

November 2011

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Review was granted in the following cases during the month of November 2011:

Secretary of Labor, MSHA v. Connolly-Pacific Company., Docket No. WEST 2011-1064-RM, et al. (Judge Miller, September 23, 2011)

Secretary of Labor, MSHA v. Mach Mining, LLC., Docket No. LAKE 2009-427. (Judge Weisberger, October 11, 2011)

Secretary of Labor, MSHA v. McCoy Elkhorn Coal Corporation, and Jason Robinson, employed by McCoy Elkhorn Coal Corp., Docket No. KENT 2008-986, et al. (Judge Feldman, October 6, 2011)

Mark Gray v. North Fork Coal Corporation, Docket No. KENT 2010-430-D. (Judge Rae, October 20, 2011)

Review was denied in the following cases during the month of November 2011:

USA Cleaning Service & Building Maintenance v. Secretary of Labor, MSHA, Docket No. EAJ 2011-01. (Judge McCarthy, September 23, 2011)

Secretary of Labor, MSHA v. Cumberland Coal Resources, LP, Docket No. PENN 2008-189. (Judge Weisberger, October 25, 2011)

John Gary Jarvis v. Highland Mining Company, LLC., Docket No. KENT 2011-64-D. (Judge Moran, October 18, 2011)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 10, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. SE 2010-350-R
	:	
OAK GROVE RESOURCES, LLC	:	

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

DECISION

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). Oak Grove Resources, LLC (“Oak Grove”) was issued an order under section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), after a Mine Safety and Health Administration (“MSHA”) inspector observed an alleged violation of 30 C.F.R. § 75.334(d).¹

At an expedited hearing before Administrative Law Judge Michael Zielinski, Oak Grove contested both MSHA’s issuance of Order No. 6698830 and its refusal to terminate the order. The judge ruled that the operator violated the safety standard, that its conduct amounted to an unwarrantable failure to comply, and that the Secretary’s refusal to terminate the order by

¹ Section 75.334(d) provides:

If the bleeder system used does not continuously dilute and move methane-air mixtures and other gases, dusts, and fumes away from worked-out areas into a return air course or to the surface of the mine, or it cannot be determined by examinations or evaluations under § 75.364 that the bleeder system is working effectively, the worked-out area shall be sealed.

30 C.F.R. § 75.334(d).

approving Oak Grove's proposed amendments to its ventilation plan was not arbitrary and capricious. 32 FMSHRC 169, 184 (Feb. 2010) (ALJ). Oak Grove petitioned for review of the judge's decision, arguing that the order in question was duplicative of a previously issued citation and that the unwarrantable failure finding should be overturned. We granted the petition for discretionary review.

For the reasons that follow, we conclude that Oak Grove did not preserve the duplication issue for Commission review. We also conclude that the judge considered all the relevant factors and evidence in his unwarrantable failure analysis and that his findings are supported by substantial evidence. Therefore, we affirm the decision of the judge.

I.

Factual and Procedural Background

Oak Grove operates an underground coal mine in Jefferson County, Alabama. *Id.* at 169. The east section of the mine, where the violation occurred, consists of more than a dozen parallel longwall panels, each of which runs from east to west. *Id.* at 169-70; Gov't Ex. 35. Most of those panels are "mined out." 32 FMSHRC at 169. At the time Oak Grove received Order No. 6698830, it was attempting to mine the northern-most panel in this series. *Id.* This panel was 750 feet wide and is designated as the "11 East LW 38" ("11 East"). *Id.*; Tr. II 8. Mining operations had previously begun on the east end of the 11 East panel, and had proceeded west for approximately 6,000 feet. 32 FMSHRC at 169-70.

Mined-out areas, also known as the "gob," generate methane and require ventilation. *Id.* at 170. The gob in the east section of the mine is ventilated by the Main East Bleeder System. *Id.* Air is circulated by the No. 6 exhaust fan, which is situated at the surface of the mine, atop a shaft in the northeast corner of the series of panels. Gov't Ex. 35. The fan ventilates the gob (mined out panels) by pulling air through the bleeder entries that run along the eastern side of the old longwall panels. 32 FMSHRC at 170. The mine is subject to spot inspections pursuant to section 103(i) of the Mine Act, 30 U.S.C. § 813(i), because it liberates over one million cubic feet of methane every 24 hours. Tr. I 30. During 2009 the mine had five incidents of methane ignitions (although none were along the longwall). Gov't Exs. 13-17.

The accumulation of water in the bleeder entries was a common occurrence at the mine. 32 FMSHRC at 170. Oak Grove attempted to control the accumulation of water by installing air-powered water pumps in the entries. *Id.* Problems began with these pumps around the middle of December 2009.² *Id.* By the end of December, the low spots in the bleeder entries

² Oak Grove was not able to access the area for three or four days as a result of an order issued by MSHA. The order is unrelated to this proceeding, as it was issued after an inspector discovered allegedly dangerous atmosphere behind a seal several miles away from the 11 East panel. 32 FMSHRC at 170-71 n.1.

held significant water accumulations, particularly entries in the southeast corner of the 11 East panel as well as the northeast corner of the old adjacent 10 East panel. Gov't Ex. 35.

On December 30, 2009, MSHA inspector Derrick Busby inspected the mine. With respect to the Main East bleeder system he found that "[t]he area from [the]10-East [panel] to the No. 6 fan was recorded as being impassable due to high water levels." OG Ex. 1. The inspector determined that the most recent time the bleeder was examined in its entirety was December 22, 2009. OG Ex. 1. As a result of his observations, the inspector issued Citation No. 6698645 pursuant to section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 75.354(a)(2)(iii). Under that standard, a certified person is required, every seven days, to examine the bleeders, which includes, in part, traveling through at least one entry of each set of the bleeders and taking measurements at specific measuring point locations.³ The citation required that the violation be abated on or before December 31, 2009. Oak Grove was not actively mining the 11 East longwall panel at the time.

Oak Grove contested the citation, as well as the associated civil penalty, although not as part of the current proceeding. Instead, the citation and its assessed penalty were included in the civil penalty case docketed as No. SE 2010-445.⁴ The citation was introduced as an exhibit at the hearing for the instant proceeding. OG Ex. 1.

On January 4 and 5, 2010, Oak Grove mined the 11 East panel and continued to mine the panel on January 6. 32 FMSHRC at 179; Gov't Ex. 10; Oral Arg. Tr. 60.

³ Section 75.364(a)(2)(iii) provides:

At least every 7 days, a certified person shall evaluate the effectiveness of bleeder systems required by § 75.334 as follows:

* * *

(iii) At least one entry of each set of bleeder entries used as part of a bleeder system under § 75.334 shall be traveled in its entirety. Measurements of methane and oxygen concentrations and air quantities and a test to determine if the air is moving in the proper direction shall be made at the measurement point locations specified in the mine ventilation plan to determine the effectiveness of the bleeder system.

30 C.F.R. § 75.364(a)(2)(iii).

⁴ On March 17, 2011, the Secretary filed a motion to approve settlement of No. SE 2010-445. Included in the motion is a representation that Oak Grove has agreed to pay the assessed civil penalty of \$108.

On January 5, 2010, MSHA District 11 manager Richard Gates and assistant district manager Joseph O'Donnell met with Oak Grove mine managers to discuss ventilation issues at the mine. Tr. II 16-17, III 92. At this meeting, the Oak Grove managers requested an extension of the deadline for abatement imposed by Citation No. 6698645. Tr. III 92. They explained that the water accumulations, as well as a roof fall, were preventing Oak Grove from completely examining the bleeders. Tr. III 92-93.⁵

That afternoon Gates and O'Donnell also met with representatives of the United Mine Workers of America ("UMWA"), the union representing miners at Oak Grove. Tr. II 17. The representatives expressed concern about the conditions in the East Bleeder, especially because miners were traveling through significant water accumulations in the bleeder entries. Tr. II 18. At the conclusion of the meeting, O'Donnell called Jacky Schubert, the supervisor at MSHA's Bessemer, Alabama field office, and informed him of the miners' safety complaints. Tr. II 18-19.

According to O'Donnell, Shubert then called Oak Grove management and informed them that "[i]f [the 11 East Bleeder system] is flooded and roofed and blocked, you do not operate the long wall." 32 FMSHRC at 171 n.4; Tr. II 39-40, III 93-94. O'Donnell and Gates subsequently met and discussed whether MSHA had authority to order suspension of mining operations based on information obtained exclusively from miners and in the absence of an official enforcement action. Tr. II 42-43. After the meeting, O'Donnell called Oak Grove management and advised them to "forget" the earlier call, and that MSHA would see them in the morning. 32 FMSHRC at 171 n.4; Tr. II 43. When an Oak Grove manager advised that it would be running the longwall, O'Donnell told him, "[m]ake sure you're up on the requirements of the law." Tr. II 43. Oak Grove proceeded with mining the 11 East longwall panel subsequent to its discussions with MSHA.

Meanwhile, on January 5, MSHA inspector Ed Boylen had commenced a regular inspection of the mine. 32 FMSHRC at 171. Boylen initiated a spot inspection of the longwall, pursuant to section 103(i), after becoming aware of the potentially hazardous conditions in the 11 East headgate and in the bleeder entries. *Id.*; Tr. I 30, 34. During his travel to the longwall, he encountered water accumulations, which prevented him from traveling further inby. Tr. I 34. Boylen returned to the surface and examined the No. 6 fan charts, which document the fan's resistance measurements. 32 FMSHRC at 171. He discovered that the pressure differential readings at the fan chart had increased from 15 to 31, indicating significant restrictions to the air flow. Gov't Ex. 2. Boylen concluded that the accumulated water in the bleeder entries was restricting the flow of air. 32 FMSHRC at 171; Tr. I 63. Boylen told Shubert, his supervisor, that he believed that Oak Grove was actively mining in the east section of the mine, but he was unable to travel to and examine the longwall because of the water in the bleeder entries. Tr. I 36, 119.

⁵ The December 31, 2009 abatement date had previously been extended to January 14, 2010, and on that date was again extended to January 29, 2010. OG Ex. 1.

On the next morning of January 6th, Boylen returned to the mine accompanied by Shubert. Tr. II 44-45. They began their inspection by examining the mine's pre-shift examination books. Tr. I 37. They discovered that the December 29, 2009 pre-shift report described several locations as impassable either due to a roof fall or flooding, as well as a "down" pump near measuring point location ("MPL") 480. Gov't Ex. 9, at 22. Additionally, they discovered that 11 MPLs had not been examined on December 29, 2009.⁶

Oak Grove managers acknowledged that 11 MPLs were not visited during the weekly examinations. 32 FMSHRC at 171-72. The managers also acknowledged that these areas could not be accessed due to the roof fall on the headgate side of the 11 East panel and the water accumulations on the east side of the bleeders. Tr. I 40. The last time that the bleeders had been walked and examined in their entirety was apparently December 14, 2009. 32 FMSHRC at 171; Tr. I 37; Gov't Ex. 9, at 22.

Boylen and Shubert and several Oak Grove mine officials traveled underground to inspect the longwall. Tr. I 48. They entered the mine at 9:35 a.m., encountered accumulations of water at multiple locations, and ultimately reached chest-deep water near MPL 476 at 2:30 p.m. 32 FMSHRC at 172; Tr. I 44, 56. The water extended to the roof entry inby MPL 483. 32 FMSHRC at 172. Because of the water accumulations, they decided not to proceed any further. *Id.*

As a result of his observations, inspector Boylen issued Order No. 6698830 pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), for an alleged violation of section 75.334(d). In the order, he described the conditions as follows:

The mine operator is not maintaining the Main East Bleeder system. There [are] eleven MPL evaluation stations that [are] not being examined by certified officials. Water was allowed to roof inby MPL 483[,] thus the bleeder [] system was not inspected to determine its effectiveness in diluting and moving methane-air mixtures and other gases. This bleeder area has existed for at least 10 shifts and the longwall had continued operating under normal production. . . . A 75.364(a)(2)(iii) citation was written on 12/30/2009 [because a bleeder examination] could not be made in it[s] entirety. The mine operator has engaged in aggravated conduct, by the bleeder not

⁶ On December 29, 2009, Jimmy Thomas, an hourly mine examiner, examined the bleeder entries, but did not take readings at every designated location. Tr. I 98; Gov't Ex. 9, at 22. The "Old Works-Fireboss Rounds" report, which was included as an exhibit, shows that MPLs 569, 557, 556, 555, 554, 553, 552, 567, and 581 were not marked as examined. Gov't Ex. 9, at 22. Additionally, the examiner indicated that MPLs 550 and 551 were "examined to fall, impassable @ fall." *Id.*

being inspected, constituting more than ordinary negligence by allowing the bleeder to remain unexamined, while the longwall was in normal production mode. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Ex. 2. Boylen also issued Order No. 6698829 pursuant to section 104(d)(2) for an alleged failure to follow the approved ventilation plan in violation of section 75.370(a)(1).

On January 6, 2010, Oak Grove filed a Notice of Contest for Order No. 6698830. On January 11, Oak Grove filed a motion for an expedited hearing and sought to consolidate the cases involving that order and Order No. 6698829. On January 15, Order No. 6698829 was terminated after the water in the cited areas had been "pumped down." 32 FMSHRC at 173 n.7. These cases were set for hearing on January 26, in Birmingham, Alabama, before Judge Zielinski.⁷ At the hearing, Oak Grove decided to challenge only Order No. 6698830 on an expedited basis. Tr. I 7. Therefore, Order No. 6698829 was not at issue at the hearing.

On the third and final day of the hearing, counsel for Oak Grove requested oral argument and moved for a bench decision on the record. Tr. III 201. The judge granted the motions and heard the respective arguments of the parties. 32 FMSHRC at 184. Subsequently, he affirmed the order and found that it was the result of an unwarrantable failure to comply with the safety standard. Tr. III 229. Additionally, the judge found that MSHA's decision not to approve any of Oak Grove's proposed alternative methods of examining the bleeder system was not arbitrary or capricious. 32 FMSHRC at 184; Tr. III 232-35.

On February 12, 2010, the judge issued a written decision which included a more thorough analysis of the issues. He wrote that

"There are two primary issues, resolution of either of which in Oak Grove's favor, would remove the bar to production. The first is the validity of the Order. If the Order is found to be valid, the second issue is the reasonableness of the conditions set for abatement of the violation, specifically, the validity of MSHA's disapprovals of Oak Grove's proposed amendments to its ventilation plan, that would have established an alternative method for evaluation of the bleeder system"

32 FMSHRC at 177.

⁷ From the time of the contest to the date of the expedited hearing, Oak Grove sought to have the order terminated by proposing amendments to its ventilation plan pursuant to 30 C.F.R. § 75.364(a)(2)(iv). In the proposals Oak Grove sought to establish MPLs in the bleeders as alternatives to the MPLs which could not be reached. The proposals and their rejection by MSHA were the subjects of considerable dispute at the hearing. 32 FMSHRC at 174-76.

The judge determined that the cited standard had been violated because the operator failed to determine if the bleeder system was effective, by ascertaining measurements at the required MPLs, for a period of about three weeks. *Id.* The operator also failed to seal the worked-out area, which was an alternative means of compliance with the cited regulation. *Id.* The judge concluded that “[t]he violation was extensive, open, obvious, and was known to the operator” as high level officials had signed off on reports of incomplete examinations. *Id.* at 177-78. He further stated that, despite the conditions in the bleeder, Oak Grove resumed production on the longwall. *Id.* at 179. The judge concluded “that Order No. 6698830, which was issued as an S&S violation pursuant to section 104(d)(2) of the Act based upon Oak Grove’s unwarrantable failure to comply with the mandatory standard, was valid in all respects.”⁸ *Id.* Accordingly, he dismissed Oak Grove’s contest of the order.

II.

Disposition

On review, Oak Grove contends that the judge erred in sustaining Order No. 6698830, which alleged a violation of section 75.334(d), while the citation for an alleged violation of section 75.364(a)(2)(iii) was already pending. In other words, Oak Grove contends that the two enforcement actions are impermissibly duplicative. In addition, Oak Grove contends that the judge erred in finding that Order No. 6698830 was attributable to its unwarrantable failure to comply with the standard. Oak Grove argues that the judge’s findings in this regard are not supported by substantial evidence and that the judge erroneously determined that Oak Grove had notice that it should not have been operating the longwall at the time the order was issued. Oak Grove does not challenge the judge’s determination that it violated section 75.334(d). Nor did the operator petition for review of the judge’s factual or legal findings regarding its efforts to abate the violation.

The Secretary asserts that Oak Grove failed to present to the judge its theory that the enforcement actions are duplicative, and therefore, according to the Mine Act, this issue may not be considered by the Commission on appeal. The Secretary further contends that substantial evidence supports the judge’s finding that Oak Grove’s violation of section 75.334(d) resulted from its unwarrantable failure to comply with the standard.

A. Whether Oak Grove Preserved the Duplication Issue for Commission Review

Section 113(d)(2)(A)(iii) of the Mine Act provides that “[e]xcept for good cause shown, no assignment of error by any party shall rely on any questions of fact or law upon which

⁸ Although not challenged by Oak Grove here, the judge also found that MSHA was not arbitrary and capricious in its refusal to approve Oak Grove’s proposed amendments to its ventilation plan and terminate the Order. 32 FMSHRC at 184.

the administrative law judge had not been afforded an opportunity to pass.” 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. 2700.70(d). The explicit statutory limitation on the scope of Commission review set forth in section 113(d)(2)(A)(iii) may be raised by an objecting party or, *sua sponte*, by the Commission itself, at any appropriate time during the Commission review process. *E.g., Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320 (Aug. 1992). In *Beech Fork*, the Commission ruled that the judge “had not been afforded an opportunity to pass” on the legal theory raised on review by petitioner. *Id.* at 1320. We stated that the petitioner’s “actions conflict with this basic principle, that parties in Mine Act cases must first present their evidence and advance their legal theories before the judge, and not for the first time on appeal.” *Id.* at 1321 (citation omitted).

At the same time, the Commission has stated that the limitation on review in section 113(d)(2)(A)(iii) should not be viewed as a “procedural straitjacket.” *Id.* at 1320. The Commission has recognized that a matter urged on review may have been implicitly raised below or is so intertwined with something tried before the judge that it may properly be considered on appeal. *See, e.g., id.* at 1321; *San Juan Coal Co.*, 29 FMSHRC 125, 130 (Mar. 2007), *Freeman United Coal Mining Co.*, 6 FMSHRC 1577, 1580 (July 1984). An issue that is “sufficiently related” to one raised before the judge satisfies these criteria. *BHP Copper, Inc.*, 21 FMSHRC 758, 762 (July 1999) (citing *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10 n.7 (Jan. 1994)). If none of these criteria are met, an issue may be heard on appeal only upon a showing of “good cause.” 30 U.S.C. § 823(d)(2)(a)(iii). The Commission’s practice has been to resolve these “opportunity to pass” questions on a case-by-case basis. *See, e.g., Ozark-Mahoning Co.*, 12 FMSHRC 376, 379 (Mar. 1990).

The record reveals that Oak Grove did not present its theory that the enforcement actions were impermissibly duplicative in any of the pleadings filed with the judge. Oak Grove filed a Notice of Contest on January 8, 2010, seeking to vacate the order, but did not specifically state that the order should be vacated because it was duplicative of the citation. Instead, Oak Grove contended, in part, that no violation of the cited standard existed. On January 8, it also filed a motion to expedite and consolidate Docket Nos. SE 2010-349-R⁹ and SE 2010-350-R. Oak Grove did not, however, seek to consolidate Docket No. SE 2010-445, which contains the citation allegedly duplicated by Order No. 6698830.

Moreover, Oak Grove failed to raise the duplication theory at the hearing. On the final day of the hearing, counsel for Oak Grove requested permission to present a closing argument (instead of filing briefs) after which the judge would issue a bench decision. Tr. III 192. In her closing argument, counsel stated, “I think that the meat of the matter is whether we have presented evidence that MSHA was arbitrary and capricious and whether this Court is comfortable with the alternatives that have been proposed.” Tr. III 204. Conspicuously absent from her argument was the term “duplicative” or any reference to a duplicative citation. Tr. III

⁹ Docket No. SE 2010-349-R contains section 104(d)(2) Order No. 6698829, which alleges a violation of 30 C.F.R. § 75.370(a)(1) for a failure to follow the ventilation plan submitted by the operator and approved by the MSHA District Office.

212-18. While she did refer to Citation No. 6698645, it was only to argue that its issuance on December 30, 2009, “perpetuated a belief on the part of [the company] that was what was at issue.” Tr. III 213.

Counsel for the Secretary interpreted this statement as a suggestion that Oak Grove was arguing that MSHA was “estopped” from issuing an additional order while the operator was attempting to abate Citation No. 6698645. Tr. III 220. Counsel for Oak Grove then clarified that she was “not arguing that the Government [is] [e]stopped. I’m arguing that [] certainly led to the Company believing one thing when it was another. That goes to the Unwarrantable Failure.” Tr. III. 220-21. Thus, it appears that counsel for Oak Grove informed the judge that its position was that the citation was only relevant to the issue of unwarrantable failure.

The judge gave no indication at the hearing that he was aware of Oak Grove’s theory that the order and the citation were duplicative. After listening to each of the counsel’s opening arguments, he did state that in summary it appeared that the order involved basically the same issues as those raised in the citation. Tr. I 16. Counsel for Oak Grove, however, did not address the judge’s statement and did not raise the issue of whether the order and the citation were duplicative. Oral Arg. Tr. 50-52.

This is not a situation where Oak Grove’s duplication theory was implicitly raised or was “so intertwined with something tried before the judge that it may properly be considered on appeal.” See *Beech Fork*, 14 FMSHRC at 1321; *San Juan Coal Co.*, 29 FMSHRC at 130. Before the judge, Oak Grove presented evidence and elicited testimony regarding issues and legal theories that are entirely separate from the duplication theory that it attempts to raise before the Commission. Now, after failing to persuade the judge that MSHA’s refusal to accept its alternative ventilation plan to abate the order was an arbitrary or capricious decision, Oak Grove impermissibly seeks to shift legal theories on appeal.

Finally, Oak Grove requests that the Commission find that “good cause” exists to hear the duplication issue on appeal. However, we conclude that Oak Grove has failed to demonstrate “good cause.” The duplication issue is not properly before the Commission because of the litigation strategy pursued by the operator, not for any other reason.

In summary, we conclude that Oak Grove failed to present its theory that the two enforcement actions are duplicative for the judge’s consideration and therefore has not preserved it for our review.

B. Whether the Judge Correctly Concluded that the Violation Resulted from an Unwarrantable Failure to Comply

The designation of a violation as resulting from “an unwarrantable failure to comply” with a mandatory standard is authorized by section 104(d) of the Act and reflects 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); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test).

The Commission has recognized that whether conduct is “aggravated” in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *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). 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*, 22 FMSHRC at 353.

1. Extensiveness, Length of Time, and Degree of Danger

Oak Grove does not dispute the judge’s findings regarding three of the unwarrantable failure factors that judges are to consider: (1) the extent of the violation; (2) the length of time the violation existed; and (3) the degree of danger that the violation posed. Moreover, our review of the record indicates these findings are supported by substantial evidence.¹⁰

In terms of the extensiveness of the violation, 11 of the MPLs were not being examined by the operator. 32 FMSHRC at 177. Furthermore, a considerable portion of the southern bleeder entries, as well as the critical portions of the headgate entries, were inaccessible. *Id.* at 179.

Regarding the length of time, the judge found that Oak Grove “knew that no [complete] weekly examination of the bleeder entries had been done since December 14, and that conditions had deteriorated since that time.” *Id.* at 177, 179.

¹⁰ When reviewing the judge’s factual findings, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. See 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (1989) (quoting *Consol. Edison Co. v. NLRB*, 302 U.S. 197, 229 (1938)). The substantial evidence test may be met by reasonable inferences drawn from indirect evidence as long as there is “a logical and rationale connection between the evidentiary facts and the ultimate fact inferred.” *Jim Walter Res., Inc.*, 28 FMSHRC 983, 989 (Dec. 2006); *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984).

The judge determined that the gravity of the condition was “high,” because the operation of a longwall with an ineffective bleeder system posed a “serious risk of serious injuries to miners.” *Id.* at 178. The judge noted that this mine liberates a substantial amount of methane and therefore that methane may have been accumulating in the gob. *Id.* The judge believed that if the methane were pushed to the working face, where there are numerous ignition sources, an explosion could have occurred. *Id.* The judge also noted that Oak Grove had in fact resumed production on the longwall from January 4 through January 6. *Id.* at 179. During oral argument before the judge, Oak Grove did not dispute that the violative condition was “significant and substantial.” Tr. III 212-18, 220-21.

2. Knowledge of the Violation and Notice of Need for Greater Compliance

The judge found that the “violation was extensive, open, obvious, and was known by the operator.” 32 FMSHRC at 177. He noted that Oak Grove management informed the inspectors, on January 6, that roof falls and water accumulations were preventing a complete examination of the MPLs. *Id.* at 178. The judge concluded that Oak Grove “knew that no weekly examination of the bleeder entries had been done since December 14, and that the conditions had deteriorated since that time, such that a considerable portion of the south bleeder entries, as well as critical portions of the 11-East headgate entries, were inaccessible. Yet it resumed production of the longwall.” *Id.* at 179.

The judge concluded that the obvious conditions in the bleeder system, considered with the incomplete pre-shift examinations signed by mine management and the severe restriction in airflow, should have put the operator on notice that it was not in compliance with the requirements of section 75.334(d). *Id.* at 177-79. Specifically, the judge found that high level Oak Grove officials had signed off on reports of incomplete examinations recorded in the weekly examination book and had candidly informed the inspector that the MPLs were not being examined. *Id.* at 177-78. Additionally, the judge noted that “[r]esistance to air flow through the bleeder system had increased by 50% over the past three weeks, indicating significant changes in the bleeder system.” *Id.* at 178. These findings by the judge clearly establish that Oak Grove officials were aware of serious compliance problems.

The judge did conclude that the issuance of the December 30 citation and the subsequent extensions of the abatement period were “somewhat of a mixed signal from MSHA.” *Id.* at 179. However, on January 5, Oak Grove was warned by MSHA that it should not be operating the longwall if it could not establish the effectiveness of its bleeder system. *Id.* at 171 n.4; Tr. II 39-40; Tr. III 93-94. Moreover, Oak Grove’s awareness of the serious problems it faced in the bleeder system otherwise put it on notice that it was not in compliance with the requirements of section 75.334(d). Consequently, the circumstances surrounding the citation do not detract from the judge’s finding of an unwarrantable failure.

3. Abatement

The judge concluded that Oak Grove had made no apparent effort to propose an alternative method of evaluating the bleeder (prior to the issuance of the order), despite resuming production. 32 FMSHRC at 177.

Oak Grove does not dispute the judge's finding that it resumed production before proposing an alternative method of evaluation. Instead, the operator alleges that the judge failed "to consider the measures Oak Grove undertook to remedy the impassability of the bleeder system" as an effort to abate the violative condition. OG Br. at 23-24. For instance, the operator alleges that it was able to activate two extra submersible pumps underground, increasing the pumping capacity in the bleeder entries. *Id.* at 24 (Larry Bennett, chief engineer for Oak Grove, testified that on "[t]he evening of January 6th, we powered up two 13 horsepower submersible pumps underground." Tr. II 308, III 8 (emphasis added)).

The Commission has held that "[t]he focus on the operator's abatement efforts is on those efforts made *prior to* the citation or order." *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009) (citations omitted)(emphasis added). The order in question was issued on January 6 at 2:00 p.m. Gov't Ex. 1. Bennett clearly testified that the pumps were not activated until that evening, after the issuance of the order. Therefore, activation of the pumps should not be considered as mitigating evidence, and the judge correctly excluded the activation of the extra pumps in his analysis.

Furthermore, the judge's decision reflects that he did acknowledge Oak Grove's efforts to abate the conditions that were performed prior to the issuance of the order. The judge noted that "[o]n or about January 1, [Oak Grove] initiated efforts to drill bore holes down to the bleeder entries near the rear of the 11-East panel to provide electrical power for more powerful electric pumps, communication lines, and additional compressed air capacity." 32 FMSHRC at 170-71. This factual finding was not expressly considered or weighed by the judge in his analysis of unwarrantable failure. Nevertheless, it is clear that the judge believed that Oak Grove's efforts to abate the conditions in the bleeder system were insufficient. In his bench decision, he concluded that "there was no successful effort to pump the water out of the bleeder in order to travel to and get to those Evaluation Points." Tr. III 229.

Although the judge did not expressly weigh Oak Grove's abatement efforts as mitigating evidence against a finding of an unwarrantable failure in his written decision, his oversight is inconsequential. The bench decision supplements the written decision and demonstrates that the judge considered Oak Grove's efforts to abate the conditions in the bleeder system.

4. Other Possible Mitigating Circumstances

Oak Grove contends that the judge failed to consider its reasonable belief that the bleeder system was functioning. The Commission has held that if an operator acted on the good-faith

belief that its cited conduct was actually in compliance with applicable law, and that belief was objectively reasonable under the circumstances, the operator's conduct will not be considered to be the result of an unwarrantable failure when it is later determined that the operator's belief was in error. *IO Coal*, 31 FMSHRC at 1357-58 (citing *Kelly's Creek Res., Inc.*, 19 FMSHRC 457, 463 (Mar. 1997); *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615-16 (Aug. 1994)).

Oak Grove alleges that it determined that the system was functioning after taking measurements and evaluating the data generated at the No. 6 fan. The operator contends that it knew the quantity of air traveling the headgate side, the quantity of air traveling in the tail gate side through the East bleeders, and the quantity of air exiting the mine at the fan. Additionally, it asserts that because the longwall is ventilated by a separate split of air, the hazards in the bleeder system would not affect its safe operation.

We find Oak Grove's arguments to be unpersuasive. Although Oak Grove was required to take air measurements at specific locations identified in the mine ventilation plan, Oak Grove was not able to access those locations because of water accumulations. Management officials acknowledged that the required examination process could not be performed and that the operator had not completed an examination since December 14. Although Oak Grove could not be certain that the bleeder system was working effectively, it nevertheless failed to seal the worked-out area as it was required to do if the bleeder examinations or an alternative process could not determine if the bleeders were functioning effectively. Management officials also knew, as demonstrated by their extensive pursuit of a modification of the ventilation plan after the issuance of the order, that any change to the ventilation plan required approval by MSHA. Oak Grove disregarded the requirements of section 75.364(a)(2)(iii), as well as the mine's ventilation plan, and did not perform a required examination for several weeks before the issuance of the order. During this period, the pressure differential at the fan increased by 50%, indicating that there was significant additional resistance to airflow in the bleeder system. 32 FMSHRC at 171; Gov't Ex. 2. Accordingly, we conclude that an objectively reasonable person would not have held the good-faith belief that the bleeder system was functioning as required.

Oak Grove also contends that it reasonably believed that it was permissible to operate the longwall in the East bleeder system during the abatement period established in the section 104(a) citation issued on December 30. Oak Grove relies on the issuance of the less serious section 104(a) citation and the two subsequent extensions of the abatement period as implicit permission from MSHA to engage in mining operations while the underlying conditions were being addressed.

We again find Oak Grove's position to be unpersuasive. First, because Oak Grove could not examine 11 of the MPLs as it was required to do, Oak Grove management did not know if the bleeder system was functional when it resumed production with the longwall. Second, when the citation was issued, the longwall was not in operation. Tr. III 136-37. Likewise, on the occasions that MSHA issued an extension of the abatement period, Oak Grove was not operating the

longwall on the 11 East panel.¹¹ OG Ex. 1; Gov't Ex. 10; Tr. III 122, 136-37. Oak Grove did not inform MSHA when it resumed longwall mining on the 11 East panel during the abatement period.¹² Thus, Oak Grove's argument that MSHA implicitly permitted operation of the longwall within the abatement period is without foundation.

Oak Grove further contends that the result of its telephone conversations with MSHA on January 5, 2010 was that it "was allowed to continue operating the longwall." OG Br. at 4, 22. At oral argument, Oak Grove claimed that January 5 conversations with MSHA caused "a lot of confusion" and even constituted "a bit of an ambush." Oral Arg. Tr. at 24. However, the fact is that Oak Grove began operating the longwall on January 4, and produced coal for three shifts, prior to the allegedly confusing or misleading telephone conversations with MSHA. Gov't Ex. 10; Oral Arg. Tr. at 60-61. Oak Grove's conduct in starting up the longwall undermines the legitimacy of its argument.

The judge weighed both the issuance of the non-S&S citation on December 30 and the subsequent decision to extend the abatement period of that citation together with the other unwarrantable failure factors and explicitly found that "[t]he issuance of the citation, and the abatement period do not excuse Oak Grove's conduct." 32 FMSHRC at 179. Thus, the judge concluded that it was not objectively reasonable for Oak Grove to run the longwall in a gassy mine with a history of explosions without knowing if the bleeder system was functioning.

Substantial evidence supports the judge's factual findings that the violation resulted from an unwarrantable failure to comply.

¹¹ At the time when the abatement deadline was first extended, Oak Grove had idled the longwall on its own volition. OG Ex. 1; Gov't Ex. 10. When the abatement deadline was again extended on January 14, Oak Grove was prohibited from operating the longwall as a result of the issuance of Order No. 6698830.

¹² Indeed, when, on January 5, 2010, Oak Grove met with MSHA to request a further extension of the abatement period for the citation, it did not inform MSHA that it was, at that time, operating the longwall. Tr. III 92, 103, 154-55.

III.

Conclusion

In summary, we conclude that the judge did not have the opportunity to pass on Oak Grove's theory that Order No. 6698830 was impermissibly duplicative of a previously issued citation. Therefore, in accordance with section 113(d)(2)(A)(iii) of the Mine Act, we decline to reach the merits of this argument. We also conclude that the judge's determination that Oak Grove's violation of section 75.334(d) was attributable to an unwarrantable failure to comply with the standard is in accordance with law and supported by substantial evidence. Accordingly, we affirm the judge's decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 15, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 2010-1224-M
ADMINISTRATION (MSHA)	:	A.C. No. 40-02968-222734
	:	
v.	:	Docket No. SE 2011-137-M
	:	A.C. No. 40-02968-2352288
MOLTAN COMPANY, LP	:	

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 22 and November 22, 2010, the Commission received from Moltan Company, LP (“Moltan”) motions made by counsel seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

However, 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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2010-1224-M and SE 2011-137-M, both captioned *Moltan Company, L.P.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

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

The Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000222734 to Moltan on June 15, 2010. The operator states that Moltan directed a new clerical employee to email and fax the proposed assessment to its counsel for contest pursuant to the operator’s standard operating procedures. Moltan states that on September 14, 2010, it received a notice from MSHA stating that the operator was delinquent in paying the proposed penalties. Upon investigation, it was discovered that the employee had mistakenly emailed the assessment to an incorrect email address by omitting one word from the email address and had failed to follow up with a faxed copy.

On October 12, 2010, MSHA issued Proposed Assessment No. 000235228 to Moltan. The operator explains that upon receiving the proposed assessment, the operator forwarded it to counsel by email/cell phone for contest while counsel was in North Dakota. Although counsel forwarded the proposed assessment to another attorney in her law firm, it was not received by that attorney due to sporadic cell phone signal problems. The error was discovered when counsel observed on MSHA’s Data Retrieval System that the proposed penalties had become a final order of the Commission because they had not been contested.

The Secretary opposes Moltan’s requests to reopen Proposed Assessment Nos. 000222734 and 000235228 on the basis that the operator has made no showing of circumstances that warrant reopening. She asserts that the operator maintained inadequate or unreliable internal distribution procedures, which do not constitute an adequate excuse for reopening under Rule 60(b).

It appears that the operator's failure to timely contest the proposed assessments resulted from unusual circumstances involving inadvertent error rather than from inadequate or unreliable distribution procedures. Accordingly, 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. Consistent with Rule 28, the Secretary shall file petitions for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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November 17, 2011

OHIO COUNTY COAL COMPANY, LLC	:	
	:	
v.	:	Docket No. KENT 2011-1155-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DIRECTION FOR REVIEW AND DECISION

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 12, 2011, Administrative Law Judge L. Zane Gill dismissed a contest of an imminent danger withdrawal order issued pursuant to section 107(a) of the Mine Act, 30 U.S.C. § 817(a). Unpublished Order (Oct. 12, 2011). On November 9, 2011, Ohio County Coal Company, LLC filed a petition for discretionary review. For the following reasons, we grant the operator’s petition, vacate the judge’s order, and remand for further proceedings.

The judge dismissed the case on the grounds that the proceeding was moot because the alleged violation was abated and the imminent danger order lifted. Citing Commission precedent, the operator argues that under these circumstances, it should have been permitted to go forward with its contest. It also asserts that because the judge entered the dismissal order *sua sponte*, it was not able to present its argument that the contest proceeding was not moot.

We agree that, at a minimum, the parties should have been provided the opportunity to make known to the judge their views as to whether the case is moot and should be dismissed. Accordingly, we grant the petition for discretionary review, vacate the judge's order, and remand the matter to Judge Gill for further proceedings.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 18, 2011

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

v.

GRAYMONT (PA) INC.

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Docket No. PENN 2011-258-M
A.C. No. 36-06468-234357

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

ORDER

By Duffy, Young, 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 March 22, 2011, the Commission received from Graymont (PA) Inc. (“Graymont”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that Graymont timely paid the full penalty amount, in reliance on the explanation provided by the citing inspector. However, Graymont states it decided to contest the citation based on the opinion of a second inspector who led Graymont to question whether the cited condition constituted a violation. In response, the Secretary states that she does not oppose the request to reopen.¹

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

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

¹ Considering the facts and circumstances of this case, we find compelling the Secretary's non-opposition to the request to reopen.

Chairman Jordan, and Commissioner Cohen, dissenting:

Graymont received a penalty assessment, paid the full penalty amount, and now asks the Commission to reopen the case to permit it to contest one of the three penalties. The sole rationale for reopening presented by the operator is that after it paid the penalty, a second inspector suggested that Graymont might not have committed a violation.

As the majority notes, section 105(a) of the Mine Act states that if an operator fails to notify the Secretary that it wishes to contest a proposed assessment of penalty within 30 days of receipt of the assessment, it is deemed a final order of the Commission. 30 U.S.C. § 815(a). Our colleagues also correctly point out that Rule 60(b) of the Federal Rules of Civil Procedure may be used to guide the Commission in evaluating motions to reopen such final orders. However, Rule 60(b)(1) (the subsection of Rule 60(b) cited by the majority) only permits reopening on the basis of mistake, inadvertence, or excusable neglect.

None of those factors apply in this case, which simply involves an operator that intentionally paid a penalty and now, upon reflection, regrets that decision and wishes to contest. The circumstances presented here do not indicate that mistake, inadvertence, or excusable neglect occurred. *See, e.g., Brzeczek v. Centerior Energy*, No. 99-3900, slip op. at 1-2 (6th Cir. June 20, 2000) (denying relief under Rule 60(b)(1) because the plaintiff was “left with only her own change of heart as a basis for seeking relief from the agreed judgment” and “[a] change of mind is not an adequate basis to vacate a judgment pursuant to Rule 60(b)”). Consequently, there is no basis under Rule 60(b) to reopen this final order. Thus we would deny the requested relief.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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WASHINGTON, DC 20001

November 18, 2011

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

v.

BARRICK TURQUOISE RIDGE, INC.

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Docket No. WEST 2011-1426-M
A.C. No. 26-02286-260102

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 1, 2011, the Commission received from Barrick Turquoise Ridge, Inc. (“Barrick”) a motion submitted 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).

The record indicates that this proposed assessment became a final order of the Commission on August 11, 2011. Barrick asserts that it forwarded the proposed assessment to its counsel via email on July 28, 2011, indicating that it wished to contest both citations. Counsel for Barrick states that although his paralegal prepared the contest letter for filing on August 1, 2011, due to an oversight the letter was never hand-delivered to the Office of Assessments. Counsel further states that he discovered the delinquency on August 31, 2011, upon reviewing the MSHA online data retrieval system. The Secretary does not oppose the request to reopen. However, the Secretary urges counsel to take all steps necessary to ensure that future penalty contests are processed in a timely manner, and cautions that she may oppose future motions.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 18, 2011

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

v.

CANYON FUEL COMPANY, LLC

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Docket No. WEST 2011-1152
A.C. No. 42-01890-253886

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 June 29, 2011, the Commission received from Canyon Fuel Company, LLC (“Canyon”) a motion submitted 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).

The record indicates that this proposed assessment was delivered on May 11, 2011, and became a final order of the Commission on June 10, 2011. Canyon asserts that its safety manager was out of the office for surgery during the majority of May and June, 2011. During the safety manager's absence, the safety engineer asked the accounts payable clerk to submit payment to MSHA's St. Louis office for three of the citations. The safety engineer believed the clerk understood that she was supposed to return the penalty contest for the remaining citation, No. 8458633. However, this was the clerk's first time paying assessments, and she did not know that the contest form had to be returned to the MSHA Civil Penalty Compliance Office. The Secretary does not oppose the request to reopen.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

November 18, 2011

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

v.

WHITE BUCK COAL COMPANY

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Docket No. WEVA 2011-1361
A.C. No. 46-09154-244847

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

ORDER

BY: Duffy, Young, 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 April 5, 2011, the Commission received from White Buck Coal Company (“White Buck”) a motion made 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).

The record indicates that the proposed assessment was delivered on January 28, 2011, and became a final order of the Commission on February 28, 2011. White Buck asserts that it followed its well-established and centralized internal process for handling proposed assessment forms received from MSHA. White Buck further asserts its Safety Director marked the form indicating its intent to contest this citation, and emailed a scanned copy of the form to the corporate legal department of its parent company, Massey Coal Service, Inc. (“Massey”), on February 1, 2011 for filing with MSHA. Massey’s Legal Analyst claims in his affidavit he either misplaced the proposed assessment form or overlooked it by mistake, due to being involved in preparing the company’s Dodd-Frank disclosures to the SEC and completing at least thirty three other proposed assessment forms during that time period. Upon realizing the assessment form had not been timely submitted, the Legal Analyst sent the completed form to MSHA on March 2, 2011. The motion to reopen was filed by counsel within 30 days of receiving MSHA’s delinquency letter.

