-3. In contrast, judging from where Ison indicated that the water remained pooled in the bleeder, the surface of the water would have been a little more than one entry-width away from the furthest stopping. Ex. G-3. I find that the surface of the water pooled in the bleeder entries dropped approximately 12-14 inches as a result of the cut-through.

sure how deep the water was. Tr. 97. There was standing water in the bleeder at that point, because the cut-through did not extend down to the floor of the bleeder entry. Tr. 98. As he was facing the cut-through, the mine floor dipped down toward the 009 section and sloped down to his right toward the corner. Tr. 156-57. The water had finished draining into the section at the time, which was about noon on September 14. Tr. 138.

Ison and Parker returned to the surface. Parker wrote and issued the citations and orders. The section 103(k) order that had been issued when they arrived was modified to allow pumping of water. Moving of the section equipment had to await pumping of water from the low area in the #5 and #6 entries because that primary escapeway had to be re-opened before miners were allowed inby. Tr. 99-100. They then left the mine site.

Citation No. 6648616

Citation No. 6648616, was issued by Parker on September 14, 2007. As modified by him on September 18,⁸ it alleges a violation of 30 C.F.R. § 75.388(a)(1), which requires that: “Boreholes shall be drilled in each advancing working place when the working place approaches – to within 50 feet of any area located in the mine as shown by surveys that are certified by a registered engineer or registered surveyor unless the area has been preshift examined.” The violation was described in the “Condition and Practice” section of the Citation as follows:

A room was driven off the no. 1 entry on the 009 section which was cut through into a bleeder which resulted in the active 009 section being inundated by water. Boreholes were not being drilled when the working places approached to within 50 ft. of the location of the cut through as required by this section. Also, the area had not been preshifted prior to the cut through. This determination was made when the area was examined and the Dates, Times and Initials of the examiner could not be found. The last examination date observed in this area was 09-07-2007 which was the date of the last weekly examination. If the boreholes had been drilled prior to the cut through, the section would not have been inundated. The inrush of water entering flooded the 009 section, caused the main power to be de-energized due to the water entering the high voltage power center, caused the equipment to be moved outby the faces as far as conditions would allow before a determination was made to evacuate the area due to rising water. Management engaged in aggravated conduct constituting more than ordinary negligence in that had the boreholes been drilled prior to the cut through the inundation would not have occurred. This violation is an unwarrantable failure to comply with a mandatory standard.

⁸ The citation originally alleged a violation of 30 C.F.R. § 75.361(a), which requires supplemental workplace examinations in certain circumstances. It was modified to allege a violation of § 75.388(a)(1), and the Condition and Practice section was amended to address the new standard.

Ex. G-7.

Parker determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial (“S&S”), that eight persons were affected, and that the operator’s negligence was high. The citation was issued pursuant to section 104(d)(1) of the Act, and alleged that the violation was the result of the operator’s unwarrantable failure to comply with the mandatory standard. A specially assessed civil penalty, in the amount of \$45,000.00, was proposed for this violation.

The Violation

The standard requires that when mining approaches to within 50 feet of other areas of the mine, that boreholes be drilled into the area being approached, unless that area has been the subject of a preshift examination to identify any hazardous conditions that might be present. When ICG initiated the cut-through toward the bleeder entries, it mined to within 50 feet of another area of the mine as shown on certified surveys. Tr. 103. There was no drill on the section, and there is no dispute that boreholes were not drilled. There is also no dispute that a preshift examination had not been conducted in the bleeder area prior to the second shift beginning work. The Secretary argues that ICG violated the plain language of the regulatory standard. ICG contends that the intent of the standard is to ensure that boreholes be drilled into areas that are inaccessible and, since the bleeder was accessible and had been examined regularly, that boreholes were not required.

ICG’s argument is premised upon two Commission decisions, wherein the general intent of the standard was described as preventing exposure to hazards in inaccessible areas, *Kellys Creek Resources, Inc.*, 19 FMSHRC 457, 461 (Mar. 1997) and *Williams Bros. Coal Co., Inc.*, 17 FMSHRC 1274, 1275 (July 1995) (ALJ).⁹ Both cases dealt with mining into old works that had been sealed, and the discussion of the standard was, understandably, couched in terms of the hazards posed by mining into such areas. The Secretary argues that the standard is clear on its face and plainly requires the drilling of boreholes unless the area about to be encountered has been the subject of a preshift examination. I agree. Language quoted by ICG from *Kellys Creek* confirms the point.

The text of section 75.388(a) makes plain that the borehole drilling requirements apply in lieu of the preshift examination required by 30 C.F.R. § 75.360

19 FMSHRC at 461. While the Commission went on to observe that preshift examinations cannot take place in inaccessible areas of a mine, that fact and the discussion that followed do not

⁹ The *Williams Bros.* case was not identified in ICG’s brief as a non-binding Administrative Law Judge decision, in contravention of Commission Procedural Rule 5(h), 29 C.F.R. § 2700.5(h).

alter the conclusion that the standard plainly requires the drilling of boreholes or a preshift examination when mining approaches another area of the mine.

ICG did not conduct a preshift examination of bleeder area for the second shift on September 13. It did not drill boreholes into the bleeder area to test for hazardous conditions prior to mining into it. The standard was clearly violated.

Significant and Substantial

An S&S violation is described in section 104(d)(1) of the 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." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. A measure of danger to safety was contributed to by the failure to drill boreholes or preshift the bleeder area. An injury resulting from mining into an area containing an unexpected hazardous condition could be expected to be reasonably serious. As is often the case, the primary issue in the S&S analysis is whether the violation was reasonably likely to result in an injury causing event.

The Secretary contends that the subject standard is equivalent to the preshift examination requirement, which is of fundamental importance in assuring a safe working environment underground, and that allowing miners to work or travel where no preshift examination has been conducted can be found to be an S&S violation even if it is eventually established that no actual hazardous condition existed. *Kellys Creek* 19 FMSHRC at 461 (citing *Buck Creek Coal Co.*, 17 FMSHRC 8, 13-15 (Jan. 1995)). ICG and Pack counter that a preshift examination of the drilling of boreholes would only have confirmed the existence of conditions that ICG and Pack already knew existed. They further argue that no miners were injured, miners were not exposed to risk of drowning, electrocution or suffocation, and, even with the mistake of making the cut-through in the wrong crosscut, no one was ever at any risk of injury. ICG's Br. at 23.

In *Kellys Creek* the Commission noted that:

[S]ection 75.388 is similar in function to the preshift examination requirement; both standards seek to prevent exposure of miners to undetermined hazards. In *Buck Creek Coal Co.*, 17 FMSHRC 8, 13-15 (January 1995), the Commission, describing the preshift examination requirement as one "of fundamental importance in assuring a safe working environment underground, held that a preshift violation was S&S irrespective of the absence of a specific hazardous condition disclosed upon the inspector's examination of the mine.

19 FMSHRC at 461.

ICG's arguments that boreholes or a preshift examination would have merely confirmed what it already knew existed and that no miners were injured are misplaced in that they are focused on what actually occurred, as opposed to what reasonably might have occurred. ICG clearly did not *know* what the conditions in the bleeder were. It may have had reason to believe that it was unlikely that hazardous conditions were present, but having failed to drill boreholes or conduct a preshift examination of the area, it did not know that the miners performing the cut-through would not encounter hazardous conditions. While conditions in the bleeder appeared to have been relatively stable, conditions in mines can change without warning; that is why preshift examinations are of "fundamental importance" in assuring a safe working environment.

In ordering the cut-through into the bleeder system, ICG caused miners to work in an area that had not been examined for six days. Ison noted that additional water may have accumulated in the area since the last examination, thereby posing a more substantial threat. Tr. 113-14. It is possible that other adverse changes may have occurred. In *Buck Creek*, the Commission reversed an ALJ's finding that failure to conduct a complete preshift examination and record the results before allowing miners to enter the mine was not S&S. The facts upon which that decision was based were much more favorable to the operator than those in the present case, with the exception that the Buck Creek mine had an unspecified history of methane accumulations and roof falls, thereby increasing the probability that adverse conditions might have developed following the last preshift examination.¹⁰ The Commission held that the violation was S&S, even though no hazardous conditions were found upon completion of the examination. *Id.* at 13-14. Consequently, neither the absence of hazardous conditions, nor the fact that no injuries occurred, bar a finding that a violation was S&S.

Here, of course, there was a considerable quantity of water in the un-preshifted area. While the water may not have posed a hazard for a weekly examiner in the bleeder system, it could have posed a hazard for miners cutting into the bleeder. The water levels had been relatively stable. However, it is possible, as Ison noted, that additional water could have accumulated in the area. Because examinations of areas where miners are scheduled to work or travel are of fundamental importance to assuring a safe working environment underground, I find that ICG's failure to drill boreholes or to conduct a preshift examination of the bleeder area prior to mining into it was reasonably likely to result in a reasonably serious injury and was S&S.¹¹

Unwarrantable Failure - Negligence

¹⁰ In *Buck Creek*, three miners, two of whom were certified mine examiners, entered the mine before the preshift examination had been completed and recorded. The last preshift examination had been conducted two days earlier. The area they traveled to was at the end of the slope and had been examined and found free of hazards shortly before they arrived. However, the examination had not yet been completed, and the Commission noted that a hazard in another area of the mine could have affected the miners.

¹¹ I do not find, however, that it was reasonably likely that the violation would result in a fatality. The Secretary argues that Pack's knowledge of the accumulation of water in the bleeder is an aggravating factor. However, I find it to have been more of a mitigating factor. Pack knew that there was a finite amount of water pooled in the corner of the bleeder entries. It was about one foot deep in the entry he traveled, somewhat deeper in the outermost entry, and had remained stable for at least a year. The Secretary did not introduce evidence on the likelihood of hazardous conditions developing in the bleeder, other than Ison's testimony regarding the possibility that additional water may have accumulated. For example, there is no evidence that the mine had a history of roof falls or methane accumulations, as there was in *Buck Creek*. On the facts of this case, I find that the violation was reasonably likely to result in a lost work days injury.

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("R&P"); see also *Buck Creek [Coal, Inc. v. FMSHRC]*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as 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 are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

Several factors generally considered in the unwarrantable failure analysis have no application to the facts of this case. The length of time that the violation existed, the extensiveness of the violation and efforts to abate the violation are not applicable. There is no evidence that ICG was put on notice that greater efforts to comply with the standard were necessary. The key factors are the operator's knowledge of the violation, which here is the equivalent of obviousness, and the degree of danger posed by the violation. Also relevant is the fact that the violation was the direct result of the actions or inactions of Pack, a senior management official and, secondarily, of Gibson, a section foreman.

Pack, ICG's superintendent, routinely conducted the weekly examinations of the bleeder area. Tr. 222. Initials on the date board in the area of the cut-through indicated that it had last been examined on September 7. Tr. 95; Ex. G-3, G-12. There is no evidence that anyone performed such an examination between September 7 and the date of the cut-through, September 13.¹² While ICG had been planning to cut through into the bleeder for some time to provide ventilation for retreat mining in the section, as of the beginning of the second shift on September 13, it had not been decided that the cut-through would be made that day. After the shift started, Pack talked with Robinson, the decision was made, and Pack called down and instructed Gibson to make the cut-through.

Pack made no effort to comply with the standard because he candidly admitted that he was unaware of the standard's requirements. Tr. 240, 255; Ex. G-12. He knew that no boreholes had been drilled, that he had not examined the area, and that he had no information that anyone else had examined it. Tr. 233, 235, 240; Ex. G-12. Nevertheless, he directed that the cut-through be made. When he called Gibson to order the cut-through, he did not discuss with him the need for an examination. Tr. 235. ICG must be charged with knowledge of the standard, and its failure to make any attempt at compliance amounts to direct knowledge of the violation. I also have found that the violation was S&S, and posed a relatively high degree of danger to miners, because it caused miners to work in an area that had not been examined for six days. The area contained an accumulation of water that had not been observed in six days and posed a potential hazard to those mining into it. The fact that it was later confirmed that the amount of water was not sufficient to pose a serious threat of trapping miners or resulting in a fatality, does little to mitigate the dangers posed by causing miners to work in an area of the mine that had not been examined for several days. Pack's familiarity with the conditions in the bleeder, and his knowledge that they had not changed since his last examination, mitigates the gravity of the violation to some extent. However, it does not override the obviousness of the violation by a senior management official.

Gibson, also an agent of ICG, bears some culpability for the violation.¹³ He, like Pack, thought that as long as the bleeder area was being examined weekly, bore holes or a preshift examination were not required. Tr. 66-67. When Pack called to tell him to make the cut-through, he also related that he had checked the bleeder and there was some water in it. Pack did

¹² ICG's examination book for the week ending September 8, 2007, did not reflect an examination as having been made on September 7. Rather, it purported to record an examination of the intake on September 4 and an examination of the return on September 5. Ex. G-6. The next report shows an examination of the intake on September 11, and an examination of the return, and all of the measuring points, on September 14. Ex. R-3. Pack confirmed in his statement to the special investigator that he had last been in the bleeder entries on September 7, the date noted on the date board. Ex. G-12.

¹³ Gibson apparently was also charged with the violation in his individual capacity, and he did not contest the violation or the assessed penalty. Tr. 57.

not explicitly state that he had examined the bleeder that day. However, Gibson knew that Pack was underground when he arrived, and had been at the mine for four hours by the time the call was made. He assumed that Pack had examined the bleeder that day. Tr. 50, 59. However reasonable Gibson's assumption may have been, it fell short of confirming that the bleeder had been examined prior to the second shift commencing work. He knew, or should have known, from reviewing the preshift report for his shift that the bleeder had not been included in the preshift examination. Ex. G-5.

I find that the violation was the result of ICG's unwarrantable failure.

Individual Liability

The Act provides that a director, officer or agent of a corporate operator may be subject to civil penalties in his individual capacity for knowingly authorizing, ordering or carrying out a violation of the Act. 30 U.S.C. § 820(c). The legal standards governing individual liability were summarized in *Target Industries, Inc.* 23 FMSHRC 945, 963 (Sept. 2001) (Commissioner Beatty):

Section 110(c) provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C.Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knew or had reason to know of the violative conditions, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). * * *

Here, Pack had reason to know of the violative condition that he directly authorized. He, like ICG, is charged with knowledge of the standard's requirements, and he knew when he ordered that the cut-through be made that they had not been complied with. Counsel for Pack argues that Pack assumed that Gibson would examine the bleeder prior to making the cut-through, and that he had no direct knowledge that the bleeder had not been examined. Resp.

Pack Br. at 3. Pack also testified that if a cut-through was to be made, he would assume that the section foreman would conduct the required examination. Tr. 234. However, I reject those factual assertions. Pack stated to MSHA's special investigator shortly after the incident, "I didn't examine [the bleeder] nor did anyone else because I wasn't aware that I had to examine it." Tr. 240; Ex. G-12. He did not discuss the examination requirement with Gibson, and did not make any assumptions about Gibson's examination of the area because he was unaware of the standard's requirements. Pack directly authorized the actions that he had reason to know constituted a violation of the standard.

Counsel for Pack also makes much of the argument that the incident was the result of miscommunication between Pack and Gibson, which resulted in Gibson's making the cut in the wrong location. If the cut had been made in the location that Pack intended, then it is likely that less water would have entered the working section, a fact that Ison confirmed. The potential mitigation of the effects of the violation does not alter the fact that the standard was violated, on the instructions of Pack, who had reason to know of the violation.

While Pack may not have knowingly violated the standard, his conduct exhibited a degree of indifference, and a serious lack of reasonable care, that constituted more than ordinary negligence. As with ICG, Pack's knowledge of conditions in the bleeder days before the cut-through, and his observations that conditions had not changed markedly over time, mitigate the danger posed by the violation to some extent. However, I find that Pack had reason to know of the violative condition that he ordered, and is subject to liability under section 110(c) of the Act.

Order No. 6648619

Order No. 6648619 was issued by Parker on September 14, 2007, and alleges a violation of 30 C.F.R. § 75.364(h) which requires that records be kept of weekly examinations of bleeder systems. The violation was described in the "Condition and Practice" section of the order as follows:

The record book for the weekly examination for hazardous conditions did not show that the bleeders or measuring points in the bleeders were being examined, nor were any hazards noted that may affect this area. The record book did not show that the last weekly examination for hazardous conditions for this area was conducted on 09-07-2007 and made no mention of an excessive accumulation of water in the area of the bleeder. Dates, Times and Initials of the mine examiner were present in the area of the bleeder along with the large accumulation of water, the water extended across 6 entries and appeared to have dropped approximately 18 inches since the room cut through into the bleeder inundating the active 009 section, causing the main power to be deenergized, and the miners to be evacuated from the section. The last date of examination was 09-07-2007. Management engaged in aggravated conduct constituting more than ordinary negligence by failure to record the examination of the bleeder or the hazards associated with it

(large accumulations of water). This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-8.

Parker determined that the violation posed no likelihood of injury, that the violation was not S&S, that eight persons were affected, and that the operator's negligence was high. The order was issued pursuant to section 104(d)(1) of the Act, and alleged that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard. A civil penalty, in the amount of \$2,000.00, was proposed for this violation.

The Violation - Unwarrantable failure - Negligence

Section 75.364(a) requires that bleeder systems be inspected at least every seven days, that hazards be noted and that methane and oxygen concentrations and air flow volume and direction be determined at various locations, including measuring points specified in the mine's ventilation plan. Section 75.364(h) requires that a record be kept of the results of each weekly examination. ICG's weekly examination records did not reflect the September 7 examination that was noted on the date board in the area of the cut-through. Tr. 95, 106-07; Exh. R-3. The record for the exams done during the week ending September 8 did not show air quantities at the measuring points, or the presence of water in the bleeder. Tr. 106-07, 168-70; Ex. G-6, R-3.

ICG does not contest the fact that the regulation was violated. It does contest the unwarrantable failure and high negligence designations, and argues that this was a simple record keeping violation that should have been issued pursuant to section 104(a), and assessed as such. The Secretary relies, virtually exclusively, on Pack's status as a management official, ICG's agent, in arguing that ICG exhibited indifference and a serious lack of reasonable care amounting to unwarrantable failure. Sec'y. Br. at 27-28.

Ison confirmed that the citation was for a record keeping violation. It is not contended that the examinations and measurements were not done, only that they were not recorded in the weekly exam book. Tr. 115-18, 168-70. Because of the nature of the violation most of the factors typically considered in the unwarrantable failure analysis are not pertinent here. Those most relevant are the direct involvement of a management official and the degree of danger posed by the violation. There is no dispute that Pack, the mine superintendent, was directly responsible for the deficient entries in the weekly exam book, which he signed as reflecting the results of his examinations. Ex. G-6, R-3. However, the degree of danger posed by the violation appears to have been relatively low, which most likely accounts for the Secretary's decision not to rely on that factor in her argument. Sec'y. Br. at 27-28.

As previously noted, Pack routinely performed the weekly examinations and had observed the presence of water in the bleeder entry in the area of the cut-through. The amount of water had remained constant for a long period of time. Ison believed that the presence and depth

of water should have been recorded in the exam book, so that there would have been a record of the rate that the water had accumulated, and so that its presence would have been noted and possibly considered in conjunction with the cut-through. Tr. 116-17, 134-35. However, aside from his belief that the water must have built up over time, there is no evidence to rebut Pack's testimony that the water level had not changed during the time he performed the examinations. Ison testified that he had no reason to doubt that the water levels had remained constant. Tr. 152 Ison also conceded that as far as he knew the water had not compromised air flow or travel in the bleeder, and that it was not required to be recorded as a hazard, at least until a decision was made to cut into the bleeder from the working section. Tr. 117, 136-37, 168-70. Ison agreed with Pacl that MSHA inspectors would have traveled the bleeder with him during any inspections, and would have addressed any failure to record the water as a hazard, which was not done. Tr. 123, 167.

The deficiencies in the entries on the weekly examination records did not include the failure to record hazards. While it may have been helpful to have noted the presence of water in that area of the bleeder system, it was not required by the regulation, and the failure to do so could have had only a tangential impact on the eventual release of water into the working section ICG could not have relied on weekly examination records to assure that it was safe to cut through into the bleeder. It was required, under section 75.388, to either drill boreholes or conduct a preshift examination of the area.¹⁴ The consequences of its failure to do so have been addressed above.

While Pack's responsibility for the violation, as an agent of ICG, justifies a finding of high negligence, the fact that the violation did not pose a high degree of danger and that ICG had not been put on notice that greater compliance efforts were required, lead me to conclude that the violation was not the result of ICG's unwarrantable failure to comply with the standard. The order will be modified to a citation issued pursuant to section 104(a) of the Act, with high negligence and the other special findings as cited.

Citation No. 6648617

Citation No. 6648617 was issued by Parker on September 14, 2007, and alleges a violation of 30 C.F.R. § 50.10 which requires that operators notify MSHA within 15 minutes of the occurrence of an accident. Included in the definition of the term "accident" is "an unplanned inundation of a mine by liquid or gas." 30 C.F.R. § 50.2(h)(4). The violation was described in the "Condition and Practice" section of the citation as follows:

An inundation of water occurred on the 009 section on 09-13-2007 at approximately 20:00 hrs. after a room was driven left off the no. 1 entry, cutting through into the bleeder releasing a large volume of water causing the section to

¹⁴ Failure to record the presence of the water accumulations on the report of a section 75.388 preshift examination would have been a different matter.

be flooded, the main power to be deenergized and the men to be evacuated from the section. The operator did not immediately contact the MSHA District Office having jurisdiction [over] its mine, nor did they contact MSHA Headquarters in Arlington, Va. The operator waited until the next morning on 09-14-2007 and contacted the local MSHA Field Office at approximately 08:15 a.m.

Ex. G-9.

The citation alleged that the violation posed no likelihood of an injury, that it was not S&S, that eight persons were affected, and that the operator's negligence was high.

On October 23, 2007, the citation was modified by Danny Deel, then acting in his capacity as an MSHA conference and litigation representative for the Secretary. Following a conference requested by ICG to challenge the citation, the gravity of the violation and the operator's negligence were substantially enhanced. The wording of the Condition and Practice section was amended by adding the following:

Timely reporting can be crucial in emergency, life-threatening situations to activate effective emergency response and rescue. As the chance for encountering older underground works increases, so does the potential for water inundation. In this case, the operator's lack of concern for miner safety is apparent in the almost 12 hours it delayed until MSHA was notified.

Ex. G-9.

As amended, the citation alleged that it was reasonably likely that the violation would result in an injury necessitating lost work days, that the violation was S&S, that eight persons were affected, and that the operator's failure to comply rose to the level of reckless disregard. A civil penalty, in the amount of \$16,867.00, was proposed for this violation.

The Violation - Inundation

The term "inundation" is not defined in the regulations. In *Island Creek Coal Co.*, 20 FMSHRC 14 (Jan. 1998), the Commission interpreted the accident notification standard in the context of an inundation:

In the absence of an express definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word to be construed. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C.Cir. 1997) (table). "Inundate" and "Inundation" are defined as "a rising and spreading of water over land not usu[ally] submerged: FLOOD . . . DELUGE" and "SUBMERGE . . . to overwhelm by great numbers or a superfluity of something: SWAMP[.]" *Webster's Third New Int'l Dictionary (Unabridged)*

1188 (1986). “Flood” is in turn defined, in relevant part, as “an outpouring of considerable extent . . . a great stream of something . . . that flows in a steady course . . . a large quantity widely diffused: superabundance[.]” *Id.* at 873. “Deluge” is defined as “an irresistible rush of something (as in overwhelming numbers, quantity, or volume) . . . a forceful jet of water (as from a fire hose)[.]” *Id.* at 598.

20 FMSHRC at 19.

The Secretary’s witnesses offered differing definitions of the term “inundation” and also differed on when the alleged inundation occurred. Ison testified that, in this context, an inundation was an inflow of water that caused ICG to lose its ability to produce coal and prompted the withdrawal of miners. Tr. 120-21. In describing the inundation further, he stated: “They lost their ability to run coal. Their belts were covered with water. Their head drive was standing in water. Water was up around the head drive. They thought water was going to get in the power centers. I don’t know if it did or didn’t, but they did kill the power and their ability to produce coal was through for the day.” Tr. at 120. Later he added, “They had to kill the power. They left the mine and mining could not continue. That’s an inundation.” Tr. 141-42.

Ison didn’t know precisely when the inundation occurred. He explained that the men were sent home before the shift was over. “This happened at 8:00, between 8:00 and 9:00 on Thursday evening, and their shift was probably over by 11:00, I guess. . . . So, it happened pretty quickly. It certainly happened by the time they sent the men home.” Tr. 121. Later, he explained further that the inundation occurred when all the elements of his definition “come together that stop them from running coal. You know, the inundation may not have occurred until 9:30 that night.” Tr. 143.

Deel offered several definitions of the term. Initially, he stated that: “My definition [of an inundation] is an accidental inrush of water or liquid or gas that stops production.” Tr. 195. At his deposition, three months earlier, he offered the following definition: “it’s an inrush of water or gas that would cause injury to persons in the mine.” Tr. 196. At the hearing he adopted both definitions. Tr. 196. Later, he testified that there would be an inundation even if no one was in the mine, and that any water coming into the mine, no matter how quickly or slowly it comes in, is an inundation. Tr. 197, 212. He was of the opinion that the inundation occurred, and the 15-minute reporting period began, at the time the cut-through was made. Tr. 177-78. His opinion was based on his understanding that the miners were scared and panicked, and that they hurried and left the section as fast as they could by riding on equipment, walking or running. Tr. 176, 185, 189, 203-04.

The Facts

The opening between the bleeder and the 009 section was approximately four feet wide and four feet high. Tr. 260. When Ison observed it from the bleeder on September 14, water had

ceased flowing through the hole. Tr. 138. Standing water remained at the cut-through because it did not extend down to the floor of the bleeder entry. As noted above, I have found that the level of the water pooled in the bleeder entries dropped a little over one foot as a result of the cut-through. Consequently, when the cut-through was made, it extended approximately one foot below the surface of the water. Water would have started flowing into the section through the lowest foot of the four-foot wide cut-through (assuming that the low edge was horizontal). The water was not "forced" into the section under pressure. Rather it flowed, as water would flow out of a swimming pool, if a four foot wide section of the pool's wall was suddenly removed to one foot below the water level. The flow was initially at a depth of one foot, but receded down to zero depth as the pool level subsided to the low point of the cut-through.

When the water entered the roughly 20-foot-wide main part of the cut-through and the #1 entry, it spread out, with a corresponding reduction in depth. Gibson, who was standing in the water handling the continuous miner cable, testified that the water was a little over ankle deep. Tr. 62. I accept that testimony as accurate, because it is likely that the one-by-four foot flow would have spread out to a depth of roughly three-to-four inches as it flowed down the wider entry. It would have spread out further, with a corresponding reduction in depth, as it flowed through more entries outby toward the low spot near the #8 belt head drive, where Ison found it pooled in the #4, #5 and #6 entries.

The miners had been told to expect some water. While Duty expressed some initial concern, there was no general panic among the miners, and no one hurried to leave. They followed Gibson's instructions and moved the equipment across the section, and then boarded a mantrip and rode outby away from any flowing water. Within five to ten minutes, the miners were on their way out of the section.¹⁵ Gibson deenergized the power center because he was uncertain about where the water would eventually pool. There was no water in the power center, or up on the head drive while the miners were underground. Tr. 63. Duty did not see any water in the power center or at the head drive. Tr. 40. Gibson rode with the men to the area of the #8 head drive where a phone was located. He disembarked, called outside and instructed that Pack be called and told that they had hit water. Pack received a call about 9:00 p.m., when he was entering the mine's parking lot. He then called Robinson, who said that he would call Bailey. Pack entered the mine, spoke briefly to the miners, who were waiting on the mantrip, 1,000-2,000 feet from the section, talking and joking. After Pack checked the conditions in the section and talked with Gibson, he determined that there was nothing more they could do, and he told the men to go home. Everyone had left the mine by 10:30 p.m. or 10:45 p.m.

The Parties' Positions - Analysis

The Secretary argues that the inrush of water at the time of the cut-through was an

¹⁵ Duty testified that he was on his way away from the water less than five minutes after the cut through. Tr. 38. Gibson testified that, in less than ten minutes, the equipment had been moved and the men were on their way out. Tr. 69.

unplanned inundation, relying almost exclusively on selected portions of Duty's testimony in characterizing the inflow of water in the nature of a deluge as described in *Island Creek*. Sec'y. Br. at 24. She argues that the water was "released with such force that it 'kicked the [continuous miner around]" that it came in "pretty fast," that the event was "scary" and it was more water than Duty had seen in his 34 or 35 years as a miner. *Id.* quoting Duty.

ICG argues that there was no "accident" as defined in the regulations, because at least some of the influx of water was planned, and that the amount of water that entered the working section did not amount to an inundation.¹⁶ While ICG contends that there was no inundation, it appears to concede that once the section was flooded, as it was when Ison and Parker saw it, an inundation had occurred. It cites the definition in *Island Creek* and argues that: "Simply put, an inundation is a flood. . . . Only several hours later did it become apparent that the section was flooded." Resp. ICG Br. at 9.

Considering the various definitions of the term "inundation" offered by the Secretary's witnesses, as in *Island Creek*, I find some ambiguity in the term, and must assess the reasonableness of the Secretary's interpretation.¹⁷ 20 FMSHRC at 19. I do not find the Secretary's interpretation to be reasonable. Her argument that there was an inundation at the time of the cut-through is not convincing. Water was not forced into the mine under pressure, nor was it released with force. Rather it flowed in, and drained down toward the low spot near the #8 head drive; a flow that was no more than a few inches deep. She did not address portions of Duty's testimony that paint a significantly different picture and, consequently, mischaracterized the facts.¹⁸ Duty thought it was scary "for a minute." Tr. 32. Neither he nor any other miner panicked or rushed to leave the area. Tr. 39-40. Duty erroneously thought that there was one foot of water in the mine *before* the cut-through, when there was no more than a

¹⁶ While ICG expected that it might encounter some water, the amount of water that actually flowed into the section, and the resultant disruption of operations, was definitely not planned. ICG also argues that it did not have fair notice of the Secretary's interpretation of the term inundation; that section 50.10 is not a mandatory standard and, as such, it cannot be S&S; and that any violation was not S&S or the result of its reckless disregard.

¹⁷ There is no evidence that the Secretary has made any effort to further define the term inundation. The definitions espoused by Ison and Deel were never conveyed to a mine operator, except in the course of this litigation. Tr. 142, 197.

¹⁸ Deel, who also was of the opinion that an inundation occurred at the initial cut-through, based his decision on an understanding that bore little relationship to the facts. His third-hand knowledge of the facts was woefully deficient in several major respects, and he steadfastly held to his opinion under considerably less-favorable factual scenarios, eventually stating that any water coming into the mine, no matter how quickly or slowly it comes in, would be an inundation. Tr. 182, 205, 211.

few inches of water after the cut-through.¹⁹ He was never in any water, did not get the soles of his feet wet, and did not get any water in his shuttle car. Tr. 38-39. The initial flow was not a forceful, irresistible overwhelming rush of water. It clearly was not in the nature of a deluge or, as yet, a flood, as described in *Island Creek*.

While I find the Secretary's position too expansive, I find ICG's too restrictive. By 9:00 p.m., the miners had left the section at Gibson's instruction. The flow had been deemed by Gibson to pose a threat to the power center, which he deenergized as a precaution. Water had been draining into the section for almost an hour and was beginning to pool in the area of the #8 belt drive and the #4, #5 and #6 entries, which were part of the primary escapeway. Pack had been advised of the situation and had called the president and general manager, who called the safety director. While the water pooling in the section had most likely not yet risen to a significant depth, it should have been apparent that it soon would. I find that, at that point, the inflow of water constituted an inundation within the meaning of the regulation. This is consistent with Ison's opinion of when the inundation occurred, which I find to be reasonable, and consistent with *Island Creek*.²⁰

I find that an inundation occurred at approximately 9:00 p.m. on September 13. ICG did not notify MSHA until the next morning, well beyond the 15 minute deadline. The standard was violated.

Notice

On the facts of this case, an inundation, as described above, occurred at approximately 9:00 p.m. ICG contends that it did not have fair notice of an interpretation of the standard that would lead to a finding of a violation. As the Commission explained in *Island Creek*, it is not required that an operator receive actual notice of an adverse interpretation. "Instead, the Commission uses an objective test, i.e., 'whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific

¹⁹ Duty testified that the water "kicked the miner around." Tr. 27. However, he didn't explain what he meant. Gibson had instructed the continuous miner operator to push the miner's head into the opening if water came out. Tr. 54. Duty may have misinterpreted such a movement. He also did not describe other experiences he had had with water entering a mine.