The Secretary does not oppose the request to reopen based solely on the fact that the contest was filed only two days late and the operator promptly discovered its own mistake. However, the Secretary also has gone to great lengths to explain that several of the grounds on which the reopening request is based do not support reopening. Contrary to White Buck’s assertion, it is apparent to the Secretary that Massey’s centralized internal procedures for processing proposed assessment forms were inadequate. Moreover, the Secretary notes she urged Massey in three previous delinquencies, when reopening was requested with essentially identical explanations, to take steps to ensure future proposed assessments are timely contested. White Buck’s violation history which has raised the specter of a pattern of violations enforcement action, the reckless disregard designation of the order subjecting it to a flagrant violation assessment, and the penalty amount of \$53,800 militate against reopening. The citations and orders in this proceeding were of critical importance, yet despite ample warning about the need to ensure such matters are responsibly managed, White Buck and its parent failed to file a timely notice of contest.

In her response, the Secretary suggests these factors should have made Massey more careful about timely processing and contesting proposed assessments. 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); *Highland Mining Co.*, 31 FMSHRC 1313, 1316 n.3 (Nov. 2009).¹ White Buck has failed to provide a response.

¹ We also note that since the Secretary assured the operator she will not argue that the operator’s failure to contest the proposed assessment estops its agents from litigating any aspect of the underlying violation if a subsequent section 110(c) proceeding is initiated, we do not find it relevant for our consideration.

Having reviewed White Buck's request and the Secretary's response, we find troubling the Secretary's assertions that Massey's centralized internal procedures for processing proposed assessment forms were inadequate, particularly in light of the large penalty at issue in this case, the seriousness of the allegations involved, and the previous history of untimely responses. However, we are concerned that Massey and its counsel may have elected not to respond to the points the Secretary has raised because she stated that, despite the deficiencies, she was not opposed to reopening. Accordingly, we deny White Buck's request without prejudice, affording it the opportunity to establish good cause for reopening the proposed penalty assessment. White Buck may submit a reply to the Secretary's response within 30 days of the date of this order. Failure to do so will result in dismissal of this matter with prejudice.

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

Chairman Jordan, and Commissioner Cohen, dissenting:

A critical factor in deciding whether to grant White Buck's motion to reopen in this case is the number of prior requests for relief from a final order filed with the Commission by this operator and its parent company, Massey Coal Service, Inc. ("Massey"). This history, along with the operator's failure to develop adequate internal procedures to ensure the filing of timely penalty contests, leads us to conclude that White Buck's motion should be denied with prejudice.

White Buck has repeatedly come to the Commission asking for relief from final orders. In February 2010, the Commission issued an order in response to the operator's motion to reopen which claimed that, due to a turnover in safety directors, it did not become aware of a delinquent penalty assessment until nearly eleven months after the assessment became a final order of the Commission. *White Buck Coal Co.*, 32 FMSHRC 112 (Feb. 2010). We remanded the case to the Chief Administrative Law Judge for a determination of whether good cause existed for the operator's failure to timely contest the penalty proposal. *Id.* at 114.

More recently, we granted White Buck's motions to reopen in two cases (that we consolidated) in which the facts are very similar to the case currently before us. *White Buck Coal Co.*, 33 FMSHRC ____, Nos. WEVA 2010-1696 and WEVA 2010-1720 (Oct. 27, 2011). In that matter, the legal analyst with Massey's corporate legal department who failed to timely contest the penalty placed the penalty assessment form to be contested into the wrong stack of assessment forms and discovered his mistake too late to file a timely contest. We also granted a motion to reopen filed by another Massey company, Martin County Coal, wherein the same legal analyst sent the penalty contest form to the Massey accounting department and mistakenly assumed that the contest had been timely filed. *Martin County Coal Co.*, 33 FMSHRC ____, No. KENT 2010-1549 (Oct. 27, 2011). Both of these recent cases involved the same legal analyst involved in the current proceeding.

Given this history of late-filed contests, we consider it inappropriate to accede to yet another request from this operator to grant relief under Rule 60(b). As the Secretary notes in her response to White Buck's motion, she has repeatedly urged the operator to take steps to make sure that future proposed penalty assessments would be timely contested. Its failure to do so has created a pattern of untimely contests, followed by requests to the Commission to reopen the final orders created by the operator's carelessness. Under such circumstances, we are no longer willing to grant relief.

The facts in this case indicate that Massey's Legal Department has not taken steps to institute a reliable process for the timely processing of penalty contests. The Commission has made clear that where a failure to file a timely contest of a proposed penalty assessment results from an operator's inadequate or unreliable internal procedures, the operator has not shown good cause for reopening a final order. *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); *Oak Grove Res. LLC*, 33 FMSHRC 103,

104-05 (Feb. 2011); *M3 Energy Mining Co. and Clean Energy Mining Co.*, 33 FMSHRC ____, slip op. at 5-6, No. KENT 2009-1101 and KENT 2009-1102 (Aug. 3, 2011); see *Gibbs v. Air Canada*, 810 F.2d 1529, 1537-38 (11th Cir. 1987). Here, the fact that Massey's legal analyst failed to file a timely contest because he had to submit contests to MSHA in 33 other cases and had to prepare the operator's Dodd-Frank disclosures to the SEC, in light of three similar recent failures, establishes only that Massey failed to devote sufficient manpower and resources to fulfill its legal responsibility under section 105 of the Mine Act. See *Big Ridge, Inc.*, 31 FMSHRC 362, 364 (Mar. 2009) (denying motion because operator's excuse of "overwhelming business matters" did not provide an adequate basis to justify reopening).

In her response, the Secretary states that the operator's procedures for processing proposed penalty assessments were inadequate. As our colleagues note, she also identifies several factors that should have made the operator more careful about ensuring that timely contests were filed, including the fact that the order at issue could impact MSHA's use of the "pattern of violations" enforcement scheme against it, and that the order could subject it to a potential flagrant violation charge in the future. The Secretary also argues the \$53,800 proposed penalty should have motivated the operator to be more careful in contesting the proposed assessment. White Buck failed to provide a reply which indicates that the failure here resulted from circumstances beyond its control or that its actions and those of its parent company represent anything more than continuation of a pattern of neglect.

The majority's denial of the motion without prejudice will permit the operator to file an additional pleading with the Commission to attempt to convince us that it treated proposed penalty assessments from MSHA with the appropriate degree of care. Given the detailed nature of the operator's original submission (consisting of an 11-page motion and voluminous attachments, including two affidavits), we consider it unlikely that additional information needs to be brought to our attention.

Consequently, having reviewed White Buck's request and the Secretary's response, we conclude that White Buck has failed to establish good cause for reopening the proposed penalty assessment and would deny its motion with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

601 NEW JERSEY AVENUE, NW

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November 22, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2011-68-M
v.	:	A.C. No. 03-01773-187135 02
	:	
DRUM SAND & GRAVEL, INC.	:	

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

ORDER

BY: Duffy, Young, 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 September 16, 2009, and October 18, 2010, the Commission received requests to reopen a penalty assessment issued to Drum Sand & Gravel, Inc. (“Drum”) 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. Under Rule 60(b), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect, not more than one year after the order was entered. *JS Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). 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 9, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000187135 to Drum. The Commission received Drum's first request to reopen on September 16, 2009. In the request Drum did not address any attempt on its part to file a contest of the proposed penalty assessment but merely stated why it wished to contest various citations. Drum attached copies of the citations it wished to contest to its request to reopen.

The Secretary opposed the request. She noted that MSHA's records show that the proposed assessment was delivered on June 16, 2009, and became a final order of the Commission on July 16, 2009. The Secretary argued that the operator failed to explain why the contest form was not timely filed.

On January 25, 2010, the Commission issued an order denying without prejudice Drum's first request to reopen on the basis that the operator failed to provide an explanation for why it failed to timely contest the proposed penalty assessment, and the request was not based on any of the grounds for relief set forth in Rule 60(b). *Drum Sand & Gravel, Inc.*, 32 FMSHRC 37, 39 (Jan. 2010). The Commission instructed the operator that if it submitted 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. *Id.* at n.1. We stated in part that Drum should include "a full description of the facts supporting its claim of 'good cause,' including how the mistake or other problem prevented Drum from responding within the time limits," and that it should also submit copies of supporting documents with its request to reopen. *Id.*

On October 18, 2010, the Commission received a second motion to reopen from Drum. In the motion, Drum stated that it timely contested the penalty assessment, although it received correspondence from MSHA stating that the Secretary did not receive the contest until July 28, 2009, after the proposed assessment had become a final Commission order. Drum attached to its second request a copy of its contest, correspondence from MSHA stating that the operator's contest was late, a copy of the proposed assessment form indicating which citations Drum wishes to contest, and MSHA records.

On November 3, 2010, the Commission received the Secretary's opposition to Drum's second request. The Secretary states that she opposes Drum's request to reopen for the same reasons she opposed the first request to reopen. The Secretary contends that in its second request, the operator provides no additional facts and documents, and that the operator has failed to provide a full description supporting its claim of good cause and to provide documents supporting that claim. The Secretary states that MSHA's records reveal that the operator's contest was post-marked July 20, 2009, four days after the proposed assessment became a final order. She notes further that there was a significant delay in the filing of the operator's second request. The Secretary attached a copy of the envelope post-marked July 20, 2009, to her opposition.

On November 17, 2010, the Commission received a reply to the Secretary's opposition from Drum's counsel. Counsel attached an affidavit by Drum's owner, Jeff Drum, to the reply. Mr. Drum asserts that he filed a contest of Proposed Assessment No. 000187135 within ten days after receiving the proposed assessment form. Mr. Drum later contacted MSHA to determine the status of the contest and was eventually informed that the operator should file a request to reopen.

The record reveals a conflict regarding whether Drum timely filed its contest of Proposed Assessment No. 000187135. Although Drum's owner swears in an affidavit that he filed a contest within ten days after receiving the proposed assessment, the Secretary submitted a copy of an envelope post-marked July 20, 2009, four days after the proposed assessment became a final order. We conclude that, in these circumstances, the factual dispute should be resolved by a Commission Administrative Law Judge, who is empowered to rule on offers of proof and receive any additional evidence. *See* 29 C.F.R. § 2700.55.

Accordingly, for the foregoing reasons, we hereby remand these proceedings to the Chief Administrative Law Judge for a determination of whether Drum timely contested Proposed Assessment No. 000187135. If the Judge determines that the contest was untimely, the Judge should determine whether good cause exists for Drum's failure to timely contest the proposed assessment and whether relief from the final order should be granted.

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

Chairman Jordan, dissenting:

It is undisputed that the proposed assessment in this case was delivered by Federal Express on June 16, 2009 and became a final order of the Commission on July 16, 2009. The Secretary sent Drum a delinquency letter dated September 3, 2009, and Drum filed a motion to reopen shortly thereafter, but failed to include any reason why it did not file a timely contest.

In January 2010 the Commission issued an order denying this request for relief without prejudice. *Drum Sand & Gravel, Inc.*, 32 FMSHRC 37, 39 (Jan. 2010). The operator waited eight months (until October 2010) before filing a second request. Notably, that submission consisted mainly of the same assertions sent in the original motion, with the addition of the unsubstantiated statement that the contest was timely, and several attachments that in no way supported this claim. One of these attachments consisted of a copy of an August 2009 letter from MSHA stating that MSHA had received the hearing request (which was mailed on July 20) on July 28, 2009 and that the penalty had therefore become a final order. This letter indicates that Drum was on notice of the default even before receiving the delinquency letter.

In her opposition, the Secretary alleged that the MSHA payment office received a contest form from Drum postmarked July 20, 2009, four days after the proposed assessment became a final order. The Secretary included in her reply a copy of an envelope from Drum to MSHA postmarked on that date.

In its reply, the operator submitted an affidavit in which the owner declared that he had filed the contest on time, declaring that he filed all contests “within or about ten (10) days after receipt of the same.” He also stated that he followed up with phone calls to MSHA.

Having reviewed the documents submitted in support of the operator’s motion, and the Secretary’s opposition, I have determined that the only reasonable conclusion to draw from the record is that the contest was late. The copy of the postmarked envelope submitted by the Secretary sufficiently rebuts the operator’s generalized claim that the contest was timely filed. Accordingly, remand to the judge is not needed. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (where evidence supports only one conclusion, remand on that issue unnecessary). Moreover, given the assertions in the letter to the Commission from the President of Drum, received on September 16, 2009, I am even less inclined to grant relief. Thus, reopening is not appropriate here.

In sum, I vote to deny the operator’s request because the operator’s second motion was filed eight months after our January 2010 order issued and provided virtually no helpful information, and the Secretary’s proof that the penalty was filed late is persuasive.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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November 22, 2011

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

v.

ANDERSON SAND AND GRAVEL

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Docket No. CENT 2011-1100-M
A.C. No. 25-01055-231165

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 16, 2011, the Commission received from Anderson Sand and Gravel (“Anderson”) 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). The Secretary does not oppose the request to reopen.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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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

November 22, 2011

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

v.

H&K MATERIALS, INC.

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Docket No. PENN 2011-308-M
A.C. No. 36-08803-232635

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

ORDER

BY: Young, 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 April 26, 2011, the Commission received from H&K Materials, Inc. (“H&K”) a motion made 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).

The record indicates that the proposed assessment was delivered on September 23, 2010, and became a final order of the Commission on October 25, 2010. A delinquency letter was sent on January 14, 2011, and the case was referred to the U.S. Treasury for collection on March 31, 2011. H&K asserts that it faxed the proposed assessment to its counsel on September 27, 2010, but due to clerical and filing errors the counsel did not return it to MSHA. Counsel asserts it first became aware of the error when it received a letter from the U.S. Treasury, and the motion to reopen was filed on April 22, 2011.

The Secretary opposes the request to reopen and notes that such conclusory statements are insufficient to justify reopening. The Secretary alleges that H&K appears to have no internal tracking system to ensure that counsel timely files a notice of contest when directed to do so, and that attributing the failure to counsel is not an adequate basis for reopening. The Secretary further questions why H&K failed to respond to the delinquency notice and waited until the case was referred to Treasury for collection, almost six months after the proposed assessment became a final order.

Counsel for H&K submitted a reply to the Secretary's opposition claiming that his law firm maintains adequate and reliable internal procedures for the docketing and tracking of litigation matters. Specifically, counsel's firm maintains a fax center which distributes two copies of each received fax via interoffice mail and email. In this case, however, counsel claims neither the hard copy nor the electronic version of the faxed assessment were forwarded to a paralegal for docketing.

H&K makes no showing of exceptional circumstances that warrant reopening. The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *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); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011). In this case, we therefore conclude that the operator's failure to follow up on the proposed assessment and the delinquency notice to see that they would be properly processed and timely addressed by counsel represents an inadequate or unreliable internal processing system.

While counsel for H&K has explained in detail how the firm processes matters brought to its attention, the Secretary challenged the operator's internal procedures, not its counsel's. Nothing in the response addresses those deficiencies. In particular, there is no explanation for the failure to respond to the January 14, 2011 delinquency notice, despite the Secretary's specific objection to that omission.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, 10-11 (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). Here, the fact that H&K failed to respond to the delinquency notice and waited more than three months to request reopening without providing an explanation, supports our conclusion that H&K has not met its burden of establishing entitlement to extraordinary relief.

¹ After receipt of the Secretary's opposition, counsel averred in a declaration that "H&K Materials and the undersigned counsel first became aware of that fact [the failure to contest the proposed assessment] in April, when the United States Department of the Treasury contacted H&K via letter to inform it that the penalties proposed for the alleged violations were delinquent." Declaration of R. Brian Hendrix, May 24, 2011, Par. 9. This statement suggests that neither H&K nor counsel were aware of the Secretary's January 14, 2011 delinquency notice. We do not question counsel's statement that he was not aware of the delinquency notice. However, counsel has no personal knowledge of whether H&K received the delinquency notice or not, and did not furnish an affidavit or declaration from a person with such knowledge at H&K. The Secretary, in her opposition, attached a copy of the January 14, 2011 letter mailed to H&K. It is presumed that a properly mailed letter reached its destination. *See, e.g., Hagner v. United States*, 285 U.S. 427, 430 (1932). The declaration by counsel in this case does not rebut the presumption.

Having reviewed H&K's request and the Secretary's response, we conclude that H&K has failed to establish good cause for reopening the proposed penalty assessment and deny its motion with prejudice.

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

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

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

Chairman Jordan, and Commissioner Duffy, dissenting:

Our colleagues deny relief in this case primarily because H&K did not, in their view, institute adequate internal procedures to ensure timely penalty contests and because it waited approximately three months after the delinquency letter was sent before it filed a motion to reopen with the Commission. However, based on H&K's detailed submission, we would grant relief in this case.

Counsel for the operator's affidavit explained in detail the procedures generally used by the law firm to timely contest penalty assessments received from H&K. The firm maintains an electronic docketing and litigation management system programmed to ensure that once a document is entered into the system, all deadlines are subsequently met. Counsel emphasizes that this software is specifically keyed to the Commission's procedural rules to ensure compliance with dockets pending before the Commission. He states that in this case, because of the absence of a hard fax copy, the proposed assessment was not forwarded to a paralegal for docketing. It thus appears that, despite a specified internal procedure, the assessment in this case was not timely contested. This type of aberration falls squarely under Rule 60(b)(1), which provides that relief may be granted due to mistake, inadvertence or excusable neglect.

Regarding the majority's view that relief must be denied because of the operator's failure to timely file a motion to reopen once MSHA sent a delinquency notice to the operator, counsel for H&K states in his declaration that the operator and its counsel first became aware that the assessment was not timely filed in April 2011 when the Department of the Treasury contacted H&K via letter to let it know about the delinquency. (The motion to reopen was then filed on April 27, 2011). This implies that neither of them received a delinquency notice from MSHA, and nothing in the record indicates a proof of service of that notice on the operator. Although the Secretary includes a copy of the delinquency notice with her opposition, there is no proof of service on the operator or its counsel, and thus there is no countervailing evidence in the record to cause us to question counsel's assertion. Accordingly, a denial of relief based on the operator's failure to timely file a motion to reopen after the delinquency notice was sent is not warranted in this case.

For the foregoing reasons, we would grant relief in this matter.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 22, 2011

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

v.

HEAVY MATERIALS, LLC

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Docket No. SE 2011-676-M
A.C. No. 55-00008-247858

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 21, 2011, the Commission received from Heavy Materials, LLC (“Heavy Materials”) a motion submitted 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). The Secretary does not oppose the request to reopen.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

November 22, 2011

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

v.

GRG CONSTRUCTION CO., INC.

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Docket No. WEST 2011-1336-M
A.C. No. 02-03021-251246

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 9, 2011, the Commission received from GRG Construction Co., Inc. (“GRG”) 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). The Secretary does not oppose the request to reopen.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

November 29, 2011

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

v.

BUCKINGHAM SLATE COMPANY

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Docket No. VA 2011-626-M
A.C. No. 44-00061-251915

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 16, 2011, the Commission received from Buckingham Slate Company (“Buckingham”) 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).

Buckingham asserts that it mistakenly neglected to check-mark Citation No. 8633701 for contest on the MSHA Form 1000-179. Buckingham enclosed a copy of the form demonstrating that it marked all the other citations, including the box indicating it wishes to contest and have a formal hearing on all violations listed in the proposed assessment. The Secretary does not oppose the request to reopen.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 30, 2011

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

v.

CAPITAL QUARRIES COMPANY, INC.

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Docket No. CENT 2011-1192-M
A.C. No. 23-01779-246105

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 9, 2011, the Commission received from Capital Quarries Company, Inc. (“Capital”) a motion submitted 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).

The record indicates that this proposed assessment was delivered on February 15, 2011, and became a final order of the Commission on March 17, 2011. MSHA received an incomplete contest form on March 2, 2011, which was not processed as a penalty contest. MSHA mailed a delinquency notice on May 6, 2011, and forwarded this case to the U.S. Department of Treasury for collection on August 18, 2011. Capital asserts that it filed a timely contest on February 24, 2011, but neglected to attach the citation check-off sheet to the proposed assessment. Capital further states that the proposed assessment included only one citation, which Capital intended to contest. In his enclosed affidavit, Capital's Safety Compliance Manager states that Capital received a delinquency notice on August 20, 2011. This notice, attached to the affidavit, was from the Department of the Treasury. The Safety Compliance Manager asserts that this was the first communication Capital had received about the penalty assessment since it initially filed its contest. The Secretary does not oppose the request to reopen.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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November 30, 2011

SECRETARY OF LABOR,	:	Docket No. KENT 2011-1153
MINE SAFETY AND HEALTH	:	A.C. No. 15-18647-228827
ADMINISTRATION (MSHA)	:	
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	:	Docket No. KENT 2011-1154
	:	A.C. No. 15-18647-243808
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v.	:	Docket No. KENT 2011-1530
	:	A.C. No. 15-18647-261203
LONE MOUNTAIN PROCESSING, INC.	:	

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

ORDER

BY THE COMMISSION:

On November 2, 2011, Lone Mountain Processing, Inc. (“Lone Mountain”) filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit, seeking review of the Commission’s October 11, 2011 Order in the above-captioned dockets. On that same day, Lone Mountain filed with the Commission its application to stay payment of penalties, or, in the alternative, to deposit payment into an escrow account pending a final appellate determination. The Secretary of Labor opposes the motion to stay payment, but does not oppose the alternative motion to deposit payment into an escrow account. For the reasons that follow, we deny Lone Mountain’s motion for a stay.

On October 11, 2011, the Commission issued an order denying with prejudice Lone Mountain’s motion to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(a). The Commission concluded that Lone Mountain had failed to establish good cause for reopening the proposed penalty assessments.

The Lone Mountain motion for stay has been filed pursuant to Rule 18 of the Federal Rules of Appellate Procedure, which provides that “[a] petitioner must ordinarily move first before the agency for a stay pending review of its decision or order.” Fed. R. App. P. 18(a)(1). Section 106(a)(1) of the Mine Act 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. 30 U.S.C. § 816(a)(1). Because the record has

not yet been filed, the Commission has jurisdiction to consider Lone Mountain's motion. *Sec'y on behalf of Smith v. The Helen Mining Co.*, 14 FMSHRC 1993, 1994 (Dec. 1992).

In *Sec'y on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1312 (Aug. 1987), the Commission held that a party seeking a stay must satisfy the factors set forth in *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958): (1) a likelihood that the party will prevail on the merits of its appeal; (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.

In support of its application, Lone Mountain asserts that it has a reasonable likelihood of prevailing on appeal, and that it will be irreparably harmed if the stay is not granted. In response, the Secretary states that Lone Mountain has failed to set forth legally adequate grounds for the extraordinary relief of a stay pending appeal, and notes that Lone Mountain's willingness to deposit the payment into an escrow account negates any notion that it will suffer irreparable harm if it is deprived of the use of the penalty amount pending resolution of this litigation.

Upon consideration of Lone Mountain's application and the Secretary's opposition, we conclude that Lone Mountain's assertions do not satisfy the requirements for a stay. As to its likelihood of prevailing on appeal, Lone Mountain has failed to provide any new or compelling reasons that were not previously considered by this Commission and deemed deficient. Moreover, as the Secretary points out, Lone Mountain's alternative application for depositing the payment into an interest-bearing escrow account undermines its claim of irreparable harm. Recoverable monetary loss "may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Accordingly, we conclude that Lone Mountain has failed to establish adequate grounds for justifying a stay. The Commission does not ordinarily become involved in the Secretary's penalty collection efforts, and does not see the need to do so here. The parties are free to negotiate an agreement regarding an escrow account and all corresponding conditions without the Commission's involvement. Lone Mountain's application is hereby denied in all respects.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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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

November 30, 2011

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

v.

ROSCOE ROCK AND SAND, INC.

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Docket No. LAKE 2011-806-M
A.C. No. 11-02984-255205

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 June 28, 2011, the Commission received from Roscoe Rock and Sand, Inc. (“Roscoe”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that this proposed assessment was delivered on May 24, 2011, and became a final order of the Commission on June 23, 2011. The motion to reopen was sent on June 27, 2011. Roscoe asserts that the staff person assigned to file the contest had inadvertently noted an incorrect due date for a response. Roscoe further states that it mailed MSHA the full payment in order to avoid further penalties. The record also shows that MSHA received a check in the amount of \$300, dated June 24, 2011. The Secretary does not oppose the request to reopen, but notes that her position is based solely on the fact that the reopening request was filed within four days after the proposed assessment became a final order.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 30, 2011

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

v.

AMFIRE MINING COMPANY, LLC

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Docket No. PENN 2011-441
A.C. No. 36-08704-247163

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 1, 2011, the Commission received from Amfire Mining Company, LLC (“Amfire”) a motion submitted 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).

Amfire asserts it received the proposed assessment on February 22, 2011, and contested Citation No. 8012006 on March 4, 2011. Amfire's Safety Director submits in an affidavit that he sent the contest in this case in the same envelope with another completed proposed penalty assessment contest form, No. 000247165. The Safety Director discovered the delinquency during the week of July 7, 2011, while reviewing MSHA's Mine Data Retrieval System. The Secretary does not oppose the request to reopen and notes that MSHA received a contest in case No. 000247165. However, MSHA has no record of receiving a contest in this case, No. 000247163. The record also shows that MSHA received a payment for the uncontested citations which were included in Assessment Case No. 000247163.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

/s/ Patrick K. Nakamura
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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

721 19th STREET, SUITE 443
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November 3, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2011-177-M
Petitioner,	:	A.C. No. 02-02614-233685
	:	
v.	:	
	:	
OMYA ARIZONA,	:	
a division of OMYA INC.,	:	
Respondent.	:	Mine: Omya Arizona

DECISION

Appearances: Hillary Smith, CLR, Mine Safety and Health Administration, Denver, Colorado, for the Petitioner.
 Luis Pacheco, Safety Director for Omya, Superior, Arizona, for the Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Omya Arizona 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 three violations with a total proposed penalty of \$300.00. The citations were issued by MSHA under section 104(a) of the Mine Act at the Omya Arizona mine near Superior, Arizona. The parties presented testimony and documentary evidence at the hearing held on October 7, 2011 in Denver, Colorado.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Omya Arizona, (hereinafter “Omya”) a division of Omya Inc., operates a mine near Superior, Arizona. The mine agrees that it is a mine operator as defined by the Act, and is subject to the jurisdiction of the Mine Safety and Health Administration. (Tr. 8); Stip. 1 and 2. The mine operates a quarry and crusher that grinds rock that is used primarily as filler for pharmaceutical materials. (Tr. 20). In August 2010, MSHA inspector Blaine MacKay conducted a general safety inspection of the Omya operation. As a result of the inspection, the three violations contested herein were issued. At hearing, the Secretary and the mine operator agreed to resolve two of the citations. The settlement agreement is incorporated below.

Following the testimony and presentation of evidence, a decision was issued on the record. That decision is incorporated herein.

Citation No. 6587605 was issued by Inspector MacKay on August 12, 2010. MacKay has 25 years mining experience, has been an inspector for four years, and is an electrical specialist for MSHA. MacKay worked for more than 25 years as an electrician in the mines, both underground and surface. He worked as an electrical supervisor and trainer, and he has received journeyman electrical training. The citation issued by inspector MacKay described the violation, in part, as follows: “The operator failed to properly maintain the 480 VAC principal power circuit in a safe condition in that the switch was not labeled to show which unit it controlled.” The standard cited by MacKay, 30 C.F.R. § 56.12018, provides that “[p]rincipal power switches shall be labeled to show which units they control, unless identification can be made readily by location.” MacKay determined that an injury was unlikely to occur, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$100.00 has been proposed for this violation.

MacKay testified that, while inspecting the crusher building at Omya, he observed a switch located on the exterior wall between the man-access door and the large roll-up door that opened into the crusher area. The switch described by MacKay was not labeled or otherwise identified as the disconnect switch for the high speed roll-up door. The disconnect switch is shown in Sec’y Ex. 3, a photo that also details the number of conduits and switches on the same wall as the disconnect switch. When MacKay viewed the wall, he could not readily determine which conduits connected to this particular disconnect switch, and it was not evident to him what the switch controlled. The switch was not labeled and MacKay believed that, without proper identification, the disconnecting of the correct equipment might be delayed. MacKay explained that a principal power switch isolates the power from the equipment and this particular disconnect switch did just that. He further explained that the subject area is accessed on an as needed basis to enter the upper level of the crusher building. The door that is controlled by the switch is a large one that is raised so that trucks or loaders may access the crusher to dump material. The disconnect switch was energized at the time of the inspection.

The operator agreed that the switch cited was a principal power switch and that it was not labeled. However, the operator argues that the switch could be identified by its location. Keith Harvey, who was the maintenance mechanic at the time of the citation, testified that he was aware that the disconnect switch was used for the roll-up door and he explained as much to MacKay. Harvey had assisted in the installation of the door and does periodic maintenance and repair on the door, along with one other employee. According to Harvey, the switch to the high speed roll-up door is the only disconnect on the wall, and he believes it is identifiable by its location for that reason. He has been a maintenance mechanic for 35 years and he uses the disconnect switch when he does periodic maintenance on the door. Only he and the other maintenance mechanic have any reason to use the disconnect and neither of them has had any difficulty identifying and using the switch. The nearest motor is 25-30 feet away, and so the roll up door is the only switch-controlled item in the immediate area.

The photo at Sec'y Ex. 3, photo 4, identifies the location of the roll-up door in relation to the area surrounding it. It is obvious that the door is out in the open and available for use by any person, not just the employees who maintain the switch. In fact, the switch must be accessible in order to immediately operate the door in case of emergency. There are 13 employees at the mine who could access the switch, as well as the contract truck drivers who are frequently on the property. The truck drivers, as well as the loader operators, occasionally access the door, but as the mine explained, the door is used primarily by four of the employees at the mine when filling the crusher.

While there is some dispute as to how readily Harvey was able to identify the switch when asked by MacKay, it is important to note that MacKay, an experienced electrician, was not able to identify the disconnect switch based upon its location on the exterior wall. MacKay testified that he could not trace the conduit, no equipment fed directly into it, and he could not tell what the switch controlled by looking at it. (Tr. 26-27). Therefore, even if Harvey did readily identify the switch as the disconnect for the roll-up door to MacKay when questioned, it is not apparent to others what the switch controls. As MacKay explained, there were several pieces of equipment and switches on the wall, and there existed enough questions as to what the switch controlled that it required a label. The disconnect switch is used primarily to de-energize the door in an emergency, and would be used not only by those who conduct maintenance on the door and are familiar with the switch, but by others, as well. Therefore, I agree with MacKay and find that identification of the switch could not be made readily by location. Further, I credit MacKay's testimony and find that the primary power switch was not labeled. Consequently, a violation has been shown.

Although MacKay testified that a delay in disconnecting the switch, due to the inability to locate it, would expose miners to shock, burn and mechanical entanglement type injuries, he did not mark the violation as significant and substantial. He believed an injury to be unlikely, but if one did occur, it would be serious. He also determined that the negligence was moderate. MacKay understood that the disconnect switch had been in the same location for a period of time and had not been labeled. He gathered that the mine had a good faith belief that it did not have to be labeled, and marked the violation as moderate negligence. No evidence has been presented to the contrary and I, therefore, affirm MacKay's finding of moderate negligence.

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 violation was abated in good faith. The history shows the past violations at this mine to be minimal. (Tr. 9-11). Omya is a small operator and the violation was a result of moderate negligence. In light of the foregoing, I assess the \$100.00 penalty proposed by the Secretary for this violation. Omya has agreed to pay the remaining two violations as issued and I find those penalties, each of \$100.00, to be appropriate. (Tr. 6-7).

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the proposed penalty of \$100.00 for the violation heard, and an additional \$200.00 for the violations that have been admitted. Omya Arizona, Inc., is hereby **ORDERED** to pay the Secretary of Labor the sum of \$300.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller

Margaret A. Miller

Administrative Law Judge

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
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November 4, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-1346
Petitioner	:	A.C. No. 15-18594-150594
	:	Mine: D&K No. 1
	:	
	:	Docket No. KENT 2008-1347
	:	A.C. No. 15-18594-147288
	:	Mine: D&K No. 1
	:	
	:	Docket No. KENT 2008-1348
	:	A.C. No. 15-18594-139998
	:	Mine: D&K No. 1
	:	
	:	Docket No. KENT 2008-1461
	:	A.C. No. 15-18594-156296
	:	Mine: D&K No. 1
	:	
	:	Docket No. KENT 2008-1541
	:	A.C. No. 15-18594-159376-01
v.	:	Mine: D&K No. 1
	:	
	:	Docket No. KENT 2008-1542
	:	A.C. No. 15-18594-159376-02
	:	Mine: D&K No. 1
	:	
	:	Docket No. KENT 2008-1543
	:	A.C. No. 15-19223-159386
	:	Mine: No. 11
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	:	Docket No. KENT 2008-1544
	:	A.C. No. 15-17894-159367-01
	:	Mine: No. 10
	:	
EMBER CONTRACTING CORPORATION,	:	Docket No. KENT 2008-1545
Respondent	:	A.C. No. 15-17894-159367-02
	:	Mine: No. 10
	:	
	:	Docket No. KENT 2008-1546
	:	A.C. No. 15-17894-159367-03

: Mine: No. 10
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: Docket No. KENT 2009-247
: A.C. No. 15-17894-165060
: Mine: Right Fork
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: Docket No. KENT 2009-248
: A.C. No. 15-18594-165069-01
: Mine: D&K No. 1
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: Docket No. KENT 2009-249
: A.C. No. 15-18594-165069-02
: Mine: D&K No. 1
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: Docket No. KENT 2009-250
: A.C. No. 15-19223-165084
: Mine: No. 11
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: Docket No. KENT 2009-251
: A.C. No. 15-19258-165086
: Mine: J&T
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: Docket No. KENT 2009-353
: A.C. No. 15-19258-168024-01
: Mine: J&T
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: Docket No. KENT 2009-354
: A.C. No. 15-19258-168024-02
: Mine: J&T
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: Docket No. KENT 2009-533
: A.C. No. 15-19258-170944
: Mine: J&T
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: Docket No. KENT 2009-578
: A.C. No. 15-19223-170943
: Mine: No. 11
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: Docket No. KENT 2009-796
: A.C. No. 15-18593-176378
: Mine: No. 12
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: Docket No. KENT 2009-897
: A.C. No. 15-18593-178874

: Mine: No. 12
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: Docket No. KENT 2009-1134
: A.C. No. 15-18593-184628
: Mine: No. 12
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: Docket No. KENT 2009-1135
: A.C. No. 15-19258-184640
: Mine: J&T
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: Docket No. KENT 2009-1292
: A.C. No. 15-18593-187486
: Mine: No. 12
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: A.C. No. 15-19258-187498
: Mine: J&T
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: Docket No. KENT 2009-1367
: A.C. No. 15-19258-190500
: Mine: J&T
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: Docket No. KENT 2009-1370
: A.C. No. 15-18593-190490
: Mine: No. 12
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: Docket No. KENT 2009-1584
: A.C. No. 15-18593-196334-01
: Mine: No. 12
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: Docket No. KENT 2009-1585
: A.C. No. 15-18593-196334-02
: Mine: No. 12

DECISION

Appearances: Matt Shepherd, Esq., U.S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee, for Petitioner;

Charles J. Baird, Esq., Baird & Baird, P.S.C., Pikeville, Kentucky, for
Respondent.

Before: Judge Paez

This case is before me upon the Secretary's Petitions for the Assessment of Civil Penalty pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). 30 U.S.C. § 815. The Secretary seeks a total civil penalty of \$226,508 against Respondent Ember Contracting Corporation ("Ember") for the single order and 247 citations at issue in the 29 dockets consolidated into this matter.¹ (Sec'y Ex. 1.)

The parties filed with the Commission a Joint Motion to Consolidate Proceedings in twenty-six of the twenty-nine above-captioned dockets on December 17, 2009. On November 9, 2009, the Chief Judge concluded on remand from the Commission that adequate cause supported reopening Docket Nos. KENT 2008-1346, KENT 2008-1347, and KENT 2008-1348, which had become final orders, and the parties filed a Joint Motion to Consolidate Proceedings in these three matters on January 22, 2010. On March 9, 2010, I issued an Order to Consolidate and Notice of Hearing setting this case for hearing on September 21 and 22, 2010, in Pikeville, Kentucky. At the hearing, the parties submitted documentary evidence as well as the testimony of one witness appearing on behalf of Ember—Charles R. Gilkerson, President and co-owner of Ember. The Secretary filed her post-hearing brief on January 4, 2011. Ember filed its post-hearing brief on February 7, 2011, pursuant to an extension granted due to a family emergency with Ember's counsel.

I. Parties' Stipulations

The parties entered into the following stipulations, which they submitted as a joint exhibit at the hearing:

1. The Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977. The Administrative Law Judge has the authority to hear this case and issue a decision regarding this case.
2. The citations and orders included in these dockets were properly issued. The Respondent accepts the citations and orders as issued. The Respondent does not contest the Secretary's characterization of the violations, including the Secretary's findings regarding gravity, negligence or the number of miners affected. The Respondent only contests the amount of the proposed assessments.
3. The citations and orders at issue in these cases were properly served by a duly authorized representative of the Secretary upon an agent of the Respondent. The Respondent timely contested the violations.

¹ In this decision, the hearing transcript, the Secretary's exhibits, and Respondent Ember Contracting Corporation's exhibits are abbreviated as "Tr.," "Sec'y Ex. #," and "Resp't Ex. #," respectively.

4. The Respondent is a small operator. The Respondent's history of violations is not an aggravating factor.

5. The only fact that remains to be litigated at trial is the effect of the proposed civil money penalties on the Respondent's ability to continue in business.

(Joint Ex. 1, at 3–4.)

II. Parties' Arguments

As stipulated by the parties, the sole issue before me is whether a proposed penalty assessment would adversely affect Ember's ability to continue in business. Under well-settled Commission precedent, it is presumed that a proposed penalty assessment will not adversely affect an operator's ability to continue in business. *Broken Hill Mining Co.*, 19 FMSHRC 673, 677–78 (Apr. 1997). Consequently, the burden here is on Ember to prove that the proposed penalty assessment will adversely affect its ability to continue in business. *Id.*

As a threshold matter, the Secretary argues that Ember has effectively shut down its mining operation, and as a result, is no longer “in business” for the purposes of section 110(i) of the Mine Act. (Sec'y Br. 6–11.) According to the Secretary's interpretation of the Mine Act, section 110(i) does not apply to mine operators that are out of business. (*Id.*) As a result, the Secretary urges me to find Ember liable for the full amount of the proposed penalty assessment. (*Id.* at 14.) Ember disagrees with the Secretary's characterization of its business, maintaining it is still “in business” based on the Commission's decision in *Spurlock Mining Co.*, 16 FMSHRC 697 (Apr. 1994) (holding that the Commission reviews the record for evidence supporting the conclusion that the operator could resume mining operations). (Ember Br. 13, 15.)

Ember argues it neither has the financial means to pay the full proposed penalty assessment nor could it have paid the entire proposed penalty even at the time the penalties were initially proposed. (Ember Br. 8.) Ember stresses that the proposed penalty assessments caused its bank to cancel its line of credit, and as a result, it cannot continue its mining operations.² (*Id.* at 14.) In support of reducing the Secretary's proposed civil penalty, Ember again relies on *Spurlock Mining* as well as the Administrative Law Judge decision in *Granite Mountain Crushing, LLC*, 26 FMSHRC 126 (Feb. 2004) (imposing a reduced penalty based, in part, on

² Ember adds that, notwithstanding the case before me, it has always paid the civil penalties assessed to it when it had the money to do so and has an excellent reputation in the mining industry. (Ember Br. 13.) Ember considers itself to be a “safe” operator, having had only one serious accident during its nearly twenty-year history. (*Id.* at 7, 13.) Ember also points out that the bulk of the violations in this case stem from the Secretary's inspection of one of its mines after a fire. (*Id.* at 13.) However, these arguments are misplaced as they go to the other civil penalty criteria under section 110(i) of the Mine Act, facts to which the parties have already stipulated. (Joint Ex. 1.)

finding no evidence operator's decision to liquidate assets was based on Secretary's proposed penalty (ALJ).

The Secretary counters that the full civil penalty should be imposed because Ember failed to explain why it had not paid the civil penalties when they were initially imposed or why the penalties would prevent it from resuming its mining operations. (Sec'y Br. at 11–14.) Additionally, the Secretary argues that under these circumstances, equity requires imposition of the full amount of the proposed civil penalty. (*Id.* at 12–13.) The Secretary points out that around the time that Ember wound down its mining activities, its owners sold Ember's assets to a related company and incorporated a new company presently engaged in mining operations. (*Id.*)

For the reasons that follow, I conclude that Ember has not satisfied its burden of proving that imposition of the total proposed civil penalty would adversely affect its ability to continue in business.

III. Background and Findings of Fact

A. Ember's Mining Business

Charles ("Randy") R. Gilkerson incorporated Ember as a Kentucky corporation in 1992. (Tr. 13:6–16; Resp't Ex. 1.) Ember is owned solely by Gilkerson and Gary Boyd. (Tr. 15:10–11, 81:7–9.) Gilkerson has served as President of Ember and Boyd as Secretary of Ember since the company's incorporation. (Tr. 15:14–19.) Gilkerson handles the business aspect of Ember while Boyd handles the operations side of the company. (Tr. 79:7–14.) In addition to having ownership stakes in Ember, Gilkerson and Boyd each take commissions of 25¢ per ton on the coal mined by Ember. (Tr. 40:9–23.)

Ember is in the business of contract mining at underground coal mines. In contract mining, larger coal operators pay smaller companies, such as Ember, to extract coal from small "reserve blocks," which is the coal remaining after a large operator has finished removing the largest reserves of coal from a particular mine site. (Tr. 14:1–13, 27:2–21.) Ember has always mined coal using "conventional mining" methods. (Tr. 68:20–22.) Thus, to extract coal, Ember uses a machine to drill a hole into the coal underground and then inserts dynamite into the hole. (Tr. 68:23–69:9.) The dynamite's ignition breaks up the coal, allowing its removal from underground. (Tr. 69:7–9.)

Contracting operators pay Ember on a per-ton basis. (Tr. 14:7–8.) Ember's contracts involve relatively small coal reserves, and the longest Ember has remained at any particular mine site is 3.5 years. (Tr. 27:24–28:4.) Overall, Ember typically mines approximately 200,000 tons of coal per year. (Tr. 28:5–10.) According to Gilkerson, Ember must mine approximately 100,000 tons of coal per year for its operation to be economical. (Tr. 28:10–29:3.) Ember mines a particular site until it extracts all of the available coal. (Tr. 27:2–5.)

Each time Ember obtains a new mining contract and begins operation at a new mine site, it must cover the costs of starting up the new operation. The start-up cost of a single one of its mining operations usually varies between \$100,000 and \$300,000. (Tr. 24:19–25:2.) To get the mine up and running, Ember must cover the cost of its employees’ payroll, equipment, and utilities. (Tr. 25:15–26:19.) Typically, Ember will go to its local bank and obtain financing based on its contract. (Tr. 25:3–15.) Ember may also be able to secure equipment from a vendor based on the strength of its contract. (Tr. 25:9–25.)

To secure a mining contract, Ember must compete against other contract mine operators bidding for the contract. (Tr. 56:3–4.) The per-ton price awarded to Ember in its mine contract may vary between \$20 per ton and \$45 per ton. (Tr. 56:12–22.) This price reflects negotiations allocating certain costs between Ember and the contracting mine operator, such as equipment and coal haulage. (Tr. 56:24–57:7.) Ultimately, Ember takes on a contract when the price, less the cost of running the proposed mine operation, makes it a profitable venture. (Tr. 56:4–11.)

B. Ember’s Recent Operational History, Business Prospects, and Financial Performance

1. Recent Operational History

The bulk of Ember’s violations were issued as a result of its operations during February and March of 2008. During that time, the Secretary issued forty-four citations and proposed a penalty assessment totaling \$156,228. (Docket No. KENT 2008-1347, Sec’y Ex. A.) According to Gilkerson, Ember did not pay the proposed penalty assessment because it was not in any financial position to do so. (Tr. 19:24–20:3.) Nevertheless, Ember continued to pay some of the civil penalties assessed against it when it was “able,” paying approximately \$10,000 to \$20,000 following the large civil penalty assessment. (Tr. 21:2–14; Resp’t Ex. 11, at 4; Resp’t Ex. 12, at 4.) Ember attempted to negotiate the civil penalties at issue in this case to “come to some sort of settlement that we could live with.” (Tr. 23:4–5.)

By end of the summer of 2009, Ember’s then-current contract mining operation had removed all of the coal available at the mine site. (Tr. 32:15–20.) As the operation wound down, Ember needed to borrow money to pursue a new mining contract. (Tr. 32:23–24.) However, based on the penalty assessments against it, Ember made the determination that it could not proceed to finance a new operation until it “did something with the fines.” (Tr. 32:10–33:1.) During this time, Ember also engaged in talks with its bank to refinance its \$100,000 line of credit, and in those discussions Ember revealed the pending civil penalty assessments. (Tr. 31:1–24, 37:4–22.) Ember asserts its bank refused to renew its line of credit based on the proposed penalty assessments. (Tr. 31:1–16.) Ultimately, the bank did not renew Ember’s line of credit, indicating Ember would not have generated enough revenue to pay off its debt. (Tr. 37:17–19; Resp’t Ex. 3.)

When Ember’s bank cancelled the line of credit, it also required Ember to repay its outstanding debt of \$100,000. (Tr. 37:20–22.) To pay off the loan, Ember sold its equipment to E.C. Management for \$115,000. (Tr. 32:21–22, 33:2–19; Resp’t Ex. 4, at 1.) E.C. Management

is a corporation owned solely by Gilkerson and Boyd that they formed to provide consulting advice on mine site development. (Tr. 34:2–4, 34:8–13, 49:15–50:1.) Ember has never purchased any consulting services from E.C. Management. (Tr. 66:12–14.) E.C. Management, however, has loaned money to Ember for various purposes, including payment of COBRA healthcare benefits to workers Ember laid-off at the end of its mining contract. (Tr. 39:14–40:4, 92:2–5.)

The “book value” of the equipment involved in the equipment sale—i.e., its value after accounting for depreciation deductions that allowed Ember to spread the cost of its equipment’s deterioration over time—was approximately \$32,000, although Gilkerson estimated its market value to be \$103,000. (Tr. 66:15–67:22; Resp’t Ex. 4, at 2.) Some of the equipment was junk and had no value other than for recoverable spare parts. (Tr. 35:22–7; Resp’t Ex. 4, at 2.) E.C. Management is still in possession of the equipment, and so far, efforts to sell it have been unsuccessful. (Tr. 36:15–18.) When E.C. Management bought Ember’s equipment, E.C. Management sent the payment directly to Ember’s bank in satisfaction of its debt. (Tr. 36:8–11.) E.C. Management had no need for the equipment it purchased from Ember. (Tr. 34:14–16.) Gilkerson admitted that E.C. Management bought Ember’s equipment solely to pay off Ember’s debt. (Tr. 34:17–19.)

2. Current Prospects in Contract Mining

At the time of the hearing, Ember had no coal mining contracts or even any employees. (Tr. 84:9–13.) Gilkerson does not consider Ember to be out of business but rather considers it “to be in waiting.” (Tr. 84:14–18.) Ember would like to resume mining, and Gilkerson considers the company to be “a brand” with a positive reputation among the companies with whom it contracts, as well as equipment vendors and regulators. (Tr. 54:11–25.)

Business opportunities are presently available to Ember, and Gilkerson predicts even greater demand for contract mining in the future, particularly in eastern Kentucky. (Tr. 55:1–3, 61:25–62:18, 63:20–64:23.) Indeed, shortly before the hearing on this matter, Ember, through Gilkerson, considered the possibility of pursuing a mining contract. (Tr. 55:4–9.) Ember, however, neither made a bid on the contract nor even explored the potential financial costs and benefits of the proposal. (Tr. 55:10–12, 55:15–22.) Rather, Ember determined it was not “in the position to know what [it] could do until [it] knew what was happening [in this proceeding].” (Tr. 55:25–56:1.) Gilkerson testified that Ember would be working today had the fines at issue in this case not been assessed. (Tr. 72:9–15.)

In January 2010, Gilkerson and Boyd formed G.R. Mining, a separate Kentucky corporation owned solely by them, which is engaged in the business of contract underground coal mining. (Tr. 67:25–68:10, 89:15–25, 90:4–6, 90:15–18.) G.R. Mining operates out of the same location where Gilkerson and Boyd operate Ember. (Tr. 90:19–22.) Boyd manages the operational aspects of G.R. Mining, just as he does at Ember. (Tr. 91:2–8.) At the time of the hearing, G.R. Mining had a contract to extract coal for McCoy Elkhorn, a large operator in eastern Kentucky. (Tr. 90:7–12.) G.R. Mining had approximately eighteen employees, some of

whom, including Gilkerson and Boyd, were the same ones who had previously worked for Ember. (Tr. 70:4–11, 90:23–91:4.) Indeed, Gilkerson and Boyd draw the same 25¢ per ton commission from G.R. Mining’s output as they do from Ember’s. (Tr. 74:6–13.) Rather than using conventional mining at this project, G.R. Mining uses a continuous miner, which is a large piece of machinery fitted with a rotating metal drum covered in bits that grinds the coal from the underground seam. (Tr. 69:10–13.) Gilkerson predicted that G.R. Mining’s contract could last for 2.5 years if it is able to extract the total reserves remaining at the mine. (Tr. 74:14–17.) In explaining whether Ember could have pursued this opportunity, Gilkerson stated that G.R. Mining’s contract “didn’t suit Ember’s mode of operation.” (Tr. 69:22–70:3.)

3. Financial Performance

Ember submitted unaudited annual financial statements (Tr. 89:8–14) from December 31, 2006, through December 31, 2009 (Resp’t Exs. 9–12), as well as its federal income returns for the years 2006 through 2009, as proof of its recent financial performance (Resp’t Exs. 5–8). Ember operates on a calendar year system, meaning that it records and reports its yearly financial performance—its revenues, costs, assets, and liabilities—over the same period as the calendar year. (Tr. 87:12–16.) Ember had yearly revenues of approximately \$11 million in 2006 (Resp’t Ex. 9, at 3), \$8.5 million in 2007 (Resp’t Ex. 10, at 3), \$5.9 million in 2008 (Resp’t Ex. 11, at 3), and \$2.2 million in 2009 (Resp’t Ex. 12, at 3).

According to its unaudited annual income statements, Ember had a net income of \$48,062.90 in 2006 (Resp’t Ex. 9, at 4), a net income of -\$32,106.49 in 2007 (Resp’t Ex. 10, at 4), a net income of -\$153,060.74 in 2008 (Resp’t Ex. 11, at 4), and a net income of -\$95,031.45 in 2009 (Resp’t Ex. 12, at 4). Ember’s federal taxable income was \$34,493 in 2006 (Resp’t Ex. 5, at 1), \$36,656 in 2007 (Resp’t Ex. 6, at 1), -\$128,261 in 2008 (Resp’t Ex. 7, at 1), and -\$82,478 in 2009 (Resp’t Ex. 8, at 1).

Ember’s unaudited balance sheets provide a snapshot of the total value of its assets (i.e., cash, equipment, and payments due to it) and liabilities (i.e., expenses owed to third-parties and debt) at a particular point in time. Ember’s balance sheets also show the amount of the owners’ equity in the company, which is the value of Gilkerson and Boyd’s stakes in Ember as measured by the difference between Ember’s assets and liabilities. On December 31, 2006, Ember had approximately \$1.1 million in assets, \$976,000 in liabilities, and \$165,000 in equity. (Resp’t Ex. 9, at 1–2.) Ember had approximately \$745,000 in assets, \$612,000 in liabilities, and \$133,000 in equity on December 31, 2007. (Resp’t Ex. 10, at 1–2.) Ember had approximately \$212,000 in assets, \$232,000 in liabilities, and -\$20,000 in equity on December 31, 2008. (Resp’t Ex. 11, at 1–2.) Ember had approximately \$4,000 in assets, \$119,000 in liabilities, and -\$115,000 in equity on December 31, 2009. (Resp’t Ex. 12, at 1.)

At the time of the hearing, Ember’s assets consisted of approximately \$1,000 in cash in a bank account and \$17,000 owed to it by the IRS as a refund for COBRA benefits paid to laid-off workers. (Tr. 37:23–39:13.) Ember had no outstanding debts with its bank. (Tr. 46:11–14.) However, Ember owes Gilkerson and Boyd approximately \$30,000 in commissions based on the

amount of coal it mined. (Tr. 40:24–41:7.) Ember owes approximately \$70,000 on its loans from E.C. Management. (Tr. 92:2–8.)

IV. Principles of Law

Section 110(i) of the Mine Act provides:

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

30 U.S.C. § 820(i) (emphasis added).

The determination of the proper civil penalty is committed to the Administrative Law Judge's discretion, which is bounded by the statutory criteria of section 110(i) of the Mine Act as well as the deterrent purpose of the Mine Act's penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983) (citation omitted), *aff'd sub nom. Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147 (7th Cir. 1984). According to the Mine Act's legislative history:

[T]he purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.

....

[A] penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance.

S. Rep. No. 95-181, at 37–38 (1977).

In evaluating whether an operator is “in business” for the purposes of section 110(i) of the Mine Act, the Commission reviews the record for evidence supporting the conclusion that the operator could resume mining operations. *Spurlock Mining*, 16 FMSHRC at 699. It is well-established that “[i]n the absence of proof that the imposition of authorized penalties would adversely affect its ability to continue in business, it is presumed that no such adverse [e]ffect would occur.” *Id.* at 700 (quoting *Sellersburg Stone*, 5 FMSHRC at 294). The operator must introduce specific evidence to show that the proposed civil penalty would adversely affect its ability to continue in business. *Broken Hill Mining*, 19 FMSHRC at 677–78.

Past financial records showing net losses are not necessarily dispositive of this issue, particularly if the operator's documentation is unreliable or other evidence, such as future

business prospects or assets, contradicts the operator's assertions about its inability to pay. *Spurlock Mining*, 16 FMSHRC at 700 (citing *Peggs Run Coal Co.*, 3 IBMA 404, 413–14 (Nov. 1974)). See, e.g., *Heritage Res., Inc.*, 21 FMSHRC 626, 638 (June 1999) (ALJ) (finding no effect on ability to continue in business in light of operator's substantial assets); *L&T Fabrication & Constr.*, 21 FMSHRC 71, 73–74 (Jan. 1999) (ALJ) (discrediting reliability of unaudited financial records); *Kennie-Wayne, Inc.*, 16 FMSHRC 2441, 2442–44 (Dec. 1994) (ALJ) (finding no effect on ability to continue in business in light of operator's future business prospects).

The Commission has repeatedly affirmed that its “function is not to pass on the wisdom or fairness of . . . asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.” *Sec’y ex rel. McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 991 (Sept. 2001) (quoting *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982)). This rule, however, has been applied only to discrimination proceedings. Nevertheless, it reflects the common law business judgment rule, which directs courts not to second-guess the decision of a corporation's board of directors, so long as the decision was made without corrupt motive and in good faith. 3A William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 1036, available at Westlaw, 3A Fletcher Cyc. Corp. § 1036.

Similarly, this Administrative Law Judge is in no position to criticize Ember's determination that the proposed penalty negatively impacts its ability to continue in business unless Ember does not meet its burden of proof or its conclusion is not credible. Likewise, the Commission has noted:

Our decision should not be interpreted to suggest that any mine operator can obtain a reduction in the penalty assessed against it for a Mine Act violation pursuant to the “effect on the operator's ability to continue in business” criterion by going out of business.

. . . .

[W]e need to “worry about creating an economic incentive to avoid a penalty by going out of business and perhaps, then reincorporating under a different name.” . . . Moreover, even “employers who were going out of business for ordinary commercial reasons would have little incentive to comply with safety regulations to the end if monetary penalties could be evaded once the business quit altogether.”

Unique Electric, 20 FMSHRC 1119, 1123 (Oct. 1998) (quoting *Reich v. OSHRC*, 102 F.3d 1200, 1203 (11th Cir. 1997)). See *Granite Mountain Crushing*, 26 FMSHRC at 130 (imposing reduced penalty based, in part, on finding no evidence that operator's decision to liquidate assets was based on Secretary's proposed penalty).

V. Further Findings of Fact, Legal Analysis, and Conclusions of Law

A. Ember's Status as a Going Concern

A preliminary matter is the Secretary's argument that Ember is out of business and section 110(i) does not apply to this case. Ember refutes the Secretary's contention and offers the Commission's decision in *Spurlock Mining* to support the conclusion that it remains in business. 16 FMSHRC at 699. In *Spurlock Mining*, the Commission considered several factors in determining that the operators could resume mining operations and thus were "in business." The Commission noted that the operators had ceased mining operations yet had not formally dissolved. *Id.* Moreover, the operators retained a significant amount of equipment and planned to resume operations if they could secure financing. *Id.* Because no evidence supported the conclusion that the operators in *Spurlock Mining* would not resume mining operations in the future, the Commission concluded that the operators were still in business. *Id.*

As correctly noted by Ember, *Spurlock Mining* is instructive on this point. Ember, through its president, Gilkerson, asserts it is an active business with intentions to resume mining. (Tr. 54:11–25, 84:14–18.) Ember has not dissolved as a corporation. Indeed, shortly before the hearing, Ember even considered a potential mining contract. (Tr. 55:4–9.) Had Ember secured financing for another mining project, it would have continued operations. (Tr. 32:23–24.) Additionally, even though Ember sold its equipment (Tr. 32:21–22, 33:2–19), it typically obtained equipment through vendors (Tr. 25:9–25) or through contracting with a large operator pursuant to the mining contract itself (Tr. 56:24–57:7). Moreover, Ember could obtain its former equipment from E.C. Management because it is still available. *See* discussion *supra* Part III.B.1. Ember's lack of equipment is not a significant obstacle to the resumption of its mining activities. Accordingly, because the evidence suggests Ember may resume mining again, if possible, I reject the Secretary's arguments and conclude that Ember is still "in business." Therefore, section 110(i)'s requirement to consider Ember's ability to continue in business applies to this case.

B. Ember's Ability to Pay the Proposed Civil Penalty

Ember has the burden of proving that the proposed civil penalty assessment would adversely affect its ability to continue in business. Ember asserts it did not have the financial means to pay the full penalty assessments when issued. Ember further argues that the unresolved total civil penalty has prevented it from resuming its mining operations by causing its bank to deny it credit. Finally, Ember argues that Commission case law supports reduction of the proposed civil penalty.

1. Ember's Recent Financial Performance

Between 2006 and 2009, Ember's financial performance followed a downward trend. Ember's financial records in 2006 reveal a net income of \$48,062.90, notwithstanding paying

\$13,514 in civil penalties. (Resp't Ex. 9, at 4.) On December 31, 2006, Ember's \$1.1 million in assets included \$698,932.23 in cash. (*Id.* at 1.) Also at that time, Ember's shareholders' equity was \$164,625.77, consisting of \$116,462.87 in retained past profits and \$48,062.90 in current earnings. (*Id.* at 2.) During the next year in 2007, Ember reported a net income of \$36,656 for the purposes of federal taxes (Resp't Ex. 6, at 1) and a net income of -\$32,106.49 after accounting for the payment of \$56,248.60 in civil penalties and other adjustments (Resp't Ex. 10, at 4).³ On December 31, 2007, Ember still maintained a relatively robust balance sheet with approximately \$745,000 in assets, \$612,000 in liabilities, and \$133,000 in equity. (Resp't Ex. 10, at 1–2.) However, during 2008 and 2009, Ember's net income, as well as the value of its assets, liabilities, and shareholders' equity, declined markedly. (Resp't Ex. 11, at 1–2, 4; Resp't Ex. 12, at 1, 4.)

The downward trend in Ember's financial performance tracked the diminution of the receipts and bills for its mining operations. In 2006 and 2007, Ember's cash and accounts receivable—receipts due for its mining activities—equaled approximately \$1 million (Resp't Ex. 9, at 1) and \$671,000 (Resp't Ex. 10, at 1), respectively. At the same time in 2006 and 2007, Ember's accounts payable—costs incurred for its mining activities—equaled approximately \$572,000 (Resp't Ex. 9, at 1) and \$564,000 (Resp't Ex. 10, at 1), respectively. By the end of 2008, the sum of Ember's cash and accounts receivable had fallen to approximately \$161,000, and its accounts payable had declined to \$92,000. (Resp't Ex. 11, at 1.) At the end of 2009, Ember had no accounts receivable or accounts payable and only about \$3,000 in cash. (Resp't Ex. 12, at 1.)

The decline of Ember's net profits, assets, receipts for coal output, and bills for mining expenses coincided with the period leading up to the exhaustion of its mining contract in late-summer 2009. Indeed, relying on Ember's reported commissions expenses as a yardstick of the company's output, Ember mined approximately 302,000 tons of coal in 2006 (Resp't Ex. 9, at 3), 158,000 tons of coal in 2007 (Resp't Ex. 10, at 3), 166,000 tons of coal in 2008 (Resp't Ex. 11, at 3), and 87,000 tons of coal in 2009 (Resp't Ex. 12 at 3).⁴ Standing alone, Ember's recent financial performance would suggest that a reduction in the Secretary's proposed civil penalty is appropriate. However, as set forth more fully below, the deterioration of Ember's financial condition between 2006 to 2008 stemmed from Gilkerson and Boyd's decision to let it wither on the vine by foregoing the pursuit of new mining contracts until the resolution of this civil penalty

³ Ember's income statement accounts for civil penalties; however, under federal law, it is not permitted to deduct the payment of any civil penalties in calculating its net income for tax purposes. I.R.C. § 162(f) (“No deduction shall be allowed [for ordinary and necessary business expenses] for any fine or penalty paid to a government for the violation of any law.”)

⁴ Ember's principal officers, Boyd and Gilkerson, collectively drew 50¢ per ton commissions on Ember's mining output. (Tr. 40:9–23.) Therefore, dividing Ember's yearly commission expenses by the 50¢ per ton commission rate yields an estimate of the mining output underlying its annual financial statements.

proceeding. Ember's unaudited past financial records are not dispositive of its ability to pay the proposed civil penalty.

2. Ember's Present Ability to Continue in Business

Ember submits that its bank declined to renew its line of credit based on the pending civil penalties. (Tr. 31:1–16.) Because of these penalties, Ember argues it cannot resume its mining operations. (Ember Br. 14.) Nevertheless, in discussing the bank's official notification letter denying renewal of the line of credit, Gilkerson admitted that Ember decided not to pursue further mining contracts until it resolved this civil penalty proceeding: “[W]e were in a position that we would have to refinance to start up a new operation. *And so we chose then*, basically, we wouldn't be able to do that until we did something with the fines.” (Tr. 32:23–33:1 (emphasis added).) Yet had the pending civil penalty assessment adversely impacted Ember's credit, Ember's bank could have indicated so in the notification letter, which contained the category checkbox “[g]arnishment, attachment, foreclosure, repossession or suit” under the list of rationales for denying the credit request. (Resp't Ex. 3.) The bank did not mark this category. (*Id.*) Instead, it marked “[c]ash flow unable to service debt.” (*Id.*) The evidence demonstrates that the bank denied Ember's line of credit based on Ember's decision not to pursue further business opportunities. The proposed civil penalty itself did not cause the bank to deny Ember's financing. *See Spurlock Mining*, 16 FMSHRC at 700 (“We decline to reduce the penalties based on the operators' mere speculation that the penalties would result in the imposition of judicial liens and that those liens would foreclose financing.”).

Ember asserts it cannot pursue any new mining contracts until it resolves this civil penalty proceeding. (Tr. 55:25–56:1.) Ember made this decision because it needed to “find something that would justify the start up of a new mine plus pay off these fines.” (Tr. 24:14–18.) However, when presented with an opportunity to pursue a mining contract, Ember did not explore the potential revenues and costs of the arrangement, asserting instead that it first needed to resolve this civil penalty proceeding. (Tr. 55:10–56:1.)

Ember's business model sheds light on the credibility of its decision not to pursue new mining contracts. Ember's mining operation is significantly leveraged in that it borrows substantially to finance the start-up costs of its mining operations. As Ember's president candidly admitted, the proposed civil penalty constituted one of those costs. (Tr. 24:14–18.) Gilkerson further stated:

[W]e have to price what it takes to do the business plus we have to price what it takes to pay off \$230,000 in fines. And once we price that in, then we're out of the game. Or if we price it where we're competitive, we can't absorb the money, can't absorb the fines. We can do it, you know, maybe one of these days, the world will get better and we can, but right now, the margins are too close.

(Tr. 56:4–11.)

At Ember's average yearly 200,000-ton production rate, the \$226,508 proposed civil penalty would, spread out over a year like Ember's other costs, levy a \$1.13/ton cost on its production, or 2.5% to 5.7% of its usual \$20 to \$45/ton contract price. No specific evidence in the record before me suggests that Ember could not have financed this cost to spread the burden of the civil penalty payment over time. In light of Ember's past profitability, the opportunities available to it, and its self-proclaimed positive reputation in the industry, I do not find Ember's purported difficulties in pursuing new mining contracts to be credible.

Rather, the activities of G.R. Mining reveal why Ember has been so reluctant in seeking additional mining contracts. Gilkerson and Boyd, the sole owners of Ember, incorporated G.R. Mining, another contract underground coal mining company, approximately four months after Ember exhausted its last mining contract. (Tr. 67:25–68:10, 89:15–25, 90:4–6.) Gilkerson and Boyd are the sole owners of G.R. Mining, too. (Tr. 89:22–25.) Boyd, who ran Ember's mining operations, also runs G.R. Mining's operational side. (Tr. 91:5–8.) Some of Ember's former employees work at G.R. Mining. (Tr. 70:4–11, 90:23–91:1.) G.R. Mining is run out of the same location where Ember operates. (Tr. 90:19–22.) Gilkerson and Boyd receive the same rate of commissions from G.R. Mining's output as they do from Ember's output. (Tr. 74:6–13.)

Ember insists that G.R. Mining is a "completely separate" company (Tr. 68:5–8) engaged in mining activity "totally different" from the mining conducted by Ember (Ember Br. 13). Gilkerson differentiates G.R. Mining from Ember based on the fact that G.R. Mining uses a continuous miner as opposed to the conventional mining method, which is the type of mining Ember has always practiced. (Tr. 68:14–22.) Ember also notes that G.R. Mining works for McCoy Elkhorn, a company Ember has never contracted with, at a site where Ember has never mined before. (Tr. 69:14–21.) In explaining whether Ember could have pursued G.R. Mining's contract, Gilkerson stated that it "didn't suit Ember's mode of operation." (Tr. 69:22–70:3.)

With overlapping owners and corporate officers, the major alleged difference between Ember and G.R. Mining is that G.R. Mining uses a continuous miner whereas Ember does not. However, Ember's open-ended Articles of Incorporation permit it to engage in contract mining using either the conventional method or a continuous miner, as well as any number of other business activities: "The Corporation shall have the powers allowed to it by law, including but not limited to those enumerated in KRS 271B." (Resp't Ex. 1.) *See* Ky. Rev. Stat. Ann. § 271B.3-010(1) (West 2011) ("Every corporation incorporated under this chapter has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation."); *id.* § 271B.3-020 (enumerating the general powers of a corporation formed under Kentucky law).

Moreover, when Ember's contract ran out, it sold all of its equipment and thus needed to obtain new equipment to pursue another mining contract. It is Ember's standard practice to obtain equipment from vendors and to negotiate flexible contracts with large operators, which also may provide for equipment. With Ember's operations manager, Boyd, at the helm of G.R. Mining, as well as some former Ember employees on board, nothing in the record suggests that Ember could not have obtained a continuous miner for its next mining contract.

Additionally, the fact that G.R. Mining has a contract with an operator at a mine site where Ember has never done business is unsurprising. Ember has done business with several operators at over a dozen mine sites throughout its history (Tr. 14:14–20), and Ember’s positive reputation, likely associated with its owners, probably contributed to G.R. Mining’s success. Gilkerson acknowledged that some in the industry probably associated G.R. Mining with the first names of it and Ember’s owners—Gary and Randy. (Tr. 73:2–5.) Given these considerations, the purported differences between Ember and G.R. Mining are mere smoke and mirrors conjured up to create a distinction that exists in name only.

It is also apparent that Gilkerson and Boyd’s companies, as well as Gilkerson and Boyd themselves, share a less-than-arm’s-length relationship with each other. When Ember wound down its mining operation and needed to pay off its bank debt, E.C. Management, another one of Gilkerson and Boyd’s companies, directly paid off Ember’s debt in exchange for Ember’s mining equipment. (Tr. 36:8–11.) As a mine development consulting company, E.C. Management had no need to buy the equipment. (Tr. 34:14–16.) Gilkerson admitted the transaction’s sole purpose was to satisfy Ember’s debt (Tr. 34:17–19), even though Ember had no prior business with E.C. Management (Tr. 66:12–14) other than borrowing money from the company (Tr. 39:14–40:4, 92:2–5).

Furthermore, Gilkerson conflated his, Boyd’s, and E.C. Management’s debts with Ember:

Q. And is Ember, how do they get the money to make those COBRA payments?

A. They borrowed it.

Q. And borrowed it from whom?

A. From us.

Q. E C Management?

A. Well, E C, yeah.

Q. And approximately how much money is E C Management or are you – is it E C Management or you all personally, which one is it?

A. Well, it could be either. I’m not exactly sure how that breaks down now because we’ve . . .

Q. How much money is owed either you and Gary or E C management for these payments or loans to E –

A. Loans for several different things. Probably [\$]70,000.

(Tr. 39:14–40:4.)

In purchasing Ember’s equipment and by loaning it money, E.C. Management expressly aided Ember while making deals that had no relationship with, and quite possibility created significant risks to, its core business of mine development consulting. These “transactions” were mere artifices created by Gilkerson and Boyd to shift money between E.C. Management and Ember. Funneling approximately \$185,000 through E.C. Management to Ember to shore up the costs associated with winding down Ember’s business may have helped preserve Ember’s

credibility in the mining industry, but Ember did not go to similar lengths to meet its civic duty to pay the civil penalties of the numerous violations it has acknowledged committing. The Mine Act's concession to operators having difficulties in continuing their businesses does not reward those engaged in shell games like the one played by Ember.

Finally, Ember relies on *Spurlock Mining* and *Granite Mountain Crushing* in support of reducing the civil penalty in this case. In *Spurlock Mining*, the Commission affirmed the Administrative Law Judge's decision not to reduce the operators' civil penalties, noting that the operators had not introduced specific evidence that the penalties would adversely affect their ability to continue in business. 16 FMSHRC at 700. In that case, the operators had ceased mining operations and presented unaudited financial statements and tax records showing losses. *Id.* at 699. At the same time, the Commission determined that nothing suggested the operators could not resume mining in the future and that the operators had substantial assets relative to the amount of the imposed penalties. *Id.* at 699–700. Concluding that no specific evidence supported the operators' argument that the penalties would adversely affect their ability to continue in business, the Commission affirmed the Administrative Law Judge's decision not to reduce the proposed civil penalties. *Id.* at 700.

In *Granite Mountain Crushing*, the Administrative Law Judge found that the operator had auctioned off its equipment and ceased its mining activities due to high operational expenses. 26 FMSHRC at 127. By the time of the hearing, the operator had a high amount of debt relative to its assets. *Id.* However, the operator acknowledged the possibility that it could resume its mining activities with new equipment, new contracts, and a better market for its products. *Id.* Finding no evidence that the operator's decision to cease mining and liquidate its assets was motivated by the Secretary's proposed penalty, the Administrative Law Judge concluded that the proposed penalty would have a negative effect on the operator's ability to continue in business. *Id.* at 130.

The record of this case is not similar to either *Spurlock Mining* or *Granite Mountain Crushing*. Here, the evidence demonstrates that G.R. Mining was founded as an alter ego of Ember to perpetuate Boyd and Gilkerson's contract mining business without the burden of the Secretary's proposed penalty assessment. Ember's decline dovetailed with the rise of G.R. Mining. Using E.C. Management, Gilkerson and Boyd paid off the liabilities Ember incurred in ceasing mining operations except, of course, the Secretary's civil penalties. Given these facts and the inseparable connections between Gilkerson, Boyd, and their companies, it is apparent that Gilkerson and Boyd let Ember decay into an empty husk while they perpetuated their contract mining business through their new company.

By remaining "in waiting" pending the outcome of this proceeding, Ember is "playing possum" by pretending to be out of business or dormant, so it can later spring back to life and drum up business and solicit contracts once the danger of federal penalties has passed. This is not the way the system works. If Ember were truly unable to operate and meet its obligations, then it should have declared bankruptcy. Instead, Ember chose to shift money, business opportunities, and contracts between the other companies owned by its principals like a

corporate shell game. Ember admits that it committed the nearly 250 violations cited by the Secretary in this case. But here, Ember and its owners want taxpayers to give Ember a pass and waive these civil penalties so it can continue to pocket profits for its owners while shirking its responsibilities under the Mine Act.

Accordingly, I cannot credit Ember's business justifications for its actions, as they are mere pretext for avoiding payment of the proposed civil penalty. It is not enough to show, as in this case, that a proposed civil penalty could have a substantial negative impact on profits. A civil penalty can and should have an adverse effect on an operator because that is the point of the Mine Act's civil penalty system—to make compliance with the Mine Act, and the protection of miners, more profitable than noncompliance. An operator's owners may not simply determine that, in light of a proposed civil penalty, their company cannot achieve an optimal level of profit and form a new company to escape an undesirable civil penalty assessment. *See Unique Electric*, 20 FMSHRC at 1123 (expressing concern over creating the incentive for operators to close down their businesses to avoid payment of civil penalties). *Cf. United Energy Servs.*, 15 FMSHRC 2022, 2085 (Sept. 1993) (ALJ) (“[T]he fact that an operator must spend money to bring its operations into compliance with MSHA’s safety and health standards, or fails to budget money for paying penalties, is no basis for not imposing civil penalty assessments for proven violations.”), *aff’d sub nom. United Energy Servs. v. FMSHRC*, 35 F.3d 971 (4th Cir. 1994).

Based on the foregoing, I reject Ember's claim that it cannot continue in business. Ember has not met its burden of proving that the proposed civil penalty would adversely impact its ability to continue in business.

VI. Conclusion

The parties have stipulated to the remaining civil penalty criteria under section 110(i) of the Mine Act. (Joint Ex. 1.) In light of these stipulations and my conclusions above, I conclude that the proposed civil penalty of \$226,508 is appropriate.

VII. Order

It is hereby **ORDERED** that Ember pay a civil penalty of \$226,508 within 40 days of this decision.

/s/ Alan G. Paez

Alan G. Paez

Administrative Law Judge

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/jts

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

November 7, 2011

SECRETARY OF LABOR, MSHA,	:	TEMPORARY REINSTATEMENT
on behalf of THURMAN WAYNE	:	PROCEEDING
PRUITT,	:	
	:	
Complainant	:	Docket No. KENT 2011-1152-D
	:	MADI-CD-2011-08
v.	:	
	:	DISCRIMINATION PROCEEDING
	:	
GRAND EAGLE MINING, INC.,	:	Docket No. KENT 2011-1258-D
Respondent	:	MADI-CD-2011-08
	:	
	:	Grand Eagle Prep Plant
	:	Mine ID 15-19011

ORDER OF DISMISSAL

Appearances: Jennifer Booth Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary;
Tony Oppedard, Esq., Lexington, Kentucky, on behalf of Thurman Wayne Pruitt;
Jeffrey K. Phillips, Esq., Steptoe & Johnson, PLLC, Lexington, Kentucky, on behalf of Grand Eagle Mining, Inc.,

Before: Judge Melick

The Secretary requests approval to withdraw her complaint in the captioned cases. The individual miner, who is the subject of the complaint, has also agreed to the withdrawal based on a mutually agreeable settlement. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. The cases are therefore dismissed.

/s/ Gary Melick
Gary Melick
Administrative Law Judge
(202) 434-9977

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
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November 7, 2011

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

v.

RIVER SAND & GRAVEL, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. KENT 2010-520M
A.C. No. 15-18290-201420

Mine: River Sand & Gravel, LLC

DECISION

Appearances: Angele Gregory, Esq. and Elizabeth L. Friary, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;

John S. Talbott III, Esq., Lexington, Kentucky, for Respondent.

Before: Judge McCarthy

This case is before me on a petition for assessment of a civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against River Sand & Gravel LLC (“River Sand” 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”).

I. Statement of the Case

A. Respondent’s Operation

Respondent operates a small sand and gravel pit near Vanceburg, Kentucky. Resp. to Pet. at 1. The mining operation includes an open pit mine where sand and gravel is excavated from an alluvial deposit three feet below the topsoil, and a processing plant that is used to sort the excavated material. *Id.* Once the rock material is excavated, it is carried to the top of the plant by conveyor belt and deposited in an inclined screen shaker. (Tr. 35).

The inclined screen shaker structure is situated at the top of the plant, about thirty feet above ground level. (Tr. 88). The shaker structure is mounted to the top of the processing plant on springs, which allow rotating drive motors to shake the structure and force the rock material to be sorted through a series of polyurethane screens that separate out progressively larger

material. (Tr. 35-36, 168). The flat screens are inlaid into a box at approximately a 20% incline. (Tr. 36, 83). A series of four metal spray bars, roughly eight to ten inches above the screens, are positioned across the shaker screen and spray water to control dust and help separate the sand and gravel. (Tr. 41, 169-70). There were no handrails installed around the top of the structure, nor was there any fall-resistant system in place. (Tr. 43).

The shaker structure is accessed by two catwalks that surround the structure on all sides. (Tr. 83). A catwalk measuring five feet three inches wide encompasses the sides and the higher, incoming end of the shaker. (Tr. 88). The distance between the top of the shaker structure and the catwalk is between five and eight feet. (Tr. 82). Another catwalk measuring four feet nine inches wide encompasses the lower, opposite end of the shaker and is located eleven feet below the structure's top. (Tr. 82, 88).

B. The Instant Inspection

On July 21, 2009, MSHA inspector Donald Gabbard conducted a regular inspection of River Sand. (Tr. 28). The mine's former owner and current foreman, Carey Highfield, accompanied him. (Tr. 23, 154). After completing the morning portion of the inspection, Gabbard informed Highfield that he was adjourning for lunch and would return to continue the inspection later in the afternoon. (Tr. 117).

Upon returning, Gabbard observed a miner, Nathan Conley, standing atop the lower end of the plant's shaker structure. (Tr. 34). Although the plant was shut down and the shaker was not operating, Gabbard concluded that it was not safe for a miner to work on the top of the shaker without fall protection. (Tr. 129). Not wanting to startle Conley by yelling at him, Gabbard went to look for Highfield to help resolve the situation. (Tr. 34). By the time Highfield was found, however, Conley had descended from the shaker screen structure onto the catwalk below. (Tr. 39). Accordingly, no imminent danger warning was issued. (Tr. 40).

Following Conley's descent from the top of the shaker screen box, Gabbard spoke with him about what he had just observed. (Tr. 48). Conley informed Gabbard that he had accessed the top of the shaker structure to inspect the condition of the screens because oversized rocks had been coming through to the stockpile. (Tr. 42). Conley stated that such inspections were always conducted without fall protection. (Tr. 58). He further stated that even though he was apprehensive about working at that height without being tied off, he did not want to be the only worker that insisted on having a harness system in place. (Tr. 58). Conley did not testify. I credit Gabbard's account of what Conley told him.

Next, Gabbard discussed with Highfield the practice of accessing the top of the shaker without fall protection. (Tr. 60). Highfield indicated that the shaker screens were routinely inspected every three months and were changed annually. (Tr. 56). In addition to normal maintenance, miners would inspect the screens whenever oversized rocks made it through to the stockpile. (Tr. 55-56). While the polyurethane screens are not heavy, replacement screens had to be lifted, hoisted, boomed, or craned up to the top of the shaker assembly where a small

number of miners would switch out the screens. (Tr. 38, 168). Additionally, Highfield stated that he had, on previous occasions, personally accessed the top of the shaker structure to inspect and change the screens without the aid of any fall protection. (Tr. 61-62). Highfield justified this practice by saying that the procedure was “common practice” and was the way they always changed screens. (Tr. 60). Highfield testified and did not contradict Gabbard’s account of what Highfield told Gabbard.

After talking to both Conley and Highfield, Gabbard concluded that the practice he witnessed violated 30 C.F.R. § 56.15005, which requires that “safety belts and lines shall be worn when persons work where there is danger of falling.” Gabbard issued Citation No. 6518754 finding that the practice was an unwarrantable failure and the result of a high level of negligence that was reasonably likely to cause fatal injuries. G. Ex. 1. In addition, the citation was designated as a significant and substantial violation. *Id.* The condition or practice section of the citation states:

A miner was observed working atop the inclined shaker screen where there was a potential to fall while not wearing fall protection. A fall of up to 34 feet to the ground below was possible. The miner removed himself from the unsafe location before an oral imminent danger order could be issued to his supervisor or the miner. The supervisor, Carey Highfield, was not present with the MSHA AR while this activity was observed. When supervisor Highfield was notified of the actions of the miner, he admitted this was a common practice. This violation is an unwarrantable failure to comply with a mandatory safety standard. Supervisor Highfield engaged in aggravated conduct in that he was aware that miners regularly worked atop the screen deck while not using fall protection and did not prevent them from doing so.

While continuing his inspection of River Sand the next day, Gabbard was accompanied by Tim Lutz, who introduced himself as the safety man for the Walker Company. (Tr. 50, 146). Highfield informed Gabbard that the Walker Company had a partial ownership interest in River Sand and that Lutz was the proper person to accompany Gabbard during the rest of the inspection process. (Tr. 123, 145). Lutz and Gabbard discussed the safety issues that had come to light during River Sand’s inspection. (Tr. 144). Lutz agreed that the practice of accessing the top of the shaker structure without fall protection was an obvious violation of MSHA regulations that should have been recognized by the operator. (Tr. 51, 122).

In accordance with Gabbard’s recommendations, Highfield installed a cable across the length of the center of the shaker, which would allow a miner to attach a movable anchor point and secure a safety rope. (Tr. 98, 179). Satisfied that the citation was abated, Gabbard terminated the citation. (Tr. 98). A few hours later, however, Highfield reported trouble maneuvering the safety rope around the spray bars. (Tr. 179). Highfield concluded that the current configuration was not workable. (Tr. 179). Highfield called River Sand’s manager, Nathan Roush, and received permission to install handrails around the sides of the shaker structure. *Id.* The handrails, and a ladder providing access to the top of the shaker structure, were completed the following weekend. (Tr. 180).

C. The Parties' Witnesses

On June 20, 2011, I held a hearing in Lexington, Kentucky. The Secretary called Gabbard to testify about the events leading up to the issuance of the citation and to the rationale behind his findings. At the time he issued the citation, Gabbard concluded that a fall from the top of the shaker structure would likely result in a thirty-four foot drop to the ground. After further inspection and contemplation following the issuance of the citation, however, Gabbard revised his assessment to account for the possibility that the catwalks surrounding the shaker structure would break the miner's fall. (Tr. 84, 88). Thus, at the hearing, Gabbard testified that the greatest likelihood of injury comes from the risk of a miner falling head first over the end plate that extends nineteen inches above the lower end of the screen shaker. (Tr. 84). Gabbard testified that such a fall would result in the miner falling eleven feet to the catwalk below and would likely cause fatal, "spinal-type" injuries. (Tr. 84). Gabbard further testified that the incline of the shaker and the elevated spray bars created an additional risk that a miner would fall off the side of the structure. (Tr. 85). The record establishes that if a miner fell from the highest point of the inclined shaker, he would fall eight feet to the catwalk below and would likely receive fatal "spinal-type" injuries or fracture bones in the neck, back, legs, or arms. *Id.* If a miner fell from the lowest point of the inclined shaker, he would only fall five feet onto the catwalk, which would likely result in less serious bone fractures. *Id.*

Respondent called Highfield and Roush to testify. Both men stated that adequate steps had been taken to ensure compliance with MSHA regulations. Highland testified that through his prior experience in the mining industry, he understood MSHA regulations to require fall protection for miners at risk of falling six feet or more. (Tr. 176). According to Highland, all of the miners at River Sand were trained in the use of fall protection and there was more than enough fall protection equipment for all of the miners at the plant. (Tr. 177-78). In addition, Roush and Highfield established that River Sand had received biannual inspections from MSHA since 2006, and had been inspected by MSHA and by an in-house safety inspector before production started. (Tr. 200, 203, 206). Neither Highfield nor Roush could recall any inspector raising an issue with the practice of miners working on the shaker structure without fall protection. (Tr. 200, 207-08).