²⁰ There are similarities between the facts in this case and those in *Island Creek*. There, the Commission traced the time line of events, and held that by the time more than six hours had elapsed following when the miner cut through the core drill hole, the general foreman and superintendent had been notified, and "methane had continued to flow with great force for over 6 hours, and that methane readings were elevated, on one occasion in the explosive range, albeit in a limited area" that the "conditions presented a safety hazard that should have alerted [the operator] to the necessity of immediately reporting the incident as an accident to MSHA." 20 FMSHRC at 24.

prohibition or requirement of the standard.' *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)." 20 FMSHRC at 24. I find that, as interpreted above, a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.²¹ Consequently, I reject ICG's notice argument. The report of water entering the section at the cut-through prompted Pack to call Robinson, who called Bailey. With the section's power cut, the miners moved a good distance away from the section, and water draining into the section and pooling in the low spot, it should have been apparent that an inundation had occurred which needed to be reported to MSHA.

S&S

This is a reporting violation. The inundation should have been reported by about 9:15 p.m. At that time, the miners were approximately 2,000 feet from the section awaiting further instruction.²² No miners were in danger of being trapped. Parker originally determined, when he wrote the citation, that there was no likelihood that a miner would have been injured as a result of the reporting violation. Ison had conferred with Parker on the citation, and obviously remained of the opinion that the violation posed no likelihood of injury, because by the time the violation occurred, the miners were well away from any water and were on their way out of the mine. He did not express any opinion about the likelihood of injury from this violation during his testimony.

I reject Deel's analysis of the likelihood of injuries occurring as a result of the violation for the same reasons that I rejected his opinion on what constituted an inundation. His third-hand knowledge of the facts was woefully inadequate in several respects, and he steadfastly maintained his opinion virtually regardless of the facts, stating that his assessment of whether an injury was reasonably likely would not be affected by how quickly the water was coming in, even if it was a little as one inch per day. Tr. 211-12. His initial explanation of the likely mechanics of an injury was focused on the period immediately after the cut-through, before this violation occurred. Tr. 200. He did not know where the men had gathered up, or where the water was draining to, information that he should have obtained from Ison, Parker, MSHA's records, or ICG itself.²³ Tr. 206. He appeared to be of the opinion that any inundation was reasonably likely

²¹ On the facts of this case, I would find that a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would not have recognized that an inundation had occurred when the cut-through was made, i.e., ICG would not have had fair notice of such an interpretation of the standard.

²² Gibson returned to the section to monitor the flow. He was in no danger of suffering an injury at that point, and didn't see any reason to worry about the situation. Tr. 69.

²³ ICG was obligated to maintain a periodically updated certified mine map, showing a number of things, including elevations. Its map was available to the MSHA upon request, and it is likely

to result in serious injury because he knew that fatal injuries had been suffered in the past when abandoned works had been cut into. Tr. 78-79, 207-08.

I find the assessment of gravity originally made by Parker and Ison, who were far more familiar with the facts than Deel, to have been accurate. The violation posed no likelihood of injury and was not S&S.

Negligence

The amended citation charges that the violation was the result of ICG's reckless disregard, a level most often associated with a section 104(d) unwarrantable failure violation. While the citation was issued pursuant to section 104(a), the unwarrantable failure analysis is useful in determining whether the violation was the result of ICG's reckless disregard. Most of the factors that would be taken into account in the unwarrantable failure analysis are inapplicable to this violation. ICG's management officials were responsible for providing the notice. Consequently, the involvement of a management official is presumed. The violation did not pose a danger to miners, and there is no indication that ICG was put on notice that greater efforts were necessary for compliance. In light of the ambiguity in the definition of the term inundation and the differing views of when the violation occurred, the violation was not obvious. The violation was not the result of ICG's reckless disregard. Its negligence was no more than moderate.

The Appropriate Civil Penalties

The parties stipulated that the Calvary mine was a medium-sized mine and that the International Coal Group, Inc., its controlling entity, was large. ICG's history of violations, a printout from MSHA's computerized database, was introduced into evidence. Ex. G-1. As summarized in the assessment documents, it reflects that ICG averaged 0.68 violations per inspection day during the relevant period. It had no repeat violations, and the two section 104(d) violations at issue in these cases were the only section 104(d) violations noted in the pertinent time period. ICG's relatively good history of violations is a mitigating factor in the determination of appropriate penalties. The parties stipulated that the proposed penalties would not affect ICG's ability to continue in business. The violations were promptly abated.

Citation No. 6648616 is affirmed as an S&S and unwarrantable failure violation. However, a fatal injury was not found to be reasonably likely, and Pack's knowledge of the conditions in the bleeder mitigated ICG's culpability slightly. A specially assessed civil penalty of \$45,000.00 was proposed by the Secretary. I impose a penalty in the amount of \$35,000.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6648616 is also affirmed as to Pack in his individual capacity. A specially assessed civil penalty in the amount of \$1,500.00 was proposed by the Secretary. Pack has no

that the MSHA had a copy of ICG's map. See 30 C.F.R. §§ 75.1200, 1203.

history of violations, and there was virtually no evidence introduced as to his financial condition. He does not contend that payment of the proposed penalty would pose an undue financial hardship. I impose a penalty in the amount of \$1,000.00 against Pack in his individual capacity, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

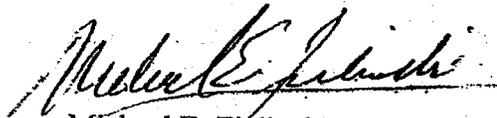
Order No. 6648619 is modified to a citation issued pursuant to section 104(a) of the Act and, as modified, is affirmed. The violation was not the result of ICG's unwarrantable failure. Its negligence was high and the other special findings were affirmed. A civil penalty of \$2,000.00 was proposed by the Secretary. I impose a penalty in the amount of \$1,000.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6648617 is affirmed as a violation that posed no likelihood of injury and was not S&S. It was also not the result of ICG's reckless disregard. Rather its negligence was moderate. A civil penalty of \$16,867.00 was proposed by the Secretary. Upon consideration of the above and the factors enumerated in section 110(i) of the Act, and guided by the Secretary's penalty calculation regulations,²⁴ I impose a penalty in the amount of \$100.00.

ORDER

Citation No. 6648616 is **AFFIRMED**. Citation No. 6648617 and Order No. 6648619, which is **modified to a citation issued pursuant to section 104(a) of the Act, are AFFIRMED, as modified**. Respondent, ICG, is **ORDERED** to pay civil penalties in the total amount of \$36,100.00 for the violations, within 45 days.

Citation No. 6648616 is **AFFIRMED** as to Respondent Randy Pack, and he is **ORDERED** to pay a civil penalty in the amount of \$1,000.00 within 45 days.



Michael E. Zielinski
Senior Administrative Law Judge

²⁴ 30 C.F.R. Subchapter P, Part 100.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 9, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-418
Petitioner	:	A.C. No. 11-02632-179544-01
	:	
	:	Docket No. LAKE 2009-419
v.	:	A.C. No. 11-02632-179544-02
	:	
	:	Docket No. LAKE 2009-494
CENTRE CROWN MINING, LLC.,	:	A.C. No. 11-02632-185333
Respondent	:	
	:	Docket No. LAKE 2009-542
	:	A.C. No. 11-02632-188265
	:	
	:	Mine: Crown III Mine

DECISION

Appearances: Natalie Lien, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Hershiel Hayden, Knoxville, Tennessee, for Respondent.

Before: Judge Rae

This case is before me on a petition for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Centre Crown Mining, LLC, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, (the "Mine Act" or "Act"), 30 U.S.C. §§ 815 and 820. A hearing was held on October 26, 2010 in Evansville, Indiana at which the parties presented testimony and documentary evidence on sixteen (16) violations issued by MSHA to Centre Crown Mining, LLC, ("Crown"), at the Crown III Mine.

The parties settled 44 violations prior to the hearing which are listed in Gov. Ex. 46. I approve the proposed settlement herein. The Respondent requested the opportunity to submit financial statements to contest his ability to pay the proposed penalties and provide an affidavit from a union representative to contest citation no. 6675284, Docket No. LAKE 2009-542. By email dated January 2, 2011, Mr. Hayden indicated that he was withdrawing the objection to the assessed penalties with regard to their ability to remain in business and that they would not be submitting the affidavit. Ct. Ex. 1. The Secretary filed a post-hearing brief.

The parties entered into stipulations contained in the Secretary's Prehearing Response pleading. Specifically, they stipulated that: (1) Crown III Mine is subject to the jurisdiction of the Act, (2) Centre Crown Mining, LLC is an operator within the meaning of the Act, (3) I have jurisdiction over the proceedings, (4) Centre Crown Mining, LLC owns Crown III Mine, (5) the exhibits are authentic, (6) the inspector who signed the citations was acting within his official capacity as an authorized representative of the Secretary of Labor, and (7) the operator demonstrated good faith in abating all cited conditions. The parties also stipulated that the proposed penalties would not affect Centre Crown Mining's ability to remain in business. That stipulation was withdrawn; however, based upon the above referenced email, the ability to remain in business is no longer at issue.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Crown operated the underground bituminous coal mine known as the Crown III Mine ("Crown III") from June 15, 2008 until July 17, 2009. The mine produced 1,360,392 tons of coal in 2009. Between January and May, 2009, several MSHA inspectors conducted regular inspections of the Crown III mine and issued a number of citations for violations of the Act, including the sixteen addressed herein.

1. Citation No 6675539 (Gov. Ex. 1)

Inspector Chad Lampley has been an MSHA inspector for 3 ½ years. Prior to that, he was a miner for almost two years performing general labor, roof bolting, driving underground equipment and performing mechanic's duties. He holds a master's degree in applied science and an associate's degree in auto mechanics. On January 29, 2009, Inspector Lampley, conducted a regular inspection of Crown III and issued Citation No. 6675539 to Crown for a violation of 30 C.F.R. §75.1725(a). The citation states:

The main west belt was not being maintained in safe operating condition in that a bottom roller was missing and the belt was rubbing the metal frame. This condition was present between crosscuts 94 & 95. Due to a failed bearing a top roller was turning against the structure, stopping at times while in contact with the conveyor belt. This condition was present at crosscut 96. Both conditions create a frictional heat source. The belt was immediately removed from service by the operator.

The inspector assessed the gravity of the violation as reasonably likely to cause an injury resulting in lost workdays or restricted duty. He designated the violation as significant and substantial affecting two persons and the operator's negligence as moderate. The proposed penalty is \$687.00.

a. The Violation

Section 75.1725(a) states 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. Inspector Lampley testified that the conveyor belt located between crosscuts 94 and 95 was missing several rollers causing the belt to cut into the metal frame thereby causing friction. Similarly, a top roller on the belt at crosscut 96 was turning against the frame cutting into metal below. This resulted in a heat source. Coal was being moved on the belt at the time he observed these conditions. At crosscut 94/95, the belt line is adjacent to the travelway used by the miners. It is also the secondary escapeway. There is common air between the travel way and the belt line. Tr 22-26.

Crown does not dispute that the violation occurred but argues that the gravity should be assessed as unlikely to cause an injury. Tr 44. This would necessitate a finding that the violation was not significant and substantial.

b. Significant and Substantial

A violation is significant and substantial (“S&S”) if the violation is “of such a 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). There must be “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). Under the *National Gypsum* definition, “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 violations; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984)(footnote omitted); see also, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-104 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (De. 1987) (approving *Mathies* criteria).

In order to meet the requirements of the third, and most difficult to establish, element of the *Mathias* formula, the Commission has provided the following guidance:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.* 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573- 1574 (July 1984).

This evaluation is made in consideration of the length of time that the condition in violation existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S

depends upon the surrounding circumstances of the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghioghen & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

As stated above, Crown does not dispute that the mandatory safety standard was violated. Nor did they contest the moderate degree of negligence assessed. Inspector Lampley testified that based upon his experience, he properly designated the violation as S&S because there was an accumulation of coal on the belt. In fact, 33 citations had been issued to this operator for improper accumulations of coal on the belt, three during this particular inspection. He explained that the accumulations provided combustible material near a heat source caused by friction from the belt rubbing against the metal frame of the conveyor. The damaged rollers and the damaged structural components and some misalignment also caused frictional heat sources. This created a significant potential for smoke and fire in an underground mine environment. Tr 27-28. Conveyor belts, according to Lampley, are one of the more likely sources of an underground fire. Tr 30.

The Commission has also considered the hazards posed by accumulations on improperly maintained conveyor belts. An ALJ's finding that a belt running on packed coal created a potential source of ignition of loose coal and float dust, which was reasonably likely to result in an injury, was upheld by the Commission. *Amax Coal Co.*, 19 FMSHRC 846 (May 1997). In a case very similar to the present case, the Commission held that friction between the belt rollers and the accumulations or between the belt and the frame of the conveyor in the presence of accumulations could cause the accumulations to ignite. The hazard was properly designated as S&S. It was immaterial, the Commission stated, that there was no identifiable hot spot in the accumulations because continued use of the equipment in the normal course of mining operations must be taken into account. *Mid-Continental Resources, Inc.*, 16 FMSHRC 1218 (June 1994).

Inspector Lampley further testified that if a belt fire were to occur, it would be reasonably likely that a miner would be injured as a result. Because the conveyor belt is also a travel road for the miners, it is used several times per day. Additionally, the miner examiner is required to examine the belt each shift exposing him to injury, as well as any miners assigned to a cleanup crew. Tr 29. Generally, there are likely to be at least two miners in this area at any one time but there could be as many as eight if they are traveling by mantrip. Tr 31. The nature of the injury likely to occur, in Lampley's opinion, is exposure to fire and smoke inhalation resulting in lost workdays and restricted duty. Tr 30.

The Respondent suggested that if they had CO₂ sensors along the belt line this would have reduced the likelihood of injury to unlikely, however, Inspector Lampley stated that he did not recall there being CO₂ sensors present. Regardless, such sensors would only protect workers who were inby, not those who were outby. Tr 46. Crown did not introduce any evidence of CO₂ sensors being present. Inspector Lampley did say that he considered the fact that there was no methane or carbon monoxide present and that the area was rock dusted but he also considered the fact that there was float coal dust and accumulations present on and around the belt. The amount of coal dust that had rubbed off the belt indicated that the condition had existed for at least one shift already. Tr 36-39, 43. Crown suggested that fire resistant belt material would also reduce the likelihood of a fire, however, again, they provided no evidence (Crown called no witnesses)

that the belt was made of such material. They represented that they would provide this evidence post-hearing which was never done. Tr 39.

Even if Crown had provided evidence of CO₂ detectors, fire resistant belt material or other protective equipment, it would not reduce the likelihood of a serious injury occurring, thereby changing the designation to non-S&S. In the case of *Buck Creek Coal*, 52 F.3rd 133, 136 (7th Cir. 1995), the operator presented evidence that the mine was equipped with CO detectors, fire retardant belts, firefighting equipment and personnel, and a rescue team. The Court upheld the ALJ's decision that the seriousness of a fire hazard was not lessened by the presence of safety measures with which to fight a fire but, rather, the precautions put in place underscore the "significant dangers associated with coal mine fires."

I find that Inspector Lampley provided highly reliable information regarding the gravity and nature of the safety hazard posed by the improperly maintained conveyor belt, giving due consideration to all of the surrounding circumstances that existed at Crown III at the time. I, therefore, find that the preponderance of the evidence establishes that it was reasonably likely that the missing rollers, misaligned belt and top rollers produced sources of friction in the presence of accumulations that possessed a reasonable likelihood of causing injuries that would be serious or fatal. The Secretary has established the four elements under *Mathies*; the violation is properly designated as S&S.

2. Citation No. 6675540 (Gov. Ex. 3)

On February 5, 2009, Chad Lampley issued this citation at Crown III during a regular inspection for violation of 30 C.F.R. §75.333(h). The citation reads as follows:

The permanent stopping line separating entries # 6 and #7 of the 1st North Submain, was not being maintained for the purpose which it was built. The stopping line separates the belt entry and travelway (Secondary Escapeway) from the intake entries (Primary Escapeway) for Unit III (MMU-002 & MMU-012) working section. Holes or leaks in the stopping line were present at the follow (sic) locations; 1) Crosscut #79 leaks along the top and bottom, 2) Crosscut #77 a 13 inch by 4 inch hole, 3) Crosscut #76 leaks along the bottom, no sealant along the bottom, 4) #75 leaks around the bottom, no sealant along the bottom, 5) #74 leaks through a hole in the upper north corner, and not sealed along the bottom. All areas were tested with chemical smoke and air was moving from the belt entry into the primary escapeway.

The inspector found that a permanently disabling injury was reasonably likely to occur, that the violation was the result of moderate negligence, that 20 persons would be affected and that the violation was significant and substantial. The Secretary proposed a penalty of \$3,689.00 be imposed.

a. The Violation

This ventilation control standard, in relevant part, requires “all ventilation controls, including seals, shall be maintained to serve the purpose for which they were built.” Inspector Lampley testified that on the day of this inspection, he found the air courses between the intake and conveyor belt and secondary escapeway were not being maintained properly. The belt line poses an inherent fire hazard and needs to be separated from escapeways. This separation of airways is accomplished by placement of permanent stopping curtains in the appropriate places. The curtains between crosscuts 6 and 7, however, were not being properly maintained to adequately separate the air from the belt line and the travelway or the escapeway. The damaged curtains were found at several places outby the working section and were noted with the defects as set forth in the citation above. Tr 51-54.

Crown does not contest that the regulation was violated nor did they object to the level of negligence. I find that the violation existed as cited by Inspector Lampley. Crown argues that the likelihood of an injury should be modified to unlikely and the nature of the injury should be lost work days rather than permanently disabling. Tr 66. This would necessitate a finding that the violation is not S&S.

b. Significant and Substantial¹

Lampley testified that should a fire occur in the belt line, the damaged stoppings, coupled with the improper air pressure cited in the following citation, would cause smoke to move from the belt line into the intake entry which is the primary escapeway, as well as into the travelway which doubles as the secondary escapeway. The improper air pressure at the site was forcing the air from the belt line toward the travel and entryways. The numerous large holes and gaps in the stoppings did not prevent the air from flowing into these areas as they are designed to do. He observed float coal dust on the intake side that had entered through the stoppings. This indicated to him, together with other factors, that this condition had existed for several days. As he previously testified, the belt line is an inherently likely location for a fire caused by the friction on the belt igniting the coal accumulations. If this were to occur under the conditions as they existed, the smoke would flow into the escapeways and the miners working inby of the area would be exposed to smoke inhalation injuries which could in turn prevent their escape. Tr 55-59. The entire working crew would be affected by this hazard which would be 20 miners. Tr 58.

Crown confirms that it had been several days since the last belt was moved which confirms that the condition existed for several days. Tr 65. They assert, however, that since Inspector Lampley did not take air readings inby on the intake that he could not tell the exact volume of air seeping into the entryway. Lampley did use chemical smoke to test the air exchange and could see it coursing through the stoppings. Tr 64.

Inspector Lampley has a master's degree in applied science. He has experience as a miner as well as three years as an MSHA inspector. I accept his expert opinion that there was a sufficient volume of air passing through the numerous sizeable holes and gaps in the stoppings

¹ The applicable legal analysis of S&S is set forth in section A.1.b. of this decision and applies to all subsequent violations addressed herein.

into the entry and escapeways to reasonably expose the miners to smoke inhalation injuries.

Thus, I find the *Mathies* formula has been satisfied. There has been an undisputed violation of a mandatory standard. Secondly, there is a measure of danger to safety contributed to by the violation – the danger of smoke infiltrating the intake entries and escapeways in the event of a belt fire. Third, the seepage of smoke from the belt line airway would cause smoke inhalation injuries, and finally, that such injuries would be serious and quite possibly fatal.

3. Citation No. 6675541 (Gov. Ex. 4)

On February 5, 2009, Inspector Lampley issued this citation for a violation of 30 C.F.R. §75.350(a). The citation states:

Air from the belt entry was being used to provide air to the working section Unit III (MMU-002 & MMU-012). When tested with chemical smoke air was traced from the belt entry to the working section. Air was traveling through leaks in the permanent stopping line separating the (#6) belt entry from the intake entry (#7) (reference citation #6675540). The operator immediately halted mining and removed the belt from service.

The violation was assessed as posing a reasonable likelihood of causing a permanently disabling injury to 20 miners and was deemed significant and substantial. A moderate degree of negligence was involved. The penalty was proposed at \$3689.00.

Crown acknowledged the violation but requested the nature of the injury be modified to lost workdays. Tr 87. They did not offer any evidence to support their assertion or to contest the degree of negligence assessed.

a. The violation

30 C.F.R. §75.350(a) states that “the belt air course must not be used as a return air course; and except as provided in paragraph (b) of this section, the belt air course must not be used to provide air to working sections or to areas where mechanized mining equipment is being installed or removed.”²

The air in the mine is designed to travel down the primary escapeway which is also the intake aircourse to ventilate the working section. The air should then return via the secondary escapeway/return aircourse, which shares air with the belt line, and exit the mine. This air flow is controlled, in part, by maintaining lower pressure in the return course in order to push the fresh air down the intake course and draw it out through the return. What Inspector Lampley found was that the air pressure in the intake was reversed; it was lower than the return. The return air then from the belt line was being sucked from the return into the entry/primary escapeway, partly due the holes and leaks in the permanent stoppings between the two air courses, and was traveling to the working section. Tr 68-69. Although the improperly maintained stoppings

² Neither party has alleged that the exception in paragraph (b), permitting belt air to ventilate the working section if approved by the district manager in the ventilating plan, is applicable.

contributed to the hazard caused by the violation, the reverse air pressure was, in and of itself, a separate and distinguishable violation caused by the return vent not being opened to the correct degree. Tr 72-73. This violation existed for several shifts in Lampley's estimation. Tr 73. The operator abated the violation by opening a vent at the end of the return to create lower pressure in the return aircourse. Tr 69.

b. Significant and Substantial

Inspector Lampley testified credibly that the belt line is an inherently likely source of a fire in a mine. At the time he issued the citation, the belt line was in operation and it was in a working section. Tr 71. There was also the potential for diesel equipment being transported through the travelway to catch fire. The very real potential for fires on the belt line has been recognized by the court and the Commission as well in *Buck Creek Coal, supra*. The threat of explosions are also a constant hazard in an underground mine. See *Wabash Mine Holding Co. v. Secretary of Labor*, 28 FMSHRC 155 at 168 (March 2006)(ALJ). Furthermore, this mine has a history of accumulations of coal along the belt way which was cited during this inspection as well. The Commission has held that it was not necessary to identify a particular hot spot in the accumulations of coal on a conveyor belt to properly designate a violation as S&S recognizing the inherent danger of ignition posed by accumulations. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994).

If a fire or explosion were to occur in the belt line or secondary escapeway outby of the working section, the lower pressure in the intake would cause the smoke and deadly gases to be drawn into the primary escapeway thereby resulting in a contaminated primary and secondary escapeway. Tr 71-72, 87-88. With both escapeways contaminated with smoke and carbon monoxide, the injuries would be reasonably likely to be serious in nature, if not fatal, and reasonably likely to occur.

The Respondent established through cross-examination of Inspector Lampley that the precise volume of air flowing from the return aircourse into the intake was not measured. Inspector Lampley also admitted that he did not know exactly how many parts per million of carbon monoxide or methane would be required to overcome a miner seeking escape from the mine in the event of a fire in the belt line. Tr 83-85. The difference in air pressure was, however, obvious in that he could feel the air flowing through the holes in the stopping. By using chemical dust, he was able to see the transfer of air from the return to the intake. Tr 74-75. Furthermore, as stated in the discussion above regarding the previous citation, he also observed float coal dust on the intake side that had filtered through the holes and gaps in the stoppings. The holes and gaps were large as well as numerous. Based upon this information, I find that Inspector Lampley's expert opinion that there was a sufficient leakage of air from the return aircourse to pose a discrete and heightened safety hazard contributed to by the violation is well founded based upon all surrounding circumstances. I accept his assessment and find the violation is properly designated as significant and substantial.

4. Citation No. 6675847 (Gov. Ex. 8)

This citation was issued by Inspector Lampley on March 27, 2009, when he found Alpha 4035 diesel truck did not have a functioning parking brake in violation of section in 1909(d) of the Secretary's regulations. The citation 6675847 alleges that:

The company #4035 diesel maintenance truck was not provided with a functional parking brake. The #4035 truck was in service at the bottom shop. The operator removed the truck from service.

This citation was also designated as S&S with a reasonable likelihood to result in an injury causing lost workdays or restricted duty affecting one person. It was a result of moderate negligence. The proposed penalty is \$634.00.

Crown contends that the Secretary has not met her burden of proving that the mandatory standard was violated because the equipment was not tested on grade which is required by the regulation.

a. The Violation

When the truck operator set the parking brake, put the truck in gear and lightly pressed on the accelerator, the truck continued to move with little or no resistance when acceleration was stopped. This test was conducted on a flat surface. Tr 119. Inspector Lampley determined that this demonstrated to him that the truck was not being maintained in accordance with section 75.1909(d) which provides, in relevant part, that "self-propelled nonpermissible light-duty diesel powered equipment under §75.1908(b)...must be provided with a parking brake that holds the fully loaded equipment stationary on the maximum grade on which it is operated despite any contraction of the brake parts, exhaustion of any nonmechanical source of energy, or leakage."

When questioned by the Respondent as to why he did not test the truck on the maximum grade in the mine where the truck would be used, Lampley testified that because the truck would not hold on a flat surface, there was no needed to test it further on grade. Furthermore, as a former assistant service manager for Ford, a certified auto mechanic and an outby mechanic miner, he knew from experience that if the brake did not hold on flat ground, it also would not hold on grade and testing the brakes in the manner in which it was done was appropriate. Tr 119-121. 142. He also did not want to endanger any miners driving a truck with faulty breaks to a location where there was a grade. The mine is very large and relatively flat. To find an area where there was a grade would have required driving the truck a considerable distance. Tr 131-134.

In a similar case before Judge Koutras, the inspector testified that he did not test the parking brake in accordance with the manufacturer's specifications which provided that the test be done on level ground. The standard required the parking brake be tested on the maximum grade on which the vehicle traveled. Instead, the inspector tested it on a slight incline while the loader was rolling to see how long it took for the parking brake to stop its movement. He concluded that the inspector, with 16 years of experience with MSHA, rightly determined that if the empty loader failed to pass the most minimal test, the parking break would not hold on the

maximum grade of travel. See *Secretary of Labor v. Highlands County Board of Commissioners*, 14 FMSHRC 270 (Feb. 1992)(ALJ). Judge Koutras cited several prior cases which affirmed inadequate parking brake citations challenged on the testing procedures. In *Thompson Coal & Construction, Inc.*, 8 FMSHRC 1748 (Nov. 1986), the inspector tested the brake by instructing the driver to put the vehicle in reverse on level ground. In a case heard by Judge Cook, the parking brakes were tested by the driver putting the vehicle in third and fourth gear, depressing the brake and accelerating. The truck started to creep which was sufficient proof that the brakes would not hold on any grade on which it would travel. The respondent could not establish that the test produced inaccurate results and the judge concluded that the test results established a *prima facie* violation. See *Medusa Cement Company*, 2 FMSHRC 810 (Apr. 1980).

I have considered the testimony presented, the inspector's experience, not only with MSHA but also as a trained mechanic with a master's degree in applied science, and the fact that the respondent has offered no evidence to rebut the inspector's expert opinion. In conclusion, I agree with Inspector Lampley's logical assessment that if the parking brake does not hold the truck stationary on a flat surface after acceleration has ceased, it will not hold under the more rigorous test of setting it on a grade. Inspector Lampley used good judgment in determining that driving the malfunctioning truck to another location only to confirm what was readily apparent, would unnecessarily put others at risk of harm. I find that the Secretary has proven by a preponderance of the evidence that the mandatory safety standard was violated. The citation is affirmed.

b. Significant and Substantial

The violation was deemed S&S because the vehicle was used routinely in all areas of the mine. When not in use, it was parked near the shop which is an area traveled by miners going to and from their work areas. There were always people in and around this vehicle. Tr 126. If this truck was parked on grade or not put in park, it could strike an individual or another piece of equipment with a miner on it. Continued use of the vehicle under normal mining operations posed a reasonable likelihood that such an accident would occur, in Inspector Lampley's estimation. Tr 125. Resulting injuries would result in, at a minimum, lost workdays or restricted duty. Tr 127. The vehicle was subject to weekly inspections as well as daily operation; therefore, the condition should have been detected and remedied. Tr 127-128. The respondent has offered nothing to contradict Inspector Lampley's testimony.

In *Secretary of Labor v. FMS Corporation*, 28 FMSHRC 50 (Jan. 31, 2006) (ALJ Manning) a Jeep's parking brake failed when the transmission slipped from park into reverse on level ground pinning the driver between the rear bumper and a wall. He suffered extensive internal injuries as a result. The violation was upheld as S&S by Judge Manning, in part, because a serious injury did occur which was directly related to the violation. While no injury occurred at the Crown III mine due to the inoperative parking brake, the *FMS Corporation case* is illustrative of the severity of injuries that are reasonably likely to occur in the context of normal mining operations even when operating the vehicle on level ground.

I conclude, having considered the credible testimony of Inspector Lampley and the surrounding facts and circumstances, that the Secretary has established the *Mathies* criteria by a preponderance of the evidence. The discrete safety hazard –being struck by an uncontrollable truck – has been created by the nonfunctioning parking brake. There exists a reasonable likelihood that being run over, struck or pinned by the truck would result in an injury and that the injury would be of a reasonably serious nature.

5. Citation No. 7493279 (Gov. Ex. 10)

This citation was issued by Inspector Larry Rinehart for inadequate parking brakes on a small mantrip under section 74.1909(d). Inspector Rinehart is a retired MSHA inspector with prior experience as an electrician in underground mines. He attended college studying power mechanics which included testing of brakes and other mechanical systems on vehicles. He was also trained in the military to conduct preoperational inspections on motorized equipment and finally, he worked in an Exxon service station performing motor vehicle safety inspections for the state of West Virginia. His training for this job was provided by the state of West Virginia and included training on brake testing procedures.

The violation issued on March 18, 2009, during a regular inspection, was designated as S&S with the reasonable likelihood of causing an injury resulting in lost workdays or restricted duty affecting one person resulting from moderate negligence on the part of Crown. The citation alleges that “the diesel vehicle, company number 3121 located in the bottom shop was not equipped with a park brake that would hold the machine stationary on a grade.” The proposed penalty is \$499.00.

a. The Violation

Inspector Rinehart testified that he tested the mantrip’s parking brake in the same manner as Inspector Lampley did the truck involved in the preceding violation discussed above. Tr 139-141. Like Lampley, Rinehart determined based upon his many years of experience in auto mechanics, that it was unnecessary to test the mantrip on grade when it did not hold on level ground.

Crown contests this violation for the same reason as they did Citation No. 6675847 discussed above. Based upon the same analysis, I find the Secretary has established a violation of the mandatory safety standard.

b. Significant and Substantial

Inspector Rinehart testified that the equipment in question is a five or six man light-duty vehicle. Tr 141. The lack of a functioning parking brake exposed miners to the hazard of being struck by it if it were to remain in operation under normal mining conditions. Tr 143. He inspected the wear on the brakes as well as the preoperational inspection reports and determined that the park brake and the service brake could fail at any time and the condition had existed for at least one shift. Tr 144.

The respondent's representative declined the opportunity to cross-examine the inspector stating "this is the same issue as the previous one...we think it should be vacated because it was not the proper test." Tr 145.

For the same reasons and based upon the same analysis set forth in section 4. b. above, I find the citation was properly designated as S&S.

6. Citation No. 7493286 (Gov. Ex. 12)

This citation was also issued by Inspector Rinehart under section 74.1909(d) on May 5, 2009 for vehicle number 3044. The citation alleges that this vehicle "located on unit two was not equipped with a park brake that would hold the machine stationary on a grade."

The citation is written as reasonably likely to cause an injury that would result in lost workdays or restricted duty, that it would affect one person and was the result of a moderate degree of negligence. It was designated as S&S and carries a proposed penalty of \$634.00.

a. The Violation

Inspector Rinehart initially testified that the vehicle was placed on a slight grade, the parking brake was set, and when placed in neutral, the vehicle began to roll down hill. Tr 147. He later said that additional testing was done on the vehicle by turning off the motor and placing it in each gear. Again, it rolled down hill without any resistance. Tr 151. At this point, Crown accepted the violation as written. Tr 152. Thus I find it unnecessary to discuss the S&S designation as it would be identical to the two preceding citations and has not been challenged.

7. Citation No. 6675287 (Gov. Ex. 20)

Dennis Baum is a certified MSHA inspector certified in March 2007. His prior experience is as a miner for Consolidation Coal for five years and with Crown III for 20 years. During a regular inspection he conducted on April 15, 2009, the inspector issued a citation under section 75.370(a)(1) of the regulations. Specifically he cited the following alleged violation:

A violation of the operator's approved ventilation plan is present in the 2nd South/Main West panel, 001/011 MMU. When checked with a calibrated anemometer, there is only 17,685 CFM of air in the last open crosscut between entries #2 and #3. The approved ventilation plan requires a minimum of 20,000 CFM of air in the last open crosscut. Coal production was ceased until ventilation could be restored.

Baum designated the violation as S&S with a reasonable likelihood that an injury would occur resulting in a permanently disabling condition affecting five persons. The negligence was marked as low. The proposed penalty is \$745.00.

a. The Violation

The cited standard provides:

The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in §75.371 and the ventilation map with information as prescribed in §75.372. Only that portion of the map which contains information required under §75.371 will be subject to approval by the district manager.