II. Violation of Mandatory Safety Standard

30 C.F.R. § 56.15055 states in relevant part that "safety belts and lines shall be worn when persons work where there is a danger of falling." In the present case, there is no dispute that Conley was not using fall protection while atop the inclined shaker structure. Therefore, I must decide whether a "danger of falling" existed for miners working atop the structure. The Commission has stated that a danger of falling exists when "an informed reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). While River Sand argues that such a standard is vague, the "reasonable person" standard is a common legal fiction used in various areas of law to deduce the standard of care owed based on the particular factual

circumstances surrounding a case. If applied consistently, the standard provides a clear, subjective metric in which to determine the appropriate behavior to comply with a regulation.

It is clear from the record, that a reasonably prudent person would recognize the inherent danger of falling from the inclined shaker. The top of the shaker structure was between five and eleven feet above the catwalks that provide access to the structure, and more than thirty feet above ground level. (Tr. 82, 88). There were no railings encompassing the top of the structure to help a miner maintain his balance or to stop a fall over the edge. (Tr. 43). Furthermore, a reasonable person should have taken notice of the numerous hazards that could potentially cause a miner to fall. Such hazards include the 20% incline of the surface, the raised metal spray bars, the nineteen-inch end plate, and the raised sides of the shaker box.

In addition, Conley, Lutz, and Highfield recognized, or should have recognized, the risk of falling. Conley stated that he did not feel safe working atop the shaker structure, but was wary about being perceived as the only miner who insisted on having fall protection. (Tr. 48, 58). Lutz reportedly told Gabbard that the practice “was very much in violation and it should have been recognized.” (Tr. 122). Although Highfield stated that he did not feel that fall protection was necessary, he provided testimony stating that, based on his years of experience in the mining industry, he understood MSHA regulations to require a miner to be tied off when working at a height of six feet. (Tr. 176, 187). Given that a miner working atop the shaker structure could have fallen up to eleven feet to the catwalk or, less likely, more than thirty feet to the ground, the practice of accessing the top of the shaker structure without fall protection did not even meet Highfield’s own understanding of MSHA’s regulations.

Furthermore, falling while changing screens is a hazard that is fairly well known in the gravel industry, and already this year, MSHA has issued a Fatalgram attributing the death of an experienced miner to falling while changing screens at a sand and gravel operation in New York. MSHA, FATALGRAMS AND FATAL INVESTIGATION REPORTS (Dep’t of Labor 2011), <http://www.msha.gov/fatals/2011/fab11m10.pdf>. In 2006, ALJ Manning pointed out that, “MSHA has issued safety alerts to mine operators about this hazard.” *Spencer Quarries Inc.*, 2006 WL 3832827 (Nov. 9, 2006). Thus, a reasonably informed and prudent individual should have been aware of the danger of the violative practice.

River Sand argues that fall protection was available to miners and that all miners were trained in its use. Resp’t Br. at 7. This fact, however, does not absolve River Sand from its responsibility to require fall protection where there exists a danger of falling, nor does it mitigate against the seriousness of the violative practice. The Commission has ruled that this standard must be actively enforced by the mine operator and not simply left to the discretion of an individual miner. *See, e.g., Southwestern Illinois Coal Corp.*, 5 FMSHRC 1672, 1675 (Oct. 1983). The mine operator is tasked with establishing a safety system requiring the use of fall protection and enforcing such system when there exists a reasonable risk of falling. *Id.* River Sand not only failed to provide adequate guidelines for its miners, but set an improper example for the violative practice through the conduct of its agent, Foreman Highfield, who admitted that he never used fall protection while accessing the top of the shaker structure. (Tr. 168).

In light of the foregoing, I fail to see how a reasonably prudent person could not recognize working on the shaker structure posed a danger of falling to a miner. As such, I affirm MSHA's determination and find that River Sand was in violation of the mandatory safety standard embodied in 30 C.F.R. § 56.15055.

III. Significant and Substantial Designation

Section 104(d)(1) of the Mine Act defines a significant and substantial (S&S) violation 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." The Commission has required that a S&S violation be supported by facts that establish a "reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, the Commission created a four-prong test to establish the S&S designation:

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*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving the *Mathies* criteria). In *US Steel Mining*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission further explained:

[T]he third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *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).

As articulated above, the practice of allowing miners to access the top of the shaker structure without fall protection is a violation of a mandatory safety standard and thus satisfies the first element of the *Mathies* test. Furthermore, the Secretary has proven the second element by demonstrating a discrete safety hazard, in that miners were occasionally subject to an unacceptable risk of falling that was not properly mitigated through the use of fall protection or guardrails.

As to the third and fourth elements of the *Mathies* test, the Secretary contends that miners accessing the top of the shaker were reasonably likely to fall and incur injuries ranging from fractured bones, spinal damage, or death. Given that numerous tripping hazards created an elevated risk of falling, I find it reasonably likely that a miner could fall from atop the shaker structure. While replacing or inspecting screens, a miner could easily catch his foot on the spray bars, the sides of the shaker box, or the elevated end plate, and the incline of the surface would likely hamper a miner's ability to regain his balance.

I also agree with the Secretary that it is reasonably likely that a fall from atop the shaker structure could be fatal. After personally inspecting the shaker assembly, Gabbard concluded that given the incline of the shaker and the elevated end plate, a miner would most likely fall head first off the lowest side of the shaker and fall eleven feet onto the catwalk below. (Tr. 84, 88). Additionally, while Gabbard deemed it less likely, he never completely dismissed his initial assertion that there existed a chance that a fall from the top of the shaker structure could result in a miner falling thirty feet to the ground. (Tr. 88). In either case, it is reasonably likely that a fall from eight, eleven, or thirty feet would result in fatal injuries, and this finding is consistent with both the recent ALJ decisions¹ and the history of fatalities reported by MSHA.²

Having satisfied all four prongs of the *Mathies* test, I find that the citation at issue was properly designated as significant and substantial.

IV. Unwarrantable Failure Principles

The Secretary bears the burden of proving all elements of the 104(d)(1) citation by a preponderance of the evidence. The Secretary must prove that the Respondent's failure to require miners to use fall protection while accessing the top of the inclined screen shaker was "aggravated conduct" after considering all the relevant facts and circumstances, as set forth in Commission precedent. Having duly considered such factors, I find that the Secretary

¹ See *Small Mine Development*, 2011 WL 3794327 (F.M.S.H.R.C.), 4 (June 2011) (ALJ Andrews) (finding that a citation for failing to use fall protection while subject to an eight-foot fall was properly designated S&S and that such a fall would cause a fatal injury); *D. Holcomb & Co.*, 2011 WL 3794324 (F.M.S.H.R.C.), 3 (June 2011) (ALJ Manning) (finding that a citation for failing to use fall protection while subject to a ten-foot fall was properly designated S&S and that such a fall would cause a fatal injury).

² MSHA, FATALGRAMS AND FATAL INVESTIGATION REPORTS (Dep't of Labor 2007), <http://www.msha.gov/FATALS/2007/fab07m22.pdf> (fatality from seven-foot fall); MSHA, FATALGRAMS AND FATAL INVESTIGATION REPORTS (Dep't of Labor 2009) <http://www.msha.gov/FATALS/2009/fab09c03.pdf> (fatality from ten-foot fall); MSHA, FATALGRAMS AND FATAL INVESTIGATION REPORTS (Dep't of Labor 2011) <http://www.msha.gov/FATALS/2011/fab11c07.pdf> (fatality from ten-foot fall).

established by a preponderance of the evidence that Respondent exhibited “serious lack of reasonable care” in failing to require the use of fall protection for miners working atop the inclined screen shaker.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d). It 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); see *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test).

The Commission has recognized that whether conduct is “aggravated” in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator’s knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) (“*Consol*”); *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, 43 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). A judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). I discuss below, the applicability, *vel non*, of all of the relevant factors.

A. The Extent of the Violative Condition or Practice

The Commission has viewed the extent of a violative condition as an important element in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1351-52 (Dec. 2009). This factor considers the scope or magnitude of the violation. See *Eastern Associated Coal*, 32 FMSHRC at 1195 (citing *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992)); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988). Here, the extent of the violation at issue is rather limited in scope. The area atop the shaker structure is only a small section of the processing plant, measuring about ninety-six square feet, and Gabbard testified that only falls from the incoming or outgoing sides would likely result in fatal, “spinal-type” injuries. From all indications, River Sand properly practiced the use of fall protection elsewhere in the plant and other areas where miners could potentially face fall hazards were properly contained by handrails. (Tr. 177; see G. Ex. 6; Res. Ex. 1-4).

Another relevant consideration in determining whether the violation is extensive is the abatement measures taken to terminate the relevant citation. *Eastern Associated Coal*, 32 FMSHRC at 1196; *Peabody Coal Co.*, 14 FMSHRC at 1263 (providing that extensiveness can be shown by condition that requires significant abatement efforts). The measures taken by Highfield to abate the citation were relatively minor and took only half an hour to complete. Even though River Sand ultimately decided that it would be better to install handrails along the top of the structure, Gabbard found that installing a cable lengthwise across the top of the shaker structure was all that was needed to terminate the citation.

The Secretary argues that this factor should support the finding of an unwarrantable failure “given the number of times [the] location was accessed, the number of miners accessing it, and the number of years over which the violation occurred.” Sec’y. Br. at 24. The top of the shaker, however, was accessed only periodically and when it was, only one or two miners accessed the top of the shaker structure at a time. The duration of the violative practice is a separate factor in the unwarrantable failure analysis, and thus should be examined independently of the extensiveness factor. Accordingly, on balance, I find that the extensiveness factor weighs against the finding of unwarrantable failure.

B. The Duration

The Commission has emphasized that the duration of the violative condition or practice is a necessary element of the unwarrantable failure analysis. *See, e.g., Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (remanding for consideration of duration evidence of cited conditions). The duration of the practice in the present case was especially egregious. The practice of accessing the top of the shaker structure without fall protection was “common practice” according to Foreman Highfield. (Tr. 60). As such, the practice presumably was established since the plant began operation in 2006. (Tr. 167). River Sand offered no evidence to the contrary. Three years provided River Sand with ample time to identify the danger to miners working atop the shaker structure and provide for measures to counteract the risk. Even though the plant’s foreman was intimately familiar with the practice, however, nothing was done during that time to provide miners adequate fall protection.

Accordingly, I find that the duration of the violation weighs heavily toward a finding of unwarrantable failure.

C. Whether Respondent Was Placed on Notice that Greater Compliance Efforts Were Necessary

The Commission has stated that repeated, similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *IO Coal*, 31 FMSHRC at 1353-55; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001). The purpose of evaluating the number of past violations is to

determine the degree to which those violations have “engendered in the operator a heightened awareness of a serious . . . problem.” *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007) (citing *Mid-Continent Res. Inc.*, 16 FMSHRC 1226, 1232 (June 1994)). The Commission has also recognized that “past discussions with MSHA” about a problem “serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard.” *Id.* (citing *Consolidation Coal*, 23 FMSHRC at 595).

The Secretary has conceded that River Sand did not have a history of violating § 56.15055. Sec’y. Br. at 25. In addition, River Sand claims that both MSHA and private inspectors have never provided any warnings concerning the danger of miners falling from atop the shaker structure. (Tr. 200, 207-08). As such, River Sand was never put on notice that greater compliance efforts were necessary.

The Secretary points out that it would be unlikely that MSHA inspectors would observe the infrequent access to the top of the shaker structure during their biannual inspections. Thus, the Secretary argues, this factor should be neutral in the unwarrantable failure analysis. Sec’y. Br. at 25. However, MSHA inspectors should be familiar enough with the sand and gravel industry to know that routine maintenance of shaker screens requires miners to have access to the top of the structure. During the preliminary inspection and subsequent biannual inspections, MSHA inspectors should have at least inquired as to how workers accessed and worked on the top of the shaker structure, even if they did not actually observe the practice. Accordingly, this factor mitigates against a finding of unwarrantable failure.

D. Whether the Violation Posed a High Degree of Danger

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See, e.g., BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals*, 10 FMSHRC at 709. As determined in the S&S analysis, *supra*, there exists a reasonable likelihood that a miner falling from atop the shaker structure would suffer serious injuries that could prove fatal. Miners working atop the shaker structure were at significant risk of falling between five and eleven feet onto the surrounding catwalks, and while less likely, a risk of falling more than thirty feet to the ground below. This risk was exacerbated by the fact that there were multiple hazards over which a miner could easily trip. Gabbard testified that falls from eight to eleven feet could result in serious “spinal-type” injuries, bone fractures, or death. (Tr. 84-85). Accordingly, this factor weighs in favor of a finding of unwarrantable failure.

E. The Operator’s Knowledge of the Existence of the Violation

An operator’s knowledge of the existence of a violation is another factor in the unwarrantable failure analysis. *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987). The Commission has found that where an agent of the operator has knowledge or should have knowledge of a safety violation, such knowledge should be attributed to the operator. *See Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000); *Pocahontas Fuel Co.*, 8 IBMA

136, 147 (Sept. 1977), *aff'd*, 590 F.2d 95 (4th Cir. 1979) (Coal Act case) (adopting the common law principle that the acts or knowledge of an agent are attributable to the principal). In addition, a mine supervisor or foreman is held to a high standard of care and the Commission has found that his involvement in a violation is an important factor in the unwarrantable failure analysis. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

In the case at bar, it is apparent that Highfield, in his role as mine foreman, was an agent of River Sand. Highfield was introduced to Gabbard as the designated representative of the operator and described his position as managerial in nature. (Tr. 32, 161). As the operator's representative, Highfield's knowledge of and participation in the practice of accessing the top of the shaker structure without wearing fall protection is particularly troubling. Having participated in the unsafe practice himself, Highfield's actions set an improper example for other miners to disregard a mandatory safety standard. (Tr. 168). Conley told Gabbard that one of the reasons he did not elect to wear fall protection was that he did not want to be the only miner that insisted on additional safety procedures while working atop the shaker structure. (Tr. 58). Highfield's actions, in light of the fact that he believed that MSHA regulations required fall protection at heights greater than six feet, manifests at least a serious lack of reasonable care if not outright indifference to the safety of the miners under his supervision.

Furthermore, other agents of River Sand present at the property should have been aware of the practice. Gabbard testified that the top of the shaker structure was the highest point in the plant and "highly visible" and that people working on the property should have been able to see miners working up there without fall protection. (Tr. 90-91, 96). Accordingly, in the circumstances of this case, I find that the knowledge of the operator weighs heavily toward a finding of unwarrantable failure.

F. The Operator's Efforts in Abating the Violation

An operator's effort to abate the violative condition is a factor relevant to determining whether a violation is unwarrantable. The level of priority that the operator places on the abatement of the problem is only relevant, however, when the operator has been placed on notice of a problem. *IO Coal*, 31 FMSHRC at 1356 (citing *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997)). Thus, the focus on the operator's abatement efforts is on those efforts made prior to the citation at issue. *Id.* Since there is no evidence showing that River Sand was ever put on notice that their practice violated a mandatory safety standard prior to the instant citation, I find this factor neutral in the unwarrantable failure analysis.

G. Conclusion on Unwarrantable Failure Issue

In sum, after considering the relevant Commission factors, I find that the violative condition was dangerous, obvious, and lengthy. The operator, through his agent Highfield, not only knew that miners were accessing the top of the shaker structure without fall protection, but condoned the practice. In the three years the plant was in operation, agents of River Sand should have recognized the obvious risk to miners working on an elevated platform without fall

protection or handrails. In addition to Inspector Gabbard's determination that the practice was unsafe, Conley expressed apprehension about working in such conditions, and the practice violated Highfield's own understanding of when fall protection was required. When presented with Gabbard's findings, even Lutz, River Sand's acting safety man, conceded that the violation was apparent and should not have gone unnoticed. Under these circumstances, I find that the citation was properly designated as an unwarrantable failure.

V. Explanation for Civil Penalty Assessed

Section 110(i) of the Mine Act sets forth the following criteria to be considered in determining an appropriate civil penalty:

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 and violation.

In addition, since Citation No. 6518754 was issued under § 104(d)(1), § 110(a)(3)(A) of the Act requires that the minimum penalty shall be \$2,000.00. Here, the Secretary's Petition has a proposed assessment of \$4,600.00 for the citation at issue. Addressing the appropriate penalty criteria in light of the facts in the record, I find that the circumstances warrant a reduction in penalty to \$3,500.00.

The gravity of the violation and negligence of the operator has already been addressed at length. Given the obviousness of the risk and the length of time in which miners engaged in the violative practice with the full knowledge of the operator, I found River Sand to have exhibited a heightened level of negligence and, at least, a serious lack of reasonable care. Similarly, I have affirmed Gabbard's assessment that the violative practice was significant and substantial in nature and was reasonably likely to result in fatal injuries.

While River Sand is a relatively small operation, employing only four miners, the company benefits from resources and personnel provided by its owners. (Tr. 177). Manager Roush and safety man Lutz are employees of the Walker Company, which owns other mines and equipment throughout the state of Kentucky. (Tr. 121, 123, 205). In addition, the parties have stipulated to the fact that the proposed penalty will not affect River Sand's ability to remain in business. G. Ex. 7.

I find, however, that River Sand's history of prior violations and rapid abatement of the citation to merit a reduction in the assessed penalty. Since 2006, River Sand has been issued eleven citations by MSHA, only three of which were designated S&S. G. Ex. 6. None of the eleven citations were cited under the same standard as the present citation, nor did they concern the use of fall protection or the existence of fall or trip hazards. *Id.* Additionally, River Sand took prompt action in abating the citation shortly after it was issued. River Sand demonstrated

that Highfield promptly installed a cable that miners could tie-off on within thirty minutes of when the citation was issued. (Tr. 226). Subsequently, he constructed a handrail surrounding the top of the shaker structure even though Gabbard did not require River Sand to do so to achieve compliance with 30 C.F.R. § 56.15055. Such actions on the part of the operator demonstrate a good-faith effort to abate the citation and to ensure the future protection of miners working atop the shaker structure. Accordingly, giving proper consideration to the statutory criteria and the deterrent purpose of the Act, I find that a penalty of \$3,500.00 to be appropriate.

VI. ORDER

For the reasons set forth above, Citation No. 6518754 is **AFFIRMED**, as written. Within thirty days of the date of this decision, Respondent is **ORDERED TO PAY** a civil penalty of \$3,500.00 for its unwarrantable failure to require miners to use fall protection when there is a reasonable chance of falling. Upon payment of the penalty, this proceeding is **DISMISSED**.

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

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/TJR.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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November 10, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2009-41
Petitioner,	:	A.C. No. 36-05466-164329-02
	:	
v.	:	Docket No. PENN 2009-42
	:	A.C. No. 36-05466-164329-03
EMERALD COAL RESOURCES, LP,	:	
Respondent.	:	Mine: Emerald Mine No. 1

DECISION

Appearances: John M. Strawn, Esq., U.S. Department of Labor, Philadelphia, PA on behalf of the Secretary
R. Henry Moore, Esq., Jackson Kelly, Pittsburgh, PA on behalf of Emerald Coal Resources, LP

Before: Judge David F. Barbour

These cases are before me upon petitions for assessment of civil penalties filed by the Secretary of Labor (“Secretary”) on behalf of her Mine Safety and Health Administration (“MSHA”) against Emerald Coal Resources (“Emerald”), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the “Mine Act” or “Act”), 30 U.S.C. § 815 (2006). In Docket No. PENN 2009-41, the Secretary petitions for the assessment of civil penalties totaling \$20,597.00 for eight alleged violations of mandatory safety standards set forth in 30 C.F.R. Parts 75 and 77.¹ In Docket No. PENN 2009-42, the Secretary seeks the assessment of civil penalties totaling \$179,812.00 for twenty alleged violations of mandatory safety standards for underground coal mines at its Emerald Mine No. 1 located in Greene County, Pennsylvania.

After the Secretary’s petitions were filed, Emerald answered by admitting the Commission’s jurisdiction, but by denying the company’s liability for any of the proposed penalties. The cases were assigned to me by the Chief Judge. Following several conferences, counsels ultimately settled all of the violations alleged in the two dockets, except for an alleged

¹ At hearing, Mr. Strawn stated that the docket numbers for the two case files had been switched, but MSHA’s Office of Assessments and FMSHRC’s docket office have confirmed that the dockets were correct as originally marked.

violation of 30 C.F.R. § 75.400 as set forth in Order No. 4165192.² The order was issued pursuant to section 104(d)(2) of the Act and in addition to the alleged violation charged that the violation was a significant and substantial contribution to a mine safety hazard (“S&S” violation) and was the result of Emerald’s unwarrantable failure to comply with the standard.³ Order No. 4165192 is contained in Docket No. PENN 2009-42. The matter was heard in Morgantown, West Virginia.

STIPULATIONS

The parties agreed to the following stipulations:

1. Emerald is an “operator” as defined in section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, (hereinafter the “Act”), 30 U.S.C. § 802(d), at the Emerald Mine No. 1 (the “Mine”), where the Order at issue in this proceeding was issued.
2. The Mine is subject to the jurisdiction of the Act.
3. The Mine is owned and operated by Emerald.
4. The Federal Mine Safety and Health Review Commission (“Commission”) and the presiding Administrative Law Judge have jurisdiction over the above-captioned proceedings pursuant to sections 104, 105 and 113 of the Act.
5. The subject Order and termination were properly served by duly authorized representatives of the Secretary upon agents for Emerald on the dates and times and at the places stated therein and may be admitted into evidence for the purpose of establishing their issuance.
6. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.

² 30 C.F.R. § 75.400 states, “Coal 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.” 30 C.F.R. § 75.400 (2011). Under Section 318(g)(4) of the Mine Act an active working is “any place in a coal mine where miners are normally required to work or travel.” 30 U.S.C. § 878 (2006).

³ Section 104(d)(2) in certain circumstances mandates a “chain” of citations and withdrawal orders that are “among the Secretary’s most powerful instruments for enforcing mine safety.” *See Emery Mining Corp.*, 9 FMSHRC 1997, 2000 (Dec. 1987) (quoting *Kitt Energy Corp.*, 768 F.2d 1477, 1479 (D.C. Cir. 1984).

7. Emerald demonstrated good faith in attaining compliance after the issuance of the Order.
8. Payment of the total proposed penalty of \$44,645 in this matter will not affect Emerald's ability to continue in business.
9. The appropriateness of the penalty, if any, to the size of Emerald's business should be based on the fact that Emerald's controller produced over 10,000,000 tons of coal in 2007, including 5,674,111 tons at the Mine.
10. The appropriateness of the penalty, if any, to Emerald's violation history should be based on the fact that Emerald had 327 assessed violations that were paid, finally adjudicated, or became final orders of the Commission during the 15 month period preceding issuance of Order No. 4165192.
11. In 2008, 30 C.F.R. § 75.400 was the most frequently cited standard and made up 12.18% of all violations issued in underground coal mines. In 2007, 30 C.F.R. § 75.400 was also the most frequently cited standard and made up 12.25% of all violations.
12. If the Administrative Law Judge upholds Order No. 4165192 as an unwarrantable failure to comply with the Act, the Order should be characterized as a section 104(d)(2) order. The original D chain on which Order No. 4165192 was issued, however, was broken. The predicate order referenced as the initial action, Order No. 7069052, was issued October 02, 2007. There were 12 enforcement actions taken under section 104(d) during that period. All section 104(d) enforcement actions during that period were contested. Of those, two have been resolved, section 104(d)(2) Order Nos. 7024630 and 7024915. Both were reclassified as section 104(a) citations in settlement and the unwarrantable failure chain was broken between November 29, 2007 and July 23, 2008, i.e. there was an intervening clean inspection. On July 23, 2008, Order No. 7077232 was issued as a section 104(d)(2) order with an S&S designation. That order is part of [D]ocket No. PENN 2009-41 herein and now becomes a section 104(d)(1) citation in the partial settlement. Order No. 7077238 was issued on July 30, 2008 pursuant to section 104(d)(2). That order is also part of Docket No. PENN 2009-41 and now becomes a section 104(d)(1) order in the partial settlement.

ORDER NO. 4165192

13. On August 9, 2008 the C-2 section of the mine was a continuous miner development section.
14. A preshift examination of the section was performed by Bill Grey on August 9, 2008 for the oncoming dayshift. He did not record that any hazards

existed in the working section. No enforcement action was taken with respect to his preshift examination.

Jt. Ex. 1.

THE TESTIMONY

On August 09, 2008, at approximately 8:00 a.m., the beginning of Emerald's dayshift, a 103(i) spot inspection for methane was conducted by MSHA's Supervisory Coal Mine Inspector Robert Newhouse at the C-2 section of Emerald Mine No. 1.⁴ Tr. 35-36. Emerald Mine No. 1 is a large mine. Tr. 31. It is a gassy mine and liberates more than 8 million cubic feet of methane every 24 hours. *See* Tr. 32-33. Under Section 103(i), gassy mines are subject to a minimum of one spot inspection every five working days at irregular intervals. 30 U.S.C. § 813 (i) (2006).

At the time of the August 09, 2008 inspection the C-2 section was in active development. Jt. Ex. 1. The C-2 section is a three-entry long wall development section with coal bottoms. Tr. 41, 46.⁵ The section's Number Three entry is located near the 27 cross cut. Tr. 41, 46-48. The Number Three entry is used as a haul road for shuttle cars transporting coal from the continuous miner to the feeder on the conveyor belt. Tr. 48. Air flows through the Number Three entry to the face. Tr. 63.

After arriving at the mine Newhouse traveled with Larry Becker, a union representative, to the C-2 section where he met with the midnight shift foreman, William Grey. Tr. 35-36. When Newhouse arrived at the C-2 section at approximately 8:30 a.m., the midnight shift production crew had already left, but the dayshift crew had not arrived and mining had not started. Tr. 36, 78. Newhouse traveled through the entries to inspect the faces and take methane readings. Tr. 37, Tr. 42. Grey did not accompany Newhouse because his cap light was not working. Tr. 37. Newhouse measured five hundredths of a percent methane at the Number Three face. Tr. 92-93, Gov. Ex. 3. When Newhouse proceeded through the Number Three entry toward

⁴ Robert Newhouse is a supervisory coal mine inspector who works out of MSHA's Ruff Creek Field Office located in Waynesboro, Pennsylvania. Tr. 28. Inspector Newhouse has approximately 43 years of mining experience and 33 years of experience as a mine inspector, supervisor and manager. Tr. 27-29. Newhouse has received training from MSHA regarding hazardous dust conditions. Tr. 106. Prior to becoming an inspector Newhouse worked in the coal mining industry as a general laborer, roof bolter, progressive mechanic and a foreman. Tr. 29. Newhouse has conducted inspections at Emerald's Emerald Mine No.1 "off and on" since 1977. Tr. 31. Newhouse has also served on mine rescue teams and responded to several mine fires. Tr. 30-31.

⁵ Newhouse described a "coal bottom" as a layer of coal left on the mine floor to provide firmer ground for equipment when the mine floor is too soft. Tr. 48-49.

the belt feeder he observed an “extensive” accumulation of coal dust on the shuttle car roadway. Tr. 37.

Newhouse noticed that the accumulation was dry, dusty and black. Tr. 46, 51. He found no evidence that any clean up or rock-dusting had occurred. Tr. 68. Newhouse measured up to eight inches of coal dust accumulated on top of the coal bottom in the center of the roadway and up to 14 inches accumulated by the ribs. Tr. 46, 80-81. The accumulation measured approximately 26 feet across from the feeder in by and extended a distance of approximately 244 feet. Tr. 52. Newhouse recorded his measurements in his contemporaneous notes. *See* Gov. Ex. 3. Newhouse believed the coal dust accumulation was caused by shuttle car traffic traveling over the coal bottoms. Tr. 50-51. He went to the load center to question Grey about the accumulation, but Grey was gone. Tr. 43. Newhouse showed the accumulation to Fred McManis, Continuous Mining Machine Coordinator (“CM Coordinator”) for the C-2 section. Tr. 43. When Newhouse showed McManis the accumulation McManis explained that neither Grey nor the crew ordinarily worked in the area, and that another crew, the crew normally assigned to the C-2 section, usually kept the area clean. Gov. Ex. 3 pg. 11-12. McManis had the area scooped and rock-dusted and the roadways watered. Tr. 169. As a result of what he saw and learned Newhouse found that the accumulation violated section 75.400 and he issued Order No. 4165192.

On Monday, August 11, 2008 Newhouse returned to the mine to conduct interviews with several miners, including Grey. Tr.75. During his interview Grey told Newhouse he had the roadway scooped early in the midnight shift. Tr. 76. Grey stated the roadway was fine when he checked it at 5:17 a.m. ⁶ *Id.*

Newhouse found that the violation of section 75.400 was reasonably likely to result in an explosion. Tr. 65-66. The block of coal in the C-2 section was virgin coal with rock intrusions containing clay veins, which trap methane. Tr. 61-62, 65. Newhouse believed that due to the geology of the coal being mined, if the continuous miner cut into a clay vein it could cause a release of methane sufficient to bring the methane level to the explosive range. Tr. 61. Newhouse acknowledged Emerald was using horizontal degasification to reduce the methane level in the block of coal.⁷ Tr. 100. However, he still believed the level of methane was likely to reach the explosive range.

⁶ Grey told Newhouse that he did not ordinarily work in the C-2 section and that his usual section did not have coal bottoms. Tr. 73. Considering this and the fact that Grey’s cap light may have been out or blinking when he did his examination (*Id.*), Newhouse decided not to issue a citation for an inadequate pre-shift exam. Tr. 76.

⁷ Newhouse testified horizontal degasification involves drilling holes in a block of coal to release methane. Tr. 100. William Shiftko, a compliance foreman at Emerald, further explained that the pressure in the seam pushes the methane out. Tr. 196. The methane is then captured in pipes and transported out of the mine. *Id.*

Newhouse also believed that as mining continued the accumulated dust would be placed into suspension by shuttle car traffic and carried through the intake inby to the continuous miner at the face. Tr. 63. He testified a methane ignition at the face would ignite the suspended coal dust and the resulting explosion would propagate back through the C-2 section and continue to expand. Tr. 55-58; 61-64. Newhouse determined an ignition could be caused by the cutter head striking a sulfur ball and testified that miners often strike sulfur balls on the face.⁸ Tr. 57. Newhouse testified that in his 33 years of experience inspecting the mine single and even multiple face ignitions had occurred “from time to time,” depending on the geology of the coal being mined. Tr. 61-62.

Newhouse also believed that the shuttle car cables could become abraded by equipment running over them, fault and ignite the coal dust. Tr. 64-65. However, Newhouse admitted he did not inspect the shuttle car cables for signs of abrasion. Tr. 84. Newhouse stated the shuttle car cable wheels can produce significant heat when energized cords are rolled up and could become ignition sources. Tr. 65.

Newhouse testified that if an ignition and explosion occurred it was reasonably likely that numerous miners could be fatally injured: the miner operator, the cable holders for the machine, a load operator, a mechanic, a foreman and several shuttle car operators and center holders. Tr. 66.

Newhouse determined that Emerald’s negligence in allowing the condition to exist was “high.” Tr. 66. Newhouse found that the coal accumulation was “very obvious and extensive” and that it existed when Grey did his pre-shift exam. Tr. 67. In fact, given the extensive nature of the accumulation, Newhouse believed it had probably existed for several shifts. Tr. 67. Further, the shift foreman frequently visits each section and had cause to go down the Number Three entry. Tr. 67. Emerald’s clean-up plan also states that extra attention is needed to keep coal bottoms clean. Tr. 69, Gov. Ex. 6. The plan requires that shuttle car roadways be kept free of loose coal accumulations and either kept wet, using water or calcium, or “very heavily” rock-dusted. Gov. Ex. 6. Moreover, on a number of occasions Newhouse had discussed the extra attention needed to keep coal bottoms clean with members of mine management, including William Shiftko, and the mine foreman. Tr. 70.

William Grey testified that on the night of August 8-9, 2008, he was acting as the midnight shift foreman for the C-2 section.⁹ Gov. Ex. 3. Grey had noticed the cited accumulation when he did his preshift examination of the section prior to the August 9 oncoming dayshift, but he did not record any hazards. Jt. Ex. 1. Grey stated his cap light was working when he did his

⁸ Newhouse described a sulfur ball as a hard rock intrusion, usually near the roof line, that generates heat or sparks when struck. *See* Tr. 57.

⁹ Grey has been involved in mining for approximately thirty years, primarily as a foreman. Tr. 110-114.

preshift exam. Tr. 120. In Grey's opinion, the accumulated material was not enough to pose a hazard. Tr. 128. Grey testified that he did not notice any sulfur balls at the faces. Tr. 119. Grey stated the company's normal practice is to clean during the shift, between cycles and after the section has been advanced. Tr. 114, 150, 153. Grey initially testified that the coal bottom was wet and had been rock-dusted, but later stated he did not water the roads that night because the roads are naturally wet. Tr. 141-142, 157.

Fred McManis, the CM coordinator for the C-2 section, supervises the section foreman.¹⁰ Tr. 159, 168. As the CM coordinator McManis is on the section every day except Sunday, and he was there when the alleged violation occurred. Tr. 161, 168. He testified that generally shuttle car operators will water the roadways at the beginning of the shift to control float coal dust. Tr. 162-163. Preferably within two hours of the end of the shift, the company will scoop away any accumulated coal. Tr. 164. McManis testified his normal routine as face boss is to examine the working place before the miners start loading coal then examine the other faces. Tr. 162. McManis testified Newhouse arrived before he had the opportunity to check the C-2 section. Tr. 165. Newhouse showed McManis the coal accumulation. Tr. 165. McManis took his own measurements and recorded them in his notes, as was his practice whenever an order was issued. Tr. 183. McManis noted that the accumulated coal dust was 12 inches deep at the feeder, 18 inches deep near the ribs, 12 feet wide and extended approximately 20 feet. Gov. Ex. 7. He also noted 3 to 4 inches of coal dust between the 24 ½ room and the 27 room. *Id.*

McManis then spoke to Grey who reported on the conditions at the face and on mining operations, per normal operating procedure. Tr. 167-168. McManis testified it was unlikely there would be a face ignition that would propagate back through the C-2 section because little methane had accumulated, the coal bottoms were kept damp and the area was rock-dusted. Tr. 171. However, McManis later admitted on cross-examination that when the citation was issued the coal accumulation was black and that the roadway was dry and tends to get dry toward the end of a shift. Tr. 173-174, 179. He also admitted that shuttle car traffic would put accumulated coal dust into suspension. Tr. 179.

William Shiftko is a compliance foreman in the safety department at Emerald mine. Tr. 192.¹¹ Shiftko testified he occasionally enters the C-2 section. Tr. 195. He testified that to the best of his knowledge there have never been any ignitions in the area where the section was located, that the degasification system that was in place when the order was issued was effective in reducing methane levels and that the ventilation system was working properly when the order was issued. Tr. 196, 205.

¹⁰McManis has been CM coordinator at the mine since 2007 and has over thirty years of mining experience, principally as a foreman. Tr. 159-161.

¹¹ Shiftko has worked for Emerald's safety department since 1992 or 1993. Tr. 193. He has worked in the mines since 1973. Tr. 194. He has worked as a compliance foreman in sections with coal bottoms. Tr. 194; Tr. 202.

THE VIOLATION

DOCKET NO. PENN 2009-42

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
4165192	08/09/08	75.400

The order states:

Loose coal and black float coal dust was permitted to accumulate on the active shuttle car roadways in the number 3 entry of the C-2 section MMU no. 022, from the feeder located in by 24 crosscut to the intersection at 26 crosscut, a[n] approximate distance of 244 feet. The accumulation measured from 0 to 14 inches deep along both ribs and from 0 to 8 inches deep in the center of the roadway. The accumulation was dry and dusty. This section of law has been cited 73 times in the previous 24 months.

Gov't. Ex. 2.

For almost as long as the Commission has existed, it has been accepted that section 75.400 is violated "when an accumulation of combustible materials exists" (*Old Ben Coal Co.*, 1 FMSHRC 1954, 1958 (Dec. 1979)("Old Ben I")) and that a violative accumulation exists "where the quantity of combustible materials is such that, in the judgement of the authorized representative of the secretary, it likely could cause a fire or explosion if an ignition source were present." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980)("Old Ben II"). Since some combustible material is inevitable in mining operations, the inspector's judgement as to what constitutes a mass of combustible materials which could cause or propagate a fire or explosion is subject to challenge before a Commission administrative law judge (*Old Ben II*, 2 FMSHRC at 2808, n.7), and the judge is required to review the inspector's judgement by applying the 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, Mining Division*, 12 FMSHRC 965, 968 (May 1990)("UP&L"); *aff'd* 951 F.2d 292 (10th Cir. 1991). The Commission has explained, "[T]he reasonably prudent person test must be based on conclusions drawn by an objective observer with knowledge of the relevant facts. It follows that the facts to be considered must be those which were reasonably ascertainable prior to the alleged violation." *U.S. Steel Mining Co.*, 27 FMSHRC 435, 439 (May 2005)(citing *U.S. Steel Corp.*, 5 FMSHRC 3, 4-5 (Jan. 1983)).

Further, the Commission has repeatedly held that violations of Section 75.400 can be established by an inspector's observations. *See e.g., Coal Processing Corporation*, 2 IBMA 336 (1973); *Amax Coal Co.*, 19 FMSHRC 846 (May 1997); *Jim Walter Resources, Inc.*, 19 FMSHRC 480 (Mar. 1997); *Enlow Fork Mining Co.*, 19 FMSHRC 5 (Jan. 1997);

Harlan Cumberland Coal Co., 20 FMSHRC 1275, 1290 (Dec. 1998) (stating the Commission has never found and does not find that section 75.400 requires a physical test to determine the particular combustible material present).

The C-2 section was an active development area (Tr. 31) where mining crews worked (Tr. 35), which makes it an active working under the Act. I find that the order reflects the reasonable exercise of Inspector Newhouse's judgement. Newhouse is an MSHA inspector with more than 33 years of experience trained to recognize hazardous dust conditions. I fully credit his description of the existence, quantity and quality of the coal dust he observed, and I find that the company violated the standard.¹²

Newhouse credibly testified he observed an extensive dry dusty coal accumulation of up to eight inches in the center of the shuttle car roadway and of up to 14 inches near the ribs extending inby from the feeder for a distance of approximately 244 feet as well as low coal dust. Tr. 52-53, Gov. Ex. 3. McManis admitted upon cross-examination that the accumulation was black and dry. Tr. 173, 179. Newhouse's measurements and observations were recorded in his contemporaneous notes. I credit Newhouse's testimony as to the quantity of the accumulation over that of McManis. McManis' testimony lacked the degree of certitude that characterized Newhouse's testimony.

The coal accumulation was extensive, and I fully credit Newhouse's belief that the loose coal dust was dangerous and posed an explosion hazard. Tr. 60. Black, dry, float coal dust can result in a self-propagating explosion. Newhouse was trained by MSHA to recognize hazardous dust conditions. I fully credit his belief that the loose coal dust would be placed into suspension by the shuttle car traffic and carried to the face by the mine's ventilation system. Tr. 63. Shiftko testified the C-2 section had a working ventilation system and coal degasification system that would reduce the likelihood of a methane explosion. Tr. 196, 205. However, Emerald Mine No. 1 is a gassy mine and I credit Newhouse's belief that since Emerald was mining virgin coal a sudden release of methane sufficient to bring the methane level to the explosive range was likely to occur. A reasonable person familiar with 75.400 and its protective purposes would have been aware that this was a hazardous accumulation.

¹² In its post-hearing brief the Respondent argues that it did not violate section 75.400 because operators are permitted a reasonable amount of time to clean up spillage and because it was complying with its section 75.400-2 clean up plan. *See* Resp't Post-hearing Br. 6. I find the Respondent's argument unpersuasive. The Commission explained in *UP&L* that the relevant legislative history for section 75.400 demonstrates "the standard was directed at preventing accumulation in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." *UP&L*, 12 FMSHRC at 968. The Commission has held that "an operator cannot avoid a finding of violation of section 75.400 by arguing that it was merely following a section 75.400-2 cleanup plan that it had established." *Id.* at 969.

S&S AND GRAVITY

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d) (2006). 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). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). “The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Resources, LP*, 33 FMSHRC ___, slip op. at 9, PENN 2008-189 (October 05, 2011).

Further, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The Commission has explained further that the third element of the Mathies formulation “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). The Commission has emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1575 (July 1984). In addition, the evaluation of reasonable likelihood should be made in terms of “continued normal mining operations.” *Id.* at 1574. The question is whether there was a confluence of factors that made an injury producing fire and/or explosion reasonably likely. *UP&L*, 12 FMSHRC 965, 970-971 (May 1990). Factors that have been considered include the extent of the accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area. *UP&L*, 12 FMSHRC at 970-71; *Texasgulf*, 10 FMSHRC at 500-503.

I have found a violation of the cited safety standard. I further find that the accumulated coal dust contributed to a distinct safety hazard, i.e., that the accumulation would propagate a mine explosion. Moreover, I find that the necessary confluence of factors existed to make an injury producing explosion reasonably likely. The cited accumulation were extensive, dry and dusty. Tr. 52-53. I find that the Secretary has proven the cutter head could serve as an ignition source. Newhouse believed it was likely that if the continuous miner cut into a clay vein enough methane would be released from the virgin coal to reach a combustible level, that the methane would be ignited by a spark from the cutter head, and that the exploding methane would ignite the accumulated coal dust leading to a greatly magnified explosion and I credit his belief. He testified that methane explosions had occurred in the past at the Emerald No. 1 mine.¹³ Tr. 61-62.

I conclude that as normal mining continued it was reasonably likely that the coal dust accumulation would propagate a methane explosion through the section causing fatal injury to miners working in the area. Thus, the violation was S&S. It also was serious. I find that should such an accident occur the likely result would be deadly.

NEGLIGENCE

In her regulation the Secretary defines conduct that constitutes negligence under the 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.

30 C.F.R. § 100.3 (d) (2011).

An operator exhibits no negligence where the “operator exercised diligence and could not have known of the violative condition or practice.” 30 C.F.R. § 100.3(d) (2011) (Table X). An operator displays low negligence if the operator “knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* An operator shows moderate negligence if it “knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* An operator exhibits high negligence when the operator “knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* An operator shows reckless disregard when it displays “conduct which

¹³ Although I conclude the Secretary proved the continuous miner cutter head cutting into the face would prove a reasonably likely ignition source as mining continued, this is the only ignition source she established. Testimony offered by the Secretary regarding other ignition sources lacked specificity and was entirely speculative.

exhibits absence of the slightest degree of care.” *Id.* MSHA considers mitigating circumstances which may include actions taken by the operator to prevent or correct hazardous conditions when determining negligence. 30 C.F.R. § 100.3 (d) (2011).

Newhouse found that the violation was due to Emerald’s high negligence, and I agree. The operator had actual knowledge of the violative condition. Grey admitted he noticed the coal dust accumulation when he did his pre-shift exam. Jt. Ex. 1. Newhouse believed that the hazard had probably existed for several shifts. Tr. 67. McManis testified that his normal routine was to inspect the working place before the miners started loading coal. Tr. 162. Therefore, even if Grey did not note the hazard on his pre-shift exam, McManis should have identified the hazard when he checked the working place before the prior shifts. Moreover, Emerald’s clean up program identified the additional attention needed to keep coal bottoms clean. Gov. Ex. 6. Newhouse gave undisputed testimony that he had spoken to mine management about the extra attention needed for coal bottoms on several occasions. Tr. 70. The hazard created by the violation reasonably could be expected to cause a fatal injury. I do not find the fact that Grey believed the accumulation was not hazardous or the fact that Grey ordinarily worked in a section without coal bottoms to be indicative of a lack of negligence on the company’s part. Mine management was aware of the hazards posed by coal bottoms and had a duty to take the steps necessary to prevent coal dust accumulation. The danger of the violation meant that management had a high standard of care. The company fell short of this standard, and I therefore find that it was highly negligent.

UNWARRANTABLE FAILURE

The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as “reckless disregard,” “intentional misconduct,” “indifference” or a “serious lack of reasonable care.” *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d. 133, 136 (7th Cir. 1995). The following factors may be considered when making an unwarrantable failure determination: (1) the extent of the violative condition, (2) the length of time the condition existed, (3) whether the violation was obvious or posed a high degree of danger, (4) whether the operator has been placed on notice that greater efforts are necessary for compliance and (5) the operator’s efforts in abating the violative condition. *Mullins and Sons Co.*, 16 FMSHRC 192, 195 (Feb. 1994). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

I find that the violation was an unwarrantable failure to comply with a mandatory standard. The violative condition was extensive. Newhouse measured up to eight inches of accumulated coal dust in the center of the shuttle car roadway and up to 14 inches near the ribs extending inby from the feeder for a distance of approximately 244 feet. Tr. 52-53. Newhouse credibly testified that the accumulation had existed for several shifts. Tr.67. The violation was obvious and posed a high degree of danger to miners. The operator was on notice that greater efforts were necessary for

compliance with the standard. The mine's clean up plan identified the additional attention necessary to keep coal bottoms clean and Newhouse had spoken with mine management about keeping coal bottoms clean on several occasions. Further, the company paid civil penalties for 44 violations of section 75.400 in the 15 month period prior to the August 09, 2008 inspection. Gov. Ex. 1. When the order was issued there was no evidence that any clean up had occurred or was in progress.

HISTORY OF PREVIOUS VIOLATIONS

In the 15 month period prior to the inspection at issue the company paid civil penalties for 327 violations, 44 of which were violations of section 75.400. Gov. Ex. 1, Jt. Ex. 1. This is a large history of prior violations.

SIZE AND ABILITY TO CONTINUE IN BUSINESS

Emerald is a large mine. The operator's controller produced over 10,000,000 tons of coal in 2007 and 5,674,111 tons of coal at the Emerald No. 1 mine. Jt. Ex. 1. The parties agreed that the proposed penalties will not adversely affect the company's business. Jt. Ex. 1.

GOOD FAITH ABATEMENT

McManis' timely and effective efforts to clean up the accumulation constituted good faith abatement of the violation. *See* Jt. Ex. 1. He promptly had the area scooped, applied rock-dust and watered the roadways. Tr. 169.

CIVIL PENALTY ASSESSMENT

DOCKET NO. PENN 2009-42

ORDER NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT
4165192	08/09/08	75.400	\$44,645.00

The Secretary proposed a large penalty of \$44,645.00 for the alleged violation primarily due to the large number of points assessed for repeat violations of the standard, for negligence, for the likelihood of injury, for the severity of any resulting injury and for the number of persons affected. I have found that the violation existed, that it was serious, that the negligence of the company was high and that the violation was an unwarrantable failure to comply with a mandatory standard. I have found that the mine and the company's controller are large and that the proposed penalty will not effect Emerald's ability to continue in business. Also, I have found that the operator exhibited good faith in abating the violation, which warrants a modest reduction in the

penalty. Given these findings and the other civil penalty criteria, I assess a penalty of \$44,500 for this violation.

SETTLEMENT

The rest of the violations in Docket Nos. PENN 2009-41 and PENN 2009-42 were settled. A Decision Approving Partial Settlement was issued for Docket No. PENN 2009-41 on May 18, 2010, disposing of six of the eight violations at issue in the docket. One citation was previously vacated and the settlement agreement for the remaining violation in PENN 2009-41 was submitted at hearing. Nineteen of the twenty violations at issue in Docket No. PENN 2009-42 settled prior to the hearing and were placed on the record at the hearing. The final violation in Docket No. PENN 2009-42 was tried and is the subject of this decision. I have considered the representations made at the hearing and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110 (i) of the Act. The terms of the settlement are set forth below.

PENN 2009-42

Citation No. 7021323 - The Respondent argued that the electrical exam conducted three weeks prior to the citation did not show any defects. In light of the Respondent's argument the Secretary proposed at hearing that Citation No. 7021323 be modified to reduce the degree of negligence to "low" and reduce the penalty from \$2,106.00 to \$1,052.00.

Citation No. 7021425 - The parties agreed to settle this violation because there were no exposed live parts, only electricians have access to the area and a miner would only be exposed to live parts if the miner used a wrench to open up the cabinet. The parties requested that Citation No. 7021425 be modified to remove the inspector's significant and substantial ("S&S") finding and that the penalty be reduced, based on the penalty points, from \$634 to \$142, based on a corresponding reduction in the points.

Citation No. 7021427 - The parties request that this citation be modified for the same reasons as Citation No. 7021425. Specifically, the parties propose that Citation No. 7021427 be modified to remove the inspector's significant and substantial ("S&S") finding and that the penalty be reduced from \$2,106.00 to \$473.

Citation No. 7070999 - The parties determined that during the last weekly exam conducted the welder was in good condition. Consequently, the parties request Citation No. 7070999 be modified to reduce the degree of negligence to "low" and that the penalty be reduced, based on the penalty points, from \$2,282 to \$1,140.

Citation No. 7071000 - The parties agreed to settle this violation in light of the fact that the cited area was dangered off, the long wall blockage plan was in effect and extra safety precautions had been taken. The parties request that Citation No. 7071000 be modified to reduce the number of

persons affected to “five.” The parties propose the penalty be reduced, based on the penalty points, from \$8,209 to \$6,209.

Citation No. 7077230 - The parties determined that miners would have been able to use the escape way to escape safely if necessary because most of the reflectors were free from rock-dust and the lifeline had directional cones in it. As a result, the parties request that Citation No. 7077230 be modified to reduce the gravity of injury to “permanently disabling,” to reduce the degree of negligence to “low” and to reduce the number of persons affected to “five.” The parties also propose that the penalty be reduced, based on the penalty points, from \$1,657 to \$167.

Order No. 7077232 - The parties determined that fewer miners would be affected by the alleged violation than the inspector believed. One employee was already cleaning out by the site of the accumulation. In addition, the pre-shift and on shift reports both show the operator was aware of the condition and was addressing it. Consequently, the parties propose that Order No. 7077232 be modified to a 104(d)(1) citation and that it be modified to reduce the number of persons affected to “four.” In addition, the parties request that the penalty be reduced, based on the penalty points, from \$47,716 to \$37,716.

Citation No. 7077237 - The parties request that this citation be modified in light of the fact that the inspector had cited the lifeline seven days earlier, but did not cite the company for improperly hanging the lifeline. The parties request that Citation No. 7077237 be modified to remove the inspector’s S&S finding. The parties also propose the penalty be reduced, based on the penalty points, from \$8,209 to \$1,842.

Order No. 7077238 - The parties have agreed to modify the order since it was not issued until seven days after the initial order. Further, the violative condition had already been abated and the pre-shift report had noted that the company was in the process of correcting several conditions. The parties propose Order No. 7077238 be modified to a 104(d)(1) order and that it be modified to reduce the number of persons affected to “four.” The parties also request the penalty be reduced, based on the penalty points, from \$30,288 to \$23,288.

Citation No. 7077240 - The parties propose this citation be modified because they have determined that exposure to the hazard was limited to the weekly examiner. In addition, the hazard may have occurred less than a week after the last weekly inspection. The parties propose Citation No. 7077240 be modified to reduce the degree of negligence to “low,” with a corresponding reduction in the penalty points and a reduction in the penalty from \$1,026 to \$512.

Citation No. 7084495 - The parties have settled this citation in light of the fact that there was only a small amount of dust in the area, which was not in contact with the belt or rollers; and the area was wet. The parties request that Citation No. 7084495 be modified to remove the inspector’s S&S finding, to reduce the likelihood of injury to “unlikely” and change the gravity of injury to “lost workdays” and to reduce the penalty, based on the penalty points, from \$4,689 to \$317.

Citation No. 8006502 - The Secretary stated at hearing that MSHA the citation had been vacated because Citation No. 8006503 was issued for the same violative condition.

Citation No. 8006503 - The parties have agreed to modify the citation since the area at issue had been dangered off and the blockage plan provided additional protection. The primary and alternative escape way were still available to the miners to allow them to escape safely. The parties propose that Citation No. 8006503 be modified to reduce the gravity of injury to “permanently disabling,” to reduce the degree of negligence to “low” and to reduce the number of miners affected to “four.” The parties also request a corresponding reduction in the penalty, based on a reduction in the penalty points, from \$5,080 to \$705.

Citation No. 8006505 - The parties request the citation be modified in light of the fact that the cited condition occurred after the pre-shift examination and had only existed for a short time. In addition, the charger at issue was reported to be in good condition during the last electrical examination. The parties propose Citation No. 8006505 be modified to reduce the degree of negligence to “low” and to reduce the gravity of injury to “permanently disabling.” The parties also propose the penalty be reduced, based on a reduction in the penalty points, from \$6,996 to \$1,569.

Citation No. 8006506 - The parties have settled this violation in light of the fact that there was no one working in the area at issue and the doors referenced in the citation still provided some separation. Further, the air leakage in the area was minimal. The parties request that Citation No. 8006506 be modified to reduce the gravity of injury to “lost workdays” and to reduce the number of persons affected to “two.” The parties also request a penalty reduction, based on a reduction in the penalty points, from \$1,203 to \$154.

Citation No. 8006581 - The parties have determined that at the time the citation was issued there were no bad splices or hot rollers and only one belt cleaner would have been exposed to the hazard. As a result, the parties propose Citation No. 8006581 be modified to remove the inspector’s S&S finding, to reduce the likelihood of injury to “unlikely” and to reduce the degree of negligence to “low.” The parties also request a corresponding reduction in the penalty, based on a reduction in the penalty points, from \$3,996 to \$403.

Citation No. 8006582- The parties have agreed to modify this citation since the cited condition only existed for a short period of time, the belt structure was not hot, there were no ribbons on bad rollers, only one belt cleaner was affected, there was a carbon monoxide monitoring system in place and the condition likely only existed since the last pre-shift. The parties request that Citation No. 8006582 be modified to reduce the degree of negligence to “low” and reduce the gravity of injury to “permanently disabling.” The parties propose a reduction in the penalty, based on a reduction in the penalty points, from \$2,678 to \$601.

SETTLEMENT			
PENN-2009-41			
CITATION/ ORDER NO.	30 C.F.R.	ASSESSMENT	SETTLEMENT
8006587	75.364(a)(2)(iii)	\$2,106.00	\$2,106.00
Subtotal		\$2,106.00	\$2,106.00
PENN-2009-42			
CITATION/ ORDER NO.	30 C.F.R.	ASSESSMENT	SETTLEMENT
7021323	77.502	\$2,106.00	\$ 1,052.00
7021327	77.1110	\$ 946.00	\$ 946.00
7021425	77.509(c)	\$ 634.00	\$ 142.00
7021427	77.516	\$ 2,106.00	\$ 473.00
7070999	75.517	\$ 2,282.00	\$ 1,140.00
7071000	75.400	\$ 8,209.00	\$ 6,209.00
7077230	75.380(d)(2)	\$ 1,657.00	\$ 167.00
7077231	75.1725(a)	\$ 3,689.00	\$ 3,689.00
7077232	75.400	\$47,716.00	\$37,716.00
7077237	75.380(d)(7)(iv)	\$ 8,209.00	\$ 1,842.00
7077238	75.363(a)	\$30,288.00	\$23,288.00
7077240	75.202(a)	\$ 1,026.00	\$ 512.00
7084495	75.400	\$ 4,689.00	\$ 317.00
8006502	75.380(h)	\$ 1,657.00	Vacated
8006503	75.380(f)(1)	\$ 5,080.00	\$ 705.00
8006505	75.340(a)(1)(i)	\$ 6,996.00	\$ 1,569.00
8006506	75.333(c)	\$ 1,203.00	\$ 154.00
8006581	75.400	\$ 3,996.00	\$ 403.00
8006582	75.1725(a)	\$ 2,678.00	\$ 601.00
Subtotal		\$135,167.00	\$80,925.00
TOTAL		\$137,273.00	\$83,031.00

ORDER

WHEREFORE, the proposed settlement is **GRANTED**.

It is **ORDERED** that Citation No. 7021323 be **MODIFIED** to reduce the degree of negligence to “low.”

It is **ORDERED** that Citation No. 7021425 be **MODIFIED** to remove the inspector’s significant and substantial (“S&S”) finding.

It is **ORDERED** that Citation No. 7021427 be **MODIFIED** to remove the inspector’s S&S finding.

It is **ORDERED** that Citation No. 7070999 be **MODIFIED** to reduce the degree of negligence to “low.”

It is **ORDERED** that Citation No. 7071000 be **MODIFIED** to reduce the number of persons affected to “five.”

It is **ORDERED** that Citation No. 7077230 be **MODIFIED** to reduce the gravity of injury to “permanently disabling,” to reduce the degree of negligence to “low” and to reduce the number of persons affected to “five.”

It is **ORDERED** that Order No. 7077232 be **MODIFIED** to a 104(d)(1) citation and that it be modified to reduce the number of persons affected to “four.”

It is **ORDERED** that Citation No. 7077237 be **MODIFIED** to remove the inspector’s S&S finding.

It is **ORDERED** that Order No. 7077238 be **MODIFIED** to a 104(d)(1) order and that it be modified to reduce the number of persons affected to “four.”

It is **ORDERED** that Citation No. 7077240 be **MODIFIED** to reduce the degree of negligence to “low.”

It is **ORDERED** that Citation No. 7084495 be **MODIFIED** to remove the inspector’s S&S finding, to reduce the likelihood of injury to “unlikely” and to reduce the gravity of injury to “lost workdays.”

It is **ORDERED** that Citation No. 8006503 be **MODIFIED** to reduce the gravity of injury to “permanently disabling,” to reduce the degree of negligence to “low” and to reduce the number of miners affected to “four.”

It is **ORDERED** that Citation No. 8006505 be **MODIFIED** to reduce the degree of negligence to “low” and to reduce the gravity of injury to “permanently disabling.”

It is **ORDERED** that Citation No. 8006506 be **MODIFIED** to reduce the gravity of injury to “lost workdays” and to reduce the number of persons affected to “two.”

It is **ORDERED** that Citation No. 8006581 be **MODIFIED** to remove the inspector’s S&S finding, to reduce the likelihood of injury to “unlikely” and reduce the degree of negligence to “low.”

It is **ORDERED** that Citation No. 8006582 be **MODIFIED** to reduce the degree of negligence to “low” and to reduce the gravity of injury to “permanently disabling.”

Within 30 days of the date of this decision, Emerald **IS ORDERED** to pay civil penalties totaling \$127,531.00 for the violations found above.¹⁴

This decision resolves all outstanding issues with regard to Docket Nos. PENN 2009-41 and PENN 2009-42.

Upon payment of the penalties these proceedings **ARE DISMISSED**.

/s/ David F. Barbour

David F. Barbour
Administrative Law Judge

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/ca

¹⁴ 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

601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

November 14, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-808
Petitioner	:	A.C. No. 15-11065-133242
	:	
v.	:	Mine No. 4
	:	
BLEDSON COAL CORPORATION,	:	
Respondent	:	
	:	
BLEDSON COAL CORPORATION,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. KENT 2007-491R
	:	Citation No. 7528990; 07/25/2007
	:	
v.	:	Mine No. 4
	:	Mine ID: 15-11065
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	
Respondent	:	

DECISION

Appearances: Robert Motsenbocker, Esq., and Tim Cornelius, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor; John M. Williams, Esq. Rajkovich, William Kilpatrick & True, PLLC, Lexington, Kentucky, on behalf of the Respondent.

Before: Judge Melick

This civil penalty case (consolidated with a related contest proceeding) is before me upon a petition filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (“the Act”), charging Bledsoe Coal Corporation, (“Bledsoe”) with six violations of mandatory standards and seeking civil penalties of \$118,548.00 for the alleged violations. The general issue before me is whether Bledsoe violated the cited standards as alleged and, if so, what is the appropriate civil penalty for those violations. At hearings, the parties filed a settlement motion regarding four of the charging documents at issue. I have reviewed the representations and documentation submitted with respect to those documents and find that the settlement is acceptable within the framework of section 110(i) of the Act. An order approving that settlement accompanies this decision.

This order, issued pursuant to section 104(d)(1) of the Act, alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 75.380(d)(7) and charges as follows¹:

When examined, the life line in the #2 return entry\secondary escapeway of the 012 section was found to be eight (8) crosscuts outby the 012 section tailpiece. The end of the life line was located two crosscuts inby survey station #11605 in the #2 entry or nine crosscuts outby the last open crosscut.

The cited standard, 30 C.F.R. § 75.380(d)(7), provides in relevant part that “[e]ach escapeway shall be-... (7) Provided with a continuous, directional lifeline or equivalent device that shall be: (i) Installed and maintained throughout the entire length of each escapeway as defined in paragraph (b)(1) of this section.”

Paragraph (b)(1), referenced above, provides that “[e]scapeways shall be provided from each working section, and each area where mechanized mining equipment is being installed or removed, continuous to the surface escape drift opening or continuous to the escape shaft or slope facilities to the surface.”

¹ Section 104(d)(1) of the Act provides as follows:

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 person 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.

John Lawson is an experienced inspector for the Department of Labor's Mine Safety and Health Administration ("MSHA") who has an additional 36 years experience in the mining industry. Inspector Lawson testified that during his inspection of the subject mine on June 19, 2007, he observed that no lifeline was present in the return of the secondary escapeway for a distance of eight crosscuts or about 500 feet. While Bledsoe maintains that the lifeline was absent for a somewhat lesser distance, there is no dispute that either condition constituted a violation of the cited standard. The Secretary also maintains however that this violation was "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 (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. Sec'y of Labor, 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); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

Inspector Lawson described a lifeline as a rope equipped with directional cones that miners can use to follow with their hands to a safe area with fresh air when their vision is impaired or prevented because of smoke. Lawson opined that fatalities were reasonably likely as a result of this violation in the event of a fire and smoke as miners would be unable to find their way to fresh air.

While Respondent admits a violation of the cited standard herein, it nevertheless argues that the inspector was wrong in finding that the lifeline was absent for as long as eight crosscuts and maintains that the lifeline was only absent for five crosscuts. I find that for purposes of the findings herein it makes no difference whether the lifeline was absent for five or eight crosscuts. Respondent also argues that since it is undisputed that the primary escapeway was compliant with the regulations and available for use, fatalities were not reasonably likely as a result of the deficiencies in the secondary escapeway.

Recently, however, in *Secretary v. Cumberland and Coal Resources, LP*, 35 FMSHRC ____, Oct. 5, 2011, slip op. p. 11, *appeal filed*, D.C. Cir., Oct. 24, 2011, the Commission, in effect, created a presumption that, in determining whether a violation of an evacuation standard is “significant and substantial”, an emergency will exist. The Commission rationalized this holding by finding, in effect, that without such a presumption, the Secretary would be unable to sustain her burden of proving by a preponderance of evidence that such violations are “significant and substantial.” Within the framework of that decision the violation herein was therefore “significant and substantial.”

The Secretary also maintains that the violation was the result of the Respondent’s unwarrantable failure. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of “unwarrantable” (“not justifiable” or “inexcusable”), “failure” (“neglect of an assigned, expected or appropriate action”), and “negligence” (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by “inadvertence,” “thoughtlessness,” and “inattention”). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference” or a “serious lack of reasonable care.” 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991). The Commission has also stated that use of a “knew or should have known” test by itself would make unwarrantable failure indistinguishable from ordinary negligence, and accordingly, the Commission rejected such an interpretation. A breach of a duty to know is not necessarily an unwarrantable failure. The thrust of *Emery* was that unwarrantable failure results from aggravated conduct, constituting more than ordinary negligence. *Secretary v. Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993).

For the reasons that follow, I find that the violation herein was the result of Bledsoe’s unwarrantable failure. First, the violative condition was extensive. The lifeline was completely missing from at least five crosscuts in an escapeway, and therefore would have likely impaired or impeded the ability of miners to reach safety in the event of a mine fire and blockage of the primary escapeway. Second, it may reasonably be inferred that the violative condition had existed from five to eight days. As mining progressed, the lifeline should have been advanced with the tailpiece, which had been moved from five to eight times. In other words, on five to eight separate occasions, mine management advanced everything necessary to produce coal but failed to insure that the lifeline was also advanced, clearly demonstrating reckless disregard for miner safety. Third, the violation was obvious and presented a high degree of danger. Indeed, a missing lifeline for a distance of as much as 500 feet would be obvious to even a casual observer. In addition, during the time that miners were deprived of a secondary lifeline, an agent of the operator had conducted preshift examinations of the area. However, the condition had not been reported in at least the preshift report for the prior shift and had not been corrected. Finally, I find that the operator was on notice that greater compliance efforts were necessary. Only six days before the instant order was issued. Inspector Lawson had issued a citation for a lifeline being torn down for a distance of twenty-six crosscuts. The lifeline had broken apart, was separated in six to eight places, was found lying in piles on the mine floor and was covered with draw rock.

This citation, also issued pursuant to section 104(d)(1) of the Act, alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

There are accumulations of loose, dry coal, coal dust and float coal dust, black in color, along with in some areas, loose, wet coal along side and underneath the #2 conveyor belt starting at the #2 belt tailpiece and extending to the #2 belt drive. These accumulations range up to 12 inches deep when measured. Several of the bottom conveyor belt rollers on the back side of the belt are buried by these accumulations and are turning in these accumulations. There are several stuck bottom conveyor belt rollers in this belt and some of the bottom belt rollers had bad bearings causing the roller shafts to heat up and be warm to the touch. Along the walkway side of the belt there are accumulations of mud, water and gob up to approximately 10 inches deep hindering safe travel through this area. There are also accumulations of coal dust and float coal dust, black in color, deposited over previously rock dusted areas for the entire length of the belt.

The operator has been cited a total of 113 times in the last fifteen months for accumulations. MSHA personnel has [sic] brought this to the attention of the mine operator three times during this inspection.

The cited standard, 30 C.F.R. § 75.400, 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 permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.”

The Secretary claims in her brief that Bledsoe did not dispute that the cited condition was violative. However, the Secretary does not document any record reference to support her claim and Bledsoe disputes that claim. Under the circumstances, I find that counsel’s assertion in this regard to be unfounded. Moreover, I find that there are serious problems with Inspector Lawson’s testimony in this matter as it is contradictory in significant respects to the allegations in the citation at bar. The citation alleges that the violative accumulations existed “along side and underneath the #2 conveyor belt starting at the #2 tail piece and extending to the #2 belt drive.” Lawson testified however that he did not mean the entire belt and there were no violations at the tailpiece, head drive or in the 360-foot “swag” area. Similarly, contrary to the allegations in the citation, Lawson testified regarding the alleged stuck or bad rollers in the following colloquy at hearing:

Q. [By Mr. Williams] I understand. But when you’ve testified about how many stuck rollers there may have been or how many bad bearings there may have been, you don’t really recall how many there where, do you?

A. No. That’s why I put several in the citation

Q. And your citation says several and I believe your notes also says several; is that correct?

A. Yes, sir.

Q. And it would also be correct that we don't know from looking at the citation or your notes the location of any of these, do we?

A. No, sir.

Q. They could have, in fact, been in the area where you saw what you said you said were accumulations or they could have been in different areas, correct?

A. Yes, sir. (Tr. 56-57)

Thus, Mr. Lawson could not, contrary to the allegations in the citation, place the rollers with bad bearings in close proximity to the alleged accumulations. In addition, when asked if a stuck roller could be "an ignition source," Lawson said it "could be...[i]f the roller is stuck and the belts running against the frame of the rollers..." (Tr. 29). In an effort to clarify this testimony, Lawson was asked several questions about whether the belt was, in fact, rubbing against the frame. (TR 30-32). In the following colloquy Lawson finally admitted that this was not an ignition source:

JUDGE MELICK: Well, I guess maybe if I want try to connect, if any—if there is a connection between the belt cutting into the frame and its proximity to any accumulations?

THE WITNESS: I can't recall, Your Honor. You know, in that location, you know-

JUDGE MELICK: Well, how would that be an ignition source for accumulations then?

THE WITNESS: You're talking about where the belt had cut into the frame?

JUDGE MELICK: Yes

THE WITNESS: Well, unless it was observed cutting into the frame it wouldn't be, you know, if they had trained the belt back over where it's not touching the frame.

JUDGE MELICK: All right. So you're saying it was not an ignition source at that time?

THE WITNESS: No. (Tr. 31-32)

Because of these significant contradictions, I am able to accord but little weight to Lawson's testimony regarding the instant charges. Moreover, in light of the contrary testimony presented by

Mine Manager Osborne regarding the non-existence of combustible materials and the Secretary's failure to provide any evidence to support the inspector's bald assertion that the cited material was combustible, I find that the Secretary has failed to sustain her burden of proving the alleged violation.

Civil Penalties

Under section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operators ability to continue in business. The record shows that Bledsoe is a large mine operator and that it has a significant history of violations. The gravity and negligence attributed to the violation have previously been discussed. There is no dispute that the violation was abated in good faith and there is no evidence that the penalties assessed herein would affect the operator's ability to stay in business.

ORDER

Citation Number 7528924 is hereby vacated. Order Number 7528951 is hereby affirmed as written and Bledsoe Coal Corporation is directed to pay civil penalties of \$44,645.00 for the violation charged therein within 40 days of the date of this decision. Pursuant to the motion to approve settlement filed herein, Bledsoe Coal Corporation is further directed, within 40 days of the date of this decision, to pay civil penalties of \$864.00, \$136.00, \$1,289.00 and \$8,564.00 respectively for charging documents 7543189, 7543190, 7505606 and 7528990. Contest Proceeding Docket No. KENT 2007-491-R is hereby dismissed.

/s/ Gary Melick
Gary Melick
Administrative Law Judge
(202) 434-9977

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/to

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 14, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-38
Petitioner	:	A.C. No. 11-02752-129287-01
	:	
	:	Docket No. LAKE 2008-142
v.	:	A.C. No. 11-02752-136300-05
	:	
	:	Docket No. LAKE 2008-525
	:	A.C. No. 11-02752-153962-01
THE AMERICAN COAL COMPANY,	:	
Respondent	:	Galatia Mine

DECISION

Appearances: Karen E. Wilcynski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Jason W. Hardin, Esq., and Mark E. Kittrell, Fabian & Clendenin, Salt Lake City, Utah, 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 The American Coal Company (“AmCoal”) 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 Evansville, Indiana, and filed post-hearing briefs.

AmCoal operates the Galatia Mine, an underground coal mine in Saline County, Illinois. At the time the citations and orders in this case were issued, the mine was very large. It had three portals: the Main Portal, Galatia North Portal, and the Millennium Portal, which is now known as the New Future Portal. Miners would often rotate between portals and equipment would sometimes be moved to different portals. The Main Portal and Galatia Portal were connected underground but, due to a fault line, the Millennium Portal was separate. All three portals had one identification number issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). This mine employed a little over 1,000 people in 2007 and produced 7,009,160 tons of coal in 2007. In 2007, the mine liberated a little over four million cubic feet of methane a year and it was under a five-day spot inspection cycle.

I. DISCUSSION WITH FINDINGS OF FACT CONCLUSIONS OF LAW

A. Order No. 7490536

On July 20, 2007, MSHA Inspector Steven Miller issued Order No. 7490536 under section 104(d)(2) of the Mine Act for an alleged violation of section 75.400 of the Secretary's safety standards. The citation alleges:

Accumulations of loose coal and coal float dust were allowed to accumulate on both sides of the Stamler Feeder located on the 9th West Tailgate active section. The feeder was located in the Number 3 Entry. The accumulations measured approximately 6 inches to 52 inches deep, 12 feet to 17 feet wide, 4 feet to 15 feet long. The accumulations were also in front and under the energized feeder.

(Ex. B). The inspector found that an injury or illness was reasonably likely to occur and result in lost workdays or restricted duty, that the violation was significant and substantial ("S&S"), that nine people would be affected, and that the violation was the result of high negligence on the part of the operator. Section 75.400 provides, in part, 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" The Secretary has proposed a civil penalty in the amount of \$60,000.

1. Background Summary of Testimony

Inspector Miller has worked for MSHA since September 1991. (Tr. 1:10-11).¹² Miller is currently a Field Office Supervisor. *Id.* Before he became Field Office Supervisor, Miller had inspected the Galatia Mine (the "Mine") several times from 2000 to 2007. (Tr. 1:12-13). Miller described the Mine as a huge mine with three portals and one mine identification number, though the Mine's status has changed since the July 20, 2007, inspection. (Tr. 1:13-14).

On July 20, 2007, Miller was at the Mine to perform an E02 spot inspection, in which he typically would look for "possible methane accumulation problems, ventilation problems, anything of that nature." (Tr. 1:15). When Miller found the subject condition, he testified that he was "near the tail area, the feeder area of the belt for this west tailgate active section." (Tr. 1:19). Miller testified that the area of concern was the accumulation around the Stamler Feeder. He stated that the Stamler Feeder is the piece of equipment that has a conveyor, and "[y]ou dump coal into it, it goes through a chunk breaker that breaks the coal up, and then it's dumped onto a conveyor belt that transfers it out of the coal mine." (Tr. 1:19).

¹ Citations to "Tr. 1-page number" reference Transcript Volume 1, citations to "Tr. 2-page number" reference Transcript Volume 2 and citations to "Tr. 3-page number" reference Transcript Volume 3.

Miller observed accumulations that “measured approximately 6 inches to 52 inches in depth, 12 feet to 17 feet wide, 4 feet to 15 feet long.” (Tr. 1:20-21; Sec’y Ex. B). He testified that the accumulations were in front, as well as under, the energized feeder. Miller observed that “[s]ome of the accumulations had been there so long that some of them had rock dust where they had rock dusted on top of the accumulations.” (Tr. 1:21). He stated that this was significant in showing that the coal dust had “been allowed to accumulate and has not been removed or cleaned up, as required.” (Tr. 1:21-22). Additionally, Miller observed accumulations in contact with the feeder itself. (Tr. 1:24). Miller recalled being told there was no scoop available that day to clean up the accumulation, but it was his opinion that the accumulation could have been cleaned up with “a scoop, a [continuous] miner, or shovels.” (Tr. 1:24; AmCoal Ex. 2).

Miller determined that the accumulation violation was S&S due to the absence of mitigating factors, prior 75,400 violations at the Mine, and the fact that the mine operator had notice of the violation. (Tr. 1:25-26). Furthermore, Miller recalls a conversation with the foreman and the escort on Friday, July 20, 2007, during which Miller believes he was told that the accumulation had been present since the previous Sunday. (Tr. 1:27-28; AmCoal Ex. 2). Miller believed that a fire could result because of the accumulation and the ignition sources present. He believed that the various ignition sources included “the feeder itself, moving parts, electrical coming to the feeder, the area under the feeder, the belt tail, the belt conveyor itself, the rollers in the tail segment, the rubbing of the belt against the structure.” (Tr. 1:30). Miller determined that in the event of a fire, the injuries to miners could include “smoke inhalation, the escapeway would be blocked, limited visibility, maybe miners not getting out of the mine, tripping, slipping, falling, broken legs.” (Tr. 1:31). In characterizing the violation as unwarrantable failure, Miller relied on the fact that there were over 360 citations for accumulation violations in a nine-month period at the Mine and the fact that management had opportunities to correct the problem. (Tr. 1:32).

On cross-examination, Miller stated that it is his general experience with the Mine that some areas can be wet. (Tr. 1:41). Miller stated that it is common for there to be some spillage around feeders, but in his opinion, the amount of accumulation here exceeded normal spillage. (Tr. 1:54-55). To clarify the location of the accumulation, Miller stated “[t]here were accumulations outby the tail, there were accumulations along both sides, under the tail to the tail roller of the belt” and that “[a]ccumulations went along the side of the feeder, over the bat wings.” (Tr. 1:63). Miller acknowledged that the prior 75,400 violations were not necessarily of the same nature as the accumulation on the feeder, but rather could have been accumulation of trash, oil, or something similar. (Tr. 86-87).

While Miller could not say whether mining occurred at that location on the day of the citation, he testified that both the belt and the feeder were energized. (Tr. 1:58). When asked about potential ignition sources, Miller could not name a specific broken part or condition of a piece of equipment that might generate heat. (Tr. 1:88-95). It was Miller’s opinion that because the feeder was energized, it could serve as an ignition source. (Tr. 1:90). Miller testified that “anytime you have a moving belt or moving rollers and you have coal in the vicinity of them, those are all ignition sources.” (Tr. 1:93). Miller thought there may have been accumulations on or near the belt, but he stated that he “wouldn’t consider that an ignition source.” (Tr. 1:91).

Miller's notes and the order did not specify whether any rollers were in the accumulations, but Miller testified "[i]t states there are accumulations under the feeder, so to be under the feeder, it has to be near the tail roller or in contact." (Tr. 1:92). Miller thought nine people would be affected because he personally observed nine people on the unit.

Dallas James Crossman, the production manager at the New Future Mine, next testified. (Tr. 1:117). Crossman started working at the New Future Mine in April 2008, and was not working at the New Future Mine when the citation was issued. (Tr. 1:118). Crossman did not have any personal knowledge of the conditions that existed on the day of the citation. (Tr. 1:158). Crossman testified that longwall mining began on the ninth west longwall soon after April 2008, because he helped cut "the ninth west through up into the ninth west headgate." (Tr. 1:121). Crossman testified to the variety of fire suppression mechanisms that are present, including a low oil switch-off for the feeders, a high oil temperature switch that shuts down a unit that reaches the trip point, a dry-type fire suppression on the feeder, and two actuators on the feeders that would "expel fire suppressant onto the components." (Tr. 1:144-148).

David McBride has worked at the Mine for over nineteen and a half years. (Tr. 1:161). He was an electrical foreman at the Mine since about 2000, and has been the maintenance manager at the Mine for the past three years. (Tr. 1:162). In July 2007, McBride was an electrical foreman at the Mine. (Tr. 1:172). McBride reviewed the Electrical Examination Book for the dates July 10, 2007 through August 8, 2007, and testified that he could not identify any potential fire hazards. (Tr. 1:165-166; AmCoal Ex. 17). McBride testified that the feeder at issue in this citation had a manual fire suppression system. (Tr. 1:177).

AmCoal employee, William Crittendon, next testified. (Tr. 1:180). Crittendon has worked in the mining industry for over thirty years, and he believes that he was the safety manager when this citation was issued. Crittendon was accompanying Miller in the Mine when the citation was issued. Crittendon testified that no activity had occurred at the site where the citation was issued from the beginning of the shift up until Miller's inspection. (Tr. 1:191). Additionally, Crittendon had written in his notes on the day of the inspection that Miller had told him that the accumulations had been present since Sunday, but Crittendon does not recall saying that to Miller. (Tr. 1:191-192; AmCoal Ex. 21).

AmCoal employee, James Matthew Carnahan, next testified. (Tr. 1:199). Carnahan has worked with AmCoal for nearly eight years and is a continuous miner ("CM") operator. Carnahan worked in the New Future Mine at the ninth west tailgate in July 2007. Carnahan was the CM operator during the shift that ended at 9:05 a.m. on July 20, 2007. (Tr. 1:201). Carnahan testified that he might not remember working that exact day, but that the conditions in that area around July 2007 were "extremely wet, a lot of mud, lot of water, water coming out of the bottoms, out of the top, and it was pretty gassy." *Id.* He testified that with the mud and water, the travelways would have been "rutted up, muddy." (Tr. 1:204). Looking over the Production & Delay ("P&D") Reports, Carnahan testified that the feeder at issue had been cleaned between 7:20 a.m. and 9:00 a.m. on July 20, 2007. (Tr. 1:208; AmCoal Ex. 14).

2. Summary of the Parties' Arguments

The Secretary argues that Miller properly established that AmCoal violated section 75.400. (Sec'y Br. 7). The Secretary's argument is based on AmCoal's actions of allowing the accumulation of loose coal and coal float dust to build up over a period of time without taking corrective action. (Sec'y Br. 7). The Secretary relies on Miller's testimony that he had spoken to AmCoal's foreman who had informed him that the accumulation had been present for around six days. (Sec'y Br. 7).

The Secretary argues that the violation was S&S. (Sec'y Br. 7-8). In support of this argument, the Secretary contends that there were "numerous ignition sources" in the affected area. (Sec'y Br. 8). The Mine produces significant quantities of methane, and as such, the Secretary argues that, by allowing the accumulation to exist for days, "any of the ignition sources in the area could have independently ignited the float coal dust if it were suspended in the mine atmosphere by a methane explosion." (Sec'y Br. 8). Since mine fires and explosions can cause serious injuries, the Secretary argues that the violation was S&S. (Sec'y Br. 8).

Next, the Secretary argues that the violation was the result of AmCoal's serious lack of reasonable care. (Sec'y Br. 8). The Secretary attributes this to the history of warnings and citations that AmCoal had received, the length of time the violation existed, the lack of mitigating factors, the presence of high negligence, and the lack of regard for the condition. (Sec'y Br. 8-9). Finally, the Secretary argues that the proposed penalty was appropriate due to AmCoal's "unwarrantable failure to comply with 30 C.F.R. § 75.400." (Sec'y Br. 9).

AmCoal argues that the alleged violation was not S&S. (AmCoal Br. 2). AmCoal primarily rests this argument on the failure of MSHA to identify an ignition source. (AmCoal Br. 2). There was no identifiable problem with the feeder or belt equipment, which would cause the feeder to serve as an ignition source, and therefore AmCoal argues that MSHA's evidence of an ignition source was too speculative. (AmCoal Br. 3).

Next, AmCoal argues that the alleged violation does not rise to the level of high negligence or an unwarrantable failure. (AmCoal Br. 4). AmCoal relies on Exhibit 14 and Carnahan's testimony that AmCoal started the process of removing the accumulations using a continuous miner about 45 minutes before the issuance of the order. (AmCoal Br. 4-5). The process of cleaning up the accumulations could have "inadvertently created [another] accumulation on the side of the feeder between it and the rib." (AmCoal Br. 4-5). Additionally, AmCoal argues that the condition did not go on for five days of active mining, because the area was idle for most of the week. (AmCoal Br. 5-6). AmCoal points to the lack of corroborating evidence to support Miller's testimony that he had been told that the condition had existed since the previous Sunday. (AmCoal Br. 5-6). Also, AmCoal asserts that since it was muddy and wet, there was not a present threat of ignition. (AmCoal Br. 6). Finally, AmCoal believes that the allegation that nine people would be affected is excessive. (AmCoal Br. 6).

3. Discussion and Analysis

AmCoal does not contest that a violation of section 75.400 occurred. Rather, it is contesting the gravity, S&S, negligence, and unwarrantable determinations of Inspector Miller. I find that the Secretary established a violation of the safety standard.

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.” 30 U.S.C. § 814(d)(1). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

[i]n 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).

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 (Aug. 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); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The Secretary established the first two elements of the *Mathies* formula. A violation was established that created a discrete safety hazard. I also find that the Secretary established the fourth element. If an injury were to occur as a result of this violation, the injury in question would be of a reasonably serious nature. As in many cases, the issue is whether there was a reasonable likelihood that the hazard contributed to by the violation would have resulted in an injury to a miner.

The Commission has provided the following guidance for accumulation violations:

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a “confluence of factors” was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990).