30 C.F.R. §75.370.

Inspector Baum was in possession of the approved ventilation plan for the Crown III mine when he performed his inspection. The plan requires 20,000 CFM of air at the last open crosscut. Tr 231-232 and Gov. Ex. 39. When he took his measurements, there was 17,685 CFM in that location.

Crown does not contest the violation per se but argues that this violation and the two discussed below should be modified to unlikely to occur and resulting in lost workdays or restricted duty. They admit that the air readings were accurate but that the lower levels permissible under the plan prior to Centre Crown ownership justify this reduction.³ Tr 249-259. This standard requires strict adherence to the approved ventilation plan which was clearly violated.

b. Significant and Substantial

Black lung disease is a permanently disabling medical condition caused by long term exposure to coal dust. At the time Inspector Baum took his readings, there was float coal dust visible in the air and miners were working downwind of it. Inspector Baum stated that this mine has a history of miner's claims of black lung disease and the inability to meet the respirable dust requirements. Tr 234-236. The inspector was not able to say, however, that any such violations have been cited since Crown took over operations of Crown III mine. Nor could he say that he was aware of any black lung disease claims since Crown has operated the mine. Because he saw the coal dust in the air while miners were working in the area, the inspector designated this particular violation S&S. Tr 236-237. The condition was believed by the inspector to have lasted only a short period of time. In fact, he recalled that mine personnel had taken air samples that shift and the volume met the ventilation plan requirements. Also, they were running the dust pumps which would provide the requisite amount of air to the area. He explained that in the past there was a problem but now they have someone go in and monitor the pumps and take air readings and ensure they are maintaining ventilation. Tr 237-238. In order to abate this citation, they tightened some curtains to keep the air in the crosscut. This increased the volume of air to 24,300 CFM. Gov. Ex. 20.

³ Respondent sought to introduce documents establishing that they objected to the changes in the ventilation plan approved by the district manager at the time they took over management of Crown III Mine. Crown requested that I hear and decide the issues regarding their objections in defense of these citations. I find these documents irrelevant to these proceedings and that this is not the proper venue to contest this issue.

I find that should an injury occur as a result of this violation, it would likely be permanently disabling. However, I find Inspector Baum's testimony that the violation existed for a short period of time and that Crown personnel were actively taking timely steps to remediate the condition, not only at the time this citation was issued, but on a regular basis by checking the pumps and taking air readings, significant. I also find significant that fact that Centre Crown had fairly recently taken over operations of Crown III mine and the inspector could not say the history of similar violations had been committed by this operator. Furthermore, complicated pneumoconiosis is contracted only from exposure to coal dust over a very long period of time. Taking these facts together, I find that an injury was not reasonably likely to occur because there was no evidence presented that the hazard lasted for a prolonged period of time or was likely to, considering the operator's demonstrated actions in monitoring air volumes. The third criterion under *Mathies* has not been met; this violation is not significant and substantial.

8. Citation No. 6675290 (Gov. Ex. 22)

This citation was issued under the same standard as the previous citation. It was issued on April 21, 2009, by Inspector Baum. The citation reads as follows:

A violation of the operator's approved ventilation plan is present in the 3rd West panel off the 1st North Sub-Mains. When checked with a calibrated anemometer, there is only 15,113 CFM of air in the last open crosscut between entries 2 and 3. The approved ventilation plan requires that 20,000 CFM of air be in the last open crosscut. Mining was ceased until corrections were made.

Inspector Baum cited the gravity as unlikely to result in permanently disabling injuries to two miners as a result of a moderate degree of negligence by the operator. This citation, unlike the previous one or the following one, was not designated as significant and substantial. Inspector Baum's reasoning was that he did not see any float coal dust in the air when he issued the citation. Otherwise, this violation was alike in all other respects from the other two. Tr 240-241. The proposed penalty is \$207.00. The operator abated the violation by tightening the curtains and the air volume increased to 23,562 CFM. Gov. Ex. 22.

As noted in the above discussion, I find the operator's objection to the change in the approved ventilation plan does not provide Crown with a valid defense to this violation. This standard imposes strict liability for a violation. The air readings were not challenged and the Secretary has met her burden of proving the violation therewith.

9. Citation No. 6675297 (Gov. Ex. 24)

This citation was issued on April 24, 2009, under the same standard as two citations discussed above. This one, like citation no. 6675287, was designated as S&S because there was coal dust visible in the air. Tr 244-245. The gravity is cited as reasonably likely to result in permanently disabling injuries due to the potential for coal dust to cause black lung disease and was the result of moderate negligence on the part of the operator. The citation states that the 2nd South/Main West, 001/010 MMU when checked with an anemometer had 17,677 CFM of air.

The curtains were tightened and air was restored to 21,645 CFM within approximately 30 minutes. Gov.Ex. 24. The proposed penalty is \$1,203.00.

a. The Violation

For the same reasons stated above, I find the Secretary has met her burden of proving that the violation did occur.

b. Significant and Substantial

Inspector Baum testified that he designated this violation as significant and substantial for the same reasons as he did citation number 6675287 discussed above. He stated that based upon the mine's history and the fact that this was the third such violation issued during this inspection, he felt the operator was just not paying sufficient attention to this issue. Tr 246. He was aware of miners who claimed black lung disease injuries and prior problems with maintaining proper air volume before he left the Crown III mine. However, again, Baum testified that he has been with MSHA since March 2007 and Centre Crown took over operations in June 2008, well after Baum's employment at Crown III ended. I find, therefore, that the mine's history as Baum knew it is not a deciding factor in the S&S analysis of these citations. Furthermore, with respect to the earlier discussed citation, he testified that Crown was addressing the issues and checking air readings and running the pumps, indicating an improvement in the amount of attention being paid to the situation. I also do not find that fact that there was coal dust in the air at the moment the inspector took his anemometer readings is a sufficient factor to distinguish a significant and substantial violation from a non-significant and substantial violation. The coal dust could have been present for only minutes and depended upon several factors including what type of work was being conducted at the moment. There was no evidence presented on this point. Moreover, complicated pneumoconiosis, the disabling form of black lung disease, is the result of very long term exposure to coal dust. Therefore, all three of these citations should logically be designated the same way and for the reasons set for the above in section 7. b., I find that they should not be designated as significant and substantial.

10. Citation No. 6675836 (Gov. Ex. 6)

This citation was issued on March 17, 2009 by Inspector Lampley during a regular inspection. The violation is issued under 30 C.F.R. §75.220(a), for failure to adhere to the approved roof control plan. It alleges:

The company's approved roof control plan was not being followed on Unit 1 (MMU-011), 2nd South panel, entry #9 S.S. 1838. From 10 ft. outby the last open crosscut up to the face (approximately 60 ft.) ten roof bolts were damaged or loose.

The citation was amended to a violation of section 75.202(a), however, the wording of the narrative section of the citation was not changed.⁴ The violation was assessed as reasonably

⁴ The standard under which the violation was written prior to amendment, Section 75.220(a), provides "each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional

likely to cause an injury resulting in lost workdays or restricted duty affecting two persons. It was the result of a high degree of negligence and was designated as significant and substantial. The proposed penalty is \$3405.00.

a. The Violation

Section 75.202(a) states the following: “the roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.”

The inspector testified that he found ten roof bolts ten feet outby of the last open crosscut were damaged or loose. Four had no contact with the bearing plate and were hanging loose from the roof. Two had no damage from being struck by equipment but were loose indicating that either some portion of the roof had fallen or they were improperly installed. None of the bolts was offering support to the roof. The entire area of unsupported roof measured 70' x 75'. This was located in a working section and exposed the miner operator, his helper, the scoop man and any haulage car drivers to the dangers of working in this unsupported area. Tr 91-94.

Crown III does not argue that the violation did not occur but that the negligence should be changed from “high” to “moderate” and the gravity of the violation to “unlikely” alleging that the area had just been cut and the violation was issued just after an idle shift. The respondent further stated that they had requested a conference with the district manager to discuss the high degree of negligence cited but before the request could be approved, the assessment of the penalty was proposed. Tr 115. I find this irrelevant to my independent assessment of the degree of negligence involved as discussed below. I conclude that a section 75.202(a) violation under the amended citation occurred as Inspector Lampley testified, rather than as the first sentence of the narrative section of the citation states.

b. Significant and Substantial

The designation of this citation as S&S was based upon Inspector Lampley's observations of the cited condition as well as his knowledge of this mine's history of roof falls as well as industry records of injuries caused by falls. Lampley testified that this 70' x 75' area of roof was not being supported by the damaged or loose roof bolts. As a result, a large area of roof may fall out injuring the miner operator, his helper, the scoop operator and any haulage vehicle operators. This section of the mine had coal and shale sloughing away from the limestone. The permanent roof bolts are designed to support the roof in between each bolt but with missing or loose bolts, a larger area of roof could fall and would be more likely to do so. Where there are multiple permanent support bolts missing or not supporting the roof in an area where miners travel multiple times each day without any warning flags to prevent exposure, there is an increased

measures shall be taken to protect persons if unusual hazards are encountered.” The operator did not raise the issue of lack of notice due to the incorrect language being used in the narrative portion of the citation and I find there has been no prejudice to the operator. The amendment was made the day after the citation was issued providing ample time for the operator to defend against it.

likelihood of a miner being struck by falling rock. Tr 92- 98. An injury caused by a rock fall is reasonably likely to be serious. Tr 98.

The Crown III mine, according to Inspector Lampley, had one of the highest incidents of roof falls with injuries in the district at the time of this violation. Within an 18 to 24 month period, they had approximately 65 falls. Additionally, there were incidents of miners being struck by sloughing rock with resulting lacerations. Lampley was aware of this history from reviewing the mine's profile before starting his inspections. Tr. 99 and Gov. Ex. 34. Although not all of the falls may have been due to unsupported roof, the likelihood is increased with the presence of damaged or loose bolts, in Lampley's opinion. Tr 101.

Inspector Lampley also referred to a January 2, 2002 fatalgram during his testimony as evidence of the likelihood of an accident and the gravity of a roof fall under these circumstances. Gov. Ex. 38. The cause of the fatal roof fall reported therein was due to the presence of seven damaged roof bolts in an entryway at the second crosscut, a situation very similar to this one. Tr 103-104.

The number of persons affected by the violation was determined to be two persons at any one time. Although there were multiple persons likely to be in this working section of the mine, it would be likely that a miner and his helper, or a bolter and his helper would be in the area at the same time in close proximity to each other and would both be struck by a roof fall. Tr 104. It would be expected that at this particular location in the mine, if a portion of the roof fell, it would likely be a relatively small amount of material causing injuries serious enough to result in lost workdays or restricted duty. Tr 102.

Based upon the expertise of the inspector, and in the absence of evidence to the contrary, I find the preponderance of the evidence establishes that it was reasonably likely that the damaged and loose permanent roof bolts contributed to the hazard of a roof fall in a working area of the mine which would be reasonably likely to result in injuries that would be reasonably serious. The Secretary has satisfied the four *Mathies* criteria and established the S&S violation.

c. The Negligence

The respondent requested that the negligence be reduced from "high" to "moderate" asserting that the area in question had been recently cut therefore the condition had existed for only a short period of time thus posing a lower exposure of danger to the miners. In support of this theory, Inspector Lampley was asked if it was possible that the damaged bolts were a result of being struck by a piece of equipment being used on the previous shift. Tr 110. Inspector Lampley responded by saying that if a piece of metal such as the bolt had been recently struck, he would be able to determine that by a visual inspection. Freshly struck metal rusts relatively quickly enabling one to assess how long the condition had existed. There was no indication from what he saw that the condition had just occurred. Tr 116. Furthermore, Inspector Lampley indicated on his sketch of the area made at the time he cited the violation, that he put the notation "no contact" on several of the bolts. That meant that the loose bolts were not damaged or bent from being struck by a piece of equipment. Tr 109 and Gov. Ex. 7. If they had been, there would be a

shiny metal stripling in the otherwise brown metal. Tr 106. They were either loose due to sloughing rock or improper installation. Tr 93. It was also evident that the face had remained unchanged for a period of time from the date, time and initials (DTI) that were inscribed on the roof support plates. There were DTIs from at least three shifts on the plates when Lampley inspected them. Tr 106.

The reason the inspector charged the operator with high negligence for this violation is because the number of DTIs on the plates proves that an examiner had been there on five different occasions, during at least three shifts, and knew or should have known the hazardous condition existed and took no corrective action. Tr 107. Nothing was done to flag off the area and nothing was noted in the pre-shift or on-shift examination book indicating the hazard. Tr 107. Nothing was offered by the operator in mitigation; however, the condition was abated in a timely manner. Tr 108.

I conclude that the Secretary has established that a high degree of negligence was involved in allowing this condition to exist. This mine is known for having an extremely high incident rate of roof falls with injuries, one of the worst in the district. The pre-shift and on-shift examiners are tasked with the duty to ensure the roof is properly supported in working sections for the protection of the miners. They should be on heightened alert of such hazards during their inspections being aware of the history of this mine and of the fatality rate from roof falls in general. It is unconscionable that five inspections were made of these roof supports and DTI'd over the course of three shifts and not one of the examiners noted the hazard, flagged out the area or took steps to install proper support pins. Moreover, they offered nothing to mitigate the severity of the violation except to ask the inspector how he could be sure all ten bolts in this 70' x 75" area hadn't just been damaged by a piece of equipment used on the preceding shift. Their lack of concern for the safety of the miners is apparent.

11. Citation No. 6675278 (Gov. Ex. 16)

The regular inspection of April 2, 2009 resulted in the issuance of this citation for another violation of section 75.202(a). This citation alleges:

The roof in the number 6 entry in the 3rd West/1 North Sub-Main panel, 012 MMU, Is not being supported or otherwise controlled to protect persons from the hazards of a fall of roof. One roof bolt was knocked out and the rib was worn off by the ram cars, creating an area of unsupported roof measuring approximately nine feet by nine feet. This area is used by the ram cars hauling coal and is one crosscut inby the turn to the feeder. The area was dangered out to prevent travel.

Inspector Baum found that an injury resulting in lost workdays or restricted duty was reasonably likely to result, that one person would be affected, that the violation was significant and substantial and that it was due to a moderate degree of negligence on the part of the operator. The penalty proposed is \$1203.00.

a. The Violation

While traveling in the belt entrance in the number 6 entry, Inspector Baum saw a corner where a bolt had been knocked out and the corner of the wall, or rib, had been rubbed off. It was obvious that as the ram cars turned the corner coming out of that entry, either their canopy or side board had knocked the bolt and nut off the bearing plate and broke the bolt off. The plate was gone as well. Tr 203. Because the turn was a tight one and the cars could not get around it easily, the side of the equipment was rubbing the corners and in this one particular place, the wall was worn away all the way up to the roof. Tr 203-204. The inspector's main concern with this situation was the unsupported roof resulting from the missing bolt as there were miners working and traveling in this section of the mine. Tr 204.

The mandatory standard states "the roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." In the inspector's opinion the missing bolt posed such a threat of a roof fall to the miners working and traveling in this area. He based his opinion, in large part on his 20 years of experience as a miner at Crown III. He stated that he recalled the Crown III mine had poor roof conditions and an extensive history of roof and rib accidents, the majority of which resulted in injuries. Tr 205. During his years at Crown, he saw many roof falls and explained that the roof can fall in between the bolts when the roof is fully bolted. When a section is unbolted, the likelihood of a fall increases. Tr 206. As a miner's representative, Inspector Baum investigated a roof fall at Crown III which resulted in an injury serious enough to warrant an immediate report to MSHA. In that instance, the roof had fallen in between the bolts. Tr. 206 – 207.

Crown raised only an objection to the S&S designation and the likelihood of an injury. Based upon this and Inspector Baum's unique expertise on roof falls in this mine, I give full credit to his testimony and find the violation occurred as cited.

b. Significant and Substantial

Inspector Baum designated the violation as S&S, again, in large part based upon his unique familiarity with the Crown III mine's history of roof falls and related injuries. In his experience, the mine has had bad roof conditions for decades throughout the mine. Many injuries have resulted from the falls under the best of conditions. With an area of unsupported roof, if the condition were allowed to continue under normal mining conditions, in his opinion, there would be a roof fall and an injury. Tr 205-206. Because this area is in by the loading point, there are workers present, usually one at any given time who would be exposed to the danger of a fall. Tr 207. The loading point is examined on every shift during the pre-shift and on-shift examinations and the condition should have been identified as a hazard as it was an obvious condition. Tr 208. Based upon how the rib was worn, the inspector estimated that the condition had existed for at least one shift. Tr 207. Inspector Baum recalled 58 roof falls and 18 other roof and rib accidents at Crown III, many of which resulted in injuries and lost workdays. Tr 213. Inspector Baum went through each and every one of these incidents to determine how many occurred while Centre Crown was operating the mine. There were 13 falls, two of which resulted in injuries to miners. Tr 214-221. He felt this was a very high number in the space of one year. Tr 221. A review of Gov. Ex. 34, the mine history, there were actually 18 roof falls in

that eleven month period with two resulting in injuries.

Regardless of whether there were 13, 18 or two roof falls, it is not necessary that an injury actually occur to find a violation is properly designated as S&S. It is also not required that the Secretary show that it is more probable than not that an injury will result from the violation, *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996) and the inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (De. 1998); *Buck Creek Coal, Inc. v. MSHA*, 52 F3d 133, 135-36 (7th Cir. 1995).

The respondent tried to establish through Baum that by the old rule of thumb, one could advance in by the last row of permanent support a certain distance – this distance being arm's length. Tr 210. The respondent then asked if this would be a distance of four feet. Baum responded by saying "if you've got an arm's length of four feet, I'd say you're a heck of a man." The distance would be closer to two feet. Tr 211. Because this broken bolt was located in a corner, there was a distance of nine feet to the next bolt in a triangular pattern. Most accidents, Baum confirmed, occur in an intersection but he has seen them in entries as well. Tr 211-212. This exchange, I infer, was intended to establish that the one broken corner bolt would pose little more of a hazard than that which exists of a roof fall between bolts or in setting the next row of bolts in unsupported roof. This logic ignores Inspector Baum's testimony that the roof in this mine is notoriously bad and even when bolts are in place, falls occur. Therefore, it is that much more of a risk when even one single bolt is not properly installed, or is damaged, broken or otherwise not doing its job. Additionally, the next bolt was nine feet away, not two.

I find no merit in the respondent's assertions that an injury was unlikely taking into account Crown III's history of having an excessive number of roof falls due to poor roof conditions throughout the mine as Inspector Baum so clearly described. Instead, I find the S&S designation is supported by the expert testimony of Baum. One damaged roof bolt under the conditions of this mine could be reasonably likely to result in an injury due to falling rock. The many past injuries from such an accident have already proven to be reasonably serious on too many occasions to doubt that an injury from this particular violation would be reasonably serious as well. The Secretary has met her burden of proof.

12. Citation No. 6675733 (Gov. Ex. 14)

George Hoytheacock has been an inspector for MSHA since May 2007. Prior to that he worked in underground coal mines for over 31 years, seven of which he worked as a roof bolter. Tr 153-155. During a regular inspection conducted on April 3, 2009, he issued this citation to Crown under section 75.202(a). It reads as follows:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs. Loose and unsupported roof was observed in Unit #4 (MMU-014) working section. A roof bolt located between room #27 and room #28 has been damaged and the exposed area measured approximately 8 feet by 7 feet.

The inspector assessed the likelihood of an injury as reasonably likely resulting in lost workdays or restricted duty affecting two miners and designated the violation as significant and substantial. The proposed penalty is \$1304.00.

a. The Violation

This standard is as stated above in sections 10 and 11. When Inspector Hoytheacock was making an imminent danger run across the face in this section of the mine, he observed a damaged bolt that appeared to have been struck by something. Tr 157. In his experience he knows that when a bolt is struck, it can become loose. The bearing plate was no longer in contact with the roof thereby offering no roof support. The area of unsupported roof measured 8' x 7' which is a significantly large area. Tr 158. In addition to the obvious condition of the bolt, it was also evident that there were gaps and slits in the roof. The inspector made a sounding to determine the exact condition of the roof where the gaps and slits were located. When tapped with a brass knobbed stick, a "drummy" noise was made indicating the rock was no longer solid and could fall. Tr 159. This was in a working section of the mine exposing miners to the hazard of a roof fall. Tr 160.

Crown does not contest the violation but requested that the gravity be reduced to unlikely that an injury would occur because this area was not in an intersection and the negligence be reduced to low because there had not been a roof fall in this location before. Tr 176.

I accept the inspector's assessment of the conditions in this area of the mine and his determination that the standard was violated. In addition to having been an inspector for MSHA for a significant period of time, he also was familiar with the roof falls in Crown III and had seven years of experience as a roof bolter to draw upon in making this assessment. I find the violation supported by the evidence.

b. Significant and Substantial

This violation was designated as significant and substantial because, as Inspector Hoytheacock stated, approximately 56 square feet of the roof was unsupported in an area where it was no longer solid. Taking into consideration the fact that this mine had had 10 lost time accidents due to roof falls in a 10 to 18 month period, this condition created a reasonable likelihood that a fall would occur. Tr 161-162. Based upon the size of the unsupported area, it was reasonably likely that a rock of sufficient size would strike a miner and cause a reasonably serious injury resulting in lost workdays at a minimum if mining operations were to continue. Tr 162. It would be likely that two persons would be injured as there would be a continuous miner operator and his helper in close proximity to one another working in this last open crosscut. Due to noise constraints and the need to communicate with each other, they would be close enough together to be struck at the same time. Tr 162-163.

It is not required that the Secretary show that it is more probable than not that an injury will result from the violation, *U.S. Steel Mining Co.* I therefore find the respondent's argument unpersuasive that an injury would be unlikely because a roof fall has never occurred, at least as

he alleges, in this location before. "As long as a miner could be at risk during the course of normal mining operations, there need not be actual exposure of miners proven" to find a violation is properly designated at S&S. *Consolidation Coal Co.*, 19 FMSHRC 1897 (Dec. 23, 1997) (ALJ Bulluck). Again, relying on *Harlan Cumberland Coal Co.*, and *Buck Creek Coal, Inc. v. MSHA*, the inspector's opinion that a violation is S&S is entitled to substantial weight. Inspector Hoytheacock articulated sufficient facts upon which to base his expert opinion and I find that this violation is significant and substantial.

c. Negligence

Crown also contends that the negligence level should be low rather than moderate because a roof fall has never occurred in this section of the mine before and would not likely to do so from only one defective bolt. He attempted to establish that under any roof plan, the roof is supported from one bolt to the next. On Crown's four foot square plan, therefore, the roof would be supported four feet in each direction from the last installed bolt. What would follow using this logic is that when one bolt in the square pattern is defective, the bolt to its north, south, east and west would hold the roof. The respondent asked the inspector how far in by the last row of bolts the roof is supported. Tr 167-169. Inspector Hoytheacock responded that it would be an imminent danger to proceed past the last row of bolts. Tr 169. He added that taking into account the cracks in the roof in this area, the roof would fall out from pin to pin. Each roof bolt contributes to the support of the roof. Tr 172. Put another way, if one bolt is out in a row of bolts, it decreases the overall strength of the roof. And although a fall had not occurred in this section before, a roof fall can occur anywhere in a mine in the inspector's opinion. Tr 177.

The respondent argued also with regard to this citation as well as the last one, that falls more often occur in the intersections and not when the damaged bolt is in a pillar as in this case. Tr 176. He asked the inspector if this was correct in an attempt to prove the point. The inspector's response was that being in a pillar, a fall would be less likely to be "massive" but a lesser fall would reasonably result in serious injuries as well. Tr 175.

Inspector Hoytheacock determined that the condition existed for one shift by the presence of dry rock dust being present which is done on the outer shift. The inspection was done during the subsequent day shift so the rock dust had to have been laid during the preceding shift. This being the case, the area should have been inspected twice before the inspection took place—once on a pre-shift examination three hours before the day shift began and again on the on-shift examination. Management, therefore, knew or should have known that the condition existed. Tr 163-164. Hoytheacock did consider the presence of rock dust a mitigating factor in reducing the negligence from high to moderate. He explained that had there not been rock dust, the area would have been black making the damaged bolt easier to see. Tr 164. He found no additional mitigating circumstances and management offered none at the time. Tr 165.

Negligence is the failure to meet the standard of care required by the circumstances. Moderate negligence is defined by the regulations as when an operator knows or should know that a violative condition exists but there are some mitigating circumstances. 30 C.F.R. §100.3(d), Table X. Inspector Hoytheacock offered credible testimony as to the circumstances

surrounding this violation. They are that: 1) Crown III has an extensive history of roof falls many of which resulted in relatively serious injuries; 2) The mine is known to have poor roof conditions making proper roof support extraordinarily important; 3) The failure of even one bolt in a four by four square configuration weakens the overall support of the roof; 4) Coupled with cracks and gaps in the roof, a damaged bolt will reasonably likely result in a roof fall under normal mining conditions; 5) Roof falls can occur in any part of a mine, not only in intersections; 6) The unsupported roof condition between room #27 and #28 existed for at least one shift and should have been examined twice prior to the issuance of this citation; and, 7) Management knew or should have known of the condition and did nothing to correct the situation. This was the third of six citations issued between March 17, 2009 and May 7, 2009 for similar unsupported roof or rib conditions. It appears that Crown bears little sense of responsibility for the safety of their miners. It is only upon Inspector Hoytheacock's testimony that he felt the presence of rock dust mitigated the violation that I find moderate rather than high negligence is appropriate.

13. Citation No. 6675454 (Gov. Ex. 29)

This citation also alleges a violation of section 75.202(a). It was issued on May 7, 2009 by Inspector Jeffrey Adams. Adams has been an MSHA inspector for three years and was a miner for 26 years prior to that. His experience in underground mining includes working as a roof bolter. The citation he issued alleges:

A loose rib in Unit 3, entry no. 4, at survey station 700 was not supported or otherwise controlled to protect persons from hazards related to falls of roof, face, or ribs and coal or rock bursts. The rib measured approximately 10 feet in length by 8 feet in height and was directly adjacent to the high voltage sled behind the section power center.

The violation was assessed as reasonably likely to result in a permanently disabling injury, significant and substantial affecting one person and a result of moderate negligence. The proposed penalty is \$1795.00.

a. The Violation⁵

On the day in question, Adams was performing respirable dust sampling when he walked through what is known as the "dinner hole" which is a place where miners congregate before they go to the working face. It is also a place where parts are stored in the shop area. As he exited the dinner hole going towards the face, he saw a loose rib near the section power station. Tr 184-185. He determined that the rib was loose by its appearance. Both ends of this ten foot by eight foot section of the coal wall had a gap approximately six inches wide at each end. There was also a crack across the top from end to end. Tr 185. The condition was very obvious and located in one of the two entryways leading to the face. It is traveled by 20 to 22 people on that unit at least once per shift. Tr 186. Adjacent to this area is the high voltage sled similar to a table on which excess high voltage cable is coiled. The sled is rather large and takes up the majority of

⁵ The same standard was cited in this violation as in the preceding three violations.

the entryway leaving only six feet or so between it and the rib for miners to pass by. Tr 187. Three timbers were required to support the rib in abatement of the citation. Gov. Ex. 29.

Crown contests the gravity of the citation asserting that it should be marked as unlikely to cause an injury but does not contest the violation.

I find, based upon Inspector Adams' testimony, the violation is established as cited.

b. Significant and Substantial

Inspector Adams described the rib as weighing approximately three tons. It was larger than the travel way and would have covered the entire walkway had it fallen. Tr 188. The large gaps at both ends and the crack across the top indicated to him that it was loose and posed a real danger of falling. Tr 184. The likely outcome of such a fall would be a crush injury that would be at least permanently disabling and very likely fatal. Tr 188-189. In support of his opinion, he referred to two fatalgrams, Gov. Ex. 42 and 43. Both fatal incidents were the result of falls of unsupported loose ribs in underground mines similar to the condition found at Crown. The most recent one was dated January 22, 2010. Tr 189-192. The location of this condition in one of the two travelways to the face made the condition especially perilous. Every miner on the unit numbering 20 to 22 was exposed to it. Generally, only one person at a time would be walking through there which is why Adams assessed the exposure as to one person. Tr 193

It does not take any imagination to find that this condition, had it not been cited and abated, posed a discrete safety hazard of a rib fall that in all reasonable likelihood would result in an injury and that injury would be of a reasonably serious nature. Taking into consideration the weight of the rib and the relative size as compared to the width of the travelway, I find that an injury resulting from a fall would likely be fatal rather than permanently disabling. I so modify the gravity of the citation.

c. Negligence

Inspector Adams testified that there were no mitigating facts offered by management at the time of the inspection. Tr 195. It appeared that the condition had existed for more than one shift as he explained that usually a pillar cracks first and then as it takes weight over the course of time, it separates. Tr 193-194. Inspector Adams stated that he designated this citation as moderate in negligence because even though it was so obvious that someone must have seen it, he could not designate it as high because he could not put the operator or a supervisor "right there to say that they saw it, but someone did." Tr 194. However, he did confirm the fact that this section would have been subject to the pre- and on-shift examinations. Tr 195.

Three timbers were required to support this huge rib. It was in plain sight in a heavily trafficked area and was subject to mandatory examinations at least twice before the citation was issued. It is not necessary to prove that management knew of the condition, only that they should have known and that there were no mitigating factors to consider in order establishing a high degree of negligence. Crown has a long and flagrant history of fall-related accidents and clearly lacks any concern for the safety of their miners. I find the appropriate degree of negligence is

high rather than moderate.

14. Citation No. 6675284 (Gov. Ex. 18)

Inspector Baum issued this citation on April 14, 2009 for an alleged violation of section 75.208 because he found:

A visible warning device or physical barrier was not installed to impede travel beyond permanent roof support. This condition was present in the number 2 entry of the 3rd West panel off the 1st North Sub-Mains. The continuous miner had holed the crosscut between number 1 entry and number 2 entry and did not post the last row of permanent support.

The citation was designated as significant and substantial, reasonably likely to cause an injury resulting in lost workdays or restricted duty, affection one person and involving a moderate degree of negligence on the part of the operator. The proposed penalty is \$634.00.

a. The Violation

The standard cited in this citation requires that "except during the installation of roof supports, the end of permanent roof support shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel beyond permanent support." What Inspector Baum encountered during his inspection was a crosscut that had been mined between two entries with no visible warning posted to impede traffic in the unbolted crosscut. Tr 224. There were no roof supports being installed at the time the inspector cited this violation. Tr 225. Inspector Baum stated that the area should be flagged before the cut is made but, at a minimum, it had to be done as soon as it is made. Tr 228. When asked by the respondent if he was told there had been a flag posted earlier that had fallen off, Inspector Baum stated that he did not recall any such comment and he would have put it in his notes if that had been the case. Tr 230.

The violation was accepted by Crown but they requested that the gravity be reduced to unlikely because they believed that area had been flagged when the cut was made. The respondent stated at the hearing that they would provide an affidavit post-hearing from an individual who was aware of the flag being posted. By email dated January 2, 2011, Mr. Hayden indicated that they would not be submitting the affidavit. Ct. Ex. 1. There is no evidence that the area had been flagged off to contest this violation or mitigate the gravity. I find the standard was violated as cited.

b. Significant and Substantial

This citation was deemed S&S by Inspector Baum because, as he had previously testified, this mine has bad roof conditions throughout making a fall reasonably likely. The area in which he found this unsupported roof was an active area of the mine exposing miners to a reasonable likelihood of being injured by a roof fall. Tr 227. Inspector Baum believed that if struck by a roof fall, the injury would be reasonably serious and would, at a minimum, result in lost workdays or restricted duty. Such a fall could easily result in a fatality, however. Tr 226-227.

Given the fact that only one miner would typically be traveling in this area at any one time, the inspector felt one miner would be exposed to this hazard. Tr 227. The operator was given only five minutes to abate this violation because it posed such a serious danger. Tr 229.

The testimony of Inspectors Lampley, Hoytheacock, Adams, and Baum make it inexorably clear that there exists a very serious and imminent potential for a roof or rib fall in Crown III due to geological conditions and lack of safety precautions. This is underscored by the dozens of roof falls recorded in the history of this mine, many of which have resulted in serious personal injury. Under these conditions, it is impossible for the operator to justify the risk posed to miners for allowing unsupported roof conditions to exist for even a minimal period of time. The fact that the operator has conceded the existence of each of these violations indicates to me that they not only knew of the unsafe practices being followed in this mine but that the safety of those who toiled underground was of little consequence to them. It is a well known truth that mine roofs are inherently dangerous and subject miners to the very real possibility of injury or death in the event of a fall. For this reason, I find that Inspector Baum's assessment of this violation as S&S is justified.

15. Citations No. 6675296 (Gov. Ex. 25), and 6675299 (Gov. Ex. 27)

These citations were issued under section 75.220(a)(1) of the regulations by Inspector Baum during the April 24, 2009 and April 29, 2009 regular inspections as a violation of Crown's approved roof control plan. Gov. Ex. 33. Citation no. 6675296 alleges:

A violation of the operator's approved roof control plan is present in the 2nd South/Main West, 001/010 MMU. The crosscut right off of #1 entry at survey station 2600, is mined from 18'2" to 20'5" wide for a distance of approximately 17'. The approved roof control plan requires that the width of entries and crosscuts be mined to a maximum of 18'.