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997).

I find that, in examining all of the factors that can contribute to a fire, the Secretary established a reasonable likelihood that the hazard contributed by the violation would have resulted in an event in which there was an injury. I credit Inspector Miller’s description of the extent and location of the accumulations. The accumulations were quite large and extensive. (Tr. 109). The accumulations were under and around both sides of the feeder breaker. The accumulations were deep in some locations and included float coal dust, which is very volatile. Rock dust was on top of the float coal dust in some locations, which indicates that at least some of the accumulations had been present for a considerable length of time. The feeder breaker was energized. Although there is no evidence that the feeder was defective, it was still a potential ignition source. I reject the argument of AmCoal that the inspector’s testimony concerning the presence of ignition sources was speculative. Inspector Miller has extensive experience and I credit his testimony. 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.3d 133, 135-36 (7th Cir. 1995). In general, the Mine liberates a high level of methane and the violation was near the face where methane is more typically liberated at a mine. Carnahan testified that the area was generally gassy. (Tr. 1:201). The size of the accumulations and their location at the feeder were the significant factors I considered in reaching the conclusion that the violation was S&S. Although a raging fire or an explosion was not very likely, the conditions could reasonably be expected to create a

smoldering ignition of coal producing smoke that would present a health hazard to miners. Smoke inhalation was the most likely consequence that would result from this violation.

I find that the Secretary did not establish that the violation was a result of AmCoal's unwarrantable failure to comply with the safety standard. In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission restated 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); *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).

In the present case, the accumulations were rather extensive given that they were around and under the feeder breaker. The length of time that the accumulations had been present is in dispute. The Secretary contends that the accumulations were present since the previous Sunday. The order was issued on Friday. AmCoal argues that there is no basis in the record to establish that the condition had existed for that length of time. The subject order was issued on July 20 at 9:45 a.m. on July 20. AmCoal presented the P&D Report from the morning of July 20 which shows that a shuttle car got hung up on the feeder and that a continuous mining machine was used to pull it off. (Ex. R-14, p.6). The operator then used the continuous miner to clean up accumulations around the tail of the feeder. *Id.* Carnahan credibly testified about this issue and stated that the effort to clean the feeder might well have inadvertently created an accumulation on the rib side of the feeder. (Tr. 1:206-08). Inspector Miller testified, however, that the accumulations he was especially concerned about were outby the dumping point on the feeder. (Tr. 1:64-66). I find that the evidence establishes that some of the cited accumulations were created just prior to the inspection while some of the material may have been present for a longer period of time.

The Secretary relies on the fact that AmCoal has received numerous citations for violations of section 75.400 and that there have been “countless meetings” with AmCoal to address the operator’s ongoing failure to abate excessive accumulations. She contends that these previous citations and meetings put AmCoal on notice that greater efforts were necessary to ensure compliance with section 75.400. I credit the testimony of Inspector Miller that AmCoal had been issued many section 75.400 citations and accumulation issues had been discussed with mine management.

Inspector Miller also testified that the section foreman told him that he was waiting for a scoop car to arrive to clean up the spillage. AmCoal contends that most of the accumulations cited by Inspector Miller were between the feeder and the rib, which was too narrow to clean with a scoop. (Tr. 1:68-70). AmCoal contends two miners were cleaning up coal with shovels along the belt line and that these miners were reasonably close to the feeder and were making their way toward the feeder as they shoveled. I find that the evidence establishes that AmCoal was making some efforts to clean up the accumulations. It was not ignoring the conditions. I credit the evidence presented that a continuous miner had been in the area cleaning up accumulations prior to Inspector Miller’s arrival and that the miners who were shoveling nearby would have helped clean up the cited accumulations in a relatively short period of time.

I find that the cited accumulations were obvious and S&S. As stated above, although it was reasonably likely that the accumulations would create smoke causing smoke inhalation, the likelihood of a serious fire or explosion was not that great. Finally, it is clear that AmCoal knew about the condition, but that it was taking some steps to address it.

Considering all of the evidence, I find that AmCoal’s negligence was moderate and that its negligence did not rise to the level of aggravated conduct constituting more than ordinary

negligence. The gravity of the violation was serious. I modify Order No. 7490536 to a section 104(a) citation with moderate negligence. I find that a civil penalty of \$40,000 is appropriate for this violation.

B. Order No. 7490556

On August 26, 2007, Inspector Steven Miller issued Order No. 7490556 under section 104(d)(2) of the Mine Act for an alleged violation of section 75.362(d)(1)(ii) of the Secretary's safety standards. The order alleges:

A qualified person did not make a test for methane immediately before energizing the Fletcher Roofbolting Machine, company number RB 17, in the Flannigan Head Gate Unit. (MMU-001) The repairman stated he energized the machine and did not take a methane test nor did anyone else make the required test. The repairman and one red hat miner were the only two people on the section and neither one of them had a multi-gas detector with them. This roofbolting machine was located in the number 3 entry on this section.

(Ex. C). The inspector found that an injury or illness was reasonably likely to occur and that the injury or illness could reasonably be expected to be fatal, that the violation was S&S, that two people would be affected, and that the violation was the result of high negligence on the part of the operator. Section 75.362(d)(1)(ii) requires that a "qualified person shall make tests for methane . . . [i]mmediately before equipment is energized, taken into, or operated in a working place." 30 C.F.R. § 75.362(d)(1)(ii). The Secretary has proposed a civil penalty in the amount of \$18,742.

1. Background Summary of Testimony

On August 26, 2007, Miller conducted an inspection at the Mine. (Tr. 1:210). Miller issued the citation, because there were "two gentlemen performing work on an energized piece of equipment that they energized, and they had not made the required methane test before energizing that piece of equipment in that area." (Tr. 1:211). Miller testified that one of these men was a repairman and the other was a red hat miner, and that the repairman "was giving directions to the red hat on what to do and so forth." (Tr. 1:212). The two miners were performing a permissibility test on a 480-volt Fletcher roof bolting machine. (Tr. 1:212-216). Miller stated that anytime equipment is energized, a methane test has to be conducted to determine whether the area is safe. (Tr. 1:217). The miners told Inspector Miller that no methane test had been performed before they energized the machine. (Tr. 1:218).

Miller described the violation as S&S, because there have been methane accumulations in this section before. The repairman "should have been aware that a gas test had to be made, and he proceeded knowing that he didn't have a detector." (Tr. 1:218). Miller testified that without performing a methane test, there is no way to determine whether there is methane present. (Tr. 1:218). Miller recalls being told by one of the miners that an opening was discovered on a panel on the equipment during the permissibility test. (Tr. 1:219). Miller

perceived that to be the hazard because if there was methane build up, then it could be ignited. (Tr. 1:219).

Miller identified one of the hazards to be the potential ignition of methane. (Tr. 1:221). He believed that this could cause burns or even be fatal. (Tr. 1:221). When asked whether it was “reasonably likely that exposure could result in death or have a reasonable potential to cause death,” Miller responded that “[i]f methane is present and you have an opening in the panel, it is possible, yes.” (Tr. 1:221). Miller elaborated that ignition could occur if the place is left to “sit or go idle, the curtain is dropped, or you just have a bleeder, methane being released from the coal seam, and that you would have a build up in that area and you throw the power on something and something arcs and ignites methane.” (Tr. 1:223). Miller characterized this situation as unwarrantable failure due to “[t]he exposure, the three conditions that we observed, management was on notice that they had a problem with not providing gas detector equipment for their people.” (Tr. 1:226).

Miller testified that there had been problems in the past with the miners at the mine failing to use the multigas detectors. (Tr. 1:227). Miller was especially concerned because an inexperienced miner, who was still learning about mine safety, was present. (Tr. 1:228).

Miller further testified that he determined that the violation was the result of AmCoal’s high negligence because the repairman was a trained electrician who held an MSHA electrical card that AmCoal had placed confidence in to perform the work in a safe manner. As a consequence, “he was more than just an hourly employee, in my opinion.” (Tr. 1:241-242). Miller believed that the repairman was serving as an agent of AmCoal. (Tr. 2:23). He reached this conclusion because the repairman was a certified electrician and because he was giving instructions to the inexperienced minor. (Tr. 2:23-24). Miller stated that even if he had thought that the repairman was not acting as an agent of AmCoal, he probably still would have found high negligence, since the repairman “was directing the workforce, or directing an employee.” (Tr. 2:23-24). He also designated it as high negligence, because of “a history of methane build up accumulations in this area of the mine.” (Tr. 2:25).

Miller stated that he had taken a methane test of the area when he issued the order, but that he did not write the results down, which signaled to him that the methane reading was normal. (Tr. 2:27). Miller agreed that he had no knowledge of high levels of methane in the affected area at the time of this incident. (Tr. 2:30-31). Additionally, Miller could not identify any accumulations near the affected area. (Tr. 2:36).

Miller recalled “many” conversations that he had on previous occasions with the operator regarding miners underground without methane detectors, miners possessing methane detectors but not turning the detectors on, and telling the operator why this was unacceptable. (Tr. 2:53-54). Additionally, Miller clarified that even if a preshift examination had included a methane test, a methane test would still need to be conducted before energizing the unit. (Tr. 2:54).

Greg Tharp testified for AmCoal. (Tr. 2:70). Tharp was the maintenance foreman at the Galatia North Mine during the time the order was issued. (Tr. 2:70). Tharp was familiar with Mr. Shea, the repairman who committed the alleged violation, because Shea was one of Tharp’s

crew members. (Tr. 2:71). Tharp stated that Shea was an hourly employee, was not a supervisor, did not conduct training, and did not direct employees on what to do. (Tr. 2:71).

Tharp testified that there were multigas detectors available to be checked out to employees and they were trained on how to use the devices. (Tr. 2:71-72). He testified that Shea had checked out the multigas detectors “many times.” (Tr. 2:73). He recalls telling Shea “to check out a multigas meter” on August 26, 2007. (Tr. 2:73). Tharp could not identify any fail-safe measures that would ensure that this policy was carried out. (Tr. 2:87-89). Additionally, Tharp directed the red hat miner to work with Shea that day, with the purpose of acting as an assistant to Shea. (Tr. 2:75). The red hat miner was not obtaining training from Shea. (Tr. 2:90-91). Tharp stated that the unit was idle that day and possibly had been idle during part of the previous shift. (Tr. 2:75).

Tharp summarized AmCoal’s policy towards methane checks: “If anything was in by the last open crosscut it shouldn’t be energized until there had been a methane test taken at that face.” (Tr. 2:79). Tharp also stated that it was policy that “you were not allowed to go underground unless you had a spotter or were in the immediate company of a person who did have a spotter.” (Tr. 2:80). Spotter is an alternate word for a methane detector. (Tr. 2:80). Tharp testified that Shea would have been informed of these policies during his training. (Tr. 2:79-80).

Steven Willis testified for AmCoal. (Tr. 2:100). Willis was the Manager of Health and Safety for AmCoal when the order was issued. (Tr. 2:101). Willis said that Shea deserved to be terminated from his employment because, “[e]veryone knows to get a spotter, everyone knows to make gas checks.” (Tr. 2:101-102). “I have given countless safety talks myself at each portal on proper gas checks, when to take them, and what to do when you find it.” *Id.* Shea was terminated that day as a result of the violation. (Tr. 2:106-107; AmCoal Ex. 32).

Additionally, Willis testified that according to the P&D reports, no mining had occurred between July 31, 2007 and August 30, 2007 at the first northwest Flannigan headgate. (Tr. 2:107-108; AmCoal Ex. 33). Willis also testified that per the preshift reports for the affected area leading up to the citation, there was “no indication of methane whatsoever.” (Tr. 2:109; AmCoal Exs. 34, 35, 36). Willis testified that, had methane been liberated from the Grobbins longwall, it would have been ventilated out of the mine through exhaust fans, and would not have worked its way into the Flannigan Unit. (Tr. 2:112-114).

2. Summary of the Parties’ Arguments

The Secretary argues that Miller properly established that AmCoal violated section 75.362(d)(1)(ii). (Sec’y Br. 9). The Secretary argues that this is a violation based on AmCoal’s actions of directing both Shea and the red hat miner “into the mine, towards the face area, to perform a permissibility test on the Fletcher Roofbolter, without carrying a multi-gas detector.” (Sec’y Br. 9).

The Secretary argues that the violation was S&S. (Sec’y Br. 10). The Mine liberates significant quantities of methane and, as such, the Secretary argues that the only way to determine whether there is methane in a given area is through the use of a methane detector.

(Sec’y Br. 10). The Secretary relies on Miller’s testimony that there was an opening in one of the panels and that the opening could serve as an ignition source. (Sec’y Br. 10). Thus, with the ignition source and the methane, the Secretary believes that “[t]hese facts supported Inspector Miller’s determination that it was highly likely that a fatal electrocution (or explosion) could have occurred.” (Sec’y Br. 10).

Next, the Secretary argues that the violation was an unwarrantable failure. (Sec’y Br. 10). The Secretary relies on Miller’s testimony that he had previously noticed a problem with miners at the Mine failing to carry methane detectors and that AmCoal had previously received warnings about the problem. (Sec’y Br. 10-11). Thus, by having notice of the problem and by allowing the repairman and red hat miner to conduct a permissibility test without a methane detector, the Secretary argues that it is unwarrantable failure. (Sec’y Br. 11). Similarly, the Secretary believes that Shea ought to be treated as a supervisor for this order because he was “allowed to travel into the mine with a trainee to perform tests required of the operator.” (Sec’y Br. 11). Finally, the Secretary argues that the proposed penalty is appropriate. (Sec’y Br. 12).

AmCoal argues that the alleged violation was not S&S. (AmCoal Br. 6). AmCoal rests this argument on the failure of the Secretary “to establish the presence of a fuel source or ignition source.” (AmCoal Br. 6). In support of this, AmCoal argues that “[t]estimony and the preshift reports for the area establish that methane was not present.” (AmCoal Br. 6). Additionally, there was no evidence that any accumulations or other fuel sources were present. (AmCoal Br. 7). Similarly, AmCoal argues that there was insufficient evidence to establish that the supposed gap in the panels posed a problem. (AmCoal Br. 7).

Next, AmCoal argues that the Court should not impute Shea’s actions to AmCoal. (AmCoal Br. 7). AmCoal points to prior case law in stating that “[i]t is well-settled that the negligence of a lower-level, hourly miner is not imputable to an operator for the purposes of penalty assessment, negligence determination, or unwarrantable failure determination.” (AmCoal Br. 7). AmCoal believes that the Secretary did not provide sufficient evidence to prove that Shea was an agent of AmCoal at the time of the violation. (AmCoal Br. 8-9). AmCoal looks toward Shea’s lack of management authority in arguing that Shea was not an agent of AmCoal. (AmCoal Br. 9). Additionally, AmCoal notes that Tharp indicated that he was nearby in case Shea and/or the red hat miner needed questions answered or supervision. (AmCoal Br. 9). Tharp’s testimony indicates that Shea was instructed to get a multigas detector that day but that Shea failed to do so. (AmCoal Br. 10).

Finally, AmCoal argues that the violation was not the result of its high negligence or unwarrantable failure. (AmCoal Br. 10). AmCoal relies on the fact that Shea was a low-level employee, who had extensive training, yet “ignored his training and the directions of his supervisor that very day.” (AmCoal Br. 10). Additionally, Shea was terminated from his employment with AmCoal immediately following the incident. (AmCoal Br. 10). AmCoal argues that by terminating Shea, it abated the current problem and deterred future similar conduct by other AmCoal employees. (AmCoal Br. 10). Additionally, AmCoal argues that the lack of a fuel source and ignition source shows that the situation did not pose a high chance of danger. (AmCoal Br. 10).

3. Discussion and Analysis

AmCoal is not contesting that a violation of section 75.362(d)(1)(ii) occurred. The Secretary established the first two elements of the *Mathies* formula. With regard to the third element of the *Mathies* formula, I will evaluate a “confluence of factors.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988).

In examining factors that contribute to a fire, I find that the Secretary did not establish a reasonable likelihood that the hazard contributed by the violation would have resulted in an event in which there was an injury. Preshift reports showed that methane was not present in that area. Miller believes that he took a methane test at the location of the cited condition but he did not write the results down. The fact that he did not do so is a strong indication that the methane test results were normal.

With regard to other possible ignition sources, Miller identified the opening in a panel on the roof bolting machine as a potential ignition source. Since no one looked further into whether this gap could actually create conditions that could lead to a fire, I find that there was no ignition source present. There was no evidence of accumulations at the location of the cited condition. Therefore, under the confluence of factors test, there was not a reasonable likelihood that the hazard contributed by the violation would have resulted in an event in which there was an injury. *See Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988).

I find that the Secretary did not establish that the violation was a result of AmCoal’s unwarrantable failure to comply with the safety standard. I find that Shea’s negligence should not be imputed to AmCoal. Miller partially based his findings of high negligence and unwarrantable failure on his belief that Shea was an agent of the operator. Imputation of a miner’s conduct can be imputed to the operator under certain circumstances, such as when the miner is found to be a supervisor or agent of the operator. *See generally Capitol Cement Corp.*, 21 FMSHRC 883, 894 (Aug. 1999). However, “[i]t is well settled that the negligence of a rank-and-file miner is not imputable to an operator for the purposes of penalty assessment or unwarrantable failure determination.” *Reading Anthracite Co.*, 32 FMSHRC 399, 411 (April 2010). To determine whether to impute negligence, “where a rank-and-file employee has violated the Act, the operator’s supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner’s violative conduct.” *Southern Ohio Coal Company*, 4 FMSHRC 1458, 1464 (Aug. 1982).

Here, Shea was accompanied by a red-hat miner, which is part of the reason why Miller perceived Shea as an agent of AmCoal. Tharp’s testimony established that Shea was paid on an hourly basis, was not a supervisor, and did not conduct training. Shea was fired immediately after this incident. Shea had been given training on the proper use and importance of a multigas detector. The company made multigas detectors available to employees who were trained to use the detectors. Tharp’s testimony established that Shea failed to follow Tharp’s directions that day to check out a multigas detector. While there is conflicting testimony as to the purpose of the red-hat miner who accompanied Shea, Shea’s supervisor testified that the red-hat miner’s purpose was simply to assist Shea with his duties. Additionally, it was company policy to carry

multigas detectors and this policy was covered in training sessions. Therefore, AmCoal took “reasonable steps to prevent the rank-and-file miner’s violative conduct.” *Southern Ohio Coal Company*, 4 FMSHRC 1458, 1464 (Aug. 1982).

Because Shea had limited duties with no supervisory authority and AmCoal took measures to prevent miners from going underground without multigas detectors, I find that Shea was a “rank-and-file miner,” and his negligence is not imputable to AmCoal. *See Reading Anthracite Co.*, 32 FMSHRC 399, 411 (April 2010)

In conclusion, I find that this violation did not rise to the level of an unwarrantable failure because Shea’s negligence is not imputable to AmCoal and the company had training and policies in place to ensure that miners traveled underground with multigas detectors. I recognize that Inspector Miller testified that he had “many” conversations with AmCoal employees in the past regarding miners failing to carry and use the multigas detectors. As a consequence, I find that AmCoal’s negligence is on the high side of moderate. In addition, future violations of this safety standard may well be accurately characterized as an unwarrantable failure. I modify Order No. 7490556 to a section 104(a) citation. A penalty of \$10,000 is appropriate.

C. Citation No. 7490558

On August 26, 2007, Inspector Steven Miller issued Citation No. 7490558 under section 104(a) of the Mine Act for an alleged violation of section 75.509 of the Secretary’s safety standards. The citation alleges:

A repairman was observed performing a permissibility test on the Fletcher Roofbolting Machine (RB 17) with the power on the machine. This machine was located on the Flannigan Head Gate Unit (MMU-001) in the number 3 entry.

(Ex. E). The inspector found that an injury or illness was highly likely to occur and the injury could reasonably be expected to be fatal, that the violation was S&S, that one person would be affected, and that the violation was the result of high negligence on the part of the operator. Section 75.509 requires that “[a]ll power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble-shooting or testing.”³⁰ C.F.R. § 75.509. The Secretary has proposed a civil penalty in the amount of \$34,652.

1. Background Summary of Testimony

This citation was issued in conjunction with Order No. 7490556. Here, Inspector Miller stated that he had observed the repairman perform a permissibility test on the Fletcher Roofbolting Machine while the machine was powered. (Tr. 1:211-212; Sec’y Ex. E). The red hat miner was present as well. (Tr. 1:212). Miller was troubled by the fact that the repairman told him that he had been performing permissibility tests the same way for at least the last six months. (Tr. 1:222; Sec’y Ex. E).

Permissibility tests are used to make sure that an enclosure is properly sealed through the use of a feeler gauge. (Tr. 1:229). Miller testified that, in his own experience in conducting permissibility tests, he would first talk to the machine operator and find out if there were any problems. (Tr. 1:230-231). Then, he would have the machine operator “lock and tag the machine out” so that he could begin the permissibility test. (Tr. 1:231). Miller said that according to policy, “the only time power can be on that machine is for troubleshooting, and we normally have meter in hand and gloves on.” (Tr. 1:232).

Miller designated this as S&S due to his fear of the “feeler gauge getting into something on one of the enclosures or the cable have a bare conductor on it.” (Tr. 1:232). Miller believed that by performing the permissibility test with the power on, there was a risk of electrocution. (Tr. 1:232). Additionally, Miller believed it was highly likely because “if that cable’s got a bare conductor on it, you’re going to be electrocuted.” (Tr. 1:233).

On cross-examination, Miller testified that under certain circumstances, the machine may need to be powered for a permissibility test, such as when checking the start/stop switch or the lights on the machine. (Tr. 2:38-40). Miller was unsure as to what part of the permissibility test was being performed by the repairman at the time of the encounter, but recalls seeing the repairman with “a feeler gauge in hand and the power on and stuck in an opening.” (Tr. 2:41). On redirect, Miller recalled his conversation with the repairman, “I had discussion with him, talked about why he was doing what he was doing and why, and as my notes reflected, he told me he did it that way for six months.” (Tr. 2:61).

Greg Tharp testified that the repairman, Mr. Shea, had performed permissibility tests “many times” and that he had personally observed Shea perform some of those permissibility checks. (Tr. 2:81). During these observations, Tharp had never observed Shea having portions of the machine energized when it should have been de-energized. (Tr. 2:81). On recross examination, Tharp testified that it was reported to him that Shea was “doing feeler gauge tests on a machine while it was energized” during the incident in question. (Tr. 2:96). Tharp stated that this was a hazard, because of “[t]he possibility of the feeler gauge coming in contact with an energized component.” (Tr. 2:96).

Steven Willis referred to Shea’s training log to show that Shea had received permissibility test training and his training had not yet expired at the time of the citation. (Tr. 2:104-105; AmCoal Ex. 30). When asked about permissibility tests on cross-examination, Willis testified that it was his belief that Shea might have been making excuses by saying that he had been engaging in the conduct for six months. (Tr. 2:115). It is his opinion that, if Shea had been engaging in the conduct for six months, someone would have reported him. (Tr. 2:116).

David McBride has been employed as an electrician with AmCoal since 1991. (Tr. 2:120). He was an underground electrical foreman since about 2000 and he has been a maintenance manager at the Mine for the last three years. (Tr. 2:120). McBride testified that miners must take a 96-hour class to obtain their certification before the miners can conduct electrical permissibility tests on equipment. (Tr. 2:121). McBride believed that Shea had received this certification. (Tr. 2:121). McBride testified about the type of roofbolter that was being used by Shea during this incident. (Tr. 2:125). He went through the various components

of the machine, and stated that, even if the machine had been energized, electrocution would not have occurred. (Tr. 2:126-129).

On cross-examination, McBride verified that he is not an electrical engineer. (Tr. 2:141). Additionally, he stated that it is not standard practice to have the equipment energized while performing a permissibility test. (Tr. 2:142-143). McBride agreed that there are risks when there is a failure to tag and lock circuit breakers prior to conducting an inspection of a machine. (Tr. 2:144).

2. Summary of the Parties' Arguments

The Secretary argues that Miller properly established that AmCoal violated section 75.509. (Sec'y Br. 9). Building on the prior arguments set out for Order No. 7490556, the Secretary adds that "the same repairman and trainee performed a permissibility test on the 480-volt roofbolter with the power on the machine." (Sec'y Br. 10).

The Secretary argues that the violation was S&S. (Sec'y Br. 10). The Secretary states that, without knowing whether there was an electrical problem with the roof bolting machine, it was reasonably likely that Shea would receive an electric shock when he conducted the permissibility examination without de-energizing the bolter.

Next, the Secretary argues that AmCoal was highly negligent with respect to this violation. Miller testified that Shea had told him that he had conducted permissibility tests in this fashion for at least the past six months. (Sec'y Br. 11). On the basis of this testimony, the Secretary argues that it can be inferred "that management had allowed the cited conduct to occur over a long period of time without proper training, oversight and supervision." (Sec'y Br. 11). Finally, the Secretary argues that the proposed penalty is appropriate. (Sec'y Br. 12).

AmCoal argues that the alleged violation was not S&S. (AmCoal Br. 10). AmCoal sets forth this argument, because "the evidence introduced at trial demonstrated there was no likelihood that the hazard would result in injury." (AmCoal Br. 10-11). It would be impossible to come into contact with an energized part on the roof bolter with the feeler gauge, even if the gauge were fully inserted. Wires were designed to be below the level at which a feeler gauge might enter, and step flanges were present in some locations which would also prevent electric shock. (AmCoal Br. 11).

Next, AmCoal argues that Shea's actions should not be imputed to AmCoal. (AmCoal Br. 11). AmCoal argues that the operator had provided training to Shea on how to properly perform a permissibility test, yet Shea ignored that training. (AmCoal Br. 11). Additionally, AmCoal argues that "the Court should find AmCoal's training of Shea and its policies and procedures regarding such training to be mitigating circumstances warranting a 'Low' or at most 'Moderate' finding of negligence." (AmCoal Br. 11-12).

3. Discussion and Analysis

I find that the Secretary established a violation of the safety standard. Under the safety standard, electrical equipment is required to be de-energized "before work is done on such . . .

equipment.” Shea was performing a permissibility test on the roof bolter. He was not attempting to repair the equipment and he had not opened any electrical compartments on the equipment. Nevertheless, I find that performing permissibility tests is “work” as that term is used in the safety standard.

I also find that the violation was S&S. The Secretary is not required to establish that it was more probable than not that an injury would result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). Rather, the Secretary must show that it was reasonably likely that the hazard contributed to by the violation would result in an injury. The Secretary established the first two elements of the *Mathies* S&S test. There was a violation of the safety standard that created a discrete safety hazard. In addition, if an injury were to occur, it would likely cause a serious electric shock injury. I find that the Secretary established that it was reasonably likely that the hazard contributed to by this violation would result in an injury. Shaw was sticking the feeler gauge into electrical boxes and other components that contained energized electrical circuits. I find that the evidence establishes that it was reasonably likely that Shaw would touch a wire or an electrical component that was energized as he was performing the permissibility test. Apparently, it was not unusual for Shaw to perform this test on energized equipment. Assuming continued normal mining operations, an accident was bound to happen.

I find that AmCoal’s negligence was only moderate, however. I credit the testimony of AmCoal’s witnesses that it instructed its employees to perform permissibility tests with the equipment de-energized and that it was not the usual practice for miners to do these tests with the equipment energized. I find that there was no showing that AmCoal had any knowledge that Shea performed permissibility tests without shutting down equipment. For the reasons discussed above, the negligence of Shea should not be imputed to AmCoal. A penalty of \$15,000 is appropriate for this violation.

D. Citation No. 6668585

On December 6, 2007, Inspector Steven Miller issued Citation No. 6668585 under section 104(a) of the Mine Act for an alleged violation of section 75.400 of the Secretary’s safety standards. The citation alleges:

Accumulations of combustible materials (trash) have been placed in the No. 23 crosscut along the Flannigan Travelway. The materials are in the form of paper, cardboard, plastic, old filters and wood.

(Ex. G). The inspector found that an injury or illness was unlikely to occur but, if there were an injury, it would likely result in lost workdays or restricted duty. He determined that the violation was not S&S but that the violation was a result of the operator’s high negligence. The Secretary has proposed a civil penalty in the amount of \$6,996.

1. Background Summary of Testimony

On December 6, 2007, Miller was at the Mine performing an E01 inspection for that quarter. (Tr. 2:146). Miller testified that the Flannigan Travelway, the location of the cited

condition, was a frequently-used travelway. (Tr. 2:147-148). Miller observed trash accumulations along the Flannigan Travelway, including “cardboard, wood, paper, plastic, and eight old filters.” (Tr. 2:148; Sec’y Ex. G). Miller was not sure whether management was aware of the condition, but it was his belief that, based on the use of the travelway, someone should have observed the trash accumulation. (Tr. 2:148).

In regard to the accumulations, Miller stated that “[w]hen I was sent there for this inspection, my supervisor advised me they had some citations issued for stockpiling trash behind curtains, basically acting as a holding tank or storage unit or whatever, so trash was an issue and an issue that we talked about during this inspection.” (Tr. 2:149). Miller recalled prior discussions that he, as well as other inspectors and his supervisor, had with AmCoal management about the stockpiling of trash. (Tr. 2:149).

Miller determined that the materials were combustible due to incidents of prior filter fires at the Mine. (Tr. 2:150). Miller testified that the trash was not contained and that the trash was present in active workings. (Tr. 2:151-152). Miller believed that this posed a fire danger. (Tr. 2:152). In the unlikely event of a fire, Miller believed that injuries could occur, such as “smoke inhalation or burn or inability to escape the mine.” (Tr. 2:152). To account for his belief that ten people would be affected, Miller followed guidelines that the number was to reflect “everyone inby the area that could be affected by the event.” (Tr. 2:153). Additionally, Miller determined that the violation was the result of AmCoal’s high negligence, because of the filter fires that had previously occurred at the Mine, the number of meetings that had been conducted, and “guidance from my boss that it was an ongoing problem that we had to get a handle on.” (Tr. 2:154). It was brought up that the three portions of the AmCoal mine complex had had over 360 section 75.400 violations for accumulations in the two years prior to the issuance of the citation. (Tr. 2:156; Sec’y Ex. A).

One of the previous fires occurred when hot filters were removed “from a scoop near one of the portals on the north” and the filters were placed in with some trash. (Tr. 2:182). The trash caught on fire and produced smoke. *Id.* Here, Miller testified that the filters in the trash were not hot. (Tr. 2:183).

Miller testified that trash accumulation is normal in the mining process, but “[i]t’s just a matter of having policy and procedure to remove it from the mine.” (Tr. 2:157). Miller did not believe that AmCoal could have any excuse for this accumulation of trash, because “[a]ll combustible materials are to be removed, and after the [previous] meetings . . . that had been conducted, they were on a heightened alert that we had a problem with 75.400 accumulation of trash.” (Tr. 2:158).

Miller stated that it was his belief that, if a fire broke out because of the accumulations, smoke would go through the primary escapeway. (Tr. 2:163). It was Miller’s opinion that the Mine had not improved its trash compliance since earlier meetings between the inspectors and the Mine operators. (Tr. 2:169). Miller was unsure about how long the trash had existed in that location, but noted that he saw rock dust on the trash. (Tr. 2:173). Furthermore, Miller does not recall specifically counting the number of people who were inby the cited condition to account for the number of people affected. (Tr. 2:174).

Joe Myers testified for AmCoal. (Tr. 2:186). Myers is currently the Safety Compliance Manager for AmCoal. (Tr. 2:186). During the time of this citation, Myers was the Safety Director at the Galatia North Mine. (Tr. 2:186). Myers testified that in late 2007, trash was removed every day from the Mine. (Tr. 2:189). Myers testified that after an earlier incident of trash accumulation, AmCoal made “it a priority to remove trash, to not let it assemble, to not let it stay in one place, because . . . materials are brought to the mine in boxes, papers, whatever, and when they are disposed of, we take the remains and we get them out of the mine.” (Tr. 2:190-191). Myers testified that, based on his review of P&D reports, if a fire had started because of the accumulation, then the only person that could have been injured would have been the examiner. (Tr. 2:192-194). Myers could not say whether trash removal was taking place on the Flannigan Travelway on the day of the citation. (Tr. 2:195). Additionally, Myers did not know whether there was any work being performed on the Flannigan Travelway on the day of the citation. (Tr. 2:195-196).

2. Summary of the Parties’ Arguments

The Secretary argues that AmCoal’s violation was the result of high negligence, because of the repeated conduct of AmCoal “storing combustible materials (trash) in cross-cuts for extended periods of time.” (Sec’y Br. 12). The Secretary rests this argument on prior meetings that Miller and others had with AmCoal, the fact that AmCoal should have known about the accumulations, and AmCoal’s alleged attempts to conceal the condition. (Sec’y Br. 12).

The Secretary argues that Miller’s determination that ten people would be affected is reasonable. (Sec’y Br. 13). Miller determined that the smoke would travel inby, thus affecting “mine management, examiners, and mine personnel who regularly travel through the affected area.” (Sec’y Br. 13). Finally, the Secretary argues that the proposed penalty is appropriate. (Sec’y Br. 13).

AmCoal seeks to vacate this citation, because “[t]he Secretary failed to establish how long the small trash pile had existed, did not establish the size, shape or dimensions of the trash pile, and did not establish whether the trash pile was in fact combustible.” (AmCoal Br. 12). AmCoal relies on Myers’ testimony as evidence of the daily trash removal that goes on in the Mine. (AmCoal Br. 12). Additionally, AmCoal points out that the evidence shows that the Mine had been idle during the time this citation was issued. (AmCoal Br. 12).

If the citation is not vacated, then AmCoal argues that the number of people affected should be reduced to one person. (AmCoal Br. 12). AmCoal believes that Miller did not know or count how many people would be affected, and therefore, the number was not accurate. (AmCoal Br. 12-13). Additionally, AmCoal would like to see the citation reduced from high negligence to no negligence, because “[w]ithout any indication by the Inspector of how long these items existed and whether they were somehow particularly combustible, it was not negligent for AmCoal to place the nondescript trash in a crosscut for pickup.” (AmCoal Br. 13).

3. Discussion and Analysis

I affirm the citation but I find that the operator's negligence was moderate. There is no dispute that the cited material was present. I agree with the argument of AmCoal that it is not negligent for an operator to place trash in a crosscut for pickup. I credit the testimony of Inspector Miller that the trash was combustible and that the mine had a history of allowing trash to accumulate rather than having it promptly removed. Section 75.400-2 requires mine operators to develop a program for regular cleanup and removal of combustible materials. I find that the testimony of Myers that the company had made it a "priority" to promptly remove trash unconvincing. He could not state whether trash removal was taking place on the day the citation was issued. The Secretary presented sufficient evidence to establish a *prima facie* case and AmCoal's evidence was insufficient to rebut the Secretary's case.

AmCoal relies, in part, on my decision in *Basin Resources, Inc.*, 19 FMSHRC 711, 717-18 (April 1997) (ALJ) to support its argument that there was no violation of section 75.400. Whether there is a violation of section 75.400 with respect to trash and other miscellaneous combustibles must be considered on a case-by-case basis. In this instance, I find that the Secretary established a violation.

I find that AmCoal's negligence was moderate because there was no showing that management was aware that the trash was present. This factor is significant because it is not clear whether there was significant activity along the Flannigan Travelway on December 6, 2007. It is clear that AmCoal must take action to improve its trash removal program. The violation was not S&S and was not serious. A penalty of \$2,000 is appropriate.

E. Citation No. 6668587, 6668591, and 6668594

On December 6, 2007, Inspector Steven Miller issued Citation No. 6668587 under section 104(a) of the Mine Act for an alleged violation of section 75.202(a) of the Secretary's safety regulations. The citation alleges:

Two loose ribs (coal and rock) were observed along the Main West Travelway between crosscut number 155 and crosscut number 156. One rib was located on the north side and one on the south side of the travelway. The North measured 5 feet long, 7 feet high and 6 inches to 18 inches in thickness, the one on the South measured 10 feet long, 8 feet high and 6 inches to 18 inches in thickness. This area is routinely traveled by the miners.

On December 7, 2007, Inspector Miller issued Citation No. 6668591 under section 104(a) of the Mine Act for an alleged violation of section 75.202(a) of the Secretary's safety regulations. The citation alleges:

Two areas of unsupported mine roof existed along the Galatia North Travelway. One area is located at crosscut number 51 (southeast corner) and measured approximately 10 feet wide by 25

feet long. The other area is located at crosscut number 86 in the travelway entry, there [are] two roofbolts that need replaced. Loose draw rock is hanging from the mine roof in these areas. There [are] also areas where sloughing has occurred and the bearing plates are no longer firmly against the mine roof in these areas as well. These areas are neither supported nor otherwise controlled to protect persons from hazards related to falls of the mine roof. These areas are routinely traveled by mine examiners and mine personnel.

On December 8, 2007, Inspector Miller issued Citation No. 6668594 under section 104(a) of the Mine Act for an alleged violation of section 75.202(a) of the Secretary's safety regulations. The citation alleges:

Two areas of unsupported mine roof existed along the Galatia North Travelway between crosscut No. 150 and crosscut No. 149. One area is located on the west side and measured approximately 10 feet wide by 30 feet long. The other area is located on the east side and measured approximately 10 feet wide and 20 feet long. Loose draw rock is hanging from the mine roof in these areas. There [are] also areas where sloughing has occurred and the bearing plates are no longer firmly against the mine roof in these areas as well. These areas are neither supported nor otherwise controlled to protect persons from hazards related to falls of the mine roof. These areas are routinely traveled by mine examiners and mine personnel.

(Exs. H, I, J). For all three citations, the inspector found that an injury or illness is reasonably likely to occur and that the injury or illness could reasonably be expected to be permanently disabling, that the violation was S&S, that one person would be affected, and that the violation was the result of high negligence.

Section 75.202(a) of the Secretary's regulations requires:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

30 C.F.R. § 75.202(a). The Secretary proposed the penalty of \$8,893 for each of the three citations.

1. Background Summary of Testimony

Miller issued all three citations on different days while conducting an E01 inspection. (Tr. 2:201-202). Citation No. 6668587 was issued due to the cited condition in the Main West

Travelway, and Citation Nos. 6668591 and 6668594 were both issued due to the cited conditions in the Galatia North Travelway. (Tr. 2:202).

When discussing Citation No. 6668587, Miller defined “loose ribs” as “where the coal is separated from the solid pillar.” (Tr. 2:203). Miller observed the separation in this instance to be six to eight inches. (Tr. 2:203-204; Sec’y Ex. H). Miller was uncertain how he measured the rib, but he believes that he did so visually, out of fear that the rib would have “rolled over” if he was too close. (Tr. 2:204). Miller believed that the cited condition was a hazard because “[t]he number of people that travel this travel road and being exposed to this area.” (Tr. 2:204). He believed that the roadway was well traveled and that the condition should have been observed. (Tr. 2:205). Miller was unsure as to how long the cited condition had existed, but he believed that the condition could deteriorate quickly. (Tr. 2:206).

When discussing Citation Nos. 6668591 and 6668594, Miller defined an “unsupported roof” as “an area where there is no longer a roof bolt installed firmly against the roof or post or crib set.” (Tr. 2:207). For Citation No. 6668591, Miller testified that “[t]he roof bolts were hanging down from the roof . . . , were no longer providing support for the roof, and the bearing plates were loose.” (Tr. 2:208). Also, Miller described the importance of bearing plates. “The bearing plate is what puts pressure on the roof to laminate it.” (Tr. 2:212). Miller compared sloughing to weathering. “In the winter months the mine dries out; in the spring and summer, the humidity comes back in . . . , the moisture cut[s] the roof, if it’s exposed, so it’s what we call sloughage.” (Tr. 2:211).

It was Miller’s opinion that the conditions in Citation Nos. 6668591 and 6668594 “should have been observed by mine personnel, agents of the operator, the examiners” due to the location of the cited conditions and the frequency of travel in that area. (Tr. 2:213). Miller believed that the conditions “had been there for awhile” because the draw rock was still hanging from the roof and there was draw rock on the floor. (Tr. 2:214-215). Miller noted these violations were in an older part of the Mine. (Tr. 2:215). Miller stated that in the past, there have been problems with the roof being inadequately supported in this area of the Mine. (Tr. 2:215). Furthermore, in issuing Citation No. 6668594, Miller noted that mine examiners had to travel in the cited area, because of the location of a transformer, which required examination. (Tr. 2:216-217).

Miller determined that the cited conditions were hazardous, because there were “no posts set or anything to keep that rib from rolling over.” (Tr. 2:216). In addition, no flagging had been put up in these areas to prevent people from traveling near these areas. Miller designated all three citations as high negligence, because “[t]here were obvious conditions that should have been observed and reported in the mine examiner’s books.” (Tr. 2:220). Miller stated that the injuries from loose ribs or roof falls can range anywhere from permanent disability to a fatal accident. (Tr. 2:217). Miller did not observe any mitigating factors for the three citations. (Tr. 2:218).

On cross-examination, Miller admitted that he had walked by the cited condition in Citation No. 6668587 on December 6, 2007, when he was on the way to issue a different citation. (Tr. 2:224). Miller did not see the cited condition at that time. (Tr. 2:225). Miller

believed that the six to eight inch gap could not have occurred in the time it took him to return to the area. (Tr. 2:226). Miller testified that it is common for sloughage to occur on the ribs. (Tr. 2:234).

For Citation No. 6668591, Miller testified that it was his belief that the area had been mined out and was only used as a travelway between the two mines. (Tr. 2:240). Miller believed that “plenty of people” used the travelway including pumpers, examiners, and individuals hauling material. (Tr. 2:249-250). Miller testified that since the Mine was old, it needed more maintenance and thorough examinations. (Tr. 2:251-252).

Joe Myers, the Safety Director for Galatia North, testified that the area of the cited condition for Citation No. 6668587 was an area that was typically traveled by miners in vehicles with “protective canopies on top.” (Tr. 2:256). Myers also testified that, due to the location of the cited condition, when miners were traveling on golf carts, “[i]f they’re traveling in the middle of the entry, like most people do, it would be very unlikely that the rib would contact the golf cart or people on it.” (Tr. 2:257). If the rib sloughed off, it would not hit the miners. Myers also testified that it is not a normal routine for miners to walk that area. (Tr. 2:258).

With respect to Citation No. 6668591, Myers testified that the travelway is used by examiners, but it is not regularly traveled by miners. (Tr. 2:258). He stated that it is more common for miners to “[g]o across the top” to the New Era Main Portal, rather than driving through the travelway. (Tr. 2:259). Myers testified that inspectors had previously traveled through that area, but that these inspectors had never cited the mine for the sloughage described in Citation No. 6668594, even though Myers estimated the sloughage had existed for several months. (Tr. 2:262). Additionally, Myers stated that “[w]ith the sloughage that’s come down, somebody would have to physically climb up on this windrow or sloughage to be under unsupported top, because the main travelway where people travel is supported.” (Tr. 2:263).

On cross-examination, Myers testified that someone in a vehicle could be injured in a rib roll, but it was his opinion that “the coal itself would not trap them or pin them, because obviously the rib roll, in my opinion, would break, would crumble, and would not pin them in an injury fashion.” (Tr. 2:275).

Mike Smith, a Safety Specialist who oversaw the Galatia North Mine in December 2007, accompanied Miller on the day that Citation No. 6668591 was issued. (Tr. 2:289). Smith testified that, to get under the unsupported part of the roof, an individual would have had to climb on top of the pile of sloughed material. (Tr. 2:291). Smith recalled previously traveling in that area with other inspectors who had seen the cited conditions, yet had not issued citations. (Tr. 2:291-292). Also, Smith did not believe that it was reasonably likely that there would be a roof fall due to the condition of the roof bolts. (Tr. 2:293).

2. Summary of the Parties’ Arguments

The Secretary argues that Miller correctly determined that all three violations were S&S and that Miller correctly determined that a permanently disabling or fatal injury was reasonably likely to occur from a roof fall or rib roll due to the cited conditions. (Sec’y Br. 13). The Secretary rests this argument on the serious hazard presented, noting that “roof falls remain the

leading cause of death in underground mines.” (Sec’y Br. 13-14). The Secretary argues that AmCoal allowed these sections of the Mine to deteriorate, despite the fact that “[t]hese travelways are main haul roads that are frequently traveled by mine managers, examiners, state and federal inspectors, and miners on a regular basis.” (Sec’y Br. 14).

Next, the Secretary argues that the violations were the result of high negligence. (Sec’y Br. 14). The Secretary rests this argument on AmCoal’s previous safety issues in letting miners travel on unsafe paths. (Sec’y Br. 14). Additionally, the Secretary reiterates that AmCoal failed to mitigate the hazard. (Sec’y Br. 15). Finally, the Secretary argues that the proposed penalties are appropriate. (Sec’y Br. 15).

AmCoal challenges the S&S designation on all three of the citations, arguing that “it was not reasonably likely that individuals would be injured from the cited condition.” (AmCoal Br. 13-15). For Citation No. 6668587, AmCoal argues that the cited condition was located in a travelway where individuals typically travel on some type of vehicle or equipment. (AmCoal Br. 13). Therefore, “[b]ecause these individuals would be traveling faster than walking speed and because they would be shielded by the vehicles as they traveled past the condition, it would be unlikely that an injury would occur.” (AmCoal Br. 13). Because of this protection, AmCoal argues that it is unlikely that an injury would be permanently disabling. (AmCoal Br. 13). AmCoal seeks a reduction on the negligence determination for this citation because Miller characterized the incident as an “open and obvious condition,” yet Miller conceded that he did not see the condition the first time he walked by it that day. (AmCoal Br. 14). Since conditions can deteriorate rapidly, AmCoal argues that it was not established when the condition presented itself. (AmCoal Br. 14). Therefore, AmCoal would like the negligence finding reduced to, at most, low negligence. (AmCoal Br. 14).

In regard to both Citation Nos. 6668591 and 6668594, AmCoal argues that the cited conditions took place in an older part of the Mine, which was infrequently used by miners. (AmCoal Br. 14-15). Only certain people, mainly examiners and inspectors, traveled in this area, and when they did travel in this area, they were typically in vehicles. (AmCoal Br. 14-16). AmCoal also argues that it should be a mitigating circumstance that MSHA inspectors had previously witnessed the cited conditions, yet had never noted or cited the condition in the past. (AmCoal Br. 15-16).

For Citation No. 6668591, AmCoal argues that the “unsupported portion of roof at crosscut 51 was due to a corner that had sloughed off years ago and was known by mine personnel.” (AmCoal Br. 14). Due to its location, AmCoal urges that it is unlikely that anyone would be under the cited condition. (AmCoal Br. 14). Additionally, for crosscut 86, AmCoal argues that the roof bolts provided support and that people infrequently traveled in that area. (AmCoal Br. 15).

AmCoal contends that its negligence was low with respect to the three violations. With respect to Citation No. 6668587, Inspector Miller traveled through the area at least once without observing the violation. With respect to Citation Nos. 6668591 and 6669594, the cited conditions had existed for years and had been observed by MSHA inspectors without being previously cited.

3. Discussion and Analysis

The Secretary established all three violations. I find that the Secretary established that Citation Nos. 6668587 and 6668594 were S&S. The fact that most travel through the cited areas was in golf carts does not negate the fact that it was reasonably likely that the hazard contributed to by the violation would result in an injury, assuming continued normal mining operations. The cited conditions created a serious hazard to miners. I find, however, that the golf cart canopies did provide some level of protection and I reduce the gravity from “permanently disabling” to “lost workdays or restricted duty” in Citation No. 6668587. I find that the evidence does not establish that a permanently disabling injury was likely. I have also taken into consideration the fact that, with respect to Citation No. 6668594, the Galatia North travelway was in an older part the mine and was infrequently used. For that reason, I similarly reduce the gravity of that citation.

I find that the Secretary also established that Citation No. 6668591 was S&S. The cited areas were at the corners of several crosscuts. I credit the testimony of Myers and Smith that a miner would have to climb up on top of existing sloughage at Crosscut 51 to be exposed to the unsupported roof. This condition, by itself, would not establish an S&S violation. The cited area at Crosscut 86, however, did create a condition that would be reasonably likely to contribute to an injury. The roof bolts and bearing plates were not flush against the roof. I reduce the gravity from “permanently disabling” to “lost workdays or restricted duty.”

I find that the negligence of AmCoal with respect to all three violations was moderate. The evidence does not establish that AmCoal exhibited a high degree of negligence with respect to the cited conditions. The fact that other unrelated problems had been encountered along the cited travelways did not put AmCoal on heightened notice to look for roof and rib problems. The conditions had existed for a lengthy period of time, a number of MSHA inspectors had traveled through the area, and no citations were previously issued. I credit the testimony of Inspector Miller as to the conditions he observed but I credit Myers and Smith as to the length of time the conditions existed. The Galatia North Travelway was infrequently used and had been inspected many times by MSHA without citations being issued. A penalty of \$5,000 for each of these citations is appropriate.

F. Citation No. 6673604

On December 7, 2007, Inspector Dean Cripps issued Citation No. 6673604 under section 104(a) of the Mine Act for an alleged violation of section 75.400 of the Secretary’s safety regulations. The citation alleges:

Combustible material in the form of hydraulic oil and motor oil was allowed to accumulate on the RC06 Jeffrey diesel ram car located on the Flannigan 1st West longwall. The oil was present on the top and sides of the diesel engine. Three of the service brake discs and calipers were coated with oil.

(Ex. K). The inspector found that injury or illness is reasonably likely to occur and that the injury or illness could reasonably be expected to be lost workdays or restricted duty, that the violation was S&S, that ten people would be affected, and that the violation was the result of moderate negligence. The Secretary has proposed a civil penalty in the amount of \$10,437.

1. Background Summary of Testimony

Inspector Dean Cripps testified for the Secretary. (Tr. 3:4). Cripps is an electrical engineer for the U.S. Department of Labor, as well as an inspector for MSHA. (Tr. 3:5). He has worked for MSHA for approximately nineteen and a half years. (Tr. 3:5). On the day of the citation, Cripps was performing an E01 inspection. (Tr. 3:7).

Cripps testified that hydraulic oil and motor oil are combustible. (Tr. 3:10). Cripps stated that the cited accumulations were in an active working area. (Tr. 3:11). Cripps believed that the oil was due to leaks on the equipment. (Tr. 3:11-12). He said that the condition created a hazard, because brakes operate through friction.

When you step on the brake pedal, friction is applied to the calipers. The pads close in tight on the disk that's moving and friction is what causes the machine to stop. Anytime you have friction you have possibility of build up of heat.

(Tr. 3:13-14). Cripps testified that this could cause a fire, and since the ram cars travel on the main intake, the fresh air might "help propagate that fire and to keep it going, and to also spread the results of that fire in by where men would be working." (Tr. 3:14). Cripps believed that this condition should have been found during the weekly inspection of the ram car. (Tr. 3:15).

Cripps determined that ten people would be affected by the condition, because the machine is operated in the intake and primary escapeway. If a fire occurred, it would affect everyone on the section. (Tr. 3:17-18). Cripps believed both an ignition source and combustible material were present. (Tr. 3:22). Cripps designated the incident as moderate negligence, because he "probably" didn't see a notation of the condition in the record books, so he was unsure if management had actual knowledge of the condition. (Tr. 3:22). Cripps recalled previous conversations that he had with management about the "condition of diesel equipment in general, leaks on these brake calipers." (Tr. 3:23).

Cripps designated the cited condition as S&S, because he determined an accident "was reasonably likely to occur, due to the fact that the combustible material was present on the brakes, calipers and the brake disks." (Tr. 3:24).

On cross-examination, Cripps looked at his notes to determine that on December 7, 2007, there was a ventilation change occurring and that the only people underground would have been working on the ventilation change. (Tr. 3:26-27; AmCoal Ex. 68). Cripps did not know whether the cited ram car was used on December 7, 2007. (Tr. 3:31). Cripps agreed that if the ram car sat idle for a shift, it would not pose a hazard. (Tr. 3:39). Cripps stated, however, that if "the ram car is there, it's ready to go, it's not tagged out of service, it's available for use, so an

operator could go up there, get on it and drive it” (Tr. 3:57). Besides the accumulations, Cripps did not identify any additional problems with the ram car’s engine. (Tr. 3:42). Cripps did not measure the temperature of the engine, but he believed that the temperature of the engine would be less than the ignition temperature of motor oil. (Tr. 3:44).

Joe Myers, the Safety Director at the Galatia North Mine, testified that on December 7, 2007, the area where the citation was issued was idle and he was not aware of any personnel in that section. (Tr. 2:264). Myers discussed the fire suppression systems available if a fire were to occur on a Jeffrey diesel ram car, including automatic fire suppression and a hand-held fire extinguisher. (Tr. 2:265). It was his opinion that if a fire had broken out on the ram car, then only one person, the operator, would be affected. (Tr. 2:266). Myers could not recall whether the specific ram car was being used on December 7, 2007. (Tr. 2:278). Myers agreed that, even with the existence of oil, there could be friction, which could produce heat, between the brake pads and discs. (Tr. 2:280).

2. Summary of the Parties’ Arguments

The Secretary argues that AmCoal’s violation was S&S. (Sec’y Br. 15). The Secretary bases this argument on Cripps’ testimony of observing “the sides of the engine and three of four service brake discs and calipers covered in oil due to obvious leaks.” (Sec’y Br. 15). The Secretary alleges that AmCoal allowed these accumulations to build up on the ram car. (Sec’y Br. 15). Accordingly, the Secretary argues that this condition was a fire danger. (Sec’y Br. 15).

The Secretary argues that Cripps’ finding that ten people would be affected is reasonable, since the ram car generally travels all over the Mine. (Sec’y Br. 15-16). Finally, the Secretary argues that the proposed penalty is appropriate. (Sec’y Br. 16).

AmCoal first challenges the finding that the violation was S&S, because “it was not reasonably likely that individuals would be injured from the cited condition.” (AmCoal Br. 16). AmCoal argues that “the Secretary failed to prove that the oil on the engine could have provided a fuel source for a fire or that the engine somehow posed an ignition source.” (AmCoal Br. 17). In terms of the hydraulic oil on the ram car brakes, AmCoal argues that since there were no temperature measurements taken, it is unknown whether the brakes would heat up to the flashpoint of the oil. (AmCoal Br. 17). Also, since there was a longwall recovery occurring in another mine portal, it was unlikely that anyone would have used the ram car. (AmCoal Br. 17).

AmCoal challenges the finding that ten people would be affected because AmCoal argues that Cripps neither accounted for the number of employees working at that time nor accounted for the fact that the Mine was idle. (AmCoal Br. 17). AmCoal believes that only one or two people were potentially affected by the cited condition. (AmCoal Br. 18).

3. Discussion and Analysis

I find that the Secretary established a violation of the safety standard but she did not establish that the violation was S&S. First, the inspector admitted that the temperature of the engine would normally be less than the ignition temperature of the oil. There were no defects found on the engine that would cause it to overheat and start a fire. Second, there was no

showing that friction on the brakes would ignite oil on the discs or calipers. It takes high heat to ignite motor oil and hydraulic oil. *See e.g. Highland Mining Co., LLC*, 30 FMSHRC 1097, 1100-02 (Nov. 2008) (ALJ). In addition, I find that it was unlikely that, if oil on the brakes did start smoking, this event would contribute to any injuries to miners. There was no showing that smoking brakes would create a serious fire or billowing smoke that would engulf the section. I also credit the evidence that it was unlikely that anyone would use the ram car during the shift because the longwall equipment was being moved to a new panel. Thus, I find that the third element of the Mathies test was not met. The gravity was serious, however. I find that the evidence establishes that only 1 or 2 people would potentially be affected if a fire did start. The inspector testified that oil on the service brake pads could increase the stopping distance of the ram car which could contribute to an accident. I note, however, that the citation does not contain such an allegation with the result that it is not part of this case. I affirm the inspector's moderate negligence determination. A penalty of \$7,000 is appropriate.

G. Citation No. 6673606

On December 8, 2007, Inspector Dean Cripps issued Citation No. 6673606 under section 104(a) of the Mine Act for an alleged violation of section 75.1914(a) of the Secretary's safety regulations. The citation alleges:

The RD01 Jeffrey diesel rock duster was not being maintained in approved condition. The following conditions were observed: 1) the lid on the air solenoid control box was open; 2) the exhaust back pressure gauge did not function.

(Ex. L). The inspector found that injury or illness was unlikely to occur and that injury or illness could reasonably be expected to be lost workdays or restricted duty, that the violation was not S&S, that ten people would be affected, and that the violation was the result of moderate negligence. Section 75.1914(a) of the Secretary's regulations requires that: "[d]iesel-powered equipment shall be maintained in approved and safe condition or removed from service." 30 C.F.R. § 75.1914(a). The Secretary has proposed a civil penalty in the amount of \$1,530.

1. Background Summary of Testimony

Inspector Cripps testified that the rock duster was in the shop, but not tagged out of service. (Tr. 3:66). Cripps clarified that if the equipment had been tagged out of service, he would not have issued the citation. (Tr. 3:66). Cripps stated that "[i]f it's out of service, it generally will have, or should have, a tag on it marking why it's out of service." (Tr. 3:67). If a vehicle is "just parked there, . . . it can be started up and used and operated." *Id.*

Inspector Cripps testified that equipment operators sometimes open the solenoid control box to manually manipulate the solenoid to get the equipment to start. (Tr. 3:68). This process overrides the safety systems in the equipment and the automatic safety shutdowns will not work. (Tr. 3:68-69). Cripps stated that he had previously brought up this concern to AmCoal operators. (Tr. 3:69). Cripps listed the cited condition as affecting ten people, because the rock duster was parked at the bottom shop in the Flannigan Portal and it is regularly operated in the primary

escapeway. (Tr. 3:72). Cripps clarified that he saw that the solenoid box was opened, but that he did not know if the solenoid had been bypassed. (Tr. 3:73).

Joe Myers testified for AmCoal. (Tr. 2:255). Myers first addressed the open lid on the solenoid control box and stated that “I don’t believe there is a hazard for the lid not being sealed or secured.” (Tr. 2:268). Also, Myers testified that most of the boxes are flat, so the lid would shut on its own. *Id.* Myers then addressed the back pressure gauge and stated that the purpose of the gauge is “for the operator to view the pressure that the particular filter has on the back pressure, that the exhaust has going to the filter.” (Tr. 2:269). Myers testified that the rock dusters have a temperature trip, which shuts down the equipment if it overheats. (Tr. 2:271). He stated that the gauge does not control any automatic protective device. (Tr. 2:271). Myers did not believe it to be a hazard if the gauge was not properly working. (Tr. 2:271-272). Myers also testified as to the various fire suppression and safety systems in the repair shop, where the rock duster was parked. (Tr. 2:284-285). Myers testified that equipment is typically parked at the repair shop so that it can be worked on. (Tr. 285).

2. Summary of the Parties’ Arguments

The Secretary argues that Cripps properly established that AmCoal violated section 75.1914(a). (Sec’y Br. 16). The Secretary argues that the equipment was not in approved condition and that the equipment was not tagged out of service. (Sec’y Br. 16).

The Secretary argues that Cripps established that the only reason a solenoid box would be open would be so that it could be manipulated, which would have dismantled the safety devices. (Sec’y Br. 16). The Secretary further argues that “in the unlikely event of a fire on the machine, everyone in the surrounding area would have been affected.” (Sec’y Br. 16). The Secretary refers to Cripps’ testimony that he had previously brought up the problem of open solenoid boxes to AmCoal and that AmCoal failed to comply. (Sec’y Br. 17). Last, the Secretary argues that the proposed penalty is appropriate. (Sec’y Br. 17).

AmCoal first argues that the number of people affected should be reduced to one or two persons, because the Mine was idle and because Cripps’ estimate of 10 individuals affected was based on speculation. (AmCoal Br. 18). Next, AmCoal believes that mitigating circumstances existed and therefore challenges the negligence determination. (AmCoal Br. 18). AmCoal argues that there is no evidence that the solenoid box was open so that the safety devices could be bypassed. (AmCoal Br. 18). AmCoal also argues that since the rock duster was at the repair shop, it could have been there for repairs, but not yet tagged out of service. (AmCoal Br. 18). Also, AmCoal addresses the back pressure fuel gauge and argues that “in the event of its malfunction, the AMOT would still operate normally and shut down the rock duster and prevent overheating or fire.” (AmCoal Br. 19).

3. Discussion and Analysis

AmCoal did not contest the fact of violation. It is contending that the violation was not as serious because it would only have potentially affected one or two people, including the equipment operator. I agree. There is no credible evidence that ten miners would be affected by

this violation. It was highly unlikely that this violation would result in a fire that would affect ten miners.

As to negligence, AmCoal asserts that its negligence should be low. Inspector Cripps testified that the solenoid box was open because the equipment operator must have been manually manipulating the solenoid to override the safety systems. I do not doubt the inspector's testimony that this has occurred at the mine but there is certainly no direct proof that this occurred in this instance. The back pressure gauge is designed to tell the equipment operator when it is time to replace the particulate filter. The temperature trip still functions whether the gauge is working or not. It is significant that the equipment was in a repair shop. There is no affirmative testimony as to why it was in the shop, but it could well have been there to repair any number of items on the rock duster, including components within the air solenoid control box and the back pressure gauge. I agree with the inspector that the rock duster was available for use but, given the fact that the mine was idle, it was not likely that it would be used.

I find that the gravity of this violation was low and that AmCoal's negligence was low. A penalty of \$800 is appropriate.

II. SETTLED CITATIONS

A number of the citations at issue in these cases settled, either prior to the hearing, during the hearing, or after the hearing. The terms of the settlements are set forth below:

LAKE 2008-38

By order dated February 17, 2011, I approved the Secretary's motion for partial settlement for 15 of the 20 citations at issue in this docket in the amount of \$21,404. In addition, the parties have now agreed to settle four citations that were based on notices to provide safeguards. These are Safeguard Citation Nos. 6667312, 7490989, 7490559, and 7490851. The total proposed settlement for these citations is \$9,640.²

LAKE 2008-142

By order dated February 17, 2011, I approved the Secretary's motion for partial settlement for 14 of the 20 citations at issue in this docket in the amount of \$12,918.

LAKE 2008-525

By order dated February 17, 2011, I approved the Secretary's motion for partial settlement for 18 of the 20 citations at issue in this docket in the amount of \$41,921.

² In agreeing upon a settlement of the safeguard citations, AmCoal is not waiving its right to file a petition for discretionary review of my order of December 17, 2010, with regard to the settled citations. In that order I denied AmCoal's motion for summary decision in which it argued that the underlying notices to provide safeguards were invalid.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have reviewed the Assessed Violation History Reports, which are not disputed by AmCoal. (Sec'y Ex. A). At all pertinent times, AmCoal was a large mine operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on AmCoal'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>
LAKE 2008-38		
7490558	75.509	\$15,000.00
LAKE 2008-142		
6668585	75.400	2,000.00
6668587	75.202(a)	5,000.00
6668591	75.202(a)	5,000.00
6668594	75.202(a)	5,000.00
6663604	75.400	7,000.00
6673606	75.1914(a)	800.00
LAKE 2008-525		
7490536	75.400	40,000.00
7490556	75.362(d)(1)(ii)	10,000.00
SETTLED SAFEGUARD CITATIONS	9,640.00	
TOTAL PENALTY	\$99,440.00	

For the reasons set forth above, the citations are AFFIRMED, MODIFIED, and VACATED as set forth above. The American Coal Company is ORDERED TO PAY the Secretary of Labor the sum of \$99,440.00 within 30 days of the date of this decision.¹

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

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RWM

⁵ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

November 18, 2011

DOUBLE BONUS COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. WEVA 2009-1670-R
	:	Citation No. 8084154; 07/07/2009
	:	
v.	:	Docket No. WEVA 2009-1671-R
	:	Citation No. 8084155; 07/07/2009
	:	
SECRETARY OF LABOR	:	Docket No. WEVA 2009-1672-R
MINE SAFETY AND HEALTH	:	Citation No. 8084156; 07/07/2009
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine ID: 46-09020
	:	No. 65
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2010-1174
Petitioner	:	A.C. No. 46-09020-220543 (L572)
	:	
v.	:	
	:	
APPALACHIAN LEASING, INC.,	:	
Respondent	:	Mine: No. 65
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2010-1175
Petitioner	:	A.C. No. 46-09020-220544
	:	
v.	:	
	:	
DOUBLE BONUS COAL COMPANY,	:	
Respondent	:	Mine: No. 65

ORDER DENYING DOUBLE BONUS’S MOTION FOR SUMMARY DECISION

This case is before me upon the Notices of Contest of Double Bonus Coal Company (“Double Bonus”) and the Petitions of the Secretary of Labor for Assessment of Civil Penalty under section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”). 30 U.S.C.

§ 815 (2006). Double Bonus has filed a Motion for Summary Decision seeking to have the citations vacated and the Secretary's penalty petition denied in Docket No. WEVA 2010-1175.¹

For the purposes of the instant Motion, the parties agree to the facts presented in MSHA's Report of Investigation – Fatal Powered Haulage Accident – August 22, 2008 (Resp't Ex. 1), Citation No. 8084154 (Resp't Ex. 2), Citation No. 8084155 (Resp't Ex. 3), Citation No. 8084156 (Resp't Ex. 4), and the Affidavit of Patrick Graham – Safety Director for Mechel Bluestone (Resp't Ex. 6). (*See* Sec'y Resp. 3 (asserting that Double Bonus's attachments of these exhibits are statements that the material facts in those documents may be treated as true).)

Double Bonus argues that the uncontested material facts in this case establish that it was not an operator of the mine haulage road involved in this case and that the road in question is not a "mine" under the Mine Act. The Secretary responds that her jurisdiction over the road is a moot point, as the citations in this matter involve conditions at Double Bonus's mine site, not along the road. Based on the reasons set forth below, Double Bonus's Motion is DENIED.

I. Issues

The issues before me are as follows:

1. Whether the Secretary needs to establish jurisdiction over the mine haulage road to charge Double Bonus with the citations at issue in this case.
2. Whether Double Bonus is entitled to summary judgment because the record establishes that it is not an operator of the mine where the alleged violations occurred.

II. Factual Background

The alleged violations in this case stem from a fatal accident involving truck driver Danny L. Jones that took place on the Pumpkin Patch Haul Road in Wyoming County, West Virginia. (Resp't Ex. 1, at 1, 3–4.) The Pumpkin Patch Haul Road lies along a mine haulage route comprised of a series of roads connecting Double Bonus's No. 65 mine ("Mine No. 65") and the Keystone No. 1 Preparation Plant ("Keystone Prep Plant"). (*Id.* at 3.) The Pumpkin Patch Haul Road, as well as nearly all the other roads in the area, is maintained by M&P Services, a subsidiary of Bluestone Coal Corporation ("Bluestone"). (*Id.* at 6.) Bluestone is also the parent company of Double Bonus. (Resp't Mot. 1.)

¹ For the purposes of this Decision, references to Double Bonus's Motion for Summary Decision, the exhibits attached to Double Bonus's Motion, and the Secretary's Opposition to Double Bonus Coal Company's Motion for Summary Decision and Memorandum of Points and Authorities are abbreviated as "Resp't Mot.," "Resp't Ex. #," and "Sec'y Resp.," respectively.

Bluestone contracted with Appalachian Leasing, Inc. (“Appalachian Leasing”), to provide coal haulage services between Mine No. 65 and the Keystone Prep Plant. (Resp’t Ex. 1, at 2.) In turn, Appalachian subcontracted with B&L Trucking for coal haulage between Mine No. 65 and the Keystone Prep Plant. (*Id.*) Jones was an employee of B&L Trucking. (*Id.*)

On the evening of August 22, 2008, Jones reported to B&L Trucking’s shop area and conducted a preoperational check of a coal haulage truck with assistance from truck driver Johnny Ball. (Resp’t Ex. 1. at 3.) After spending approximately two hours there, Jones and Ball each drove a truck to Mine No. 65. (*Id.*) After picking up their loads of coal, Jones and Ball headed toward the preparation plant via the mine haulage route, taking the Pumpkin Patch Haul Road at the haulage route’s intersection with County Route 6. (*Id.*) After cresting a hill, Jones’s truck veered left of center and struck a berm along the road. (*Id.*) Jones exited the truck as it continued along the berm, and the rear tandem wheels ran over him. (*Id.*) After traveling 400 feet along the berm, the truck left the roadway and hit the side of the hill. (*Id.*)

Following the accident, the Secretary’s Mine Safety and Health Administration conducted an investigation. (Resp’t Ex. 1.) The Secretary subsequently issued five citations to Double Bonus alleging violations for Jones’s failure to receive hazard training, task training, and new miner training, as well as for Double Bonus’s failure to properly inspect the truck and for operation of the truck with safety defects. (Docket No. WEVA 2010-1175, Sec’y Ex. A.) The Secretary charged the gravity in each of these violations as “fatal” and “occurred.” (*Id.*)

III. Principles of Law

A. Standard for Summary Decision

Commission Rule 67 sets forth the guidelines for granting summary decision:

(b) A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

The Commission “has long recognized that [] ‘summary decision is an extraordinary procedure,’ and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which ‘the Supreme Court has indicated that summary judgment is authorized only ‘upon proper showings of the lack of a genuine, triable issue of material fact.’” *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Energy West Mining Co.*, 16 FMSHRC 1414,

1419 (July 1994)). In reviewing the record on summary judgment, the Court must evaluate the evidence in “the light most favorable to . . . the party opposing the motion.” *Hanson Aggregates*, 29 FMSHRC at 9 (quoting *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)). Any inferences “drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.” *Hanson Aggregates*, 29 FMSHRC at 9 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

B. Jurisdiction

The Mine Act provides that “[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter.” 30 U.S.C. § 803. Therefore, in order for the Secretary to establish jurisdiction under the Mine Act, she must prove that a company is an “operator” of a “coal or other mine.”²

1. Definition of a Mine

The Mine Act defines “coal or other mine” as:

(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, . . . or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1).

Reviewing courts have consistently interpreted the Mine Act’s jurisdiction in light of the exhortation in its legislative history stating “that what is considered to be a mine and to be regulated under the Act be given the broadest possible interpretation, and it is the intent of this [Senate] Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.” S. Rep. No. 95-181, at 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3414. *See, e.g., Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1554 (D.C. Cir. 1984) (concluding Mine Act’s legislative history supports Secretary’s broad interpretation of definition of a mine); *Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 797 (4th Cir. 1981) (noting Mine Act’s “sweeping” definition of a mine supports Secretary’s interpretation of Mine Act jurisdiction).

² Double Bonus does not contend that its products do not enter or affect commerce.

See also *Calmat Co. of Ariz.*, 27 FMSHRC 617, 622 (Sept. 2005) (interpreting Mine Act jurisdiction in light of language of legislative history).

2. Definition of Operator and Operator Liability

An operator “means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.” 30 U.S.C. § 802(d). To be an operator, an entity must have “substantial involvement” in the operation of a mine. *Berwind Natural Res. Corp.*, 21 FMSHRC 1284, 1293 (1999). Under the Mine Act, “an entity cannot be held liable unless it ‘operates, controls, or supervises’ the mine.” *Sec’y of Labor v. Nat’l Cement Co. of Cal.*, 573 F.3d 788, 795 (D.C. Cir. 2009).

It is well-established that a mine owner is strictly liable for violations that occur at its mine site. See *Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 154–55 (D.C. Cir. 2006) (discussing circuit court precedent on mine owner-operator liability). Moreover, a mine owner may not simply “exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship.” *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 315 (4th Cir. 2008) (quoting approvingly *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1120 (9th Cir. 1981)). Indeed, in *Cyprus Industrial Minerals*, the court explicitly rejected the operator’s contest of Mine Act liability for an independent contractor’s violation even though the contractor had complete control over the work done at the site. 664 F.2d at 1118–20. The court reasoned, in part, that operators ultimately exercise control over the entire mine site. *Id.* at 1119. As noted by the Fourth Circuit, “owner-operators possess ultimate authority over independent contractors—retaining, supervising, and even dismissing them, if necessary.” *Speed Mining*, 528 F.3d at 315.

The Commission recently held an independent contractor liable for a violation committed by another independent contractor at a mine site, even though the contractors had no contractual relationship with one another. *Ames Construction, Inc.*, Docket No. WEST 2009-693-M, 2011 WL 3794313 (FMSHRC July 25, 2011), *appeal docketed*, No. 11-1303 (D.C. Cir. Aug. 24, 2011). Specifically, Kennecott contracted with Ames Construction, Inc. (“Ames”), to build a tailings dam, pipe, and roadways at the Kennecott Tailings Facility near Magna, Utah. *Id.* at *1. Kennecott purchased pipes for the project, and Ames received delivery of them at the property. *Id.* An employee of Bob Orton Trucking, William Kay, brought a shipment of pipes to the facility, and during the course of unloading the pipes under the supervision of Ames’s employees, the pipes became loose and Kay was killed. *Id.* at *1–*2. Ames received a citation for failing to unload the pipes safely in accordance with 30 C.F.R. § 56.9201. *Id.* at *2.

The Commission determined that, as a contractor hired to build structures for the mine site, Ames was an “operator.” *Ames*, 2011 WL 3794313, at *3. The Commission explained that analysis of liability under the Mine Act is “‘focus[ed] on the actual relationships between the parties, and is not confined to the terms of their contracts.’” *Ames*, 2011 WL 3794313, at *4

(quoting *Joy Technologies, Inc.*, 17 FMSHRC 1303, 1306 (Aug. 1995), *aff'd sub nom. Joy Technologies, Inc. v. Sec'y of Labor*, 99 F.3d 991 (10th Cir. 1996)). Additionally, the Commission acknowledged the D.C. Circuit's exhortation in *National Cement* that strict liability under the Mine Act means liability without fault but not "liability for things that occur outside one's control or supervision." *Ames*, 2011 WL 3794313, at *4 (quoting *Nat'l Cement*, 573 F.3d at 795). Noting Ames's control over pipe deliveries at the site, the Commission reasoned that the lack of a contract between Ames and the trucking company was immaterial. *Ames*, 2011 WL 3794313, at *4. Based on this supervisory control, the Commission concluded that Ames was liable for failure to unload the pipes safely. *Id.* at *4–*6.

Ames is not the only Commission decision holding an operator strictly liable for a violation committed by an independent contractor with which the operator has no direct contractual relationship. Another Commission decision, *Bluestone Coal Corp.*, involved Bluestone's operations at the Keystone No. 6 Strip Mine in McDowell County, West Virginia. 19 FMSHRC 1025, 1026 (June 1997). There, Bluestone had contracted with Blackstone Coal Company ("Blackstone") to develop an underground coal mine on the property. *Id.* In turn, Blackstone subcontracted with Mullins Trucking Company ("Mullins") to deliver coal to the Keystone Prep Plant. *Id.* In hauling coal from Blackstone's mine to the preparation plant, one of Mullins's drivers lost control of his vehicle and died in the ensuing accident. *Id.*

The Administrative Law Judge found Bluestone liable for the driver's failure to maintain control of the truck. *Bluestone Coal Corp.*, 19 FMSHRC at 1027–28. On appeal, the Commission rejected Bluestone's argument that it should not have been cited for this violation, reasoning that "[o]perators are liable without regard to fault for violations of the Mine Act and its standards. As a mine operator, Bluestone is strictly liable for all violations of the Act that occur at its mine, including those committed by its contractors' employees." *Id.* at 1032 (citations omitted).

IV. Conclusions of Law

A. Mine Site Involved in Alleged Violations

The accident giving rise to the alleged violations in this case occurred on the Pumpkin Patch Haul Road, which lies along the route connecting Mine No. 65 and the Keystone Prep Plant. Subsection (B) of the Mine Act's definition of a "mine" concerns "private ways and roads appurtenant to such [extraction] area." 30 U.S.C. § 802(h)(1)(B). In *National Cement*, the D.C. Circuit affirmed the Secretary's interpretation of this provision, holding that an operator is responsible for the conditions of a private haulage road itself and for vehicles on the road under its control and covered by subsection (C) of the definition of a "mine" as "mining equipment." 573 F.3d at 792.

As noted by the Secretary (Sec'y Resp. 4), the citations in this case allege that Double Bonus allowed Jones to operate a coal haulage truck with numerous defects affecting safety, and

that Jones had not received required training (Docket No. WEVA 2010-1175, Sec’y Ex. A). This case does not involve the Pumpkin Patch Haul Road but rather the haulage truck driving on it. Therefore, the Pumpkin Patch Haul Road’s status as a “mine” is irrelevant to the jurisdictional issue presented in this case. *Cf. Jim Walter Res., Inc.*, 22 FMSHRC 21, 23–28 (Jan. 2000) (holding that an equipment supply shop that services coal mines, but is not located at any of the actual extraction sites, is a “mine”).

As for whether the coal haulage activity between Mine No. 65 and the Keystone Prep Plant involved a “mine,” the Fourth Circuit has held that the work of delivering coal from a mine site to another location for processing falls under the Mine Act’s definition of a mine. *United Energy Servs., Inc. v. FMSHRC*, 35 F.3d 971, 974–75 (4th Cir. 1994). *Cf. Calmat Co. of Ariz.*, 27 FMSHRC at 621–24 (holding that citation was properly issued to mine owner for independent contractor conduct in relation to haul truck used in mining operations that was located in area falling under MSHA and OSHA jurisdiction). The coal haulage truck operation between Mine No. 65 and the Keystone Prep Plant is the “mine” at issue in this case.

Neither Double Bonus nor the Secretary seriously contends that the alleged violations in this matter do not involve the coal haulage activity between Mine No. 65 and the Keystone Prep Plant. The linchpin of the jurisdictional question presented by this case is not whether Double Bonus is an operator of the mine haulage road but, rather, whether Double Bonus is an operator of the coal haulage activity between Mine No. 65 and the Keystone Prep Plant.

B. Double Bonus’s Status as an Operator

For Double Bonus to be liable for the alleged violations at issue in this case, it must be an operator of the truck hauling activity originating from Mine No. 65. The common thread connecting the circuit court and Commission decisions on the parameters of an operator’s liability under the Mine Act is the determination that the operator retains some modicum of control over an independent contractor, notwithstanding differences in the operator’s status as an owner-operator or privity of contract. Hence, an owner-operator is liable for the actions of its independent contractors because it maintains control over the general mine site, as well as the selection of contractors. *E.g., Speed Mining*, 528 F.3d at 314–16 (restating precedent on owner-operator liability under the Mine Act); *Cyprus Indus. Minerals*, 664 F.2d at 1118–20 (describing owner-operator liability under the Mine Act). Even a non-owner operator may be liable for an independent contractor’s violation in the absence of a contractual relationship if it retains some control over the independent contractor. *Ames*, 2011 WL 3794313.

Here, the record sheds little light on the nature of the relationship between Double Bonus and B&L Trucking, Jones’s employer and the company providing the truck. According to the stipulated facts, Bluestone contracted with Appalachian Leasing to provide coal haulage services between Mine No. 65 and the Keystone Prep Plant. Double Bonus, as a subsidiary of Bluestone, presumably benefitted from this arrangement, yet the record fails to elucidate the connections between Bluestone, Double Bonus, Appalachian Leasing, B&L Trucking, and M&P Services.

Additionally, Double Bonus presumably retained at least some control over B&L Trucking's operations while its trucks were at Mine No. 65. *See Speed Mining*, 528 F.3d at 315 (recognizing that multiple "operators" may be simultaneously present at a mine site). Nevertheless, the record before me is silent on this relationship as well, and it does not show whether Double Bonus is even the owner of Mine No. 65. Nevertheless, these factual questions do not foreclose the possibility that Double Bonus may be an operator of the mine involved in these alleged violations should more evidence be adduced resolving this issue.

Responding to Double Bonus, the Secretary focuses on the nexus between B&L Trucking's activities and Double Bonus at Mine No. 65. (Sec'y Resp. 2, 4.) Because Jones was present at Mine No. 65 without proper safety training and he operated his truck there, the Secretary asserts that she has established jurisdiction over Double Bonus. (*Id.*) However, the Secretary's analysis commits a fatal error. She asserts that Appalachian and B&L Trucking are Double Bonus's contactor and subcontractor, respectively, statements which contradict the record before me. (Sec'y Resp. 2.) This sort of direct contractual relationship would tend to support Double Bonus's status as an operator of B&L Trucking's activities, but that view of the facts is not supported by the sparse record before me.

In turn, Double Bonus does not dispute the Secretary's assertions concerning its operation of Mine No. 65 and B&L Trucking's status as provider of coal haulage between the mine and the Keystone Prep Plant. More importantly, Double Bonus also does not address its relationships with the numerous corporate entities involved in this case. Not surprisingly, this oversight stems from its view that this case centers on the Pumpkin Patch Haul Road's status as a "mine," which is not germane to resolving the jurisdictional question posed by this case.

The incomplete record before me does not address Double Bonus's status as an operator responsible for alleged violations at this mine. Therefore, summary judgment must be denied.

V. Conclusion

I conclude that the Secretary need not establish that the Pumpkin Patch Haul Road is a "mine" for Double Bonus to be subject to Mine Act jurisdiction for the citations at issue in this case. Because factual issues remain concerning Double Bonus's status as an operator of the mine involved in this matter, I conclude that Double Bonus has failed to prove entitlement to summary decision under Commission Rule 67. Accordingly, Double Bonus's Motion for Summary Decision is **DENIED**. The parties are hereby **ORDERED** to comply with the September 27, 2011, Notice of Hearing issued in this case.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 22, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. LAKE 2009-710
	:	A.C. No. 11-03193-195113
v.	:	
	:	Lively Grove Mine
PRAIRIE STATE GENERATING CO.,	:	
Respondent	:	
	:	

AMENDED DECISION¹

Appearances: Emily B. Hays, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, CO, on behalf of the Secretary of Labor;
R. Henry Moore, Jackson Kelly, PLLC, Pittsburgh, PA, on behalf of Respondent, Prairie State Generating Co.

Before: Judge L. Zane Gill

Procedural History

This case involves a Petition for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). It alleges that Prairie State Generating Company (Prairie State) is liable for a single violation of the Secretary's Mandatory Safety Standards for Underground Coal Mines, and seeks a civil penalty of \$687.00. A hearing was held on January 11, 2011, in St. Louis, MO; the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that Prairie State committed a violation of 30 C.F.R. § 50.10, but I reduce the negligence to “moderate” and the gravity to “no lost work days.” Further, I conclude that although 30 C.F.R. § 50.10 is a mandatory standard that could support the enhanced enforcement element of S&S, the violation was not significant and substantial. Thus, I impose a civil penalty in the amount of \$112.00.

¹ The original Decision (10/21/2011) in this case erroneously treated the alleged violation as if it originated from section 104(d), when in fact it was charged as a 104(a) violation. Corrections have been made to correct that mistake and to renumber the outline structure.

On June 25, 2010, Inspector Edward Law (“Law”) issued Citation No. 8417269 to Prairie State², alleging a violation of 30 C.F.R. § 50.10 (Exhibit S-3), relating to an alleged failure to immediately notify MSHA of an incident at the Lively Grove mine on June 8, 2009, which involved flooding of a portion of the mine during a heavy rain storm.

Stipulations

The parties submitted the following stipulations at the hearing, (Joint Exhibit 1):

1. In June 2009, Prairie State was constructing the Lively Grove Mine (Lively Grove) in Washington County, Illinois.
2. Lively Grove is an underground coal mine.
3. In June 2009, work on the slope from the surface to coal seam was in progress. The work was being conducted by a contractor to Prairie State, Pittman Mine Service, LLC.
4. By June 8, 2009, the slope had advanced approximately 1,270 feet.
5. On June 8, 2009, there was a rainstorm in the area of the Lively Grove Mine.
6. As a result of [the] storm, water accumulated in the pit around the slope area.
7. On June 25, 2009, MSHA issued to Prairie State Citation No. 8417269 alleging a violation of 30 C.F.R. § 50.10 as follows:

On 6/08/09 at 19:00 hours the mine experienced an inundation of water. Torrential rains occurred causing the water to overtake the sumps and pump system located at the bottom of the box cut.³ A large volume of water flowed into the slope that is being developed currently at the 1270 Foot mark and inundated the slope. There was no immediate notification of the inundation to MSHA as required with in the 15 Minute time frame. The citation was

² Pitman Mine Services contracted with Prairie State to perform the mining services relevant to this citation. (See, Stipulation Nos. 3 and 9) Inspector Law also cited Pitman for the incident in question here, however Pitman did not contest the citation.