Citation no. 6675299 alleges the same facts except that the location of the violation was in the 3rd South/Main West working section, 001/010 MMU crosscut between 7 and 8. The area was mined to approximately 19'5" wide to 19'7" wide for a distance of approximately 25'.

Inspector Baum designated both violations as reasonably likely to result in an accident causing lost workdays or restricted duty, significant and substantial and resulting from moderate negligence on the part of the operator. He determined that one person was exposed to the hazard in the first citation and two persons in the second. The proposed penalty is \$897.00 on the first citation and \$873 on the second.

a. The Violation

Section 75.220(a)(1) provides that "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered." The approved roof control plan for Crown

III in effect at the time of this inspection provided that the maximum width of a main entry or main entry crosscut shall be 18'. Gov. Ex. 33 pg 1.

Crown argued that under a supplemental roof plan, if a cut exceeded 18' an additional bolt no less than 18 inches in length could be installed to bring the operator into compliance with the roof support plan. Inspector Baum testified that this supplemental plan required in the event an entry is driven wider than 18' or the ribs slough off wider than that width, a bolt no less than two feet in length must be installed between the rows of the bolts installed in the regular pattern. When questioned by the respondent why they were, then, not in compliance with the supplemental plan, Inspector Baum pointed out that the only bolts in the area were those on pattern according to the plan. There were no additional support bolts as required under the supplemental plan installed. Tr 274-276.

After Baum provided this explanation of why Crown was not in compliance with the roof control plan or the supplemental provision, Crown accepted these two violations as written. Tr 277. I therefore find these two citations were correctly cited and approve them as written.

II. PENALTIES

The Mine Act delegates the duty of proposing civil penalties for violations to the Secretary. 30 U.S.C. §§815(a) and 820(a). When an operator challenges the Secretary's proposed penalties, the Secretary petitions the Commission to assess them. 29 C.F.R. §2700.28. Once petitioned to assess the penalties, the Commission delegates the authority to the administrative law judges to assess the civil penalties *de novo*. Section 110(i), 30 U.S.C. §820(I). The administrative law judge is required by the Act to consider the following six statutory criteria in her assessment of the appropriate penalties:

(1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. §820(i).

The penalty assessment for a particular violation is within the sound discretion of the administrative law judge so long as the six statutory criteria and the deterrent purpose of the Act are given due consideration. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

I have given each of the six statutory criteria consideration as well as the deterrent purpose of the Act in assessing the penalties below. The parties entered into several stipulations of fact which affect the assessment of penalties. They are: 1) the operator produced 1,360,392 tons of coal in 2009; 2) Crown demonstrated good faith in abating the cited citations, and 3) the proposed penalties will not affect Crown's ability to remain in business. Secretary's Prehearing Response. The last stipulated fact was withdrawn at the commencement of the hearing and

respondent was provided the opportunity to provide financial records post-hearing to contest this issue. By email dated January 2, 2011, they withdrew their objection to this stipulation and declined to submit any financial information. Ct. Ex. 1. I find, therefore, that they have conceded this point.

The parties entered into a settlement agreement on 44 citations prehearing. The terms of this agreement are contained in Gov. Ex. 46. They have agreed to modify Citation No. 6675094 to reasonably likely to unlikely, high negligence to moderate negligence and S&S to non-S&S with a penalty of \$270.00; Citation No. 6675530 from permanently disabling to lost workdays or restricted duty with a penalty of \$100.00; Citation No. 6675531 from 10 persons affected to 2 with a penalty of \$745.00; Citation No. 6675533 from reasonably likely to unlikely, and permanently disabling to lost workdays or restricted duty with a penalty of \$191.00; Citation No. 6675097 from reasonably likely to unlikely with a penalty of \$426.00; Citation No. 6675534 from permanently disabling to lost workdays or restricted duty and from 18 persons affected to 2 with a penalty of \$109.00; Citation No. 6675098 from reasonably likely to unlikely and from 40 persons affected to 2 with a penalty of \$335.00; Citation No. 6675535 from permanently disabling to lost workdays or restricted duty and from 9 persons affected to 2 with a penalty of \$119.00; Citation No. 6675536 from permanently disabling to lost workdays or restricted duty, affecting 2 persons instead of 9 with a penalty of \$335.00; Citation No. 6675542 from 3 persons affected to 1 and moderate negligence to low with a penalty of \$128.00; Citation No. 6675546 from moderate to low negligence with a penalty of \$100.00; Citation No. 6675552 from lost workdays or restricted duty to no lost workdays and from moderate to low negligence with a penalty of \$100.00; Citation No. 6675556 from high negligence to moderate with a penalty of \$1,112.00; Citation No. 6675557 from 20 persons affected to 1 and from moderate negligence to low with a penalty of \$100.00; Citation No. 6675558 from moderate to low negligence with a penalty of \$635.00; Citation No. 6675325 as assessed with a penalty of \$127.00; Citation No. 6675562 from moderate to low negligence with a penalty of \$100.00; Citation No. 6675832 from moderate to low negligence with a penalty of \$426.00; Citation No. 6675833 from moderate to low negligence with a penalty of \$100.00; Citation No. 6675834 as assessed with a penalty of \$224.00; Citation No. 6675835 as assessed with a penalty of \$499.00; Citation No. 6675838 from 10 persons affected to 1 and from moderate to low negligence with a penalty of \$100.00; Citation No. 6675842 from high to moderate negligence with a penalty of \$500.00; Citation No. 6675848 from fatal to no lost workdays with a penalty of \$100.00; Citation No. 6675850 from fatal to no lost workdays with a penalty of \$100.00; Citation No. 6675277 as assessed with a penalty of \$540.00; Citation No. 6675736 from 13 persons affected to 1 with a penalty of \$128.00; Citation No. 6675280 from reasonably likely to unlikely with a penalty of \$109.00; Citation No. 6675416 from high to moderate negligence with a penalty of \$207.00; Citation No. 9942564 from high to moderate negligence with a penalty of \$1,530.00; Citation No. 6675744 from fatal to no lost workdays with a penalty of \$100.00; Citation No. 6675286 from fatal to permanently disabling with a penalty of \$100.00; Citation No. 6675288 from 4 to 1 person affected with a penalty of \$285.00; Citation No. 6675748 as assessed with a penalty of \$499.00; Citation No. 6675750 from 12 to 1 person affected with a penalty of \$128.00; Citation No. 6675294 from high to moderate negligence with a penalty of \$100.00; Citation No. 7493284 from reasonably likely to unlikely with a penalty of \$309.00; Citation No. 6675903 from fatal to

permanently disabling with a penalty of \$191.00; Citation No. 6675453 from permanently disabling to lost workdays or restricted duty with a penalty of \$163.00; Citation No. 6675906 from fatal to lost workdays or restricted duty and from 20 to 1 person affected with a penalty of \$425.00; Citation No. 6675457 as assessed with a penalty of \$190.00; Citation No. 6675459 from permanently disabling to lost workdays or restricted duty with a penalty of \$634.00; Citation No. 6675909 from high to moderate negligence with a penalty of \$1,795.00; and, Citation No. 6675910 from high to moderate negligence with a penalty of \$127.00. The total penalties agreed upon by the parties are \$14,641.00.

I accept the stipulations by the parties and the proposed modifications and penalties on the settled citations as being appropriate to this operator's size, ability to pay, history of violations, degree of negligence, seriousness of the violation and good faith abatement of the condition.

As to the citations adjudicated at the hearing, I assess the following penalties:

Citation No. 6675539: I assess a penalty of \$687.00 as proposed by the Secretary for the reasons set forth above.

Citation No. 6675540: I assess a penalty of \$3,689.00 as proposed by the Secretary for the reasons set forth above.

Citation No. 6675541: I assess a penalty of \$3,689.00 as proposed by the Secretary for the reasons set forth above.

Citation No. 6675847: I assess a penalty of \$634.00 as proposed by the Secretary for the reasons set forth above.

Citation No. 7493279: I assess a penalty of \$634.00 based upon the fact that this citation is for a violation of the same standard as in citations nos. 6675847 and 7493296 with the same gravity and degree of negligence. The penalty, therefore, should be the same in all three violations and I find based upon the gravity and negligence, this penalty is appropriate.

Citation No. 7493286: I assess a penalty of \$634.00 as proposed by the Secretary for the reasons set forth above.

Citation No. 6675287: I assess a penalty of \$207.00 based upon my finding that this violation was not significant and substantial.

Citation No. 6675290: I assess a penalty of \$207.00 as proposed by the Secretary for the reasons set forth above.

Citation No. 6675297: I assess a penalty of \$207.00 based upon my finding that this violation was not significant and substantial.

Citation No. 6675836: I assess a penalty of \$3,405.00 as proposed by the Secretary for the reasons set forth above.

Citation No. 6675278: I assess a penalty of \$1203.00 as proposed by the Secretary for the reasons set forth above.

Citation No. 6675733: I assess a penalty of \$1304.00 as proposed by the Secretary for the reasons set forth above.

Citation No. 6675454: I assess a penalty of \$3500.00 based upon my finding the degree of negligence is high rather than moderate, and the gravity is fatal rather than permanently disabling as set forth above.

Citation No. 6675284: I assess a penalty of \$634.00 as proposed by the Secretary for the reasons set forth above.

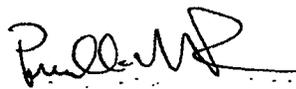
Citation No. 6675296: I assess a penalty of \$897.00 as proposed by the Secretary for the reasons set forth above.

Citation No. 6675299: I assess a penalty of \$897.00 based upon the fact that the circumstances surrounding the violation were identical to that involved in citation no. 6675296. I find based upon the degree of negligence and the gravity of the hazard the penalty is appropriate as set forth above.

A total of \$ 22,428 is assessed for the violations heard and decided herein. The total penalty for the four dockets (Lake 2009-418, Lake 2009-419, Lake 2009-494 and Lake 2009-542) is \$37,069.

III. ORDER

Centre Crown Mining, LLC. is **ORDERED** to pay the Secretary of Labor the sum of \$37,069.00 within 30 days of the date of this decision.⁶



Priscilla M. Rae
Administrative Law Judge

⁶ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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37919**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 15, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-641-M
Petitioner,	:	A.C. No. 12-00066-158510
	:	
v.	:	
	:	Essroc Cement
ESSROC CEMENT CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Linda M. Hastings, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner;
C. Gregory Ruffennach, Esq., Washington, DC, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Essroc Cement Corporation (“Essroc”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Louisville, Kentucky, and filed post-hearing briefs.

Essroc operates a cement plant in Clark County, Indiana. This facility employed an average of 206 people in 2008. The case involves seven citations issued under section 104(a) of the Mine Act. The Secretary proposes a total civil penalty of \$16,021 in this case.

**I. DISCUSSION WITH FINDINGS OF FACT
CONCLUSIONS OF LAW**

A. Citation No. 6411412

On June 11, 2008, MSHA Inspector Kenneth Diez issued Citation No. 6411412 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.6101(a) as follows:

An accumulation of combustible material was found within fifty feet of the explosive material storage facility. Several large pieces of plywood were [lying] on the ground next to ANFO Trailer. The

trailer is in a remote area of the mine site and an ignition source was not present making an accident unlikely. Should an ignition source be introduced into the area it may result in burns and/or smoke inhalation injuries to miners in the area.

(Ex. G-1). The inspector determined that an injury was unlikely but that if an injury did occur it would result in lost workdays or restricted duty. He determined that the violation was not of a significant and substantial nature (“S&S”) and that the company’s negligence was moderate. Section 56.6101(a) provides that “[a]reas surrounding storage facilities for explosive material shall be clear of rubbish . . . for 25 feet in all directions” The Secretary proposes a penalty of \$362.00 for this citation.

Inspector Diez testified that he issued the citation because cardboard trash and plywood were lying near a trailer used for storing explosive materials. (Tr. 17, 18). He did not believe an accident was likely because the trailer was located in a remote location and there was no ignition source nearby. (Tr. 19). He issued the citation because, in the event of a fire in the area, employees could suffer smoke inhalation injuries or burns. *Id.* He determined that the company’s negligence was moderate because the condition was open and obvious to anyone making a workplace examination. (Tr. 20) The inspector testified that at the time of the MSHA inspection Ronny Mull, the quarry foreman, did not indicate any mitigating factors were present. *Id.*

David Johnson, quarry mobile equipment superintendent, testified for Essroc. He testified that employees of Orica Explosives deliver the trailers used for storing explosive materials. (Tr. 157). When new explosives are needed, Essroc orders a new trailer from Orica. *Id.* Orica delivers the explosives in a trailer and takes back the empty trailer. (Tr. 157-58). Based on a conversation with Mull, it was Johnson’s understanding that, on the day the citation was issued, Orica’s employees left material from the empty trailer near the new trailer. (Tr. 158). He also stated that the plant’s blaster was busy at the time, but intended to pick up the trash at a later time. *Id.*

The Secretary argues that “[t]he blaster was clearly aware of the violation at the time, but chose to leave the condition and ‘come back later.’” (Tr. 158; Sec’y Br. 2). Essroc requests the citation be modified to indicate no likelihood of injury and no negligence. (Essroc Br. 2). Essroc argues that the alleged violation did not present any danger to miners because “an ignition source was not present making an accident unlikely.” (Ex. G-1). Essroc also argues it was not negligent in allowing the condition to exist. (Essroc Br. 2). It states that the operator proved that employees of an independent contractor created the condition while Essroc’s area supervisor was occupied with other work. *Id.* It relies on *Southern Ohio Coal Co.*, 4 FMSHRC 1459 (Aug. 1982). In that case, the Commission held that negligence of rank-and-file non-supervisory employees cannot be imputed to the operator for penalty assessment purposes. *See Id.* at 1464. Essroc maintains that the first time anyone from the company actually observed the cited condition was during the MSHA inspection. (Essroc Br. 2).

In *Southern Ohio Coal*, the Commission also held “[i]t is well-settled that under the Mine Act, an operator is liable without fault for violations of the Act and mandatory standards committed by its employees.” *Id.* at 1462; e.g., *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38-39 (Jan. 1981). Furthermore, the Court of Appeals for the Fourth Circuit has affirmed that coal-mining companies can be held responsible for violations of construction contractors. *Bituminous Coal Operators’ Ass’n*, 547 F.2d 240, 246-47 (1977). The Commission explicitly reaffirmed the decision in *Republic Steel Corp.*, 1 FMSHRC 5, 9 (Apr. 1979).

I find that Essroc is liable for the violation. I also find, however, that Essroc’s negligence is low. It did not create the condition and it was in the process of taking steps to correct it. I also find that the record establishes that the violation did not create a serious safety hazard. A penalty of \$100.00 is appropriate for this violation.

B. Citation No. 6411414

On June 11, 2008, MSHA Inspector Diez issued Citation No. 6411414 under section 104(a) of the Mine act alleging a violation of 30 C.F.R. § 56.11012 as follows:

The opening on the south side of the clay apron was not provided any railings, barriers or covers. The opening in the walking surface is located between the drive unit and conveyor structure and is approximately four feet in length and three feet in width. The location of the opening would make an accident unlikely. Should a miner fall in or step into the opening it may result in lacerations, contusions and/or fracture bone injuries.

(Ex. G-2). The inspector determined that an injury was unlikely and that if an injury did occur it would result in lost workdays or restricted duties. He determined that the violation was not S&S and that the company’s negligence was low. Section 56.11012 provides that “[o]penings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers.” The Secretary proposes a penalty of \$162.00 for this citation.

Inspector Diez testified that the cited area was on the backside of the clay apron and provided easy and open access for employees. (Tr. 22). The opening was between the clay apron and an equipment guard “with some depth.” *Id.* He stated that an injury was unlikely because he did not see any need for an employee to be in the cited area unless the equipment needed maintenance. (Tr. 24, 25). He also found the company’s negligence to be low because the condition’s location was such that there was a good possibility someone making a workplace examination would not see it. *Id.*

On cross-examination, Inspector Diez testified that MSHA does not have official criteria for determining “near” or “barriers” as used in the relevant standard. (Tr. 68). He also testified

that, based on the condition's obviousness, it is reasonable to believe another MSHA inspector would have observed it.

Mark Terry, a maintenance worker and miners' representative for Essroc, testified that the cited area is not easy to access. (Tr. 106). In order to do so, a worker would have to fit between a six to eight inch opening. *Id.* He stated that he has done maintenance work in the cited area and safety precautions, such as placing a board over the hole or using a tie-off, are taken to prevent an accident. (Tr. 106). However, he could not state with certainty that every miner follows the proper procedure for working in this area. (Tr. 111). Mr. Terry testified that no previous MSHA inspectors have indicated there are insufficient barriers around the hole. (Tr. 107).

Mr. Johnson testified that, based on the measurements he took, he believes there is an adequate barrier separating the walkway from the cited condition. (Tr. 146). A 48-inch-tall guard, a 34-inch-high motor, and a 2-foot-square concrete column protect the hole. (Tr. 146; Ex. R-2, R-3).

Essroc requests that the citation be vacated, or in the alternative that the findings be modified to indicate no likelihood of injury and no negligence. (Essroc Br. 3). Essroc argues the condition was not a violation of 30 C.F.R. § 56.11012 because MSHA failed to prove the cited opening was near a travelway. *Id.* The term "travelway" is defined as "a passage, walk or way regularly used and designated for persons to go from one place to another." 30 C.F.R. § 56.2. Essroc relies on *Alan Lee Good d/b/a Good Construction*, 23 FMSHRC 995, 999-1000 (Sept. 2001) to dispute MSHA's conclusion that prior access for maintenance purposes establishes the area as a travelway. (Essroc Br. 4). It also argues that, in light of past non-enforcement and the ambiguity of the words "near" and "barriers" in the cited standard, MSHA's attempted enforcement has denied Essroc of constitutionally mandated fair notice as articulated in *Good Construction*. (Essroc Br. 4).

Alternatively, if the cited area is found to be a travelway, Essroc argues that the alleged violation did not present any danger to miners and it was not negligent in allowing the condition to exist. (Essroc Br. 5) It notes Inspector Diez's statement that "the location of the opening would make an accident unlikely." (Ex. G-2; Essroc Br. 5). Furthermore, because no previous MSHA inspector has indicated the area in question poses a problem, Essroc maintains it was not negligent in allowing the condition to exist. (Essroc Br. 5).

The Secretary defines "travelway" as a "passage, walk, or way regularly used and designated for persons to go from one place to another." 30 C.F.R. § 56.2. When determining whether an area qualifies as a travelway under the standard, the Commission has held that "the relevant question is whether the areas in question were used, or intended to be used, for walking." *Good Construction*, 23 FMSHRC at 1000. In overturning the judge's decision, the Commission held that "[t]he inference that the areas were of sufficient size to permit actual 'walking' does not answer that question." *Id.* When analyzing this issue the "key phrase . . . is

'regularly used.' ” *APAC-Mississippi, Inc.*, 26 FMSHRC 811, 812 (Oct. 2004) (ALJ). The weight of the evidence must establish the area is regularly used and designated for persons to go from one place to another. *See id.* Testimony from workers about the frequency and purpose of use of the area is given strong weight when analyzing this issue. *See, e.g., Oil-Dri Production Company*, 32 FMSHRC 1761, 1762-63 (Nov. 2010) (ALJ); *Beco Construction Co.*, 23 FMSHRC 1182, 1201 (Oct. 2001) (ALJ).

I find that the record in this case does not indicate that the cited area was regularly used or designated as a passage for employees to go from one place to another. It was not shown that employees did not walk by the cited area on a regular basis. As I recently held in *Lehigh Southwest Cement Co.*, 33 FMSHRC ___, slip op. at 15, No. WEST 2009-22-M (Feb. 1, 2011), the definition of “travelway” is rather narrow and the Secretary must establish that the “walk, way, or area [is] regularly used and designated for persons to go from one place to another.” The Secretary has failed to establish that the cited area is a travelway. Consequently, the citation is vacated.

C. Citation No. 6411417

On June 16, 2008, MSHA Inspector Diez issued Citation No. 6411417 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.4104(a) as follows:

The containers located on the Triple Gate Floor had an excessive accumulation of oil leakage. Two of the containment vessels are approximately 24” X 24” and the third is 30” wide and 48” long. The containers had from one inch to six inches of oil present at the time of inspection. Waste liquids should not accumulate in quantities that could create a fire hazard under the standard cited. Any leakage or spillage is to be removed in a timely manner under 56.4102. The area appeared to be void of ignition sources at the time, a warning sign was not posted but a fire extinguisher was provided making an accident unlikely. Should an ignition source be introduced a miner may receive burns and/or smoke inhalation injuries.

(Ex. G-3). The inspector determined that an injury was unlikely but that if an injury did occur it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that the company’s negligence was moderate. Section 56.4104(a) provides that “[w]aste materials, including liquids, shall not accumulate in quantities that could create a fire hazard.” The Secretary proposes a penalty of \$362.00 for this citation.

Inspector Diez testified that there were two containers placed under equipment for the purpose of collecting leaking oil. (Tr. 27). He stated that there was an accumulation of oil that was between one and six inches deep in the containers at the time of inspection. (Tr. 28). The

inspector further testified that the depth of the oil was the reason for issuing the citation. (Tr. 31). He stated that operators typically have procedures for removing such oil, and this was not being done often enough. (Tr. 32). He also testified that an injury was unlikely due to the lack of an ignition source and high flashpoint of the oil, making it difficult to ignite. (Tr. 28). The inspector believes that, if the oil were ignited, a miner trying to fight the fire might suffer smoke inhalation injuries or burns, likely only affecting one miner. (Tr. 29). The inspector determined that the company's negligence was moderate because anyone making a workplace inspection should have seen the condition. *Id.*

On cross-examination, Inspector Diez testified that there was no regulation preventing an operator from catching hydraulic fluid in basins. (Tr. 71). He stated build-up of hydraulic fluid presents a fire hazard when it becomes excessive; however, MSHA does not have criteria for inspectors to use to determine if fluid build-up has become excessive. (Tr. 72). Rather, it is a subjective determination made on a case-by-case basis. (Tr. 71). The inspector was not able to articulate how a larger accumulation of fluid presents a more significant hazard. (Tr. 73).

Mr. Terry testified that an oiler should inspect and, if needed, empty the cited basins every first shift. (Tr. 104, 105). He testified that previous MSHA inspectors have not indicated the cited area posed a fire hazard. (Tr. 105). However, Mr. Terry testified that the condition in the containers during previous inspections may have varied from the condition during this inspection. (Tr. 111).

Mr. Johnson testified that the Triple Gate is a hydraulically operated system that is not perfectly sealed. (Tr. 151). This causes hydraulic fluid from the pillow block bearings to leak from the unit. (Tr. 151). Mr. Johnson stated that using basins is probably the best practice to catch the leaking material, as opposed to letting it run onto and be absorbed by the floor. (Tr. 151). This technique is standard industry practice, according to Mr. Johnson. (Tr. 152). The hydraulic fluid's Material Safety Data Sheet ("MSDS") indicates a flash point of 392 degrees Fahrenheit. (Tr. 153; Ex. R-5). Mr. Johnson does not believe the depth of fluid in the basin is relevant when assessing potential fire hazard. (Tr. 154).

The Secretary distinguishes the case at bar from *Tide Creek Rock, Inc.*, 18 FMSHRC 390, 415-16 (Mar. 1996) (ALJ), where a citation for a violation of 30 C.F.R. § 56.4104(a) was vacated. (Sec'y Br. 4). In *Tide Creek*, there was less than two inches of accumulation of motor oil in a container under an oil drum to catch drips or spills. *Id.* at 415-16. She maintains this case is distinguishable because the vessels here were placed under equipment to catch leaking liquid rather than drips or spills. *Id.*

Essroc requests that the citation be vacated or, in the alternative, the findings be modified to indicate no likelihood of injury and no negligence. (Essroc Br. 5, 6). It relies on *Tide Creek* to establish the fluid in the containment vessels did not present a fire hazard in violation of 30 C.F.R. § 56.4104(a). (Essroc Br. 6). At the time of inspection, an ignition source was not present, and the inspector thought the introduction of one was "extremely unlikely." (Ex. G-3;

Tr. 73). Essroc also notes the inspector stated “I don’t see really a particular hazard being involved here.” (Essroc Br. 6; Tr. 73). Essroc avers that the difference between the fluid’s flash point, *i.e.* 392 degrees Fahrenheit, and the fluid’s ambient temperature, *i.e.* 110 degrees Fahrenheit, “presented no potential for combustion.” (Essroc Br. 6).

Essroc also requests that the citation be vacated because the safety standard is so vague that it denies mine operators notice of its requirements. (Essroc Br. 6). Essroc believes this because the practice of using containers to catch hydraulic leaks is not specifically prohibited by MSHA standards, the standard is ambiguous as to what “quantities” of liquid are prohibited, there are no guidelines for determining what quantities are hazardous, and no other MSHA inspectors have determined the use of containment vessels in the area to be a citable hazard. (Essroc Br. 6, 7).

It is well established that the Secretary is not required to prove that a violation of a safety standard creates a safety hazard, unless the safety standard so provides.

The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982) (footnote omitted). Section 56.4104(a), however, specifically requires that that Secretary establish a safety hazard. That standard provides that liquids “shall not accumulate in quantities that *could create a fire hazard.*” (emphasis added). The question here is whether the Secretary established that the accumulation of hydraulic fluid described in this case could create a fire hazard.

I find that the Secretary did not meet the burden of establishing that the condition created a fire hazard. The flashpoint of hydraulic fluid is quite high and there were no ignition sources in the area. A spark or other similar event would be insufficient to ignite the fluid. The Secretary’s use of the word “could” in the standard broadens its scope somewhat, but the standard cannot reasonably be interpreted so broadly that any liquid in any quantity would qualify. Without a realistic possibility of a fire hazard, there is no violation. This citation is vacated.

D. Citation No. 6411419

On June 16, 2008, MSHA Inspector Diez issued Citation No. 6411419 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.12032 as follows:

The door on the 480-volt electrical box was left open and unattended on the portable RC161 Sullair TS-20 Air Compressor. The unit was positioned outside the building housing the Sidewinder Pumps. The unit was energized and the wiring, parts

and connection points were exposed [to] possible contact. Footprints were visible in the dust along the compressor and box area at the time of inspection. Should a miner contact the energized parts it may result in a fatal electrical shock.

(Ex. G-4). The inspector determined that an injury was reasonably likely and that if an injury did occur it would be fatal. He determined that the violation was S&S and that the company's negligence was moderate. Section 56.12032 provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." The Secretary proposes a penalty of \$5,961.00 for this citation.

Inspector Diez testified that he observed an energized electrical box with an open door. (Tr. 36). The box was in a room housing "side winder pumps." (Tr. 35). The inspector observed that workers traveled in and out of this room, making an accident reasonably likely. (Tr. 37, 38). He testified that the box was at face level, with nothing in front of it, exposing any worker in the area to a potentially fatal shock. (Tr. 29, 40).

On cross-examination, the inspector testified that the footprints in front of the box could have been from a miner or contractor performing repairs on the box, but he was not certain. (Tr. 70). On reexamination, Inspector Diez testified that any repairs to the box would need to be done when the box was de-energized. (Tr. 81). He indicated that once the box was energized, no repairs could be done. *Id.*

Mr. Heathcock testified that there was a serviceman within eyesight of the condition at the time the citation was issued. (Tr. 90). He believes the serviceman was working on a rental compressor that is powered by the open electrical box. *Id.* If the serviceman was working on this piece of equipment, he would need to access the cited box. *Id.* However, Heathcock could not conclusively state that the serviceman had finished his work at the time the citation was issued. (Tr. 93). Although trained and authorized electrical personnel are allowed to work on energized equipment with the appropriate tools, Mr. Heathcock was not sure if this particular serviceman was so authorized. (Tr. 93, 94).

Mr. Terry also testified that there was a repairman in the area of the open box who had been working on the box. (Tr. 97). The plant has a rule that prevents workers other than electricians from working with these types of electrical boxes. (Tr. 98). Mr. Terry testified that it was unlikely any miner would access or interface with this box unless the worker was an electrician specifically asked to do so. He also testified that he does not recall seeing any company employees in the area at the time. (Tr. 99).

Mr. Johnson testified that an employee of a contractor was diagnosing and repairing a fault in the compressor that caused the unit to shut down. (Tr. 149; Ex. R-4). Mr. Johnson was not present at the time the citation was issued. (Tr. 163). His knowledge of the condition is

based on conversations with Mr. Heathcock and Mr. Terry, as well as reading the invoice. (Tr. 163; Ex. R-4).

The Secretary argues that a discrete safety hazard was created by this violation and it was reasonably likely a worker passing by would be seriously injured. (Sec'y Br. 6). She states that none of the witnesses presented by Essroc had first hand knowledge of what was done on the Sullair equipment, who opened the electrical box, or why it was open. (Sec'y Br. 6).

Essroc denies that the cited condition constituted a violation of 30 C.F.R. § 56.12032. Essroc requests that the citation be vacated or, in the alternative, the findings be modified to indicate no likelihood of injury and no negligence. (Essroc Br. 7). It argues the evidence presented establishes the electrical box was open during a repair, which is an exception provided for in the safety standard. (Essroc Br. 8; Tr. 90, 97). Essroc contends the service technician was not negligent in leaving the box open while in the area working on the equipment because the cited safety standard does not specify a time during repairs that an electrical box must be closed. (Essroc Br. 9; 30 C.F.R. § 56.12032). Furthermore, Essroc notes that even if the serviceman was negligent, his negligence is not attributable to it as a rank and file employee of an independent contractor. (Essroc Br. 9).

Essroc also denies that the condition was S&S, and argues MSHA did not prove there was a "reasonable likelihood" that the hazard contributed to will result in an injury or illness of a reasonably serious nature. (Essroc Br. 8); *National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981); *see, e.g., Richard E. Seiffert Resources*, 23 FMSHRC 426, 431 (Apr. 2001) (ALJ) (holding an open 480 volt panel box not a S&S violation)). Essroc supports this argument by stating the condition was short lived, MSHA did not establish any potential exposure to the open box, and MSHA did not prove the possibility of contact with energized parts. (Essroc Br. 9).

The Commission analyzes S&S issues under a four-part test. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Id.* Whether a particular violation is S&S depends on the particular facts surrounding the violation. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

I find that the Secretary established a violation of the standard. There was no showing that it was necessary for the electrical box to be left open while a compressor was being repaired. I find that the violation was not S&S because it was not reasonably likely that the hazard contributed to by the violation would result in an injury. Although I credit the inspector's testimony that employees can walk through the area, there was no showing that it was reasonably likely that anyone would come in contact with live electrical components. The footprints could have easily been made by the contractor performing the electrical work. Assuming continued mining operations, the door would have been closed within a short period of time. The violation

did create a discrete safety hazard, so it was moderately serious. I also find that Essroc's negligence was low. The violation was created by an employee of an independent contractor. A penalty of \$600 is appropriate.

E. Citation No. 6411424

On June 17, 2008, MSHA Inspector Diez issued Citation No. 6411424 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.20003(a) as follows:

The passageway going along the North Reclaim Clinker Conveyor was not being maintained in a clean and orderly condition. The walkway on the west side was covered with piled hardened material, loose large chucks and air hose. The walking surface cited is approximately three feet in width and fifty feet in length. The three steps midway on the walkway are covered with an approximate four inches of hardened material. Miners are in the area regularly and were present at the time of inspection. Miners regularly travel the area for maintenance, repair, cleaning and examination. Should a miner slip, trip and fall it may result in contusions, lacerations, and/or fractured bones.

(Ex. G-5). The inspector determined an injury was reasonably likely and that if an injury did occur it would result in lost workdays or restricted duty. He determined that the violation was S&S and that the company's negligence was moderate. Section 56.20003(a) provides that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." The Secretary proposes a penalty of \$6,458.00 for this citation.

Inspector Diez testified that he issued the citation because hoses and chunks of material were lying in the walkway along the North Reclaim Clinker Conveyor, creating an irregular walking surface. (Tr. 43, 44). He testified that he observed build-up of hardened material four inches thick and some chunks of material the size of a football in the walkway. (Tr. 47, 48). Because it is a regularly used travel way, he determined an accident was reasonably likely. (Tr. 49).

On cross-examination, the inspector testified that he did not know how long it would take for four inches of material to build up in the walkway. (Tr. 73). The inspector revealed in his testimony that the football-sized chunks of material could have been created through continuing operations in the area, including clean-up of the walkway. (Tr. 75).

Mr. Terry testified that a worker could use this walkway to access the head wheel or to inspect the conveyor belt. (Tr. 100). However, he stated that if he were doing an inspection on the head wheel he would not use the cited walkway. *Id.* Mr. Terry thought it was more than likely the material came from a feed shoot above the passageway. (Tr. 100, 101). He testified

that the build-up of material would take two or three days to occur and the chunks of material could have accumulated in a short period of time if there was a big enough spill. (Tr. 101). Mr. Terry further stated that the spilled material hardens quickly in rainy weather. Unpredictable accumulation and rainy weather can combine to quickly recreate a condition that had recently been cleaned up. (Tr. 114). It is Essroc's policy that workers should not walk through piles of material, and Mr. Terry testified that he personally would not have done so if he had observed a similar condition. (Tr. 101). Typically, the labor crew is responsible for cleaning conditions such as this. (Tr. 102). However, if maintenance personnel needed to access the walkway, they would be responsible for cleaning the condition. Mr. Terry testified that it would likely take a labor crew one and a half to two days to clean the cited condition. (Tr. 102). He testified that clean-up in this area had begun and he was unsure why it had stopped. (Tr. 114).

Travis Hostetler, the hourly lead man for the labor crew at Essroc, testified that a clean-up crew was scheduled to work in the North Reclaim area on the days of June 16, 17, and 18. (Tr. 125). Based on photographs, it was obvious to him clean-up had begun in the area. (Tr. 125, Ex. G-5). While he did not have a specific recollection of why the scheduled clean-up was not completed, he testified that it was likely the crew had been pulled off this job to work on other conditions cited by Inspector Diez. (Tr. 126, 127).

The Secretary argues that a discrete safety hazard was created by this violation because it was reasonably likely a miner working in the area would be injured. (Sec'y Br. 8). She further argues that it is reasonably likely any injuries suffered would be serious. *Id.* Therefore, she argues, it is reasonably likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. *Id.*

Essroc argues that MSHA did not prove a violation of 30 C.F.R. § 56.20003(a). (Essroc Br. 10). Essroc requests the citation be vacated or, in the alternative, the findings be modified to indicate no likelihood of injury and no negligence. *Id.* Essroc maintains it met the requirements of the safety standard by keeping the walkway "clean." (Essroc Br. 10; 30 C.F.R. § 56.20003(a)). It states that the MSHA inspector misinterprets the standard as prohibiting spillage. (Essroc Br. 10, 11). Essroc relies on *Placerville Industries, Inc.*, 27 FMSHRC 115 (Feb. 2005) (ALJ) when interpreting the cited standard to mandate cleaning. (Essroc Br. 10). Essroc argues that it was issued the citation as clean-up was underway. *Id.* The inspector testified that cleaning is an ongoing process, and the cited standard does not specify a time frame for initiating or completing clean-up operations. (Essroc Br. 11; *see* Tr. 48). Based on these facts, Essroc believes its clean-up efforts were consistent with what a reasonably prudent mine operator would do. (Essroc Br. 11). Furthermore, Essroc believes it affirmatively defended the citation by providing uncontroverted evidence the corridor would not be used as a "passageway" until the clean-up process was complete. (Essroc Br. 11-12; Tr. 101-102, 129-130).

Essroc also denies that the condition was S&S, and argues MSHA did not prove there was a "reasonable likelihood" that the hazard contributed to will result in an injury or illness of a reasonably serious nature. (Essroc Br. 12). It notes MSHA presented no direct evidence of

exposure to the cited condition. (Essroc Br. 13). Furthermore, the inspector conceded he was uncertain whether he saw anyone in the general vicinity of the corridor before, during, or after the condition was cited. *Id.* Although the “frequency of travel” was crucial to the inspector’s gravit determination, Essroc argues this finding was based entirely on the inspector’s speculation. *Id.* Furthermore, Essroc maintains it effectively rebutted this inference with testimony that “alternative” routes were available to access the conveyor and the cited condition was not on the normal route. (Essroc Br. 13; Tr. 100, 129-30).

Essroc also argues that it was not negligent in allowing the condition to exist. (Essroc Br 14). It notes that the inspector’s negligence finding is based on his understanding that the material accumulated “over a matter of time,” but he was unable to estimate how long the condition existed. (Essroc Br. 14; Tr. 48, 49). Because clean-up in the area had begun, and this clean-up “took a back seat” to addressing other conditions of concern to the inspector, Essroc maintains it was being “diligent,” not negligent. (Essroc Br. 15).

I find that the Secretary established a violation of the safety standard. The passageway was covered with material, as shown in the photographs taken by the inspector. (Ex. G-5). This material created a stumbling and tripping hazard. Although the operator apparently was in the process of cleaning up the material, the hazard existed at the time of the inspection. I find that the Secretary did not establish that the violation was S&S, however. There was no showing that it was reasonably likely that the hazard contributed to by the violation would cause an injury. Specifically, it was not established that anyone had walked through the area or that anyone would walk down the passageway. Mr. Terry testified that there were alternative routes to the head wheel and the conveyor belt. (Tr. 100). I find that the Secretary did establish that miners were exposed to the hazard. I find that Essroc’s negligence was moderate. A penalty of \$1,000 is appropriate.

F. Citation No. 6411426

On June 17, 2008, MSHA Inspector Diez issued Citation No. 6411426 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11002 as follows:

Handrailing was not provided for the east end of the elevated walkway. The walkway is located in the Core Building on the south end of the Burner Floor. The walkway is access for the #2 Kiln burner discharge end. The open area is at the right hand side of the ladder. The area is approximately 40” X 40” and a fall of 4’ down to other structure. The tubing across the opening is approximately 20” high off the walking surface. Miners access the platform regularly for repair, maintenance and examination of equipment. Should a miner fall from the area it may result in lacerations, contusions and/or fractured bones.

(Ex. G-6). The inspector determined that an injury was reasonably likely and that if an injury did occur it would result in lost workdays or restricted duty. He determined the violation was S&S and the company's negligence was moderate. Section 56.11002 provides that "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided." The Secretary proposes a penalty of \$1,412.00 for this citation.

Inspector Diez testified that there were inadequate handrails protecting an elevated workspace, exposing workers to a four foot fall hazard. (Tr. 53, 57). The inspector determined an accident was reasonably likely because workers make observations in the vicinity of the cited condition. (Tr. 56). He stated the condition was S&S based on how frequent the workspace is accessed. (Tr. 58). On cross-examination, Inspector Diez testified that § 56.11002 would not necessarily apply to the cited area. (Tr. 76). He also stated that there was no one working in the cited area at the time he observed the condition. (Tr. 77).

Mr. Terry testified that he could not recall any previous MSHA inspectors requiring a handrail to be placed in the cited area. (Tr. 103). Mr. Johnson testified that the cited area is visited very rarely for maintenance purposes. (Tr. 154). The area would generally be accessed on a shutdown during maintenance up to four times per year. He stated that it is very hot up there because it is immediately adjacent to the burner. *Id.*

The Secretary analogizes the case at bar to *Carder Inc.*, 27 FMSHRC 839, 848-50 (Nov. 2005) (ALJ), based on the frequency that miners accessed the cited area, *i.e.* two to four times annually, and the purpose, *i.e.* observation. (Sec'y Br. 9). The Secretary notes that if miners were to access the cited area for observation purposes, this would generally require some movement forward and backward, making the area an elevated walkway. (Sec'y Br. 10).

The Secretary argues that a discrete safety hazard was created by this violation because it was reasonably likely a miner working in the area would be injured. (Sec'y Br. 10). She argues further that it is reasonably likely any injuries suffered would be serious. *Id.* Therefore, she argues, it is reasonably likely that the hazard contributed to by the violation would result in an injury of reasonably serious nature. *Id.*

Essroc requests that the citation be vacated or, in the alternative, the findings be modified to indicate no likelihood of injury and no negligence. (Essroc Br. 16). It argues the cited area is not covered by the safety standard because it is a "working area," not a "walkway." (Essroc Br. 16).

Essroc also argues that the violation was not S&S and it was not negligent in allowing the condition to exist. (Essroc Br. 16, 17). Although the inspector based his S&S determination on "frequency" of exposure, he did not testify how often the area was accessed. (Essroc Br. 16, Tr. 56). To the contrary, Essroc argues that the evidence it presented established the area was accessed "very rarely," thus proving exposure to the condition was minimal. (Essroc Br. 16; Tr.

155). Furthermore, no previous MSHA inspector has cited the condition. (Essroc Br. 16; Tr. 103).

At trial, the Secretary moved to amend the cited standard from section 56.11002 to section 56.11027. (Tr. 9-10). The former section dictates construction standards for elevated walkways, elevated ramps, and stairways. The latter dictates construction standards for working platforms. Counsel for the Secretary did not seek to amend the standard until the day of trial. She also did not bring a copy of section 56.11027 with her to the trial. Instead, she asked that I briefly recess the proceedings so that she could obtain a copy of that safety standard. I denied her that request. Although the Commission has held that, under certain circumstances, the Secretary may seek to amend a citation to allege a violation of a different safety standard than that asserted by the inspector, I find that, in this particular instance, the request was not timely made. More importantly, if the Secretary moves to amend a citation to allege a violation of a different safety standard on the day of the hearing, it is incumbent on her representative to have a copy of the safety standard at issue to read into the record or for the court to review. The Secretary's motion to amend is denied.

I find that the Secretary failed to establish the cited area was a crossover, elevated walkway, elevated ramp, or a stairway under section 56.11002. The photographs reveal that it is questionable whether a handrail would provide any benefit in the area because of the presence of tubing in the cited area. (Ex. G-6; Tr. 155-56). Consequently, the citation is vacated.

G. Citation No. 6411439

On June 24, 2008, MSHA Inspector Diez issued Citation No. 6411439 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14112(b) as follows:

The guard was not in place on the #1 Can Elevator drive unit located at the North Plant. The lack of guarding left the moving drive chain and sprockets expose[d] to possible contact. The unit had been under repair and the guard was damaged. The unit was started and in operation while the guard was being repaired in the shop. Construction tape had been placed around the base of the ladder to serve as a warning and it is a remote elevated location making an accident unlikely. Should a miner contact the moving machine parts it may result in disabling injuries to the hand and/or arm.

(Ex. G-7). The inspector determined that an injury was unlikely but that if an injury did occur it would be permanently disabling. He determined that the violation was not S&S and that the company's negligence was moderate. Section 56.14112(b) provides that "[g]uards shall be securely in place while machinery is being operated, except when testing or making adjustments

which cannot be performed without removal of the guard.” The Secretary proposes a penalty of \$1,304.00 for this citation.

Inspector Diez testified that the Number 1 Can Elevator Drive unit was in operation with an unguarded moving drive train and sprocket. (Tr. 61, Ex. G-7). The inspector was informed the guard was being repaired at the time. (Tr. 61). The inspector testified that an injury was unlikely because the unit was located at the top of a building and the area was marked with caution tape. (Tr. 63, Ex. G-7). On cross-examination, Inspector Diez stated that there was caution tape at the base of the ladder leading up to the unguarded unit but this is not a sufficient protection against injury. (Tr. 66). He also testified that he has routinely seen caution tape being pulled down by workers on other inspections. (Tr. 80).

Mr. Terry testified that he saw caution tape on the ladder on the day of the inspection. (Tr. 109). He further testified that he would not cross caution tape unless he was the one who put it up and he was accessing the area to do a repair or if he had express permission from a supervisor or whoever had tagged the area. (Tr. 109, 110).

Mr. Johnson testified that the guard was removed the day prior to the inspection to replace a broken chain. (Tr. 140). The broken chain had also damaged the guard, which had to be taken into the shop for repair. *Id.* Because of the size of the guard, it had to be removed and eventually replaced using a crane. (Tr. 141). Mr. Johnson does not contest the fact that the machine was in operation on June 24 without the chain guard in place. (Tr. 161). He also testified the taped-off ladder was the only way to access the cited condition. (Tr. 142).

The Secretary argues that placing warning tape at the bottom of the ladder is not a defense to the violation because it is not a sufficient safety device to prohibit access to the hazard. (Sec’y Br. 11). This argument is based on the fact Mr. Terry testified warning tape means “to enter with caution” and can be removed with permission from a supervisor who does not have knowledge as to the hazard beyond the tape. (Sec’y Br. 11; Tr. 110, 111).

Essroc argues that the condition was not a violation of 30 C.F.R. § 56.14112(b) and disputes the gravity and negligence findings. (Essroc Br. 17). Essroc requests the citation be vacated or, in the alternative, the findings be modified to indicate no likelihood of injury and no negligence. *Id.* It is Essroc’s position that no guard was required under 30 C.F.R. § 56.14107. *Id.* Section 56.14112 does not include a provision that establishes where guards are required. *Climax Molybdenum Company*, 30 FMSHRC 886, 891 (Aug. 2008) (ALJ). Instead, section 56.14107 sets forth the guarding requirements. Subpart (b) of section 57.14107 expressly exempts “exposed moving parts [that] are at least seven feet away from walking or working surfaces.” 30 C.F.R. § 56.14107(b). Essroc argues that the cited area was between 15 and 35 feet above the nearest walking or working surface. (Essroc Br. 18-19; Tr. 66-67, 141-42). It argues that the record establishes that the elevated platform at the top of the ladder was not a “walking or working surface.” (Essroc Br. 19).

Alternatively, Essroc argues it took appropriate precautions in accordance with 30 C.F.R. § 56.20011. (Essroc Br. 17). Section 56.20011 requires an operator to limit access to an area where “safety hazards exist” with a “barricade.” See 30 C.F.R. § 56.20011. Essroc believes it provided uncontroverted evidence that caution tape is an effective barricade. (Essroc Br. 20; Tr. 108-09, 130). Essroc notes MSHA’s regulations provide a barricade can consist of any “material object, or objects that separates, keeps apart, or demarcates in a conspicuous manner such as cones, a warning sign, or *tape*.” 30 C.F.R. § 56.2 (emphasis added) (Essroc Br. 20).

Essroc’s third alternative argument is that “attempted enforcement [in this case] is absurd and contrary to fundamental principles of fair notice.” (Essroc Br. 17). It argues that prohibiting an operator from using a barricade to temporarily prevent access to areas where moving parts hazards may exist would produce “an absurd result that the presiding judge must avoid.” See *Rawl Sales & Processing Co.*, 23 FMSHRC 463, 471 (May 2001) (two Commissioners holding that the plain language of a regulation cannot be enforced where it produces an absurd result); (Essroc Br. 21). Essroc argues MSHA’s position is contrary to the purpose of 30 C.F.R. § 56.20011, which allows temporary barricades to protect persons from other, serious, hazardous conditions while the conditions are being corrected. (Essroc Br. 21). In light of this, Essroc argues that it is absurd for MSHA to argue a ladder cannot be taken out of service using caution tape while repairs are underway. (Essroc Br. 22).

One of the key issues is whether the cited elevator drive unit was within seven feet of a walking or working surface. Commission Judge Jerold Feldman faced a similar issue in *Brown Brothers Sand Co.*, 17 FMSHRC 578, 579-80 (Apr. 1995) (ALJ). In that case, a guard for the head pulley at the top of a stacker conveyor was not securely in place. The head pulley had a vertical height of about 43 feet above the ground. Judge Feldman determined that the citation should be vacated. He relied, in part, on *Thompson Brothers Coal Company, Inc.*, 6 FMSHRC 2094, 2097 (Sept. 1984), where the Commission held:

[T]he most logical construction of [a guarding] standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness Applying the test requires taking into consideration all relevant exposure and injury variables, e.g. accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-case basis.

The Secretary in Judge Feldman’s case argued that there was a violation of section 56.14112(b) because there were no barriers or signs prohibiting employees from walking up to the top of the stacker conveyor. Judge Feldman concluded that the walkway up the stacker conveyor was used exclusively by employees who needed to maintain the head pulley and rollers.

As a consequence, he rejected the Secretary's arguments and concluded that the top of the stacker conveyor was not within 7 feet of a walking or working surface.

The guard in this instance is quite large and requires a crane to move it. The guard was removed so that it could be repaired. The chain drive was in use while the guard was being repaired. For reasons similar to those expressed by Judge Feldman, I find that the unguarded chain drive was more than seven feet from a walking or working surface. The small platform at the top of ladder near the chain drive was accessed solely for the purpose of maintaining the drive unit. The photographs taken by Inspector Diez clearly demonstrate that no employee would ever go up the fixed ladder to that location for any reason other than to maintain the chain drive. Essroc had installed caution tape across the bottom of the ladder to warn employees. I find that this tape complied with the requirements of section 56.20011. Once the guard was repaired, the equipment would have been shut down and locked out and, using a crane, the guard would have been reattached to the drive. The Secretary did not establish a violation and the citation is vacated.

III. APPROPRIATE CIVIL PENALTIES

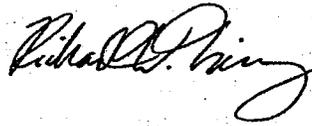
Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Essroc had about 106 paid violations at the plant during the 24 months preceding the date of this inspection and 44 of these violations were classified as S&S. Essroc is a medium-sized operator, but it is owned by a larger operator (Italcementi Group). The plant employed about 206 people in 2008. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Essroc's ability to continue in business. The gravity and negligence findings are set forth above.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
6411412	56.6101(a)	\$100.00
6411414	56.11012	Vacated
6411417	56.4104(a)	Vacated
6411419	56.12032	600.00
6411424	56.20003(a)	1,000.00
6411426	56.11002	Vacated
6411439	56.14112(b)	Vacated
	TOTAL PENALTY	\$1,700.00

For the reasons set forth above, the citations are **AFFIRMED, MODIFIED, and VACATED** as set forth above. Essroc Cement Corporation is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,700 within 30 days of the date of this decision.¹ Upon payment of the penalty, these proceedings are **DISMISSED**.



Richard W. Manning
Administrative Law Judge

Distribution:

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 16, 2011

DICKENSON-RUSSELL COAL CO., LLC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. VA 2009-44-R
	:	Order No. 8157629; 10/06/2008
v.	:	
	:	Docket No. VA 2009-45-R
SECRETARY OF LABOR,	:	Citation No. 8157630; 10/06/2008
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Cherokee Mine
Respondent	:	Mine ID 44-06864
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. VA 2009-137
Petitioner	:	A.C. No. 44-06864-170772
v.	:	
	:	
DICKENSON-RUSSELL COAL CO., LLC.,	:	Mine: Cherokee Mine
Respondent	:	

DECISION

Appearances: Benjamin D. Chaykin, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of the Secretary of Labor;
Cameron S. Bell, Esq., Penn, Stuart & Eskridge, Abingdon, Virginia, for Dickenson-Russell Coal Company, LLC.

Before: Judge Zielinski

These cases are before me on Notices of Contest and a Petition for Assessment of Civil Penalties filed pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Petition alleges that Dickenson-Russell Coal Company, LLC, is liable for three violations of the Secretary's Mandatory Safety Standards for Underground Coal Mines¹ and proposes the imposition of civil penalties in the amount of \$8,038.00. Two of the alleged violations were settled, and a Decision Approving Partial Settlement was entered on November 8, 2010. Remaining at issue are Dickenson-Russell's contest of Order No. 8157629, an imminent danger order issued pursuant to section 107(a) of the Act, and one citation in the penalty case. A hearing

¹ 30 C.F.R. Part 75.

was held in Abingdon, Virginia, and the parties filed briefs following receipt of the hearing transcript. For the reasons set forth below, the imminent danger order is affirmed. I also find the Dickenson-Russell committed the violation alleged in the citation and impose a civil penalty in the amount of \$1,200.00.

Findings of Fact - Conclusions of Law

The facts are largely undisputed. Dickenson-Russell operates the Cherokee Mine, an underground coal mine located in Dickenson County, Virginia. On October 6, 2008, Johnny L. Asbury, an MSHA inspector and roof control specialist, went to the mine to continue a regular quarterly inspection. He had issued a citation for a roof control violation in the travelway to the 2 Left section, and was going to check on abatement efforts and terminate the citation. He traveled into the mine with Franklin Calo, a union representative, and Michael Stacy, a certified mine foreman who conducted weekly airway examinations for Dickenson-Russell. They rode into the mine on the main track and disembarked at a stub track serving the 2 Left section. Supply cars and other tracked conveyances serving the 2 Left section were switched onto the stub track. Rubber-tired vehicles were used to travel from the stub track to the section. The main track continued on to the East Main section, where a 12-person day-shift crew was working. Stacy crawled through a low spot to get a rubber-tired vehicle. Asbury and Calo waited for Stacy at the end of the stub track, near the intersection of the entry to the left of the track entry and the crosscut just inby where the stub track branched off the main track.

While Asbury was waiting for Stacy, he heard popping and cracking sounds and observed cracks developing in the crosscut roof. The cracks were one-half to three-quarters of an inch wide and ran diagonally toward the track entry. Asbury was concerned, because if two or three of them came together, then a block of rock between them could easily fall. He then noticed a large slab of rock hanging over the track that was starting to ease down. The rock was about three feet wide by four feet long and was thin on one side, tapering up to about 6 to 12 inches thick. There were "cutters," or crack runs, along the ribs of both pillars that ran all the way out to the track entry. Timbers had been set in the crosscut alongside the pillar on the right as one faced the track entry. The wedges on the tops of the timbers were "mashed flat," and the timbers were starting to crack. Small pieces of rock were "dripping" around the edge of the pillars. Asbury drew a diagram of the area as it existed prior to the installation of additional supplemental roof support. Tr. 27-28; Ex. G-4.

As depicted in Asbury's drawing, a rough version of which was recorded in his notes, there were indicators of roof control problems in the vicinity of the affected area. Pillaring had been done two breaks to the right of the track entry, which increased pressure on nearby pillars. The roof in the intersection at the end of the stub track, where Asbury and Calo waited for Stacy, had begun to sag, and had been supported with steel H-beams, cribs, steel jacks and cable bolts. Asbury explained that rock continuously moves, and where support such as pillars have been removed, pressure will develop on adjoining pillars. As a roof control specialist, he generally attempts to ascertain where pressure will develop, or has developed, and tries to assure that

appropriate roof support is provided. He had traveled through the intersection on his way to the 2 Left section four days earlier, and had not noticed any problems with roof support in the area. He had not traveled through the track entry in the area where the rock settled down, because that intersection was just inby the stub track for the 2 Left section.

When Stacy returned at approximately 10:05 a.m., Asbury issued an oral imminent danger order pursuant to section 107(a) of the Act, and told Stacy that the area had to be dangered-off and the track blocked to keep people out. The area subject to the order, essentially from 60 feet outby the hanging rock to 60 feet inby the rock, is depicted on Asbury's diagram. Ex. G-4. In addition to the imminent danger order, Asbury issued a citation charging Dickenson-Russell with failure to properly support the mine roof.

Calo had seen the conditions developing while he was with Asbury. He departed to secure warning tape to danger the area off. After warning tape had been hung at the approaches to the area, Stacy called Michael Ohlson, the mine superintendent, and requested supplies to install supplemental roof support. Stacy also called the belt examiner, who was working outby, and told him about the rock hanging in the main track entry to make sure that he didn't attempt to travel in that area. Supplemental roof support, consisting of cribs and steel jacks, was installed in the track entry. A flat car was then backed under the hanging rock. It was pried down and landed to one side of the car, almost flipping it over.² The rock was loaded onto the car and removed from the area. The order was terminated and the citation was abated about 1:30 p.m.

Dickenson-Russell timely contested the imminent danger order and the civil penalty assessed for the roof control violation.

The Imminent Danger Order

Order No. 8157629 was issued pursuant to Section 107(a) of the Act, and required the immediate withdrawal of miners from the area where the dangerous roof conditions existed, and prohibited entry into that area until the conditions were abated. The "Condition and Practice" section of the Order described the grounds for its issuance as follows:

At the mouth of the No. 2 Left Section, an imminent danger was present at survey station No. 5348. An oral imminent danger order was issued at 10:05 AM. The top was working at survey station No. 5348, that is located in the track and belt entry, and had cracked and was flaking and the post and metal jacks that were

² Dickenson-Russell contends that the rock was only partially, not directly, over the track. The Secretary takes issue with Respondent's position, and argues that adverse inferences should be drawn from Respondent's failure to preserve photographs and a sketch of the conditions. There is no need to resolve that issue because the validity of the order and citation, and the special findings of the citation, are unaffected by whether the rock was directly, or partially over the track. The condition was extremely hazardous in either event.

placed approx. 60 feet inby were broken and popping and cracking. Three cracks were running across the entry, one approx. 1/4 inch wide and the others were approx. 1/2 to 3/4 of an inch wide. A large slab of rock was observed, approx. 3 feet wide by 4 and 1/2 feet long, and the rock was very slowly coming down from the roof. The track way and belt line have to travel under this area, to get to the East Mains, and a crew of approx. 11 men are located inby the area. All approaches were dangered off to prevent entry into the area.

Ex. G-1.

Section 3(j) of the Act defines “imminent danger” as the “existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.” 30 U.S.C. § 802(j). Section 107(a) of the Act provides, in pertinent part:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

30 U.S.C. § 817(a).

“Imminent danger orders permit an inspector to remove miners immediately from a dangerous situation, without affording the operator the right of prior review, even where the mine operator did not create the danger and where the danger does not violate the Mine Act or the Secretary’s regulations. This is an extraordinary power that is available only when the ‘seriousness of the situation demands such immediate action.’” *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991) (“*Utah*”) (quoting from the legislative history of the Federal Coal Mine Health and Safety Act of 1969, the predecessor to the 1977 Act). An imminent danger exists “when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.” *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting from *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (“*R&P*”). While the concept of imminent danger is not limited to hazards that pose an immediate danger, “an inspector must ‘find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.’” *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555 (Aug. 2006) (quoting from *Utah*, 13 FMSHRC at 1622). Inspectors must determine whether a hazard presents an imminent danger without delay, and a finding of an imminent danger must be supported “unless there is

evidence that [the inspector] had abused his discretion or authority.” *R&P*, 11 FMSHRC at 2164.

While an inspector has considerable discretion in determining whether an imminent danger exists, that discretion is not without limits. An inspector must make a reasonable investigation of the facts, under the circumstances, and must make his determination on the basis of the facts known, or reasonably available to him. As the Commission explained in *Island Creek Coal Co.*, 15 FMSHRC 339, 346-347 (Mar. 1993):

While the crucial question in imminent danger cases is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector’s subjective “perception” that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving [her] case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he believes to be hazardous, the reasonableness of an inspector’s imminent danger finding is subject to subsequent examination at the evidentiary hearing.

An inspector “abuses his discretion . . . when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners.” *Utah*, 13 FMSHRC at 1622-23.

The Secretary argues that the imminent danger order was properly issued because there was an area of mine roof that was not adequately supported, including a large rock that was loose and hanging over the track that miners routinely traveled. It appeared that the roof and/or rock would fall at any moment and that multiple miners could be expected to travel through the area and be exposed to the dangerous condition before it could be corrected. Asbury estimated that it would take approximately one and one-half hours to abate the condition, and that miners could suffer serious injuries before the condition was corrected.

Dickenson Russell argues that there was no imminent danger because normal mining operations were not permitted to proceed, i.e., that Stacy had the area dangered-off and warned miners not to travel through it. It argues that Asbury issued the order based upon a series of assumptions that were not likely to occur and, in fact did not occur, including, that the condition had not been observed, that the area had not been dangered-off, that employees would travel through the area, and that employees would not observe the obvious conditions and avoid them. Resp. Br. at 6. It further contends that, since Asbury couldn’t say when, if ever, the rock would have fallen, that the Secretary did not prove that an injury could have occurred within a short period of time.

Respondent’s arguments are misplaced. Asbury’s determination that an imminent danger existed was based upon facts, not assumptions. He personally observed an extremely hazardous

condition, a significantly compromised mine roof and a large loose rock hanging over the main track entry to the East Main section of the mine. Miners were permitted to travel through the area and, in fact, routinely did so. While Asbury could not specify exactly when the rock, or any other portion of the roof, would fall, it clearly could have fallen at any time. Miners could have encountered the condition prior to its being corrected. Asbury had inspected the Cherokee mine on four prior occasions. He was aware that a maintenance crew usually worked in the East Main section until about 10:00 a.m., and that he hadn't encountered them departing. Twelve miners worked the day shift in the East Main section and would have departed at approximately 2:30 p.m. In the interim, there was nothing to prevent a miner from traveling through the area to or from the section. A belt man, a two-person supply crew, and a pump man could also have traveled through the area while the condition existed. Brookfield mantrips, which do not have overhead protection, were used on the track entry. Miners traveling through the area could have been struck by falling rock, could have collided with a fallen rock, or could have encountered track damaged by a falling rock.

Respondent argues that miners were trained to observe obvious defects and would have avoided any such problems. While that is possible, such an assumption cannot be made where miners safety is at stake. The argument is not relevant to the fact of violation, and is not a defense to an S&S designation. As the Commission observed in *Eagle Nest, Inc.*, 14 FMSHRC 1119 (July 1992), in holding that the exercise of caution is not an element in determining whether a violation rises to the level of S&S: "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." 14 FMSHRC at 1123. The Commission has also consistently emphasized that, in evaluating the risk of injury, the vagaries of human conduct cannot be ignored. See, e.g., *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984).

Respondent's argument that the dangering-off of the area precluded the possibility of the condition causing an injury to a miner is unavailing. Even if Stacy had observed the conditions first, and dangered the area off before Asbury saw it, an imminent danger order could have been properly issued. In *Cyprus Emerald Corp.*, 12 FMSHRC 911 (May 1990), the Commission upheld the validity of an imminent danger order that had been issued four days after the operator had dangered-off an area of adverse roof conditions and installed supplement roof support.³ Cyprus argued, as does Dickenson Russell, "that no persons were exposed to the hazardous roof conditions since it prohibited access to the area and that the nature of the cited roof conditions could not reasonably have been expected to cause death or serious harm before they were abated." *Id.* at 918. The Commission observed that "the operator acted appropriately in dangering-off the area of bad roof and that no miners worked, traveled or were required to enter

³ In *Cyprus Emerald*, mine foremen observed hazardous roof conditions adjacent to the last shield on a longwall face. They dangered the area off, and subsequently installed supplemental roof support. Because the area remained hazardous, the danger tape was left in place, while mining continued. Four days later, while the yellow "danger tape" was still in place, an MSHA inspector observed the adverse roof conditions, and issued an imminent danger order.

into the area at issue.” 12 FMSHRC at 917. Nevertheless, the Commission upheld the validity of the order, noting:

Under section 107(a) of the Act, the Secretary is responsible not only for determining the area of the mine affected by the danger and removing miners from such area but also determining when miners may safely re-enter the affected area because conditions or practices that caused the danger no longer exist. We cannot conclude that the inspector abused his discretion in issuing an order prohibiting re-entry into the area until the hazard was eliminated.

Here, it was Asbury, not Stacy, that first observed the hazardous roof conditions. He issued a verbal imminent danger order to Stacy, who then implemented necessary measures to bar entry to the area, and abate the condition. The order not only required that any miners be removed, it prohibited re-entry into the area until Asbury was satisfied that the hazardous conditions were completely abated. MSHA inspectors are afforded wide discretion in making decisions to issue imminent danger orders, and their determinations will be reversed only if the Secretary fails to prove that an inspector did not abuse his discretion. Asbury, an experienced inspector and roof control specialist, clearly did not abuse his discretion in issuing the order.

Citation No. 8157630

Citation No. 8157630 alleges a violation of 30 C.F.R. § 75.202(a), which requires that “The roof face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock outbursts.” The violation was described in the “Condition and Practice” section of the Citation as follows:

The main track way used by the East Mains crew, at the mouth of the 2 Left Section, had bad roof and an imminent danger order was issued to prevent travel through the area. Cracks were present and timbers were breaking and the metal jacks were taking weight in the area. The bad top conditions were observed and rock was breaking loose over the area the mantrip must travel under. The conditions were rapidly getting worse and could be observed, as the rock dripped and loose pieces fell out. A large piece of rock was hanging over the track and it kept dropping down, a gap of 3 to 4 inches was in the large rock. The area is the main travel way for the crew, the belt men and the repair crews. All travelways where men regularly travel must be maintained in safe condition.

Ex. G-2.

Asbury determined that it was highly likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator’s negligence was moderate. The citation was subsequently modified to allege that the operator’s negligence was low. A civil penalty in the amount of \$2,976.00 was proposed for

this violation.

The Violation

Cyprus Emerald is instructive in disposing of Respondent's challenge to this violation. There the Commission vacated the roof control citation that had been issued in conjunction with the imminent danger order, because the area had been effectively dangered off, such that it was not an area where persons worked or traveled. 12 FMSHRC at 917-18. Had Stacy observed the conditions first and dangered them off prior to Asbury's observing them, as in *Cyprus Emerald*, persons would not have been allowed to work or travel in the area and the standard would not have been violated. However, those are not the facts of this case. Asbury, not Stacy, first observed the condition. At that time there was nothing to prevent miners from traveling into the area and encountering the dangerous condition. It was not until after the verbal imminent danger order and the citation had been issued that measures to bar entry to the area and abate the condition were implemented.

Respondent argues that, judged by the familiar "reasonably prudent person familiar with the mining industry and the protective purpose of the standard" test, that its efforts to support the roof would not be found wanting. Resp. Br. at 7-8. The argument misses the mark. Respondent's efforts to address the adverse roof conditions were entirely reasonable. Respondent had also fully complied with its roof control plan, and had adequately supported the roof, prior to the development of the adverse conditions. However, once the adverse conditions developed, any "reasonably prudent person" would have had to conclude that the roof was not adequately supported.

The roof in the track entry, a place where persons traveled, was not adequately supported when Asbury observed it. The area had not yet been dangered-off, and miners could have traveled through the area. As such, the standard was violated. The Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of fault. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). In *Asarco*, the Commission concluded that "the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." *Id.* at 1636. Because the mine roof in the travelway was not adequately supported at a time when work or travel had not been effectively precluded, it follows that the operator violated the standard. That Asbury eventually determined that Respondent's negligence with respect to the violation was low, that Stacy promptly dangered the area off after the imminent danger order was entered, and that the violation was abated shortly after the citation was issued, do not alter that conclusion.

Significant and Substantial

An S&S violation is described in section 104(d)(1) of the 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." A violation is properly designated S&S "if, based upon the

particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

Consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. A measure of danger to safety was contributed to by the inadequate roof support in the affected area. There is little question that a miner being struck by a rock falling from the mine roof, or colliding with a fallen rock while traveling through the area, could reasonably have been expected to suffer a serious injury. As is often the case, the primary issue in the S&S analysis is whether the violation was reasonably

likely to result in an injury causing event.

Asbury witnessed the development of the condition. The roof “started working” while he was waiting for Stacy to come back. Tr. 24, 58. Consequently, the violative condition did not exist for any appreciable length of time prior to the issuance of the order and citation. Whether the violation was S&S turns on whether an injury causing event was reasonably likely to occur under continued normal mining operations, i.e., “absent intervention by a federal enforcement official.” *U.S. Steel*, 6 FMSHRC at 1574 (Commissioner Lawson, concurring). While Stacy and Calo most likely would have taken action to abate the conditions in the absence of the imminent danger order, their presence was due to the intervention of the MSHA inspector. If Asbury had not visited the mine to continue his inspection by going to the 2 Left section to check on abatement efforts for a previously issued citation, neither Stacy nor Calo would have been in a position to observe the deterioration of the roof and taken corrective action. The dangerous condition would have been discovered by some other traveler on the track, very possibly with disastrous results.

The Commission and courts have observed that an experienced MSHA inspector’s opinion 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). Asbury, who had extensive mining experience and had worked for MSHA for over ten years, was an experienced inspector. Given the number of persons that used the track, and the hazardous nature of the condition, his conclusion that the violation was S&S was reasonable. The large rock was hanging down in a precarious position. It could have been contacted by a miner riding in a man trip, causing the rock to fall. Or, if it fell prior to a miner passing, it could have been struck by a man trip. In either case, a reasonably serious injury would have been reasonably likely.⁴ As noted above, the fact that miners may exercise caution is not an element that can be taken into account in determining whether a violation rises to the level of S&S.

Negligence

Asbury modified the citation to reflect that Respondent’s negligence was low, because “the operator did not have knowledge of the condition.” Ex. G-2. The Secretary argues that Respondent’s negligence was “at least” low. Sec’y. Br. at 14. She contends, based on Asbury’s

⁴ The Secretary attempted to establish that as many as nine persons were affected by the violation, because the East Main crew would have departed at the end of their shift and may have had as many as nine members on a man trip. Sec’y. Br. at 14. I find that it was substantially more likely that one person would have been affected, e.g., the belt man or the pump man, because one of them would most likely have traveled through the area before the East Main crew departed and, in any event, the number of miners that would have been riding on the first man trip taking the 12-person crew out of the mine is unknown. I find, as Asbury originally determined, that one person was affected by the violation.

testimony that the previous deterioration of the roof in the intersection at the end of the stub track, the fact that there had been a roof fall seven months earlier about 180 feet away, and the general conditions, such as the pillaring that had occurred on the other side of the track entry, should have given Respondent “some inkling” that there were problems in the area. Tr. 66. She also points out that Respondent’s violation history reflects numerous violations of the roof control standard in the 15 months preceding the issuance of the citation, which should have put it on notice that greater compliance efforts were necessary.⁵

The Secretary’s penalty calculation regulations define low negligence as: “The operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” 30 C.F.R. § 100.3(d). Respondent obviously did not know about the violative condition. The area was subject to as many as three preshift examinations per day, and Asbury confirmed that the reports of those examinations did not include any problems with the roof. Tr. 58. Moreover, Asbury agreed that the roof in the subject intersection had been supported consistent with Respondent’s roof control plan, and that he had not observed any deficiencies when he traveled to the 2 Left section four days earlier. Tr. 29-30, 53-55. While Respondent should have had, as Asbury stated, “some inkling” that further roof deterioration might occur, there was no way to predict that the violation would occur in that location, only that something might be expected at some time in the general area. Tr. 64-66. I find that Respondent should not have known of the violative condition and that it was not negligent.

The Appropriate Civil Penalty

The parties stipulated that the Cherokee Mine is a large mine; that its controlling entity is also large; and that the maximum penalty that could be assessed for the violation would not affect Dickenson-Russell’s ability to continue in business. The assessment data reflects that it averaged slightly over one violation per inspection day during the relevant period, a moderate incidence of violations. Respondent had 20 repeat violations within the pertinent time period, which enhanced the regularly assessed proposed penalty. The violation was promptly abated.

Citation No. 8157630 is affirmed. However, Respondent was not negligent with respect to the violation. A civil penalty of \$2,976.00 was proposed by the Secretary. The lowering of the level of negligence justifies a reduction in the proposed penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and guided by the Secretary’s penalty calculation regulations,⁶ I impose a penalty in the amount of \$1,200.00.

⁵ The Secretary argues that Respondent had 42 previous violations of the standard. However, the assessment control form reflects 20 such violations, as does the violations history report submitted by the Secretary. Ex. G-6.

⁶ 30 C.F.R. Subchapter P, Part 100.

ORDER

WHEREFORE, Order No. 8157629 is **AFFIRMED**, Citation No. 8157630 is **AFFIRMED as modified**, and Respondent is **ORDERED** to pay a civil penalty in the amount of \$1,200.00, within 45 days.



Michael E. Zielinski
Senior Administrative Law Judge

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February 18, 2011

EMERALD COAL RESOURCES, LP, : CONTEST PROCEEDINGS
Contestant, :
 : Docket No. PENN 2009-614-R
 : Order No. 8008143; 06/15/2009
v. :
 : Docket No. PENN 2009-615-R
 : Order No. 8008144; 06/15/2009
 :
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Emerald Mine No. 1
Respondent : Mine ID 36-05466
 :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 2009-697
Petitioner, : A.C. No. 36-05466-192658
v. :
 :
EMERALD COAL RESOURCES, LP, :
Respondent : Mine: Emerald Mine No. 1

DECISION

Appearances: Patrick M. Dalin, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, Paul Marone, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor;
Ralph Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Emerald Coal Resources, LP

Before: Judge Andrews

This case is before me upon the petition for assessment of a civil penalty filed by the Secretary of Labor ("Secretary") pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (the "Act") charging Emerald Coal

Resources, LP ("Emerald") with violations of mandatory standards and seeking civil penalties in the amount of \$71,862.00¹ for two safety violations. Both orders were section 104(d) actions. Section 104(d) of the Act provides as follows:

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

A hearing was held on October 5, 2010, in the Federal Mine Safety & Health Review Commission's Pittsburgh, Pennsylvania, hearing room.

The general issues before me are whether Emerald violated the cited standards as charged and, if so, what are the appropriate civil penalties to be assessed for those violations. Additional specific issues are addressed as noted below.

Preliminary Matters

Motion to Amend

¹ The parties, by joint stipulation, agreed to a modification of order No. 8008144 to change the likelihood of injury from highly likely to reasonably likely, resulting in a §100.3 point total of 130, reducing the assessed penalty from \$60,000 to \$30,288. Citation No. 8008143 was assessed a penalty of \$41,547.

Order No. 8008144 was issued on June 15, 2009. On September 17, 2010, the Secretary filed a motion to amend to change the provision of the regulations in Block 9.C. of Form 7000-3 from 75.363(a) to 75.360(a). There is no specific Commission Procedural Rule on motions to amend. Pursuant to Commission Procedural Rule 1(b), where the Commission's own Procedural Rules do not address the question presented, we are *guided so far as practicable* by the Federal Rules of Civil Procedure (Fed.R.Civ.P.) 30 C.F.R. §2700.1(b). emphasis added. Therefore, I will look to Fed.R.Civ.P. 15(a) for guidance. Emerald's opposition to the motion, filed September 27, 2010, was primarily on the grounds that the amendment was sought more than a year after the order was issued, and that Emerald would be prejudiced by granting an amendment only 2 ½ weeks prior to the hearing. At the hearing, Emerald limited their opposition to undue delay in moving to amend the Order. (Tr. 322).

The Condition or Practice written by the Inspector in Block 8 of the form clearly concerned a pre-shift examination, 30 C.F.R. § 75.360(a), rather than the posting of a danger sign, 30 C.F.R. § 75.363(a). In that narrative, both of these regulations were listed, in the context of reviewing the requirements with all of Emerald's Mine Examiners. The requested amendment merely conforms the Section of Title 30 in Block 9. C. to the actual Condition or Practice written in Block 8 by the Inspector. Listing 75.363(a) instead of 75.360(a) appears more likely to be a simple clerical error in copying a cite than a substantive determination of a controlling standard. *See*, 30 C.F.R. § 2700.79. For this reason, fairness requires that either the delay in requesting the amendment or the incorrect transposition of a citation must not become a basis for any argument that the order be vacated. Accordingly, the Secretary's Motion to Amend is GRANTED.

Admission of exhibits

Exhibit G-7, Mine Accidents. This was initially admitted without objection, (Tr. 99), but in the Joint Stipulations (#15) there was the objection by Emerald based on relevance to penalty criteria. The document itself is a public record, compiled and made public by the Mine Safety and Health Administration ("MSHA"), and is admissible. It was apparently offered to show ignitions at this mine, and does show a number in 2004, one in 2006, and two in 2009. However, in further testimony, it was shown that these reported ignitions were in the D-Mains section of the mine, well removed from C-Mains, where there has never been an ignition. Thus, while the agency record is admissible, the past ignitions do not appear to be relevant.

Exhibit G-9, Mine Citations, Orders and Safeguards. This is a public record from the MSHA website, therefore, the document itself is admissible. The objection by Emerald is to the use of any of the data beyond the 15-month period relevant to 30 C.F.R. § 100.3, for history of violations in penalty assessment. The data from the 15 month period is relevant for penalty assessment. The 24-month data is relevant to show past violations.

See Consolidation Coal Co., 23 FMSRHC 588, 595 (June 2001). Hence, the exhibit is admitted, and the data used as appropriate.

Exhibit G-10, Order No. 8007448. This order was issued on April 16, 2009 for a violation of 75.400. It was initially issued as a 104(a) citation but subsequently changed to a 104(d)(2) order, and refers to another order, No. 7069052, issued on October 2, 2007, also alleging a violation of 75.400. These violations were the basis for the history in the June 15, 2009 order. Emerald's objection was that order No. 8007448 remained unadjudicated. I conclude that order No. 8007448 should be admitted for the limited purpose of notice provided by the issuance, alone, of the prior orders. *See Lopke Quarries, Inc.*, 23 FMSHRC 705 (July 2001); *Extra Energy, Inc.*, 23 FMSHRC 829 (Aug. 2001); *Peabody Coal Co.*, 14 FMSHRC 1258 (Aug. 1992).

Discussion with Findings of Fact and Conclusions of Law

The Emerald Mine No. 1 is located in Greene County, Pennsylvania, and is an underground coal mine. (Tr. 38.) It liberates more than one million cubic feet of methane over a 24-hour period, which necessitates E02, 103(i) spot inspections. (Tr. 38-39.)

On June 15, 2009, Mine Safety and Health Administration ("MSHA") Inspector Joseph A. Vargo went to Emerald Mine No. 1 to perform an E02 spot inspection. (Tr. 38.) At the time of the hearing, Inspector Vargo had been employed by MSHA for three years and three months. (Tr. 35.) His experience in the mining industry began in 1977, and he worked for Consol Pennsylvania Coal Company at the Oakmont, Renton, and Bailey mines. (Tr. 35, 131.) For most of the time, about 25 years, he was a Mine Examiner at the Bailey mine. (Tr. 131.) At Consol, he participated in 8-hour annual retraining, and at MSHA he completed the 21-week Mine Academy course and 15 weeks traveling with seasoned Inspectors. (Tr. 37.) He received his AR card in July 2008, and then began inspections on his own. (Tr. 35.) In June 2009, he was still within the probationary period as a new Mine Inspector for MSHA. (Tr. 35-37, 131.)

Inspector Vargo arrived at Emerald Mine No. 1 at approximately 7:00 am. (Tr. 39.) He obtained a strip map from the Foreman's room, and reviewed the pre-shift report for the midnight shift. (Tr. 42.) He found that no violations, dangers, or hazardous conditions were reported for the C-Mains section, and the area was deemed safe to enter. (Tr. 39, 42, 120, Ex. G-11.) For the entire inspection, Inspector Vargo was accompanied by Jeff Stewart from the Emerald Safety Department and United Mine Workers ("UMW") walk around representative Dave Laporte. (Tr. 63.)

The inspection started at the C-Mains #1 entry, included all five faces in that section, and then proceeded to the C-3 section to include the four faces there. (Tr. 49.) The continuous miner was operating in the #2 entry, outby the #3 crosscut. (Tr. 49.) When Inspector Vargo came to the #3 entry, he found accumulations at the face. (Tr. 50.)

As he traveled from the #3 entry to the #4 entry, he found accumulations in the 4 to 3 crosscut. (Tr. 57.)

Order No. 8008143 (The accumulations)

Order No. 8008143, issued at 0930 hrs, alleges a violation of a mandatory safety standard, section 75.400, and states:

[t]he mine operator was not following the cleanup program in the C-Mains section (MMU 029-0). Coal was permitted to accumulate on the previously rockdusted surface in the #3 entry of C-3, inby #3 crosscut. The accumulation was 34 feet in length, 2 to 3 feet high, and 15 to 16 feet in width, damp to dry, and black in color. There was also an accumulation of coal in the #4 to #3 entry at 3 crosscut of C-3, that was 33 feet in length, 2 to 6 feet high, and 9 to 16 feet wide, damp to dry, and black in color.

Inspector Vargo testified that the accumulations measured 34 feet back from the #3 face, were 16 feet wide, rib to rib, and 2 feet deep. (Tr. 50, 54, 55.) He found the material to consist of coal and fine coal, damp to dry, approximately 60% coal and 40% rock. (Tr. 56.) He also made notes. (Ex. G-1.) He observed the material closely, bending down, picking up some, and poking with his walking stick, and concluded there was more coal than rock. (Tr. 55, 56, 60, 90.) The color was black, and not rock dusted. (Tr. 96, 127.) A couple of 4-foot metal roof pins were also noted. (Tr. 57, 90, 91.)

Inspector Vargo found that the accumulation in the 4 to 3 crosscut was approximately 33 feet long, 9 feet wide, and varied in depth from 6 feet to 1 foot. (Tr. 57, 58.) The two accumulations were close in proximity and were connected by some additional material inside an installed air connection. (Tr. 82, 83, 84.) He estimated the composition as 80% coal and 20% rock, damp to dry, with one roof pin. (Tr. 60.) Again, he bent down, picked up some, and used his stick to dig down into the accumulation. (Tr. 59, 60.)

The size of the two accumulations is confirmed by the written statement of Foreman Jeffery Stewart issued on the same day. (Ex. G-25.) UMW walk around representative Dave Laporte observed Inspector Vargo use his stick and kick pieces of the material around "to see what was in there." (Tr. 189, 190.) Mr. Laporte described most of it to be dry, black and grey, and 45% coal. (Tr. 177, 179, 180.) Vargo testified that never in his 30 years of mining experience had he seen accumulations like these, and they should have been loaded out to the conveyor belt. (Tr. 70, 71.) Mr. Laporte was also of the opinion that they should have gotten rid of the material. (Tr. 182.) Although Mr. Stewart in his testimony attempted to characterize the accumulations as "70% rock," he acknowledged that he was not present for the loading out and this was just an estimate. (Tr. 262.)

30 C.F.R. §75.400 states:

[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

It is well accepted that “a violation of . . . 30 C.F.R. §75.400 occurs when an accumulation of combustible materials exists.” *Old Ben Coal Company*, 1 FMSHRC 1954, 1958 (Dec. 1979). “[A]n accumulation exists where the quantity of combustible materials is such that, in the judgment of the [inspector,] it likely could cause or propagate a fire or explosion if an ignition source were present.” *Old Ben Coal Company*, 2 FMSHRC 2806, 2808 (Oct. 1980).

Emerald argues that the material pushed up to the face was part of the active normal cleanup process, and therefore, not an “accumulation.” (Resp. Posthearing Br. 8.) As noted above, accumulations exist when a certain mass of materials is present. I agree with the Secretary’s argument that how the mass came to be is not relevant to the determination of whether an accumulation exists. (*See Secy. Posthearing Rep. Br. 2.*) The accumulations were so large that Inspector Vargo spotted them as soon as he walked toward the face. (Tr. 109.) He testified to the combustible nature of the accumulations. (Tr. 86, 87, 94, 95.) In his notes, written at the time of the inspection, Vargo recorded comments made by Section Coordinator Gary Bogumit that the accumulations were excessive, and he did not know why they had not been cleaned up. (Tr. 65, Ex. G-1.) Yet Mr. Bogumit testified that he did not recall saying that the material was excessive, and attempted to contradict the inspector’s notes stating, “I’m sure I didn’t make that comment.” (Tr. 224, 225.)

Mr. Bogumit, as well as mine employees Mark Hanley and Thomas Nickel, testified to the effect that the accumulations were mostly all rock with a little coal mixed in. (Tr. 214, 215, 218, 246, 247, 273.) Mr. Hanley did describe loose coal as being present in his written statement. (Tr. 258, Ex. G-15.) Mr. Bogumit described the rock and dust as wet, (Tr. 218, 224), but this assessment was not shared by other witnesses. Manager William Schifko even testified that the material was not coal, but rock, (Tr. 305), despite the fact that he did not go into the mine until June 16th, after the 4 to 3 crosscut had been cleaned out and the #3 face rockdusted. (Tr. 307.) When compared to the direct, close, tactile, and even probing examination of the accumulations by Inspector Vargo, I am unable to assign any significant weight to the testimony of the company employees other than UMW walkaround representative Dave Laporte.

I place little value on the attempts to either maximize or minimize the amount of rock that fell from the roof, was “pushed up” and included in the accumulations. There were two areas where some “potting out” around roof bolts had occurred, (Tr. 76, 77,

146, 170, 171, Ex. G-2A, R-1), but the amount of such rock and its contribution to the composition of the accumulations were only estimates at best. The examinations of Inspector Vargo and the observations of Mr. Laporte are the best evidence of the coal and loose coal present and are accorded controlling weight, with the greater weight placed on the testimony of the Inspector. I find that the accumulations were very large, mostly coal and loose coal, damp to dry, black in color, and also contained rock. Where loose coal is present, the Commission has concluded that the 75.400 standard is violated. *Black Diamond Coal Mining Company*, 7 FMSHRC 1117, 1121 (Aug. 1985).

Therefore, Emerald violated the mandatory safety standard in section 75.400.

Significant and Substantial

This violation was designated as significant and substantial (“S&S”) by the inspector. A violation is S&S when the violation is “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. §814(d)(1). A violation is properly designated as 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 order to establish that a violation is S&S, the Secretary must prove:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984); *see also*, *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-4 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). The evaluation is made in terms of “continued normal mining operations.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

I have found a violation of the cited mandatory safety standard thereby meeting the first criterion. The accumulations did contain coal and loose coal, combustible material by definition, and a discrete safety hazard. As the MSHA Manual sets forth, loose coal is a potential fire hazard, especially with drying out and turning into float coal dust. Ignition sources include sparks from the carbide bits of the continuous miner, electrical arcs, and the operation of beltways and equipment in roadways. With such a source, combustion can occur with methane, (especially in a methane liberating mine), float coal dust, loose coal dust, and spillage of other flammable materials, such as hydraulic fluid. (Ex. G-6.) Therefore, the accumulations in this case did present a potential fire hazard. But our analysis does not end there.

An ignition source is also needed to start a fire or produce an explosion. "When evaluating the reasonable likelihood of a fire, ignition or explosion, the Commission [looks to] whether a "confluence of factors" were present based on the particular facts surrounding the violation." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997), citing *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). These factors include "the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area." *Enlow Fork Mining Co.*, 19 FMSHRC at 9, citing *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (Mar 1990); *Texasgulf, Inc.*, 10 FMSHRC at 500-3.

Inspector Vargo took no methane measurements on or in the accumulations. (Tr. 130, 131.) Although this is a methane liberating mine, such measurements as were made in the area did not reveal combustible concentrations of gas. (Tr. 129.) This reduces the idea of trapped methane pockets inside the accumulations to speculation. The ventilation was adequate throughout the area. (Tr. 137, 138.) The continuous miner was in another entry. (Ex. G-4.) The nearest belt drive was 300-400 feet away. (Tr. 173, 174.) No other equipment was operating at the piles, and no electrical cables were there either. (Tr. 149.) The record does not contain any evidence of spilled hydraulic oil. There was no active work by miners in the immediate area. (Tr.158.) No witness described float coal dust as being present.

The Secretary appears to rely on the potential for ignition, especially the return of mining activity to the #3 entry and the installation of conveyor belt assemblies. Inspector Vargo estimated the miner would return in 2 to 3 days. (Tr. 81.) He noted that fire suppression water sprays are installed on the miner. (Tr. 136.) Taking all of this into account, at the time of the inspection the danger of a catastrophic explosion from these accumulations is not shown. The ventilation was adequate, methane was minimal, and there were no ignition sources present. Therefore, applying the "confluence of factors" test of *Enlow Fork*, I find that the violation was not S&S. Further, I find that the likelihood of injury should be reduced from "reasonably likely" to "unlikely".

Unwarrantable Failure

The order was also designated as an unwarrantable failure, as set forth in section 104(d)(1) of the Mine Act, 30 U.S.C. §814(d)(1). Unwarrantable failure is conduct which is considered "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec, 1987). Unwarrantable failure is "characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care."” *Id.* at 2003-4; *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-4 (Feb. 1991).

The Commission has set forth factors to be considered in making an unwarrantable failure ("UWF") analysis. They are: "the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to

eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1548 (Sept. 1996), *citing Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994).

The violation was extensive. Inspector Vargo testified that from the moment he "walked up on it [he] noticed" the accumulations. (Tr. 109.) The accumulations were very large in size. Each measured over 30 feet in length, over 2 to 3 feet high, and over 9 feet wide. (Cit. 8008143, Tr. 50, 53-58.) The volume of material far exceeded any accepted practice of pushing up small amounts (3 to 4 feet in length, a foot in depth) left from the mining process to the face. (Tr. 62.) Whether considered individually or collectively, the masses of coal, loose coal and rock that had been created were certainly extensive.

The violative condition also existed for quite some time. The area had been examined for at least the prior five shifts. (Tr. 72, 109, 118, Ex. G-1, pp 12, 15, Ex. G-11.) While Emerald does have a cleanup program in which it is noted that "extra attention is needed to eliminate accumulation of loose coal and fine coal" (Ex. G-13), part of Emerald's normal cleanup process is to push excess material to the face. (Tr. 214, 216.) Despite testimony to the contrary, it does not appear that the mine's clean up program was being followed. (Tr. 293.) There is also evidence that the accumulations could have existed from June 9th until discovered on inspection. The potting out that occurred on June 8th was cleared by pushing the material to the #3 face on June 9th. (Tr. 154-159, 213, 214, Ex. G-4.) Certainly the coal, loose and fine coal, and rock were lying on the coal bottoms and in the crosscut long enough for drying out to be well under way. (Tr. 56, 60.) This supports the time estimate of Inspector Vargo, and is even suggestive of several more days.

Considering both the extent of the accumulations and length of time they existed, the opinions of Vargo and Mr. Laporte that they should have been loaded out of the mine are compelling. (Tr. 69-71, 182.) As to these two factors, Emerald displayed an indifference toward the standard violated.

Efforts on the part of the operator to timely abate the violation were lacking. There was a delay in the agreed upon abatement plan. (Tr. 163-64.) The credible evidence shows that Emerald did not place a priority on abatement of the violation, despite a favorable amendment of the order allowing for rockdusting without removing the accumulation at the #3 face and only loading out the accumulation in the crosscut. (Ex. G-5.) Despite testimony suggesting that the delays were caused by the need to unload a scoop containing supplies for the continuous miner, and the need to glue the roof in the #2 crosscut near the #3 entry, (Tr. 183, 184, 223, 252), it appears more likely that the abatement was subordinated to these other activities. The order to clean up was at 9:30 a.m., and should have taken about one and one-half hours. (Tr. 165.) But the

abatement was not completed until about 4:00 p.m. (Tr. 165.) Emerald did not exercise diligence when ordered to perform the agreed-upon abatement.

The mine has been on notice that greater efforts are necessary for compliance. Specifically, on April 16, 2009, Inspector Vargo issued Order No. 8007448 to Area Manager and Section Coordinator Gary Bogumit for a violation of 30 C.F.R. §75.400. (Tr. 114, Ex. G-10.) At that time, Vargo told Mr. Bogumit that he would not allow an accumulation that was similar to the #3 entry accumulation in the instant case. (Tr. 117.) Further, multiple prior orders have been issued to Emerald regarding section 75.400. (Ex. G-9.) In the 24 months prior to June 15, 2009, 77 citations or orders were issued to Emerald for violating 75.400. (Tr. 110, Ex. G-9.)

Mr. Bogumit testified that the standard process at Emerald mine is, after mining, to push to the face the coal left behind and not loaded out. (Tr. 211-213, 214, 216.) In this case, the accumulations existed through at least 5 pre-shift examinations. On the shift preceding the inspection, Foreman Thomas W. Nickel performed the preshift examination. (Tr. 268.) He encountered the material pushed up to the #3 face, and in the 3 to 4 crosscut. (Tr. 270, 279.) Emerald had actual notice of the accumulations at the #3 face and 3 to 4 crosscut, but took no action to clean them up until ordered to do so, and then did not act promptly on the order. This constitutes, at least, a serious lack of reasonable care.

Accordingly, based on the above analysis, I find that the violation was more than ordinary negligence and constitutes unwarrantable failure and high negligence.

Order No. 8008144 (Failure of pre-shift examination)

Order No. 8008144 alleges a violation of 30 C.F.R. §75.360(a)² and states that

[t]he pre-shift examination conducted for the C-Mains section (MMU 029-0) entry on midnight shift, 6-15-09 for the on-coming day shift was not adequate in that the following hazards were not entered in the pre-shift examiners record book.

Loose coal and coal was permitted to accumulate as stated in order No. 8088143.

The requirements of CFR 75.363 (a) and 75.360 shall be reviewed with all mine examiners before this order is terminated.

² Citation No. 8008144 originally alleged a violation of section 75.363(a). Pursuant to the above discussion in the preliminary matters, the citation has been amended to correctly reflect a violation of section 75.360(a).

This Federal Safety Standard has been cited 5 times at this mine in the last 24 months.

As noted above, the parties, by joint stipulation read into the record at the hearing, agreed to a modify order No. 8008144 to change the likelihood of injury from "highly likely" to "reasonably likely," resulting in a §100.3 point total of 130, reducing the assessed penalty from \$60,000 to \$30,288.

30 C.F.R. §75.360(a)(1) states:

[e]xcept as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

"The preshift examination requirement is of fundamental importance in assuring a safe working environment for miners." *Enlow Fork Mining, Co.*, 19 FMSHRC 5, 15 (Jan. 1997) (quoting *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995)). Additionally, "accumulations of combustible materials qualify as hazardous conditions that should be recorded by a preshift examiner when found." *Enlow Fork* 19 FMSHRC at 13, 15. "Preshift examinations assess the overall safety conditions in the mine . . . identify hazards . . . and through this identification facilitate correction of hazardous conditions." *Nat'l Mining Ass'n v. MSHA*, 116 F.3d 520, 540 (D.C. Cir. 1997).

I have already found that the accumulations were present and they were considered potentially hazardous. As established in the discussion of order No. 8008143, above, the accumulations at the #3 face and in the 3 to 4 crosscut existed for at least five shifts. Both were large, mostly coal and loose coal, damp to dry, black in color, were not rockdusted, and did present a potential fire hazard. Inspector Vargo reviewed the June 15, 2009 midnight shift examination report before entering the mine and found no indication of any violation, danger, or hazard; it was deemed safe to enter. (Tr. 120.) However, when he came upon the accumulations that day, they were so extensive they could not have been overlooked. (Tr. 109.) Foreman Nickel performed the examination reviewed by Vargo before entering the mine. (Tr. 268, 269.)

Mr. Nickel testified that he did encounter the two accumulations. (Tr. 270, 279.) He did not consider the material to be a hazard, because it would be cleaned up at a later time. (Tr. 272.) That a hazard would be taken care of at a later time is irrelevant to the requirement to record the condition before the next shift begins. The record shows that Emerald's employees did, in fact, see the accumulations. Testimony by other company

employees was to the effect that the accumulations were not hazardous, and there was no need to record them. (Tr. 218, 224, 250, 251, 263, 264, 272, 279.) In view of findings already made that there was a fire hazard and that the clean up program was not being followed, this testimony is not found credible.

Therefore, I find the failure to record the large accumulations at the #3 face and in the 3 to 4 crosscut was a violation of 75.360.

Significant and Substantial

The Commission has held that a pre-shift violation was S&S irrespective of the absence of a specific hazardous condition disclosed upon the inspector's examination of the mine. *Kellys Creek*, 19 FMSHRC 457, 461 (Mar. 1997); *Buck Creek Coal Co.*, 17 FMSHRC at 13-15 (Jan. 1995).

The fact of a violation has been established. There was a discrete safety hazard, considering the size of the accumulations, the combustible content, the small loose coal particle size, its dryness, and the length of time the accumulations were allowed to remain in the C-3 section without being recorded. This measure of danger to safety was contributed to by the failure of the pre-shift examiners to report the hazards before the next shift entered the mine.

The third question in the evaluation of the violation is whether there is a reasonable likelihood that the hazard contributed to will result in an injury. Where there is no advance warning that combustible accumulations are present in a working section of the mine, the danger to unwary miners is heightened, and the risk increased that the hazard contributed to by the lack of a report will result in an injury.

Finally, in the context of continued normal mining operations, should a fire event occur, it is reasonably likely that injuries would be of serious nature, and the fourth element of the S&S evaluation is also satisfied.

Accordingly, the violation of section 75.360 was "significant and substantial".

Unwarrantable Failure

The wide extent of the failure to record and report large accumulations containing combustible materials is revealed by the operator's stated position that pushing coal left from the mining process up to the face is standard operating procedure. After the potting out on June 8th was cleared by also pushing it to the #3 face, which had been mined with coal bottoms left in place, each pre-shift examiner thereafter found that the area was "safe to enter." (Ex. G-11, G-24.) There were at least 16 such examinations prior to the inspection on June 15th, with no notice provided to miners entering the C-3 section that there were potentially hazardous accumulations present in the 4 to 3 crosscut and

extending back 34 feet from the #3 face. The sheer volume of the piles would not be missed by any pre-shift examiner traversing the area.

Emerald's efforts to ensure accurate and complete pre-shift examinations were lacking. The Mine Examiners should have known that the clean up program requiring extra attention to eliminate accumulations of loose coal and fine coal when leaving coal bottoms was not being followed. (Ex. G-13.) The accumulations should have been well described on each pre-shift report after they were created, with loading out, or at least "dangered off" being the appropriate response. As evidenced by testimony, the operator had actual knowledge of these hazards.

There was also prior notice that the pre-shift examinations had to improve. The safety standard had been cited 5 times in the 24 months before the issuance of the order on June 15, 2009. Further, the pre-shift examiners, instead of ignoring the accumulations, should instead have been especially careful to discover and promptly report such violations of 75.400, which had been cited 77 times in the previous 24 months. Therefore, Emerald was on notice that greater efforts were required to ensure adequate pre-shift examinations.

This aggravated conduct was beyond ordinary negligence and did constitute unwarrantable failure and high negligence.

Penalty

Pursuant to section 110(i) of the Act, "[t]he Commission shall have authority to assess all civil penalties provided in this Act." 30 U.S.C. §820(i). The following six statutory criteria are to be considered:

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

Id. I have considered each of the statutory criteria in assessing the penalties. Additionally, the parties stipulated that the penalty will not affect Emerald's ability to continue in business. (Ex. JX-1.)

Order No. 8008143 is found to be non-S&S, with injury or illness unlikely. This results in a penalty reduction from \$41,574.00 to \$8,421.00.

Order No. 8008144, as modified by the parties, is properly assessed in the amount of \$30,288.00.

ORDER

For the reasons set forth above, Citation No. 8008143 is **MODIFIED** to reduce the likelihood of injury or illness from “reasonably likely” to “unlikely” and to delete the significant and substantial designation. Citation No. 8008144 is **AFFIRMED AS MODIFIED BY THE PARTIES ABOVE**. Emerald is hereby **ORDERED TO PAY** the sum of **\$38,709** within 30 days of the date of this decision.³ Upon receipt of payment, these cases are **DISMISSED**.



Kenneth R. Andrews
Administrative Law Judge

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 18, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2009-126
Petitioner,	:	A.C. No. 15-14728-162918
	:	
v.	:	
	:	
FOX KNOB COAL COMPANY	:	Mine: Foresters Creek Strip
Respondent,	:	

DECISION

Appearances: Robert Motsenbocker, Esq. Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Julia L. McAfee, Esq., Carl R. McAfee, P.C., Norton Virginia, for the Respondent

Before: Judge Gill

This case arises from petitions for civil penalties filed by the Secretary of Labor under Section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq., (the "Act"). They charge the operator, Fox Knob Coal Company ("Fox Knob"), with three violations of mandatory standards and seek civil penalties for those violations. The general issue before me is whether Fox Knob violated the standards as alleged and, if so, what is the appropriate civil penalty for those violations. Additional specific issues are addressed as noted.

The case was heard on October 28, 2010, at the Bell County Courthouse in Pineville, Kentucky. Respondent agrees in its Answer to the Secretary's Petition for Assessment of Penalty that it is subject to the jurisdiction of the Mine Safety and Health Administration and that the Administrative Law Judge has jurisdiction to issue this decision.

Findings of Fact - Conclusions of Law

Respondent Fox Knob operates a surface coal mine in the vicinity of Wallins Creek, Harlan County, Kentucky. Between June 12 and 23, 2008, MSHA inspector Larry Boggs conducted inspections of portions of the Foresters Creek Strip and Wallins dump sites, operated by Fox Knob. Boggs wrote the three citations relevant to this case on June 12 and 23, 2008. (Tr. 41:7- 42:15) Two of the citations, No. 8329773 (Exhibit S3) and No. 8329782 (Exhibit S9), relate to the steering mechanism on large rock hauling trucks. The third citation, No. 8329772, (Exhibit S1) relates to a berm at the Wallins dump site.

The Citations

Citation No. 8329772, issued on June 12, 2008, reads as follows:

Berms shall be provided to prevent overtravel and overturning at dumping locations. The berm provided for the dump site of the Wallins Pit is inadequate in that it was not midaxle height on the Eculid [sic] Rock Trucks that are using this dump site. The dump berm that was provided was missing in most places and only had two spots that had berms left from where the trucks had dumped.

Exhibit S1

The gravity of the violation was assessed as reasonably likely to result in lost workdays or restricted duty for a single person and as significant and substantial.¹ It was written as a 104(a) citation. The operator's negligence level was assessed as moderate, and the proposed fine is \$946.00. (Petition for Assessment of Penalty)

The Standard

30 C.F.R. § 77.1605 (I) provides:

(I) Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.

The Evidence

Boggs testified that he personally inspected the Wallins dump site on June 12, 2008. He observed a truck rated to haul loads in the range of from 85 to 100 tons back up to the edge of the dump site and dump a load. He also observed that there was no berm where the truck dumped. There was a residual berm at two other places at this dump site where other trucks had dumped "short"² so as to leave part of the dump load on the dump ramp for the bull dozer operator to use to restore the berm. Boggs concluded that if a truck failed to stop at the edge of the dump site, it

¹ A violation is properly designated significant and substantial, "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The question of whether a violation is S&S must be based on the particular facts surrounding the violation. *Texas Gulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

² The process of "short" dumping is described at Tr. 39:17- 40:1 and 178:9-18.

would fall 25 to 30 feet, or more. (Tr. 49:12-51:3) Boggs informed Henderson that he was going to write a violation citation for the lack of berm at this location. (Tr. 53:19-54:11) The citation was prepared and served on Henderson later, after the berm had been restored. (Tr. 53:7-18)³ Boggs testified that he wrote the citation alleging a “reasonable likelihood” instead of a “high likelihood” of injury because a dozer operator was on the scene and was acting as a spotter for the dump truck drivers. (Tr. 54:25-55:17) The dozer operator was using a CB radio to communicate his spotter information to the truck drivers. (Tr. 54:25-56:12)

Fox Knob witnesses, Jeff Dean and Harvey Henderson, disputed whether a truck would fall 30 feet or more if it tipped over the edge of the dump area. Dean testified that the height of a “lift” or dump area is only about ten feet. (Tr. 154:12-158:14 and 175:16-176:4) Henderson testified that lift height is no more than ten feet due to equipment size constraints and company policy. (Tr. 224:1-15 and 228:14-19)

Henderson testified that he was with Boggs when Boggs observed the conditions that led to the berm citation. He saw a bull dozer push a large boulder over the edge of the dump area, which wiped out a portion of the berm in the process. There was intact berm remaining on either side of the disturbed area. The dump site was about 30 to 40 feet wide. The dozer had disrupted a section of berm about 10 feet wide, leaving most of the six-foot-high berm intact on both sides. (Tr. 229:7-232:4) The dozer operator pulled to one side out of the way and visually directed the next truck by CB radio to the edge of the lift to dump its load. He then used some short dumped material to rebuild the berm that had been disrupted by pushing the boulder over the edge. (Tr. 232:5-234:5)

Boggs agrees that the standard allows for means other than berms to prevent overtravel and overturning when it speaks of “similar means.” He also agrees that using a spotter is such a “similar means” under his understanding of the standard. (Tr. 137:19-138:3)

Discussion

The standard mentions berms as one of several means to prevent overtravel and overturning. It also uses the general term “or similar means” to show that the purpose of the standard is to require effective means to prevent a vehicle from tipping over the edge of a work area or roadway. It does not limit those means to berms only. Fox Knob argues that using a spotter constitutes a “similar means” and fully complies with the standard. I agree.

The language of the standard is clear and unambiguous. There is no dispute between the parties that using a spotter can be an appropriate means to comply with the intent of the standard, and that berms are intended to be used only as a visual reference and not to stop trucks. (Tr. 143:2-144:14) This is also consistent with language in the MSHA Dump Point Inspection Handbook, Handbook Number PH01-I-6, September 2001:

Appendix D. Dump Point Safety: Best Practices

[. . .]

³ It took only minutes for the berm to be repaired. (Tr. 62:7-63:12)

III. DOZER OPERATORS

Best practices for **dozer operators** at dump points are to :

- Maintain adequate berms at the dump points.
- [...]
- Act as a spotter for the trucks and keep them back from the edge when conditions warrant.

Exhibit R10, page 31. [Emphasis in the original.]

Further clarity comes from a review of the MSHA Dump Point Inspection Handbook section dealing with berms and the testimony related to it (Tr. 135:16-20):

CHAPTER 2 - DUMP POINTS

[...]

G. Safe dumping practices near the edge of a pile

- ▶ **The berm should be used as a visual guide only.** The berm should not be used to help stop the truck but only as a visual guide to judge where to stop.

Exhibit R10, page 15. [Emphasis in the original.]

There is no dispute that using a berm is but one means, among several, to satisfy the intent of 30 C.F.R. § 77.1605 (l). There is also no dispute that having the dozer operator act as a spotter can satisfy this regulatory intent as well. The dispute between the parties devolves to whether using a spotter during the brief period when the integrity of the berm at the Wallins dump was compromised violates the standard. I conclude that it does not. To reach this conclusion, I am mindful that the regulations and handbook guidance cannot anticipate every possible circumstance. They strive to guide those on the scene by establishing as clear an intent as possible and by bolstering it with suggested best practices. Consistent with this, it is more important to determine whether the intent of the standard is met than to argue over whether the exact means chosen by the operator to address that intent are the best. It is also important not to let disputes over best means become the primary focus. In my view, that is what has happened here. Regardless of whether it is better to use a spotter or to insist on uninterrupted berms, it is easy to conclude on these facts that there was no time in question when some approved means of providing visual guidance to dump truck drivers were not in place. Accordingly, Citation No. 8329772 will be vacated. It follows that the related issues of gravity and negligence are moot.

Citation No. 8329773, issued on June 12, 2008, reads as follows:

Mobile equipment shall be maintained in safe operating condition and equipment in unsafe condition shall be removed from service immediately. When checked the Euclid R85 B Rock Truck had excessive slack in the steering jack on the right hand side of the truck. The steering jack moved from 1 ½ to 2 inch in a up and down manner. The operator removed this truck from service.

Exhibit S3

The gravity of the violation was assessed as reasonably likely to result in lost workdays or restricted duty for a single person and as significant and substantial. It was written as a 104(a) citation. The operator's negligence level was assessed as moderate, and the proposed fine is \$3,689.00. (Petition for Assessment of Penalty)

Citation No. 8329782, issued on June 23, 2008, reads as follows:

Mobile equipment shall be maintained in safe operating condition and equipment in unsafe condition shall be removed from service immediately. The steering jack on the left hand side of the Euclid R85 B Rock Truck, Co.# 28011 has ½ to 1 inch of movement in a manner affecting the steering of this truck. The operator has removed this truck from service until repairs are made.

Exhibit S9

The gravity of the violation was assessed as reasonably likely to result in lost workdays or restricted duty for a single person and as significant and substantial. It was written as a 104(a) citation. The operator's negligence level was assessed as moderate, and the proposed fine is \$3,459.00. (Petition for Assessment of Penalty)

Citations 8329773 and 8329782 were written on June 12 and June 23, 2008, respectively. The factual allegations supporting these citations are essentially identical, aside from the difference in the dates. They both refer to the same safety standard and allege the same underlying factual predicate. Accordingly, I treat both citations together in the following analysis.

The Standard

30 CFR § 77.404 (a) provides:

(a) 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.

The Evidence

The two trucks involved in these citations are the same size and model designation - Euclid R85 B dump trucks.⁴ (Exhibits S3 and S9) Their steering mechanisms are essentially identical and will be treated as such here. Euclid R85 B trucks have a hydraulic steering system comprising opposing hydraulic ram cylinders that work in opposition, with one side pushing and the other side pulling, to actuate a drag link that mechanically ties together the front wheel assembly on each side of the truck so that the front wheels turn in tandem when the steering wheel is turned. (Tr. 26:6-29:20; and 164:14-165:7) The two parts of the steering mechanism central to this dispute are the "steering jacks" and the "drag link." The steering jack attaches to the moveable steering assembly through a ball-and-socket joint. (TR. 106:7-14; and 245:6-246:23)

Boggs used the same general procedure when he inspected each of the two trucks. (Tr. 71:9-18; 74:15-75:15; 84:14-23; and 101:14-102:21) He testified that when he inspected the trucks in question here, he observed excess movement or "slack" in the joint that connects the steering jack to the steering assembly. He made his assessment visually and did not use any tools or instruments. (Tr. 87:5-88:7; and 93:10-94:8) Boggs testified that he detected up to two inches of slack on truck number 28003 (Exhibit S3; and Tr. 106:15-25), and up to one inch of slack on truck number 28011 (Exhibit S9). (Tr. 75:16-25; 78:1-4; 84:24-85:6; and 106:15-25) He considered this amount of slack an obvious hazard. (Tr. 139:6-25) He ordered that the trucks be taken out of service immediately for repair. (Tr.89:19-90:12) The repairs were promptly done (Tr. 86:10-87:4), and the out-of-service orders were satisfied the same day they were issued. (TR. 88:12-89:4)

Boggs testified that if a steering jack joint were to fail, the jack on the opposite side of the truck would have to do the work of both jacks through the drag link. (Tr. 79:14-80:20) He views this as a dangerous situation that had a bearing on his assessment of severity (Tr. 114:7-115:4), particularly in light of the roads and terrain conditions where these trucks operate. (Tr. 30:16-31:24; 79:14-81:4; 80:21-81:4; and 167:25-168:10) Boggs determined that, in the event of a steering mechanism failure, serious physical injury was reasonably likely, up to and including death. (Tr. 81:5-83:5; 85:10-23; and 114:7-115:4) Boggs determined that there had been "moderate" negligence based on his conclusion that a defect of this nature and magnitude would require an extended period of time to develop, and Fox Knob purported to conduct frequent inspections that should have brought these defects to their attention. (Tr. 81:13-82:9; 82:3-84:7; 85:10-23; and 110:11-112:8) Boggs testified that, based on his own experience and common sense, a driver of a truck like these should be able to feel the amount of slack in question here; it

⁴ Exhibit S3 is Citation Number 8329773 which relates to truck number 28003. Exhibit S9 is Citation Number 8329782, which relates to truck number 28011. (Tr. 68:1-69:25)

should be obvious.⁵ (Tr. 22:22-23:6; 116:7-117:5; and 139:6-25) Boggs determined that these alleged violations were significant and substantial (S&S) because of the excessive amount of slack he observed. (Tr. 83:1-5; 110:11-112:8; and 118:22-119:6)

Fox Knob's witnesses testified that there was no obvious slack in the steering jack joints beyond what would be considered normal and acceptable. (Tr. 107:8-108:4; and 245:6-246:23) They produced evidence that MSHA has no regulatory standard that specifies how much slack is acceptable. (Tr. 108:5-9; and 130:20-131:7) They characterized Boggs' assessment of the slack in the steering mechanism as inherently unreliable because the joint would have failed long before that degree of slack could have developed. (Tr. 246:20-249:4) They dispute that Fox Knob should be found negligent based on evidence that the steering mechanisms were inspected daily by the truck operators (Tr. 109:12-21; and 189:15-191:21)⁶ and service personnel (Tr. 191:23-192:20) and less frequently by management and mechanics (Tr. 240:12-241:8), whose responsibility it is to look for such problems. Fox Knob's witnesses conceded that it is not optimal nor advisable to continue to operate a truck when one of the steering jacks has failed. (Tr. 165:19-169:18) However, they maintained that even if there were a total failure of one of the steering jack joints, the drag link is designed to and would, in fact, allow the truck to be steered with sufficient control to allow the driver to bring it to a safe stop on the roads and in the work areas where these trucks operate. (Tr. 165:8-14; 196:11-24; and 260:4-261:9)

Discussion

Section 77.404(a) requires that "[m]obile [. . .] equipment [. . .] be maintained in safe operating condition and [. . .] equipment in unsafe condition [. . .] be removed from service immediately." The Commission has held that section 77.404(a) imposes two duties: (1) to maintain equipment in safe operating condition; and (2) to remove unsafe equipment from service immediately (*Peabody Coal Company*, 1 FMSHRC 1494, 1495 (Oct. 1979)) and that "[d]erogation of either duty violates the regulation" (1 FMSHRC at 1495; see also *Ambrosia Coal & Construction Co.*, 18 FMSHRC 1552, 1556 (Sept. 1996)).

Equipment is in unsafe operating condition under section 77.404(a) when 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 warranting corrective action. (See *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982) (involving identical standard applicable to underground coal mines)). The

⁵ Boggs agreed, on both direct and cross examination, that a truck driver would likely not notice the gradually increasing amount of slack in the steering mechanism due to habituation. (Tr. 78:20-79:13; and 142:7-18)

⁶ The testimony of Fox Knob witnesses Michael Patterson and Samuel L. Howard was essentially identical regarding how a truck driver does a daily pre-shift inspection and notes anything out of the ordinary in his pre-shift log book.

burden of proof is on the Secretary. The trucks in this case were mobile equipment. Obviously, they were not removed from service before the citations. Therefore, if the conditions cited by Boggs existed, and if they singly or in combination rendered it unsafe to operate the trucks, a violation occurred.⁷

Boggs has years of mining experience, including time driving heavy trucks such as these. (Tr. 22:22-23:1) Although he had limited experience as an MSHA inspector at the time of these inspections⁸, he had received on-the-job training and classroom instruction regarding the safety and inspection of trucks. (Tr. 32:19-34:24) Nothing in the evidence calls into question the methods used by Boggs to inspect these trucks. His inspection methods seem reasonably conceived and executed to yield reliable observations. (Tr. 74:15-75:15; and 101:14-102:21)

In making this judgement, I am aware that these are very large trucks, capable of hauling many tons of material at a time and potentially capable of causing very serious consequences if something should malfunction. I note that the roads on which these vehicles operate are mostly unpaved work roads characterized by the presence of other trucks and moveable mining equipment and constantly changing surface conditions due to wear and weather so as to require: (1) constant driver vigilance, and (2) the ability of the mechanical systems to respond appropriately to emergent demands. Irrespective of the dispute between the parties regarding the amount of slack in the steering mechanisms, the evidence supports a finding that there was sufficient slack to justify Boggs' issuance of the citation. There is no evidence suggesting that Boggs did not conduct a competent, thorough, and reliable inspection. Giving him the general deference due to any competent MSHA inspector, I conclude that the issuance of the citation was justified and that there was enough slack present to require replacement of the defective parts.

However, testimony from Fox Knob witnesses raises questions as to the reliability of Boggs' quantification of the amount of play in the steering mechanism, but fails to undercut his observation and conclusion that the steering mechanisms were unsafe and should have been removed from service for repair. The evidence has enough probative weight to support Boggs' conclusion that a violation of the standard occurred, but not enough to support the more specific and pertinent issue that must be addressed in connection with the third prong of the *Matthies* S&S test discussed below.

⁷ Equipment may be defective and not be in violation of the standard if the defect does not affect safe operation of the equipment during its normal intended use (See *Hobet Mining, Inc.*, 19 FMSHRC 411, 414 (Feb. 1997) (ALJ Maurer)).

⁸ Boggs had been an MSHA inspector for only three months at the time of this dispute. He had done only a few other inspections prior to this. (Tr. 96:4-20)

The preponderance⁹ of the evidence supports Boggs' conclusion that there was some degree of slack in the steering mechanism on both trucks. There is nothing in the evidence that undercuts Boggs' conclusion as to the basic violation of the standard to the degree necessary to discredit it. The dispute goes to whether the degree of slack was enough to support Boggs' conclusions as to negligence and gravity. I conclude that Boggs' decision-making and testimony overstated the degree of slack. However, the evidence is sufficiently convincing to establish that there was enough slack apparent to an earnest and competent inspection to support a finding of a violation of the standard. Thus, I conclude that the Secretary has met her basic burden. I affirm the violation in each of these two citations.

Significant and Substantial

A significant and substantial violation is described in section 104(d)(1) of the 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.¹⁰ A violation is properly designated S&S if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *affg Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

⁹ In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Moreover, the preponderance standard, in general, means proof that something is more likely so than not. *Hopkins v. Price Waterhouse*, 737 F.Supp. 1202, 1206 (D.D.C. 1990).

¹⁰ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a [. . .] mine safety or health hazard [. . .]."

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). And, when evaluating the “reasonable likelihood” element, “likelihood” is viewed in terms of continued normal mining operations without any assumption as to abatement (*U.S. Steel Mining Co., Inc.* 6 FMSHRC 1573, 1574 (July 1984); *Halfway, Inc.*, 8 FMSHRC 1, 12 (Jan. 1986); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991)). The Secretary’s burden of proof runs to all of the *Mathies* elements. If the Secretary fails to present preponderant evidence on one or more of the *Mathies* elements, there can be no conclusion that the violation was S&S.

The facts of this violation do not support a conclusion that these steering mechanism violations are significant and substantial. The S&S allegation fails on the third prong of the *Mathies* test. First, as discussed above, both violations - as described in the citations - are affirmed. Second, the failure of a hydraulic steering jack would, judged by common sense, constitute a discrete, albeit potential, measure of danger to safety. Third, the evidence presented at trial fails to convince as to the reasonable “likelihood” that this hazard will result in an injury that is: Fourth, of a reasonably serious nature.

The evidence presented at trial did not adequately address the element of “likelihood” as defined above. In keeping with the requirement that “likelihood” be assessed in terms of continued normal mining operations without any assumption as to abatement, the decision point here is whether it is likely that a serious injury would result if Fox Knob continued to operate, inspect, and maintain its rock trucks as the evidence showed it had and continued to do at the time of these citations. The issue is not whether a steering system failure is reasonably likely based on Boggs’s conclusion about the degree of slack in the steering mechanism. The issue is whether, after factoring out the excess in Boggs’ conclusion, a steering system failure is reasonably likely. It is not unreasonable to conclude that Boggs’ assessment of the imminent danger arising from the condition of the steering mechanism was strongly influenced by his underlying and overstated assessment of the degree of slack in the system. Further, it is not unreasonable to conclude that if Boggs’ misjudged or misperceived the degree of slack, his conclusion that it would amount to an S&S violation could and should be re-evaluated. In other words, since the facts do not support Boggs’ description of the amount of slack, his S&S evaluation does not warrant particular deference, and without a significant degree of deference, the evidence does not preponderate in favor of an S&S finding.

The Commission and courts have observed that an experienced MSHA inspector’s opinion that a violation is significant and substantial 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, 135-136 (7th Cr. 1995). As mentioned above, this analysis does not imply that Boggs’ findings and conclusions do not warrant a degree of general deference. He is a trained and adequately experienced inspector, and as such, is considered an important - though not unassailable - source of information. However, because the preponderance of the evidence

supports a finding that Boggs significantly overstated the amount of play in these steering systems, general deference does not bridge the gap.

Neil Manning's testimony is important and helpful in assessing the degree of deference to give to Boggs testimony about the amount of slack in the steering jacks. Manning has decades of experience working on a wide range of mechanical systems on trucks such as these. (Tr. 239:18-240:11) Specifically, he has replaced some 40 - 50 steering jack assemblies during that period. (Tr. 244:17-245:1) At trial he illustrated his testimony with reference to an actual replacement ball-and-socket joint from a steering jack assembly. His demonstration made it clear that the degree of slack Boggs testified to, and on which Boggs concluded that these violations justified an S&S enhancement, was simply not possible without a complete joint failure. Moreover, the failure would have occurred with much less slack in the ball joint assembly than implied in Boggs' testimony. I credit Manning's testimony that the ball-and-socket joint would have failed completely with half or less of the slack Boggs claimed he observed. (Tr. 246:20-247:23; and 272:23-273:20) I also credit Manning's and Michael Patterson's testimony and opinions about whether a driver could maintain sufficient control over one of these trucks in the event of a steering assembly failure in which one side's steering jack failed and the other side's jack had to take over the entire steering system load through the drag link. They both opined that there would be sufficient, though substantially compromised, steering control to bring a truck to a safe stop on the haul roads relevant to these citations. In fact, Patterson has experienced just such a failure and was able to safely stop. (Tr. 260:4-261:9 Manning; and 196:11-24 Patterson)

I conclude that the Secretary has not carried her burden of proof to show that this violation was significant and substantial because that conclusion must refer to Boggs' unsupported assessment of the amount of play in these steering systems. The facts of record do support a finding of a basic violation of the standard, but do not support the more demanding *Mathies* third prong test.

Penalty Assessment

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). Sections 815(a) and 820(a) delegate the duty of proposing penalties to the Secretary. Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria: [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(I).

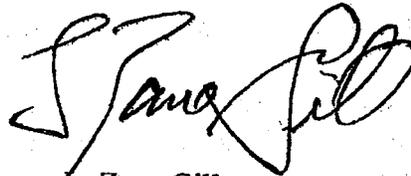
I find that Fox Knob acted in good faith in abating the violating conditions. Neither party

adduced any evidence that justifies either an increase or decrease in penalty based on the operator's size or history of violations. No evidence was presented to imply that the proposed penalty would affect Fox Knob's ability to continue in business. I find the evidence establishes the existence of sufficient slack in the steering mechanisms to justify the issuance of citations for violations of the relevant standard at the level of moderate negligence. For the reasons set forth above, I find that Fox Knob's negligence was moderate, but that it did not reach the level of aggravated conduct.

Based on the criteria in Section 110(i) of the Act, the Secretary proposed a penalty of \$3,689.00 for citation No. 8329773, and \$3,459.00 for citation No. 8329782, for a total penalty of \$7,148.00. Adjusting the Section 110(i) calculations to account for the lower negligence level and lack of S&S severity, I find that the appropriate penalty amount is \$745.00 for citation No. 8329773 and \$687.00 for citation No. 8329782, for a total assessed penalty of \$1,432.00.

Order

Citation No. 8329772 is hereby vacated. Citations No. 8329773 and 8329782 are modified as explained above. Fox Knob is directed to pay a civil penalty of \$1,432.00 within 40 days of the date of this decision on Citation Nos. 8329773 and 8329782.



L. Zane Gill
Administrative Law Judge

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/cd

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

January 12, 2011

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION, MSHA, : Docket No. WEST 2009-1274-M
Petitioner : A.C. No. 24-02386-193778
 :
v. :
 :
 :
E.S. STONE & STRUCTURE, INC., : E.S. Stone & Structure Mobile 2
Respondent :

DECISION AND ORDER

Appearances: Matthew B. Finnigan, Esq. , Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado for the Petitioner
Josh Shultz, Esq., Law Office of Adele L. Abrams, P.C., Beltsville, Maryland for
Respondent

Before: Administrative Law Judge Patrick B. Augustine

Procedural History

This case is before the court upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.* (the "Act"). The parties filed joint stipulations of fact and cross-motions for summary decision. This case involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") under Section 104(a) of the Act alleging a violation of 30 C.F.R. §50.10. The parties stipulated to the following facts:

1. Respondent E.S. Stone & Structure, Inc. ("E.S. Stone") owns the E.S. Stone & Structure Mobile 2 Mine (Mine ID 24-02386) near Barber, Montana in Golden Valley County (the "Mine").
2. E.S. Stone is engaged in mining operations in the United States, and its mining operations affect interstate commerce.
3. The ALJ has subject matter and personal jurisdiction over the dispute in this case.
4. E.S. Stone is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§801-965 (the "Mine Act").
5. The Mine is a surface, dimension stone mine.
6. Eric Johnson and Scott Puppe own E.S. Stone.
7. Bennie Jo Pearrow was an employee of E.S. Stone.

8. Mr. Pearrow was 51 years old and had worked at E.S. Stone for approximately 28 weeks as a “stacker” before April 8, 2009. In this position, Mr. Pearrow was responsible for stacking and packaging rock to be sold to customers.

9. On April 8, 2009, Mr. Pearrow began his shift at the Mine at 7:00 a.m.

10. After beginning work on April 8, 2009, Mr. Pearrow reported that he did not feel well and E.S. Stone Supervisor Clinton Theriault instructed Mr. Pearrow to go home.

11. Mr. Pearrow elected to remain at work on April 8, 2009. Mr. Theriault instructed Mr. Pearrow to work at a slow pace. He performed his regular duties, palletizing stone at a slow pace with frequent breaks.

12. Palletizing stone requires E.S. Stone’s employees to stack on shipping pallets individual pieces of stone.

13. The stone that Mr. Pearrow was palletizing was various sizes. Each piece of stone weighed between approximately 10 pounds and approximately 15 pounds.

14. At approximately 11:00 a.m. on April 8, 2009, Christina Riley, Mr. Pearrow’s work partner, took a short break.

15. When Ms. Riley returned to work at approximately 11:05 a.m. on April 8, 2009, she found Mr. Pearrow laying on the ground, next to the pallet that the two were stacking on the east side of E.S. Stone’s processing yard.

16. Ms. Riley yelled to Jeremy Forrest, an E.S. Stone breaker operator, who was working in a nearby tent, that Mr. Pearrow needed medical assistance.

17. Upon hearing this, Mr. Forrest called Mr. Theriault via radio.

18. After Mr. Forrest’s radio call, Mr. Forrest, Mr. Theriault, Ms. Riley, E.S. Stone Tumbler Operator Barry Larette, and E.S. Stone Stacker Jonathan Lambert attended to Mr. Pearrow. However, Mr. Pearrow was unresponsive, was not breathing, and did not have a pulse.

19. At 11:08 a.m. on April 8, 2009, E.S. Stone employees began performing cardiopulmonary resuscitation (“CPR”) on Mr. Pearrow.

20. Also at 11:08 a.m. on April 8, 2009, an unidentified E.S. Stone employee contacted owner Eric Johnson via two-way radio to alert Mr. Johnson of what had occurred.

21. Mr. Johnson, in response, called the E.S. Stone office.

22. Both the E.S. Stone office and Mr. Theriault promptly telephoned the Golden County Sheriff’s Department.

23. E.S. Stone employees continued to perform CPR on Mr. Pearrow until an ambulance arrived at approximately 11:30 a.m. on April 8, 2009.

24. Upon the ambulance’s arrival, emergency medical technicians took over CPR from E.S. Stone employees.

25. At approximately 11:45 a.m. on April 8, 2009, a life flight helicopter from St. Vincent Healthcare in Billings, Montana arrived. Emergency medical technicians from the life flight administered medication and automated external defibrillation to Mr. Pearrow.

26. At 12:05 p.m. on April 8, 2009, Golden Valley County Sheriff/Coroner Floyd Fisher pronounced Mr. Pearrow dead.

27. Mr. Pearrow’s body was taken via ambulance to Billings, Montana for an autopsy.

28. After Mr. Fisher pronounced Mr. Pearrow dead, Mr. Johnson spoke with Mr.

Fisher to gather information to report to Mr. Pearrow's family.

29. After speaking with the medical personnel, Mr. Johnson addressed the 20-25 employees who had gathered at the scene. Mr. Johnson dismissed the employees for the day and answered questions from the employees.

30. Mr. Johnson then contacted the E.S. Stone office via two-way radio to gather information from Mr. Pearrow's file to report to MSHA.

31. Between 12:45 and 12:50, Mr. Johnson attempted to contact MSHA to report Mr. Pearrow's death. Mr. Johnson called MSHA, however the cell phone service dropped the call and Mr. Johnson changed location to seek better reception.

32. Mr. Johnson was only able to get cell phone service utilizing the cell phone power booster and external antenna in his pickup truck, located near the work trailer on the west side of the processing yard.

33. At 12:52 p.m. on April 8, 2009, Mr. Johnson reported Mr. Pearrow's death via cell phone to Brian Goepfert of the Mine Safety and Health Administration ("MSHA").

34. MSHA issued an order pursuant to Section 103(k) of the Mine Act and instructed Mr. Johnson to secure the area.

35. At 6:34 p.m. on April 8, 2009, MSHA lifted the 103(k) order.

36. The autopsy concluded that Mr. Pearrow suffered from severe hypertropic cardiomyopathy, which caused the heart attack that killed Mr. Pearrow.

37. Owen Erickson, an authorized representative of the Secretary of Labor, investigated Mr. Pearrow's death for MSHA.

38. Mr. Erickson interviewed E.S. Stone owners and employees, including Mr. Johnson, Mr. Puppe, and Mr. Theriault.

39. On April 8, 2009, at 6:45 p.m., Mr. Erickson issued E.S. Stone Citation No. 6451203 pursuant to Section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. §50.10. Mr. Erickson indicated in that citation that there was no likelihood of injury or illness arising from the alleged violation; that an injury or illness arising from the alleged violation could reasonably be expected to yield no lost workdays; that the violation was not significant and substantial; that E.S. Stone had engaged in moderate negligence in violating 30 C.F.R. §50.10; and that no miners were affected by the alleged violation.

40. Mr. Erickson terminated the citation at 6:50 p.m. after confirming that E.S. Stone had notified MSHA about Mr. Pearrow's death and discussing with the company's owners the requirements of 30 C.F.R. §50.10.

41. MSHA proposed a specially assessed penalty of \$5,000 for Citation 6451203.

The Cited Regulation

30 C.F.R. §50.10: The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving:

(a) A death of an individual at the mine;

(b) An injury of an individual at the mine which has a reasonable

potential to cause death;

(c) An entrapment of an individual at the mine which has a reasonable potential to cause death;

(d) Any other accident.

Brief Summary of the Parties' Arguments

A. Secretary of Labor:

Petitioner argues that the record clearly establishes that Respondent "failed to alert MSHA about an accident - a miner's death - until at least 47 minutes had lapsed." This was 32 minutes beyond the deadline proscribed in the regulation. Therefore, she asserts that the citation should be affirmed and the proposed penalty of \$5,000.00 is the minimum penalty required by Congress for such a violation pursuant to the provisions of the Miner Act, 30 U.S.C. §820(a)(2).

B. E.S. Stone:

Respondent argues that it conducted a brief, reasonable investigation into the incident prior to notifying MSHA, which is authorized and anticipated by the preamble to the regulation. Once Respondent quickly concluded that an accident had occurred, that emergency life-saving measures were exhausted, and ensured that there were no immediate dangers posed to other mine employees, Respondent immediately contacted MSHA and reported the fatality in full compliance with the regulation.

Discussion

The Commission's rules provide that a "motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits show that: (1) there is no genuine issue as to any material facts; and (2) the moving party is entitled to summary decision as a matter of law." 29 C.F.R. §2700.67(b). The court finds that the facts stipulated to by the parties are sufficient to render a decision on the legal issues raised in the parties' cross motions for summary judgment.

The court summarizes the parties' stipulations as follows: Respondent operates a surface stone mine near Barber, Montana. On April 8, 2009, Bennie Pearrow and Christina Riley were stacking cut stone onto pallets. At approximately 11:00 a.m., Ms. Riley took a short break. When Ms. Riley returned five minutes later, Mr. Pearrow was laying on the ground and unresponsive. Ms. Riley then yelled to nearby employee, Jeremy Forrest, that Mr. Pearrow needed medical assistance. Mr. Forrest immediately called Supervisor Clinton Theriault on the radio and told him of the emergency. About three minutes later, there were five employees at the scene, including Ms. Riley, Mr. Forrest, and Mr. Theriault. They assessed Mr. Pearrow and determined that he was not breathing, had no discernable pulse, and was unresponsive. One of them then began performing CPR, while at approximately the same moment, another employee

informed owner Eric Johnson by radio of the event. Mr. Johnson called the main office and told them to call the County Sheriff. Mr. Theriault, separately, also called the County Sheriff. Respondent's employees continued to perform CPR on Mr. Pearrow until an ambulance arrived at approximately 11:30 a.m., twenty-five minutes after Mr. Pearrow was first discovered. At 11:45 a.m., a medical response helicopter arrived at the site. At 12:05 p.m., Golden Valley County Sheriff/Coroner Floyd Fisher pronounced Mr. Pearrow dead. Between 12:05 p.m. and 12:45 p.m., Mr. Johnson conducted a brief investigation into the incident, which included monitoring the removal of Mr. Pearrow's body by ambulance, speaking briefly with the Coroner, briefly addressing and dismissing the approximately twenty-five employees who had gathered at the scene, and contacting the main office by radio to gather personnel information about Mr. Pearrow in preparation for contacting MSHA. At 12:45 p.m., Mr. Johnson then telephoned MSHA's toll-free number by cell phone. When his cell phone could not complete the call because of low signal, he immediately traveled to his truck to obtain a cell phone signal booster. At 12:52 p.m., Mr. Johnson executed the call to MSHA and reported the fatality.

MSHA Citation 6451203 alleges "[t]he mine operator failed to immediately contact MSHA at once without delay and within fifteen (15) minutes of a fatality that occurred at the processing site on April 8, 2009. A miner succumbed to an apparent heart attack and was pronounced dead at 12:05 hours MDST. MSHA was notified at 12:52 hours MDST. The mine operator was aware of the immediate reporting requirement." MSHA characterized the alleged violation of 30 C.F.R. §50.10 as a non-S&S violation with moderate negligence on the part of the operator. Despite these characterizations, Petitioner assessed a penalty of \$5,000.00 based on the statutory language regarding minimum penalty assessments for this type of violation at 30 U.S.C. §820(a)(2).

The Miner Act imposed a 15-minute time limit for reporting fatalities and serious accidents. 30 U.S.C. §813(j). As a result, in March of 2006, MSHA issued an Emergency Temporary Standard ("ETS") which modified the language of 30 C.F.R. §50.10 where operators were previously required to "immediately" report fatalities and accidents, by imposing a 15-minute time limitation. 71 F.R. 12260. In the preamble to the ETS, MSHA stated that the "ETS does not change the basic interpretation of §50.10. By the terms of the provision, an operator is required to notify MSHA only after determining whether an 'accident' as defined in existing paragraph 50.2(h) has occurred. This affords operators a reasonable opportunity to investigate an event prior to notifying MSHA. That is, mine operators may make reasonable investigative efforts to expeditiously reach a determination." *Id.* When the Final Rule on the amendment to this regulation (and others) was promulgated in December of 2006, Section 50.10 was further modified and MSHA's preamble language explaining that the amendments to 50.10 still allow a "reasonable opportunity to investigate an event prior to notifying MSHA" was removed. The preamble to the Final Rule also clearly states that "like the Miner Act, [§50.10] does not include any exceptions to the 15-minute notification provision..." 71 F.R. 71435. The preamble also clarifies, in a manner consistent with Commission case law, that incidents requiring cardio-pulmonary resuscitation (CPR) constitute "injuries which have a reasonable potential to cause death." 71 F.R. 71434. *See Cougar Coal*, 25 FMSHRC 513 (September 5, 2003).

Therefore, based primarily on the undisputed facts that: (1) Respondent's employees, in the presence of a supervisor, began performing CPR on Mr. Pearrow at 11:08 a.m. on April 8, 2009, (2) Mr. Pearrow was pronounced dead by the Coroner at 12:05 p.m., and (3) Respondent made its first attempt to contact MSHA at 12:45 p.m., the court finds that Respondent failed to comply with the requirements of 30 C.F.R. §50.10.¹ Respondent knew it had experienced a reportable accident arguably at 11:23 a.m. (fifteen minutes after CPR was initiated) and conclusively at 12:20 p.m. (fifteen minutes after the official pronouncement of death). The court agrees that the violation was non-S&S but does not agree that Respondent demonstrated moderate negligence in this instance. Respondent quickly implemented and exhausted life-saving efforts, conducted a prompt assessment/investigation into the situation, and then immediately proceeded to contact MSHA. Accordingly, the operator's negligence will be modified from "moderate" to "low."

Penalty

Under section 110(i) of the Act, "the Commission shall have authority to assess all civil penalties provided in this Act." 30 C.F.R. §820(i). Although the Secretary issues citations and orders under the Act and *proposes* civil penalties, it is the Commission that is responsible for *assessing* civil penalties and providing other appropriate relief. *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-91 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). The Commission's assessment of penalties is a *de novo* determination based on the six statutory criteria specified in section 110(i) of the Act. In this case, the Secretary points to the language of the Miner Act, at 30 U.S.C. §820(a)(2), which states: "The operator of a coal or other mine who fails to provide timely notification to the Secretary as required under section 813(j) of this title (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." The court notes that this penalty provision is plainly and unambiguously directed only at the Secretary of Labor, not the Commission. As further evidence of this point, one need only look to the statutory language of the following two paragraphs of the Miner Act. Section 820(a)(3)(A) provides that "the minimum penalty for any citation or order issued under section 814(d)(1) of this title shall be \$2,000.00." Section 820(a)(3)(B) similarly provides that "the minimum penalty for any order issued under section 814(d)(2) of this title shall be \$4,000.00." Clearly, the plain language of §§820(a)(3)(A) and (B) indicate generally applicable minimum penalties, while the language of §820(a)(2) applies only to the Secretary of Labor.² Therefore, consistent with long-standing precedent, the undersigned interprets these provisions as recognizing discretion on the part of the Commission in assessing penalties for violations of 29 C.F.R. §50.10. *Sellersburg Stone Co.*, supra.

Section 110(i) of the Act requires the Commission to assess civil monetary penalties

¹ Although prior ALJ decisions are not controlling, the court notes that this case is distinguishable from *Premier Chemicals, LLC*, 2007 WL 2409536 (F.M.S.H.R.C. Aug. 10, 2007) in that the violation in that case occurred on July 19, 2006, while the Emergency Temporary Standard, rather than the Final Rule, was in effect.

² The court has also considered the language of 30 U.S.C. §820(a)(4) and concluded that it applies only to Federal appellate review in a circuit court and does not clarify the differences in the statutory language between §820(a)(2) and §§820(a)(3)(A) and (B). Accordingly, it does not dictate a different result by this court.

considering: (1) the operator's history of previous violations, (2) the size of the business, (3) the level of negligence by the operator, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. The stipulations do not address Respondent's violation history, however, MSHA's penalty assessment form in the court's files indicate three previous violations. Respondent is a small operator, exhibiting low negligence in this instance, and demonstrated good faith in notifying MSHA of the incident forty-seven minutes after life-saving efforts ended and Mr. Pearrow was officially pronounced dead. Accordingly, the \$5,000.00 penalty proposed by Petitioner for Citation No. 6451203 will be reduced to \$2,000.00.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation No. 6451203 is hereby AFFIRMED with an ASSESSED penalty of \$2,000.00, which shall be paid by Respondent within thirty (30) days.



PATRICK B. AUGUSTINE
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

January 3, 2011

SECRETARY OF LABOR, MSHA, on behalf of RODNEY PAYNE, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	
v.	:	Docket No. CENT 2010-1135-D DENV-CD 2010-14
	:	
SPIRO MINING, LLC, AND ITS SUCCESSORS, Respondent	:	DISCRIMINATION PROCEEDING
	:	
	:	Docket No. CENT 2011-42-D DENV-CD 2010-14
	:	
	:	Mine: Calder Mine Mine ID: 34-02105 A408

**ORDER DISSOLVING TEMPORARY ECONOMIC REINSTATEMENT ORDER
FOR FAILURE TO FILE SECTION 105(c)(3) ACTION**

This matter is before me on the Respondent's December 29, 2010 Motion to Dissolve Temporary Economic Reinstatement Order granted on behalf of Rodney Payne pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). In Respondent's Motion to Dismiss, Respondent states that the Secretary has decided not to proceed under section 105(c)(2), and that Payne has not filed an action on his own behalf under section 105(c)(3) within the allowable 30-day time period. Respondent moves that the temporary economic reinstatement be terminated and the September 8, 2010 Order of Temporary Reinstatement be dissolved. For the reasons explained, Respondent's Motion is granted.

The Secretary filed an Application for Temporary Reinstatement on behalf of Rodney Payne on August 12, 2010. A hearing was scheduled for September 3, 2010 in Fayetteville, Arkansas. Prior to the hearing, the parties negotiated a settlement of the issues raised by the Application and filed a Settlement Agreement and Joint Motion for Temporary Reinstatement. Mr. Payne signed the Settlement Agreement. Pursuant to the terms of the Settlement Agreement, Respondent agreed to economically reinstate Mr. Payne effective September 6, 2010, until the merits of his discrimination complaint were resolved.

On September 8, 2010, I granted the Joint Motion for Temporary Reinstatement and ordered Respondent to economically reinstate Mr. Payne will full pay and benefits as existed prior to his June 14, 2010 termination, as specified in the Settlement Agreement and Joint

Motion for Temporary Reinstatement.

On November 17, 2010, the Secretary filed a Motion to Dismiss Discrimination Complaint. In her Motion to Dismiss, the Secretary determined that the provisions of section 105(c)(1) had not been violated. The Secretary vacated the civil monetary penalties proposed and requested the dismissal of her discrimination complaint without prejudice to the right of Mr. Payne to file a timely action under section 105(c)(3). On November 17, 2010, Respondent filed a Motion for Dissolution of Temporary Reinstatement Order.

On November 23, 2010, I issued an Order Granting the Secretary's Motion to Dismiss Discrimination Complaint; Order Denying Respondent's Motion to Dissolve Temporary, Economic Reinstatement Order; Order Denying Respondent's Motion For Summary Judgment Without Prejudice; Order Denying Respondent's Motion for an Expedited Hearing or Alternatively for Order Vacating Temporary Economic Reinstatement; and Order Denying Respondent's Objections to Complaint and Motion to Dismiss. I concluded, *inter alia*, that a temporary reinstatement order remains in effect until final Commission order on the merits of the miner's underlying discrimination complaint, even if the Secretary exercises her prosecutorial discretion not to pursue that complaint under section 105(c)(2). I concluded that under section 105(c)(2) and the terms of my September 8, 2010 Order of Temporary Economic Reinstatement, there had been no final order on the complaint. I further concluded that Mr. Payne had 30 days from the Secretary's November 17, 2010 notification of no violation, to file an action on his own behalf before the Commission under section 105(c)(3). Finally, I noted that if Mr. Payne did not initiate a timely action under section 105(c)(3), the "temporary" reinstatement provision was no longer applicable, and Respondent could move for a dissolution of the Order and obtain a final Commission order on Mr. Payne's discrimination complaint.

As set forth in the Respondent's Motion, Mr. Payne has failed to file his own action under section 105(c)(3) within 30 days of the Secretary's November 17, 2010 notification of no violation. The 30-day statutory deadline expired on December 17, 2010. The expiration of the allowed time to file an action under section 105(c)(3) leaves no further avenue for Mr. Payne to pursue his discrimination complaint. Therefore, the temporary reinstatement provision is no longer applicable and my previous Order of Temporary Economic Reinstatement is dissolved under Commission Rule 45(g). This Order shall become a final decision of the Commission 40 days after its issuance, unless a petition for discretionary review is granted. 30 U.S.C. § 823(d)(1).

Accordingly, it is **ORDERED** that Respondent's Motion to Dissolve Temporary Economic Reinstatement Order be **GRANTED**.

It is further **ORDERED** that my September 8, 2010 Order of Temporary Economic Reinstatement is **DISSOLVED**, and that Mr. Payne's economic reinstatement is terminated.

Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 4, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-41
Petitioner	:	A.C. No. 11-02752-129287-05
	:	
	:	Docket No. LAKE 2008-42
	:	A.C. No. 11-02752-129287-06
	:	
	:	Docket No. LAKE 2008-43
v.	:	A.C. No. 11-02752-129287-07
	:	
	:	Docket No. LAKE 2008-81
	:	A.C. No. 11-02752-131664-03
	:	
	:	Docket No. LAKE 2008-145
	:	A.C. No. 11-02752-136300-08
THE AMERICAN COAL COMPANY,	:	
Respondent	:	Mine: Galatia Mine

ORDER DENYING RESPONDENT’S MOTION FOR SUMMARY DECISION

These cases are before me on petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Act”). American Coal Company (“American” or the “Respondent”) filed a motion for summary decision (the “motion”) under Commission Procedural Rule 67. 29 C.F.R. § 2700.67. The Secretary of Labor (“Secretary”) filed a response in opposition to the Respondent’s motion. The parties have also submitted the following joint stipulations:

1. American Coal is 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. § 803(d), at the coal mine at which the citations at issue in this proceeding were issued.
2. Operations of American Coal at the coal mine at which the citations were issued in this proceeding are subject to the jurisdiction of the Mine Act.

3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
4. The individuals whose signatures appear in Block 22 of the citations at issue in this proceeding were acting in their official capacity and as authorized representatives of the Secretary of Labor when the citations were issued.
5. A true copy of each of the citations at issue in this proceeding was served on American Coal as required by the Mine Act.
6. The total proposed penalties for the citations in this proceeding will not affect American Coal's ability to continue in business.
7. The citations contained in Exhibit "A" attached to the Secretary's petitions are authentic copies of the citations that are at issue in this proceeding with all appropriate modifications or abatements, if any.
8. Any motion for summary judgment filed in these proceedings - and any decision by this Court in response to any such motion - shall apply to the following citations: in Docket No. LAKE 2008-41, Citation No. 6669738 and 6667302; in Docket No. LAKE 2008-42, Citation No. 6668301; in Docket No. LAKE 2008-43, Citation Nos. 6668322 and 6668325; in Docket No. LAKE 2008-81, Citation No. 6667919; and in Docket No. LAKE 2008-145, Citation No. 6668169.

Jt. Stip. 1-8.

Section 2700.67 sets forth the grounds for granting summary decision:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

American argues that the subject safeguards are invalid on their face and, therefore, any citations issued for violations of such safeguards must be vacated. Specifically, American contends that the underlying safeguards fail to identify with necessary specificity any hazard and/or the conduct required of the operator to remedy such hazards, and/or they do not address hazards that are not covered by a mandatory standard. The Secretary contends that the underlying safeguards are valid and summary decision is not appropriate.

The material facts are not in dispute. However, for reasons that follow, I find that American is not entitled to summary decision as a matter of law and, accordingly, **DENY** its motion.

I. DISCUSSION

Section 314(b) of the Mine Act grants the Secretary authority to issue “[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials.” 30 U.S.C. § 874(b). A representative of the Secretary, generally an inspector, may issue a notice to provide safeguard only after “determin[ing] that there exists . . . an actual transportation hazard this is not covered by a mandatory standard.” *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (Jan. 1992). The Commission has held that, because a notice to provide safeguard is issued by an inspector and is not subject to the notice and comment procedural protections of section 101, the language of a notice to provide safeguard “must be narrowly construed” and is “bounded by a rule of interpretation more restrained than that accorded promulgated standards.” *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985). In recognition of such, and in order to provide proper due process, a notice to provide safeguard “must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard.” *See id.*; *See also Cyrus Cumberland Resources Corp.*, 19 FMSHRC 1781, 1784-1785 (Nov. 1997).

Based on the foregoing, a notice to provide safeguard is valid where a transportation hazard, and the conduct required to remedy such, are identified with necessary specificity. The parties’ arguments in this case are essentially the same as those raised by the same parties in an earlier proceeding involving the same issue, i.e., the validity of underlying safeguards.¹ In my order denying a motion for summary decision in the earlier proceeding, I stated the following:

I find that the “hazard,” as contemplated by section 314(b) of the Mine Act, refers to conditions/objects in the mine, as opposed to potential risks/outcomes associated with those conditions or objects. I base my below analysis on whether the subject notices to provide safeguard identify with necessary specificity (1) a condition/object that could affect the safe transportation of men and materials and, (2) the conduct required to remedy such. If the notices to provide safeguard are sufficiently specific, then the safeguards are valid and may be properly enforced. However, in the event they are not sufficiently specific, then the safeguard will be deemed invalid and the Respondent will not be subject to citations or orders issued under the safeguard. At

¹ The earlier proceeding involved American Coal Company Docket Nos. LAKE 2007-139, LAKE 2008-79, LAKE 2008-83, LAKE 2008-84, LAKE 2008-122, LAKE 2008-237, LAKE 2008-532, LAKE 2008-536, LAKE 2008-537, LAKE 2008-538, and LAKE-2008-539.

the outset, I note that I will not allow specificity to be argued to the detriment of common sense.

While, on occasion, the Secretary chooses to include language in the safeguard which addresses the potential risks/outcomes associated with hazards, such inclusion is not necessary under Commission case law. The fact is, far too many potential risks exist with any hazard for an Inspector to be expected to identify each and every one. Further, it would be nonsensical and not in the spirit of the Act for a violation of safeguard to be vacated where a hazard exists, causes an injury or accident, but the notice to provide safeguard fails to include the specific scenario involving the hazard that leads to the injury or accident.

American Coal Co., LAKE 2007-139, etc., Unpublished Order at 3 (Sept. 20, 2010). The same analysis is equally applicable here.

a. *Safeguard No. 4056981*

On October 12, 1994, MSHA issued a notice to provide safeguard No. 4056981, which stated as follows:

The MT-11 personnel carrier located on the MMU 004, was not provided with a well maintained audible warning device. It failed to sound an alarm or warning when operated. This is a notice to provide safeguards that all personnel carriers should be equipped with well maintained, functional audible warning devices.

The notice was issued under section 75.1403-6(a)(1) of the Secretary's regulations.

I find that the notice to provide safeguard identifies with necessary specificity the hazard of a non-functioning audible warning device on a personnel carrier. The Respondent points out a number of potential risks that may be created by this hazard. *See* Resp. Mot. 5. Further, I find that the Secretary's description of the conduct required to remedy the hazard is sufficiently specific, namely, that all personnel carriers be equipped with functioning, well maintained audible warning devices. This condition is easily identified and corrected. I find this safeguard to be sufficiently specific. Moreover, Section 75.1403-6(a)(1) of the Secretary's Regulations "set[s] forth specific 'criteria' which guide authorized representatives in requiring safeguards," *see Wolf Run Mining Co.*, 32 FMSHRC ___, slip op. at 2 n. 3, No. WEVA 2008-804 (Oct. 21, 2010), and states that "[e]ach self-propelled personnel carrier should . . . [b]e provided with an audible warning device[.]" This criteria provision, which requires essentially the same thing as

the notice of safeguard at issue, provided notice to the Respondent that such a safeguard could be issued.

For the above reasons, I find that Safeguard No. 4056981 is valid on its face and, therefore, the Secretary may issue citations pursuant to violations of such.

b. Safeguard No. 7582396.

On November 22, 2005, MSHA issued a notice to provide safeguard No. 7582396, which stated as follows:

This is a notice to provide safeguard for all longwall units, the hydraulic manifolds, hoses and CIU shield control boxes shall be mounted in a manner to provide maximum walkway clearance between the pan line cable tray rail and the shield components. In the event that clearances cannot be maintained to provide safe travel in these areas for the miners the conveyor shall be shut off and the electrical isolation switch at the head gate opened before miners travel through the affected area.

The notice was issued under section 75.1403 of the Secretary's regulations.

I find that the notice to provide safeguard identifies with necessary specificity the hazard of hydraulic manifolds, hoses and CIU shield control boxes which could obstruct the walkway between the pan line cable tray rail and the shield components on the longwall. The Respondent points out a number of potential risks that may be created by this hazard. *See Resp. Mot. 6.* Further, I find that the Secretary's description of the conduct required to remedy the hazard is sufficiently specific, namely, that the above mentioned objects be mounted in such a way that provides maximum walkway clearance between the pan line cable tray rail and the shield components. American argues that it is not clear what amount of clearance will be considered adequate for miners to safely travel through the walkway. By not providing a specific amount of clearance, the Secretary has chosen to impose upon herself a more difficult standard of proof for a violation of the safeguard. In the event the Secretary issues a citation for violation of this safeguard, the Secretary will be required to establish that American failed to mount the object in a position that provides the maximum amount of walkway clearance between the pan line cable tray rail and the shield components. Conversely, American will be able to provide evidence that it has mounted the objects in a location that provides maximum walkway clearance in the subject area. Moreover, the notice of safeguard goes on to provide a contingency plan if the objects "cannot be maintained to provide safe travel." By providing the operator with corrective measures which can be taken to address the hazard, as well as a contingency plan which can be utilized if the preferred method of remedying the hazard cannot be used, the Secretary has provided a sufficiently specific description of the conduct required to remedy the hazard.

For the above reasons, I find that Safeguard No. 7582396 is valid on its face and, therefore, the Secretary may issue citations pursuant to violations of such.

c. Safeguard No. 4267616

On January 27, 1995, MSHA issued a notice to provide safeguard No. 4267616, which stated as follows:

The PV55 was not equipped with a sealed-beam headlight, or its equivalent, on each end. The rear lights had a blown fuse. This is a notice to provide safeguards that all personnel carriers shall be equipped with a functional sealed-beam headlight or its equivalent on each end.

The notice was issued under section 75.1403-6(a)(2) of the Secretary's regulations.

I find that the notice to provide safeguard identifies with necessary specificity the hazard of a non-functioning sealed-beam headlight on a personnel carrier. The Respondent points out a number of potential risks that may be created by this hazard. *See* Resp. Mot. 7. Further, I find that the Secretary's description of the conduct required to remedy the hazard is sufficiently specific, namely, that all personnel carriers be equipped with a functional sealed-beam headlight or its equivalent. I find this safeguard to be sufficiently specific. Moreover, Section 75.1403-6(a)(2) of the Secretary's Regulations "set[s] forth specific 'criteria' which guide authorized representatives in requiring safeguards," *see Wolf Run Mining Co.*, 32 FMSHRC ____, slip op. at 2 n. 3, No. WEVA 2008-804 (Oct. 21, 2010), and states that "[e]ach self-propelled personnel carrier should . . . [b]e provided with a sealed-beam headlight, or its equivalent, on each end[.]" This criteria provision, which requires essentially the same thing as the notice of safeguard at issue, provided notice to the Respondent that such a safeguard could be issued.

For the above reasons, I find that Safeguard No. 4267616 is valid on its face and, therefore, the Secretary may issue citations pursuant to violations of such.

d. Safeguard No. 7577893

On January 21, 2004, MSHA issued a notice to provide safeguard No. 7577893, which stated as follows:

A material trailer was observed parked along the 4th North Headgate at crosscut number 24. The cable roof[]bolts, on the trailer, extended outby the rib line approximately four feet into the

travelway. A continuous mining machine was also parked, along the Main West Travelway, at crosscut number 36 with the tail extending outby the rib line approximately three feet. This is a notice to provide safeguards requiring all trailers and mine equipment be parked inby the rib line at all times.

The notice was issued under section 75.1403 of the Secretary's regulations. On May, 18, 2004, MSHA modified the notice to provide safeguard by adding the following language to the end of the "Condition or Practice" set forth above: "If not possible, then a readily visible warning device will be posted on each side to alert oncoming traffic."

I find that the notice to provide safeguard identifies with necessary specificity the hazard of mine equipment and trailers parked such that they extend outby the rib line. The Respondent points out a number of potential risks that may be created by this hazard. *See Resp. Mot. 8.* Further, I find that the Secretary's description of the conduct required to remedy the hazard is sufficiently specific, namely, that all trailers and mine equipment be parked inby the rib line at all times. Moreover, the modification to the notice of safeguard added a contingency plan if parking the trailers and equipment inby the rib line is not possible. By providing the operator with corrective measures which can be taken to address the hazard, as well as a contingency plan which can be utilized if the preferred method of remedying the hazard cannot be used, the Secretary has certainly provided a sufficiently specific description of the conduct required to remedy the hazard.

For the above reasons, I find that Safeguard No. 7577893 is valid on its face and, therefore, the Secretary may issue citations pursuant to violations of such.²

e. Safeguard No. 7581083

On June 3, 2005, MSHA issued a notice to provide safeguard No. 7581083, which stated as follows:

A suitable crossing facility was not provided for the energized 6th North Conveyor Belt in the belt drive area, where miners are routinely crossing under the energized belt conveyor. A bridge has been built under the belt in this area for miners to cross under the moving belt. This is a Notice to Provide Safeguards requiring where persons cross moving belt conveyors that a suitable crossing facility be provided.

The notice was issued under section 75.1403-5(j) of the Secretary's regulations.

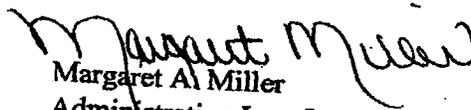
² Recently, in *American Coal Co., LAKE 2007-171, etc.*, Unpublished Order at 17-18 (Dec. 17, 2010), Judge Manning determined that this same notice of safeguard was valid.

I find that the notice to provide safeguard identifies with necessary specificity the hazard of miners routinely crossing under an energized belt conveyor. The Respondent points out a number of potential risks that may be created by this hazard. *See* Resp. Mot. 8-9. Further, I find that the Secretary's description of the conduct required to remedy the hazard is sufficiently specific, namely, that suitable crossing facilities be provided at places where persons cross moving belt conveyors. American argues that the language of the safeguard is too subjective to provide meaningful notice of what is required to comply with the safeguard. I agree with Judge Manning's statement addressing the validity of the same safeguard that "[c]onveyor crossing facilities are frequently built in underground mines so American Coal will not have to start from scratch or take a wild guess as to what MSHA will find acceptable." *American Coal Co.*, LAKE 2007-171, etc., Unpublished Order at 20 (Dec. 17, 2010). Moreover, Section 75.1403-5(j) of the Secretary's Regulations "set[s] forth specific 'criteria' which guide authorized representatives in requiring safeguards," *see Wolf Run Mining Co.*, 32 FMSHRC ___, slip op. at 2 n. 3, No. WEVA 2008-804 (Oct. 21, 2010), and states that "[p]ersons should not cross moving belt conveyors, except where suitable crossing facilities are provided." This criteria provision, which requires essentially the same thing as the notice of safeguard at issue, provided notice to the Respondent that such a safeguard could be issued.

For the above reasons, I find that Safeguard No. 7581083 is valid on its face and, therefore, the Secretary may issue citations pursuant to violations of such.

II. ORDER

Based on my findings, the Respondent is not entitled to summary decision as a matter of law and, accordingly, I **DENY** its motion for summary decision.


Margaret Al Miller
Administrative Law Judge

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February 28, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
UNITED STATES DEPARTMENT	:	
OF LABOR (MSHA),	:	Docket No. PENN 2009-564
	:	A.C. No. 36-05466-186704
Petitioner	:	
v.	:	
	:	Mine: Emerald Mine No. 1
EMERALD COAL CO.,	:	
Respondent	:	

DECISION DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a motion to approve settlement. The originally assessed amount was \$208,685.00 and the proposed settlement is for \$30,773.00. The Secretary also requests that each of the Orders be modified. For the reasons which follow, the Motion is DENIED.

The Motion seeks to have the six orders involved in this docket reduced by 78% for two of them, 76% for two others, 92% for one and 97% for another. This results in an overall reduction of more than 85% from the original assessments. To support this dramatic reduction the Secretary's Motion provides a breathtaking economy of words. As one example, for a section 104 (d)(2) Order, number 8006616, asserting an inadequate preshift examination, the rationale employs a mere 33 words¹ for its supporting rationale to bring a proposed penalty of \$35,543.00 down by 78% to \$7,774.00.

¹Removing necessary but unenlightening articles, conjunctions and a recitation about the nature of the violation, the number of words explaining the proposed reduction drops to 20.

Of course, it is not simply a matter of tallying words. The few words offered to support the motion are quite uninformative.² The rationale, *in its entirety*, provides: “Modify to reasonably likely, change number of persons affected from 6 to 1. This is an inadequate preshift violation, and the underlying conditions were not as likely as originally assessed because only the examiner would be affected.” Motion at 2.

There is much to comment about the justification presented for this 78% reduction over the initial proposal. First, it is a non sequitur to state that the underlying *conditions* were not the same because only the examiner would be affected. Second, the Order relates that hazards described in another order and in two other citations³ were not recorded in the preshift exam and that such omissions exposed miners entering the section to unknown hazards. The issuing inspector deemed it to be an unwarrantable failure. Nowhere does the motion address the impact of those other hazards. Nor does the Secretary’s motion deal at all with the inspector’s notation that the standard, that is, the inadequate preshift, has been cited 4 times at the mine in the past 2 years. Then too, much of the pithy rationale, offers in fact no rationale but instead consists of unsupported assertions, such as “[m]odify to reasonably likely,” and “change number of persons affected from 6 to 1.” Those assertions do not illuminate any underlying basis for support of those changes and therefore the Court is uninformed as to the reasoning, as opposed to conclusions, to support them.

As mentioned, the Order described above, number 8006616, referenced two other citations which are not included in this docket and the motion provides no information about them to the Court. But one order is included in this docket and it is appropriate to examine that included order, number 8006611, and the Secretary’s offering in this motion to support the 92 % reduction it seeks for it. That order pertained to coal accumulations running some 702 feet. The order also recorded accumulation depths running from 1 to 7 inches and some 2 to 4 feet in width. The inspector marked it as an unwarrantable failure, significant and substantial, the

² Uninformative, and despite being as short as it is, wrong too. For example, in its Motion and in its draft order the Secretary lists the last of the six violations as Number 6607448. The problem with that is that there is no such number among the citation/order numbers for this docket. Instead the correct number is 8007448. This is important because, aside from being inaccurate, the violation was originally issued as a section 104(a) citation and then modified to a 104(d)(2).

³ The two citations, identified by number, are not part of this docket. The Secretary does not indicate what those citations involved, whether it checked on their nature, nor whether it consulted with the issuing inspector about the Respondent’s contentions regarding this Order or, for that matter, any of the six citations/orders involved in this docket. It turns out that, at least the allegations for the one order which is part of this docket and which was referenced in this alleged violation, involves the very serious matter of considerable accumulations of coal and coal dust for some 702 feet in an entry that serves as an alternate escapeway. That latter order was also deemed by the issuing inspector as unwarrantable.

injury likely to be fatal if it occurred, and the likelihood as “highly likely.” The issuing inspector considered it important enough to note that the mine had been cited 79 times for violation of this standard in the past two years. The Court considers this to be of importance as well, and at least deserving of comment in any motion. Yet, the Secretary’s motion is very uninformative, stating only “Modify to unlikely (still a 104(d)(2)), change number of persons affected from 6 to 1. Upon further review, an ignition of this material was unlikely under the circumstances.” Yet, the order states that the accumulations were dry to touch, black in color, and of the depths previously described above. The inspector also noted that battery scoops travel the entry every shift.

Other aspects of the motion are equally troubling, beyond the lack of supporting rationale for the Court to be able to independently assess the proposed, great, reductions. For example, both Orders 8006616 and 8006617, deal with very different topics, the former with an inadequate preshift, while the latter deals with an unsafe conveyor belt in a different longwall section. The unsafe conveyor in 8006617, it was alleged, had abraded the belt structure and was hot with *visible smoke* emanating from the belt, which belt was in operation. Yet, somehow, the motion seeks the exact proposed reduced penalty for both orders, at \$7,774.00.

The Court will not go into further detail to describe every aspect of the inadequacies of the motion. Suffice it to say that each putative “rationale” suffers from the same type of deficiencies noted above and deprives the Court of adequate information to independently evaluate the merit of the proposed reductions, as opposed to simply accepting conclusions upon faith. Without such information, the Court is unable to perform its job.

Also, there is no averment that the Secretary consulted with the issuing inspector upon receiving the contentions made by the Respondent mine. If the Secretary fails to consult with the inspectors who are diligently performing their safety and health inspection responsibilities in the Nation’s mines, it is obvious this will have a demoralizing effect upon those front-line enforcement personnel. Accordingly, the Court considers it a fundamental averment for the Secretary to at least include a statement that there has been such consultation, so that the Court can be assured that the Secretary’s averments are grounded in fact. Finally, the Court has expressed before that settlements should reflect proportionality. That is, as the amount of a given reduction grows from the initial assessment, generally the amount of information to justify the reduction should be proportionally greater as well. Restated, a proposed reduction of 50% will generally require more information to support it than a reduction proposing a 10% reduction.

Accordingly, for the reasons stated, the Motion is DENIED. The Secretary is directed to either resubmit an adequately supported motion, and to indicate whether it has consulted with the issuing inspector as to assertions made by the Respondent which run contrary to the inspector's citation or order. Alternatively, the Secretary, upon reevaluation of its position, may elect to proceed to hearing on such matters for which a settlement justification, as currently proposed, is no longer deemed fitting.

William B. Moran

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