³ According to Michael D. Rennie (“Rennie”), Law’s direct supervisor from the Benton, Illinois MSHA field office, a “box cutout” is a mining technique which involves digging down to rock where coal is located, creating a shaft structure, and then the refilling the resulting pit to cover the shaft. Lively Grove is a “box cutout.” (Tr. 168:20-24)

designated as significant and substantial, "high" negligence, seven persons affected and "lost work days."

8. On July 23, 2009, MSHA issued a subsequent action to 8417269 to Prairie State, No. 8417269-02. Subsequent Action No. 8417269-02 states as follows:

MSHA was notified on the inundation on 6/8/09. The parties agree that the inspector did not mean, through this text, that Prairie State or Pittman notified MSHA on June 8, 2009 of the accumulation of water from the rains that occurred on June 8, 2009. The parties agree that MSHA became aware of the accumulation of water on June 9, 2009.

9. On June 25, 2009, MSHA issued to Pittman Citation No. 8417271 alleging a violation of 30 C.F.R. § 50.10 as follows:

On 6/08/09 at 19:00 hours the mine experienced an inundation of water. Torrential rains occurred causing the water to overtake the sumps and pump system located at the bottom of the box cut. A large volume of water flowed into the slope that is being developed currently at the 1270 Foot mark and inundated the slope. There was no immediate notification of the inundation to MSHA as required with in the 15 Minute time frame. The citation was designated as significant and substantial, "high" negligence, seven persons affected and "lost work days."

10. Prairie State is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Act"), 30 U.S.C. § 803(d), at the coal mine at which the Citation at issue in this proceeding was issued.

11. Operations of Prairie State at the coal mine where the Citation was issued in this proceeding are subject to the jurisdiction of the Act.

12. 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 Act.

13. The individual whose signature appears in Block 22 of the Citation at issue in this proceeding [Exhibit S-3] was acting in the official capacity and as an authorized representative of the Secretary of Labor when the Citation was issued.

14. A true copy of the Citation at issue in this proceeding [Exhibit S-3] was served on Prairie State as required by the Act.

Fact Summary

This case involves an alleged mine inundation resulting from a significant rain storm on June 8, 2009, at the Lively Grove Mine site, an underground coal mine under construction in Washington County, Illinois (Stipulation Nos. 1 and 2). In June 2009, Prairie State was in the process of constructing the Lively Grove Mine (Lively Grove), but was not yet actively mining coal. (Tr. 195:14)⁴ Pittman Mine Services, LLC was doing the mine construction work under contract with Prairie State on the single entry slope from the surface down to the coal seam. (Stip. 3; Tr. 20:1-22; 22:14-23:1; 188:1-6; 192:1-16; 234:1-7)⁵

By June 8, 2009, Pittman had driven the slope from an open surface pit downward at an angle of eight degrees some 1,270 feet. (Tr. 22:14-23:10; 78:9-79:17; 102:5-103:3; Exhibit PSGS 2, and Stip. 4) Pittman was also in the process of installing a belt structure in the upper half of the slope shaft as it progressed downward toward the coal seam. (Tr. 202:2-15; and Exhibit PSGS 5) The surface pit was open, but Pittman had done some backfill work around the slope shaft, (Tr. 22:14-21; 255:19-257:7) and was doing concrete work around structural arches that were still exposed to the outside. (Tr. 22:22-23)

June 8, 2009 - The Storm

The worst part of the storm hit around 5:00 PM on June 8, 2009. According to Victor H. Daiber ("Daiber"), Engineering Manager for Prairie State Generating Company Lively Grove Mine, the storm produced approximately 2.36 inches of rain in a short period of time, a number confirmed by data from a weather station at the site. (Tr. 227:24-228:2; 246:19-247:6; 253:5-254:5 and Exhibit PSGC-10). Daiber did not believe that it was "that big an event," just a "simple rainstorm," not an inundation. (Tr. 246:12-247:6; 253:16-254:5) In contrast, John Snowden ("Snowden"), Pittman's Safety Manager, later described the rainstorm as "torrential" and estimated that it produced "6-8 inches per hour."⁶ (Tr. 72:1-3; 113:13-21; and Exhibit S-5)

Conditions At The Surface

The slope down to the coal seam originated in a pit at the surface. (Exhibit PSGC 1 and 2) Various diesel pumps, sump lines, and power control panels were situated in the surface pit, along with a ventilation air portal and fan. (Tr. 199:2-201:2; and Exhibit PSGS 2) There is a dispute as to how much rain water accumulated in the surface pit and how the water made its

⁴ Prairie State claims in its post-hearing brief that mining operations in the coal seam commenced on September 10, 2009. Even though this is not evidence, it is included in this summary for clarity of context.

⁵ During the construction period, the only Prairie State employees on the site were office personnel. (Tr. 196:6-11)

⁶ I note that this evidence describes the rate of rainfall, not the cumulative amount.

way down the slope (and other openings) to the face area.⁷ For purposes of this decision, exactly how the water got down the slope is of secondary importance to the fact that there was flooding at the face and the ultimate issue of whether the operator had an obligation to report the flooding within fifteen minutes of its discovery.⁸ Nonetheless, it is uncontested that at least some of the water entered the slope shaft along its sides in the surface pit area where portions of the shaft structure had yet to be completely backfilled. (Tr. 246:1-11)⁹ I credit the evidence that the water at the surface pit did not rise to the level of the electrical equipment located in the pit, including the fan motor. (Tr. 215:5-216:4; 248:3-25; 249:4-13; and Exhibit S-8)¹⁰ The water seeped into the mine behind the liner of the slope and accumulated at the face of the slope. (Tr. 246:1-14) It did not flow into the mine by means of the slope opening but came in around the side and possibly around the ventilation tubing which was on the pit floor. (Tr. 209:20-210:16) Once inside the slope, it flowed steadily down the slope at about one inch in depth. (Tr. 244:23-246:10)

⁷ Exhibit S-8, Page 2 shows a 480-volt electrical panel that the Secretary alleged had been under water. It feeds power to a number of devices, including pumps. It clearly was not submerged from its appearance in the photo, despite Law's suspicion that it had. (Tr. 91:14-21; 92:23-93:3) It is stipulated that this photo was taken on June 9, 2009 - the day after the storm. (Tr. 94:5-7) The photos were taken by inspector Charles Jones.

⁸ There is no dispute that the flooding was not reported within fifteen minutes, even though it is impossible to determine from the evidence in the record when enough water had accumulated at the face area to trigger a duty to report.

⁹ Evidence presented at trial suggests that the water in the pit might have risen to a depth sufficient to allow it to run down the ventilation shaft and into the face area at the bottom as well. However, this theory is less than convincing. (Tr. 72:12-21; 91:12-92:5; 137:22-138:17; 176:3-10; 239:6-16; 248:6-22)

¹⁰ Law concluded that the volume of water was so great that it rose above the fan intake in the surface pit area and allowed water to rush down through the ventilation tubing, overtaking the sump system at the face. (Tr. 72:10-21; 74:10-18) I do not share this conclusion. No watermarks can be seen in photographs of the fan motor or other structures in the pit. Although the inspector did not record it in his notes, he testified that Chris Cross, a maintenance foreman for Pittman, said he saw water swirling at or around the fan. (Tr. 72:10-21). It is unclear and unconvincing what that might have meant because the photographs in evidence do not indicate the water was up to the fan motor or the ventilation tubing. (Tr. 215:1-216:4; 248:3-13; and Exhibit S-8, p. 2). Moreover, Daiber was actually present that night and testified credibly that he saw no whirlpool or swirling around the fan (Tr. 248).

Conditions Underground

Seven Pittman men were working underground during the shift when the flooding started. (Tr. 103:3-7) Preponderant evidence shows that the men noticed water running down the eight percent slope at a depth of about one inch (Tr. 245:14-25) and accumulating at the face at a rate exceeding the capacity of sump pumps to evacuate it (Tr. 83:2-12; 207:21-208:3; 228:24-229:6). The water came in steadily, but it did not rush in with enough force to knock anything down. (Tr. 211:3-7; 247:15-21) The miners became concerned that the ventilation pump in the surface pit might flood and shut down. (Tr. 205:19-206:1) They had time to confer, make the decision to leave the mine, turn off the power underground (Tr. 224:11-16), and reposition some larger equipment to protect it from the rising water (Tr. 209:7-11) before exiting the mine at about 7:00 PM in an orderly manner in a permissible battery-operated transport vehicle. (Tr. 206:3-5; 228:23) No miners were entrapped. (Tr. 245:10-16)

When they reached the surface, the ventilation fan was still operating, but the decision was made to shut it off as a precautionary move since no one was left in the mine. (Tr. 205:19-25) The ventilation fan was shut off at about 7:00 PM and turned on again about 10:00 PM. (Tr. 71:6-14) The water accumulation at the surface did not shut the ventilation pumps down, as alleged by the Secretary. (Tr. 205:6-8) With the ventilation fan off, no one could be (and no one was) underground. (Tr. 205:6 -206:19; 228:19-22) Pittman miners returned underground at about 10:30 PM, after the mine had been examined. (Tr. 71:6-21; 73:23-75:6; 208:4-20; 229:13-22), and began pumping water out of the mine. (Tr. 71:6-14; 74:5-9) Then, between 3:00 AM and 6:00 AM on June 9, 2009, the ventilation fan motor shorted out (Tr. 72:4-9; 75:14-21; 92:6-15), shutting it off again, which meant that anyone underground would have to come back to the surface.¹¹ All the miners at the site when the ventilation fan shorted out, except two, went home early, before the end of their shift and before the day shift miners had arrived. Two men stayed at the site to monitor the water situation and pump the pit area. (Tr. 75:22-76:9) Pittman placed an air-driven pump underground near the belt's tail to catch any water that was accumulating.¹² The water that accumulated underground at the face was pumped out. The flooding prevented mining for approximately two days. (Tr. 76:16-22)¹³

Paul Krivokuca ("Krivokuca"), Vice President of Mining for Prairie State, was at the Lively Grove site when the storm happened. He called Daiber at around 8:00 PM. Daiber arrived at the site around 8:30 PM. (Tr. 244:17-245:16) Daiber testified that he believed the

¹¹ It is unclear whether there were any men underground when the ventilation fan shorted out and shut down.

¹² An air pump runs off compressed air and does not require electricity. (Tr. 238:9-25)

¹³ There is no evidence on this record as to how long it actually took the water to accumulate or the extent to which it did (Tr. 209). The only direct testimony about the rate of flow is Mr. Daiber's, which would suggest it took some period of time to accumulate (Tr. 245-46).

crew was out of the mine when he arrived. (Tr. 245:14-15) Krivokuca, Bill Jankousky (“Jankousky”), Prairie State's Safety Director, and John Snowden, Pittman's Safety Director, conferred and decided that the circumstances did not fit the definition of an immediately reportable accident because they did not believe the event was an “inundation.” (Tr. 203:15-22; 204:23-207:12; 212:9-213:2) Therefore, they concluded that there was no need to report the event to MSHA within fifteen minutes under 30 C.F.R. Part 50.¹⁴

June 9, 2009 - Inspector Jones' Visit To The Mine

The next day, June 9, 2009, MSHA Inspector Charles Jones (“Jones”) was at the Lively Grove mine to conduct a six-month roof control evaluation unrelated to the events of the prior day. (Tr. 95:3-20) He was accompanied during his inspection by Jankousky.¹⁵ Jankousky told Jones that they could not go down into the mine because the ventilation fan was turned off. (Tr. 119:15-120:9; 213:21-214:7 and Exhibit S-9) Jones asked Jankousky why the fan was off; Jankousky told him that there had been a rainstorm the previous night, the fan motor had shorted out, and was taken away for repair. Jankousky also mentioned that the roof bolter had been under water. (Tr. 213:24-214:14) Jones did not conduct the underground portion of his inspection. He took pictures of the surface pit area, but he did not issue any citations related to the storm water. (Tr. 96:3-16; 120:15-121:12; 214:15-21 and Exhibit S-8) The residual storm water in the pit had been pumped down and the pit was muddy. (Tr. 120:8-22; 214:22-215:4; 251:17-23; and Exhibit S-8) Jones was a Designated Authorized Representative of the Secretary.¹⁶ Jones told his supervisor about the water issue, but did not issue a citation. (Tr. 96:7-16).

June 11, 2009 - Meeting At MSHA District 8 Office

On June 11, 2009, Jankousky met with a number of MSHA representatives in the MSHA District 8 Office to talk about Lively Grove’s roof control and ventilation plans, again unrelated to the storm. (Tr. 236:1-8) During the meetings, Mark Odum (“Odum”), MSHA Roof Control Supervisor in District 8, and David Whitcomb (“Whitcomb”), Assistant District Manager and the head of enforcement in the district (and Odum’s boss), mentioned that they heard that there was a large amount of rain and subsequent water issues on June 8, 2009. They talked about Jones’ visit to the mine on June 9, 2009, and the fact that the mine could not be inspected because of the water, and that the roofbolter was submerged. (Tr. 220:13-223:7) According to Jankousky,

¹⁴ The miners had all exited the mine before the discussion regarding whether the event was reportable occurred. (Tr. 205:6-13)

¹⁵ Mark Odum apparently accompanied Inspector Jones as well. See the discussion of the follow-up investigation below.

¹⁶ Jones had retired prior to the hearing and was not called as a witness.

neither Odum or Whitcomb told him that the incident should have been reported. (Tr. 220:8-222-24)¹⁷

June 23, 2009 - Law's Visit To The Mine And Discussion With Rennie

On June 23, 2009, MSHA Inspector Law was at the Lively Grove mine to conduct a regular E01 inspection. (Tr. 24:1-9; 28:20-29:13) He was accompanied by Snowden and Jankousky. (Tr. 29:21-31) During the June 23rd inspection, Law observed several things that made him suspect that a large volume of water had gotten into the mine:¹⁸

- The fan at the bottom of the surface pit, which sat at ground level on his previous visit a few weeks prior, now appeared to be raised approximately five feet off the ground . (Tr. 44:1-25; 171:18-172:8) Law was told the move was "to keep the fan motor dry" because of "water in the motors." (Tr. 44:1-21; 63:15-66:17)
- What appeared to be new "dams" were being built in the pit area. (Tr. 45:6-46:5; 67:14-17)
- Down the slope in the face area, the continuous mining machine and shuttle car were stuck in mud. (Tr. 32:6-33:12)
- A roofbolter appeared to have been damaged by water at the level of its trays - about twenty-four inches from the ground. Its junction boxes were open and its motors were missing, indicating repairs had been required. (Tr. 35:6-36:10)
- The roofbolter had been backed away from the face and moved to the side of the slope. (Tr. 33:16-34:2).
- When Law asked Snowden what had happened to the roofbolter, Snowden responded that it "got some water on the motors, but it's just a little rain." (Tr. 35:23-36:3)
- There was water in the trays on the roofbolter, over four feet off the ground. (Tr. 36:16-37:17)
- There was a water line on a ventilation duct approximately seven-and-a-half feet above the mine floor, about twenty feet from the face of the mine. (Tr. 38:14-41:8; 173:16-24)

At this point, Law had not concluded that what he saw constituted a violation, even though it raised questions in his mind. (Tr. 43:18-22) He issued some citations on June 23, 2009, but nothing pertaining to the flooding. (Tr. 43:14-22) These observations concerned him enough that he discussed them on the evening of June 23, 2009, with Rennie, his supervisor.

¹⁷ By stipulation (Stipulation No. 8), the parties have agreed that MSHA became aware of the flooding at Lively Grove on June 8, 2009. The evidence does not support their agreement as to the date. MSHA became aware of the flooding on June 9, 2009, when Jones was prevented from conducting his inspection and took the photographs referred to in this decision.

¹⁸ The following bullet-point allegations are presented as Law believed to be true and to illustrate the beliefs which motivated him to cite Prairie State for violating 30 C.F.R. § 50.10. They are not findings of fact.

(Tr. 43:18-22; 46:10-49:1; 159:5-25) Law was unaware that Jones had been at the mine on June 9th until after he saw the pictures mentioned below. (Tr. 94:19-25)

June 23 - 25, 2009 - Follow-Up Investigation

Following the conversation with Law, Rennie independently investigated the water issues with MSHA management. (Tr. 169:8-162:25) Rennie called Mary Jo Bishop, Assistant District Manager of Enforcement and Rennie's immediate supervisor, and asked her if she knew anything about an incident involving water at Lively Grove. (Tr. 180:13-15) She had Odum call Rennie back later. Odum told Rennie that he and MSHA Jones had taken pictures at Lively Grove on June 9, 2009, showing the results of a heavy rain storm the previous night. Odum then emailed the photos to Rennie. (Tr. 160:2-162:4 and PSGC Exhibit 8) Upon learning that Odum and Jones had not done anything after seeing and obtaining evidence of a possible inundation, Rennie decided that further investigation was necessary. He accompanied Law to Lively Grove on June 25, 2009, to complete the E01 inspection. (Tr. 50:1-53-4; 53:2-8; 160:5-161:18).

June 25, 2009 - Inspection Performed And Citations Issued

On June 25, 2009, Law and Rennie re-visited and re-inspected the surface pit area and slope face, factoring into their analysis the photographs showing the water and mud resulting from the rain storm on June 8th. (Tr. 54:8-67:18; 163:1-17) When Rennie, Law, Snowden and Jankousky went down the shaft on June 25, 2009, construction had resumed on the belt structure (Tr. 55:23-56:4), however, a shuttle car was still stuck in mud, which impeded their permissibility inspection. (Tr. 56:10-25) As he inspected at the slope face, Law noticed a water mark on a ventilation air tube approximately seven feet above the ground that would account for the water in the roof bolter motor compartments and trays that he had seen during his earlier inspection. (Tr. 38:14-41:8; 57:5-58:23; 173:16-24) In Law's experience, it was very unusual for there to be water that deep near the face of a mine, even if the sump pumps had failed. (Tr. 58:24-59:5)

What Law saw led him to suspect that there had been an inundation rather than a slow flooding of the mine face. He surmised that had the flooding been slow, the men would have had time to find another sump pump to handle the water. (Tr. 59:8-15) Law and Rennie saw the flooded roof bolter, and the shuttle car and mining machine stuck in the mud. Water still remained in the bolter's four-foot-high trays two weeks after the flood. (Tr. 35:20-22; 37:11-17) Law also inspected the surface ventilation fan, which he believed had been raised after the storm, and brought it to Rennie's attention. (Tr. 64:1-65:3; 171:18-172:8) Law sensed a disconnect between management's claim that there had been a "little rain" and what he saw in the mine. (Tr. 60:3-9) He continued with the inspection, but had not yet formed an understanding of what had happened. (Tr. 60:12-63:10).

Law and Rennie then met with mine management to discuss the water evidence. (Tr. 67:20-70:21; 163:18-164:8) Chris Cross ("Cross"), Pittman's Maintenance Manager, explained

that a storm began about five o'clock on the evening of June 8th, and that it rained so hard that a ventilation fan in the surface pit area shorted out and was shut down between 3:00 and 6:00 AM. (Tr. 71:2-14; 72:1-21) Cross stated further that water was "swirling" by the surface fan such that the fan became an inlet for the water to rush into the mine. (Tr. 72:10-21) Law concluded that the slope itself also allowed water to flow into the mine, entering on the sides of the slope in the open pit, which had not yet been sealed with concrete or backfilled. (Tr. 77:16-79:17; 78:10-25) Law concluded that, at some point, water had overtaken the surface sump pumps to the point where the water was uncontrolled and entering the mine faster than the mine systems could pump it out. (Tr. 72:10-21; 74:10-18; 81:19-25) As Snowden summarized in the Mine Accident Report (Exhibit S-5), the "rain and run-off water eventually flooded the face of the slope." (Tr. 113:13-21)

After inspecting Lively Grove twice, analyzing the photographs taken the day after the flood, and interviewing mine management, Law and Rennie determined that the flooding events at Lively Grove Mine on June 8, 2009, constituted an inundation (Tr. 80:5-83:12; 164:9-21; 179:11-17; 182:19-184:20) and decided to cite Prairie State for failing to report the alleged inundation within 15 minutes.

The Citations

On June 25, 2009, Law issued to Prairie State Citation No. 8417269 alleging a section 104(a) violation of 30 C.F.R. § 50.10 as follows:

On 6/08/09 at 19:00 hours the mine experienced an inundation of water. Torrential rains occurred causing the water to overtake the sumps and pump system located at the bottom of the box cut. A large volume of water flowed into the slope that is being developed currently at the 1270 Foot mark and inundated the slope. There was no immediate notification of the inundation to MSHA as required within the 15 Minute time frame. (Exhibit S-3)

The citation was designated as significant and substantial, "high" negligence, seven persons affected and "lost work days." This was the first citation Prairie State had received since the mine was opened. (Tr. 141:11-18; and Exhibit S-3)

Also on June 25, 2009, Law issued Citation No. 8417271 a to Pittman alleging a violation of 30 C.F.R. § 50.10 as follows:

On 6/08/09 at 19:00 hours the mine experienced an inundation of water. Torrential rains occurred causing the water to overtake the sumps and pump system located at the bottom of the box cut. A large volume of water flowed into the slope that is being developed currently at the 1270 Foot mark and inundated the slope. There was no immediate notification of the inundation to MSHA as required within the 15 Minute time frame. (Exhibit S-4)

The citation was designated as significant and substantial, "high" negligence, seven persons affected and "lost work days." (Exhibit S-4)¹⁹

According to Law, his decision to cite the violation at the level discussed above, was based on the following factors and conclusions. Snowden stated that there were seven miners in the mine during the incident. Law concluded that the miners would be confronted with rushing water and debris coming from the face, fan intake, and sides of the slope. Law also believed that there would have been electrical hazards from the equipment powered at the bottom of the shaft, including pumps, lights and the shuttle car (Tr. 102:5-103:10). Law concluded that the two miners who stayed on site to monitor the water were in danger from the electrical hazards in the pit - specifically the electrical panel and pumps in the pit (Tr. 103:18-104:3). Law believed that it would be hazardous for the miners to exit the mine up the eight-degree slope for approximately 1,270 feet with water rushing into the mine (Tr. 104:16-25). Law designated the gravity as reasonably likely to cause injuries because the workers in the area could have been injured either by the rush of water, by the debris the water is carrying, or by the electrocution hazards. (Tr. 106:7-20). Law concluded that the flooding could reasonably be expected to cause lost workdays and restricted duty because while attempting to exit the mine, a miner could have slipped or been hit by debris which could have caused a sprain or broke a bone. (Tr.106:25-107:7) Law designated the violation as significant and substantial because the inundation was reasonably likely to cause an accident and the operator failed to call MSHA, which allowed the condition to persist. (Tr. 108:1-10)

Analysis

The Secretary approaches liability from two alternate angles: (1) The flooding that occurred at Lively Grove mine satisfies the definition of "inundation" and is, by reference to 30 CFR § 50.2(h)(4), an "accident" that must be reported, and/or; (2) If the flooding does not meet the definition of "inundation," the circumstances of the event still make out an "accident" that must have been reported. This analysis harmonizes the two theories and concludes that Prairie State should have reported the flooding that happened on June 8-9, 2009.

A. Was there a reportable inundation?

Inspector Law cited Prairie State for an alleged violation of 30 CFR § 50.10 which requires a mine operator to notify MSHA within 15 minutes of determining that an "accident" has occurred.²⁰ "Accident" is a term of art specifically defined at 30 CFR § 50.2(h) (1 through

¹⁹ Pittman did not contest Citation No. 8417271.

²⁰ 30 CFR § 50.10 Immediate notification.

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;*****eqpvkpwgf 00-

12) by reference to a list of twelve situations, which includes “inundation.”²¹ Specific to this case, 30 CFR § 50.2(h)(4) makes “an unplanned inundation of a mine by a liquid or gas” a reportable “accident.” The lynchpin question for this decision is whether the flooding that occurred at the Lively Grove mine was a reportable event, not just whether it meets the definition of an inundation.

It is tempting to limit the analysis by searching for a definition of “inundation” that passably fits the facts of the case and then shoe-horning those facts into the definition to reach the conclusion that the event should have been reported.²² But, these facts do not lend themselves to this ungraceful approach. The problem is that this approach relies too heavily on the connotation of emergency associated with the term “accident” in 30 CFR § 50.10 and tends to blur its technical meaning with the vernacular understanding of the word. In many instances, there is an emergent situation that can easily be described as an “accident” and in which there is

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- ""(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.

²¹ 30 CFR § 50.2(h) Accident means[:]

- (1) A death of an individual at a mine;
- (2) An injury to an individual at a mine which has a reasonable potential to cause death;
- (3) An entrapment of an individual for more than 30 minutes or which has a reasonable potential to cause death;
- (4) An unplanned inundation of a mine by a liquid or gas;**
- (5) An unplanned ignition or explosion of gas or dust;
- (6) In underground mines, an unplanned fire not extinguished within 10 minutes of discovery; in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery;
- (7) An unplanned ignition or explosion of a blasting agent or an explosive;
- (8) An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage;
- (9) A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour;
- (10) An unstable condition at an impoundment, refuse pile, or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area; or, failure of an impoundment, refuse pile, or culm bank;
- (11) Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes; and
- (12) An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs. [Emphasis added.]

²² This is the tack taken by the parties in their post-hearing briefs.

no discord between the apparent emergency and the need to report. However, in this case the slow pace of water accumulation at the face and the deliberate, calm, and orderly manner in which the miners dealt with the developing situation make it difficult to treat this as an emergency or to characterize it as an “accident” for purposes of deciding whether it should have been reported.²³ Such was the dilemma faced by Prairie State management as the events unfolded on June 8 and 9, 2009, and such is the case in writing this decision. Use of the term “accident” in 30 CFR § 50.10 is subtly misleading in cases like this. As a result, I will broaden the analysis to consider whether the flooding in this case was a reportable event, first because it fairly meets the definition of the term “inundation” and, second because additional policy reasons require reporting.

1. **The Definition Approach**

Reference to 30 CFR § 50.2(h)(4) does not explain clearly what can constitute an inundation other than to specify that it must be “unplanned.” The uncertainty about what is meant by “inundation” is the same here as it was for Judge Zielinski in *MSHA v. Randy Pack*, *Employed by ICG Knott County, LLC*, 2011 WL 840799 (FMSHRC), Docket No. KENT 2009-517, February 9, 2011, where he quoted from *Island Creek Coal Co.*, 20 FMSHRC 14 (Jan. 1998), and discussed the Commission’s interpretation of 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. “

Judge Zielinski interpreted the common meaning of “inundation” in reference to the conditions in that case. He ultimately concluded that there had been an inundation and determined an approximate time from which to count the 15-minute mandatory reporting time.

²³ It could be argued that MSHA also downplayed the urgency of the situation by failing to act on the knowledge of the flooding as soon as it became aware that something out of the ordinary had happened. (Stip. 8) Regardless of why MSHA took no immediate action, there is arguable congruity between Prairie State’s decision not to immediately report the event and MSHA’s lack of reaction to the first evidence of flooding on June 9, 2009.

I agree with the result of Judge Zielinski's analysis and take it one step farther. "Inundate" generally means to cover with water. There is no certainty in the definition found at 30 CFR § 50.2(h)(4) that the flooding must occur with force or immediacy to constitute an inundation, although it does imply that it must be unplanned. While the flooding in this case was more pronounced than in the *Randy Pack* case, that is only one factor. The more critical factor for purposes of the reporting requirement at play here is whether a measure of urgency is implied, which lies at the heart of Prairie State's defense, or whether any unplanned flooding in a mine is a reportable event.

It is understandable from reading the language of 30 CFR § 50.10 and 30 CFR § 50.2 that one would believe that an event's urgency is the dominant factor in deciding whether a flooding event should be reported. This is consistent with the overall tone of the definitions in 30 CFR § 50.2(h), which define "accident" in terms of an urgency to evacuate personnel or key equipment.²⁴ It is also consistent with the overall emphasis on emergency response at the core of the 2006 Miner Act. However, as the facts of this case illustrate, too much emphasis on urgency can result in a myopic assessment of the need to report a non-urgent event. First, it can detract from the one clear guideline found in the language of 50.2(h)(4), i.e., that the flooding be "unplanned," whether it is urgent or not. Second, it tends to short circuit consideration of an independent, policy-based and non-emergency rationale for event reporting. De-emphasizing the emergency element allows us to evaluate more clearly whether unplanned flooding in a mine must be reported under 30 CFR § 50.10. I conclude that it must.

With proper emphasis on the unplanned nature of the flooding and the policy underpinnings (discussed below), the differences in the competing definitions of "inundation" become less important. A gradual flooding event which allows for deliberate and calm response on the part of the miners is not an emergency, but it is nonetheless a reportable, unplanned event, which we are constrained by 50.10 and 50.2(h) to call an "accident." This is important because, when viewed in light of the confusion that comes of using only the definition approach, I am convinced that Prairie State management acted in good faith when they evaluated the circumstances at Lively Grove on June 8 and 9, 2009, and concluded that the flooding was not an inundation and, therefore, need not be reported. This conclusion has bearing on my assessment of liability and S&S, but it does not affect my conclusion that the flooding should have been reported.

2. **The Policy Approach**

(a) **The Two-Tier Penalty Protocol**

²⁴ 30 CFR § 50.2(h) uses language that focuses on the elements of danger to miners, urgency, emergency, and disruption, e.g., "death" 50.2(h)(1); "potential to cause death" 50.2(h)(2 and 3); "unplanned" 50.2(h)(4 through 8); "causes withdrawal of miners [. . .] or disrupts [. . .] mining activity" 50.2(h)(9); "requires emergency action" 50.2(h)(10); "endangers an individual" 50.2(h)(11); "causes death or bodily injury" 50.2(h)(12).

The Miner Act of 2006²⁵ modified 30 CFR § 50.10 to create a two-tier accident reporting protocol.

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

30 USC 813(j) [Italics added.]

A cursory reading of 30 USC 813(j) or 30 CFR § 50.10 can create confusion about whether the 15-minute reporting requirement applies only to lethal or potentially lethal accidents, or as implied in 30 CFR § 50.10(d), “any other accident.” The legislative history for Section 5 of the 2006 Miner Act²⁶ does little to resolve the confusion when it speaks of creating a new 15-minute reporting requirement only for a new subset of lethal or potentially lethal accidents corresponding to the definitions at 30 CFR § 50.2(h)(a), (b), and (c). However, the MSHA Procedure Instruction Letter (“PIL”), No. I10-III-01, effective date April 23, 2010, and expiration date March 31, 2012, provides some clarification by explaining how the 15-minute rule works in the context of the new two-tier penalty mechanism.

The 2006 Miner Act included a change in the 15-minute rule by which the penalty for failure to report an accident within 15 minutes could be enhanced with a minimum penalty of \$5,000.00 for accidents covered by 50 CFR § 50.10, subparts (a), (b), or (c), which correspond to accidents defined in subparts (1), (2), and (3) of 30 CFR § 50.2(h). Under the old enforcement scheme, all accidents defined under Sec. 50.10(h) were either handled under the general penalty assessment protocol or manually processed for special assessment if a higher penalty was sought. The changes in the 2006 Miner Act made it so that deadly accidents, i.e., those defined at 50 CFR § 50.10, subsections (1), (2), and (3), could be cited as Sec. 50.10(a), (b), or (c) violations and trigger the higher minimum penalty without the need for special assessment. All other accidents are still subject to the general and traditional penalty process and should be cited as Sec. 50.10(d) violations. MSHA’s case management systems should now be able to automatically detect Sec. 50.10 (a), (b), or (c) violations, thus obviating the need, as before the

²⁵ Miner Act of 2006, PL 109-236 (S 2803), June 15, 2006, Sec. 5.

²⁶ S. Rep. No. 109-365, 109th Cong., at 9, (2006)

2006 Miner Act, to manually separate, process, and specially assess the more lethal incidents in order to seek higher penalties.²⁷ As a result of this change, MSHA can now seek greater minimum fines for those accidents or entrapments causing death or entailing a reasonable potential to cause death, without having to treat them as special assessments.

(b) **The 30 CFR § 50.11 Policy Statement**

It is obvious why lethal and potentially lethal accidents must be reported and why it is imperative to report them within 15 minutes. As for the other accident types defined in 30 CFR § 50.2 (h) (4) through (12) , another regulation, not directly implicated in this case, helps explain why they must also be reported, even if they lack the element of obvious urgency:

30 CFR § 50.11(a) After notification of an accident by an operator, the MSHA District Manager will promptly decide whether to conduct an accident investigation and will promptly inform the operator of his decision. If MSHA decides to investigate an accident, it will initiate the investigation within 24 hours of notification.

The MSHA District Manager has the authority and responsibility to decide which events should be investigated, including non-emergency but reportable events. Thus, the reason for the two-tier penalty protocol comes into focus. By law, all lethal or potentially lethal accidents must be reported and investigated. They can also now be processed for enhanced penalty without special assessment. All other accidents must also be reported to the MSHA District Manager in order that he/she may exercise his/her review-for-investigation authority. If a mine operator, as in this case, makes an erroneous on-the-scene decision that a mine event is not reportable, the decision can interfere with the statutory duty of the MSHA District Manager to review all accidents for potential investigation. And, in this case this is the crux of the violation the citations seek to address. Prairie State's management decision that these facts did not make out an inundation was wrong because it focused on the narrow definitional analysis rather than the broader question of whether this unplanned flooding should have been reported to MSHA for the policy reasons discussed here. MSHA's approach was similarly limited to an attempt to shape these facts to match the definition of inundation, which also failed to factor in the broader policy question.

For these reasons, I conclude that the decision whether an event is reportable must take into account the broader policy mandate expressed in 30 CFR § 50.11(a) in addition to the customary urgency and definitional assessment implied in 30 CFR § 50.10. This is a supplemental and independent basis to conclude that Prairie State should have reported the flooding and failed to do so.

²⁷ The citation in this case was erroneously written as a general Sec. 50.10 violation instead of Sec. 50.10(d), which nonetheless makes it subject to the lower and customary fine rules.

(c) **Deference To The Secretary's Interpretation**

The Secretary argues that in the absence of clear guidance as to how to define and interpret the term "inundation," her interpretation should be given deference. *Island Creek Coal Co.*, 20 FMSHRC 14 at 18-19. Even though the definitions of "inundation" cited in the Commission case precedent fall short of a clear, comprehensive, and compelling elucidation, when "inundation" is interpreted in light of both its dictionary definitions and the policy evident in the Secretary's broad mandate to evaluate all reportable incidents for possible investigation, the deference argument becomes more compelling, albeit for reasons not argued by the Secretary. A debate limited to which definition best fits the facts of a given case can lead to confusion rather than clarity. However, when the discussion is broadened to consider the "why" along with the "when" of the reporting requirement, it becomes easier for the operator to make the report-or-not-report decision in the field and easier for MSHA officials to evaluate that decision after the fact. Thus, as I view the Secretary's argument from this broader perspective, I am presented with another, and in this instance convincing, reason to defer to the Secretary's interpretation. I agree that this was a reportable event.

The flooding at the Lively Grove mine on June 8 - 9, 2009, should have been reported. Because it fits generally under the definition of "inundation," it should have been reported within 15 minutes, not because of any emergency created by the inundation, but because of the unplanned nature of the flooding and the underlying public policy favoring more - rather than less - reporting to MSHA in order to allow it to properly carry out its duties under 30 CFR § 50.11. The Secretary has proved a violation of 30 C.F.R. § 50.10.

B. **Does Prairie State's Violation of 30 C.F.R. § 50.10 Support a Finding of S&S?**

1. **Is 30 CFR § 50.10 A Mandatory Standard?**

The Secretary seeks a ruling that this violation is significant and substantial ("S&S"). If an inspector finds, "based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature," then the violation must be classified as significant and substantial ("S&S"). *National Gypsum Co.*, 3 FMSHRC 822, 825 (1981). To establish that a violation of a mandatory safety standard is S&S, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard, i.e., a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood that the hazard will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (1984).

Prairie State takes the position that 30 CFR § 50.10 is regulatory only - true to its Part 50 pedigree - despite MSHA's efforts in the wake of the changes in the 2006 Miner Act to elevate it through rule-making to the status of a mandatory standard. As a result, Prairie State argues that a violation of § 50.10 cannot support a finding of S&S because § 50.10 was not "promulgated"

in the Final Rule, but merely “revised,” and, since it was not a mandatory standard prior to the 2006 rule making, it was not converted into one.

Prairie State argues in particular that there was no clear indication in either the Emergency Temporary Standard (“ETS”), issued on March 9, 2006, 71 Fed. Reg. 71430 (2006), or the December 2006 Final Rule, 71 Fed. Reg. 71452 (2006), to convert § 50.10 from a regulatory provision into a mandatory standard. Prairie State also argues that the Secretary did not provide actual notice that she intended to apply § 50.10 as a mandatory standard subject to enhanced penalty assessment under section 104(d)(1). Prairie State argues that the ETS's revised statement of authority for the Part 50 regulations cites only the Secretary's general rule making authority, and the primary change to § 50.10 was described as a modification that did “not change the basic interpretation of §50.10.” 71 Fed. Reg. 12256, 12260 (2006). Although acknowledging that the citation to section 101 was added to the statement of authority for the Part 50 regulations in the Final Rule, Prairie State argues that the change was made without explanation, and as a result, the rule making was ineffective and did not convert the regulatory provision into a mandatory standard.

The Secretary argues that the rule-making after passage of the 2006 Miner Act was effective to convert what had previously been a Part 50 regulation that would not support an S&S finding into a mandatory standard that would. In support, the Secretary makes reference to the unpublished decision by Judge Zielinski in *Wolf Run Mining Co.*, WEVA 2008-1417, Order Denying Respondent’s Motion for Partial Summary Judgment, (July 2, 2010).

The Secretary asserts that the ETS and Final Rule were published pursuant to section 101, the Secretary's statutory authority for the issuance of mandatory standards. The ETS included findings that delays in notification of accidents subjected miners to grave danger, a prerequisite to issuance of a temporary mandatory health or safety standard. 71 Fed. Reg. 71431 (2006). The Secretary further argues that the December 8, 2006 Final Rule was the culmination of the rule making proceeding initiated pursuant to section 101. In fact, a reference to section 101 as authority for the Part 50 regulations was included in the Final Rule. Consequently, because §50.10 was promulgated pursuant to Title I of the Act, the Secretary contends that it is a mandatory standard that can be enforced as an S&S violation.

Prairie State counters that the Final Rule's addition of a “passing reference” to section 101 in the citation to authority is insufficient to transform § 50.10 into a mandatory standard. But it is not the addition of the reference to section 101 in the Final Rule that rendered the new reporting requirements in § 50.10 a mandatory standard. Rather, the fact that the current text of § 50.10 was promulgated pursuant to a section 101 rule making proceeding brings it within the Act's definition of a mandatory standard. *Wolf Run*, unpublished Order at 5.

I am not convinced by Prairie State’s arguments. I find that the Secretary made § 50.10 a mandatory standard by promulgating it pursuant to section 101. I concur with Judge Zielinski’s ruling on this issue in *Wolf Run*, supra and rely heavily on Judge McCarthy’s thorough treatment

of this issue in *Sec’y of Labor (MSHA) v. Pine Ridge Coal Co., LLC*, 33 FMSHRC 987, April 29, 2011, 2011 WL 1924269:

Carried to its logical extreme, Respondent's argument would mean that the Secretary could never promulgate any new requirement as a “standard” if the Secretary carried over any existing requirements from the regulation. As Senior Judge Zielinski observed, both the ETS and the Final Rule set forth a complete revised text of § 50.10, not piecemeal amendments to the wording of the earlier regulatory provision. *Wolf Run*, unpublished Order at 5. The ETS and Final Rule incorporated a definitive standard into § 50.10 of what is meant by “immediately contact,” i.e., “at once without delay,” and “within 15 minutes,” which sets a maximum time within which notification to MSHA of a reportable accident must be made. 71 Fed. Reg. 12260.

Id. at 1008.

I conclude that § 50.10 is a mandatory standard and will support a finding of S&S.

2. **Negligence, Gravity And Enhanced Enforcement (S&S)**

Concepts of negligence and gravity apply to all citations and orders under the Miner Act, irrespective of whether the Secretary pursues enhanced enforcement. They are codified and reduced to table form at 30 C.F.R. § 100.3 and form a defined and integral part of the penalty assessment mechanism used by MSHA and its inspectors. The concepts of “significant and substantial” and “unwarrantable failure” are applied, primarily to 104(d) orders²⁸, as part of the enhanced enforcement mechanism set forth in the Miner Act.

Section 110(i) of the Miner Act requires that in assessing penalties the Commission must consider, among other criteria, “whether the operator was negligent.” 30 U.S.C. § 820(i). Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard. An operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.

(a) **Negligence**

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Miner Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* “MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous

²⁸ The Miner Act also contemplates that “any citation given to the operator under this Act” may form the basis for enhanced enforcement if the elements of “significant and substantial” and “unwarrantable failure” can be proved. 30 U.S.C § 814(d)(1)

conditions or practices.” *Id.* Reckless negligence is when “[t]he operator displayed conduct which exhibits the absence of the slightest degree of care.” *Id.* High negligence is when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Low negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* No negligence is when “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.*

The Secretary alleges that the degree of negligence associated with Prairie State’s violation in this case is “high.” (Exhibit S-3, Citation 8417269) There are two aspects to the violative condition in this case, the flooding itself and the decision not to report it. Facts more closely related to the flooding event are more relevant to the issue of gravity than negligence in this case, and will be discussed more thoroughly below. There is no question that Prairie State’s management knew of the flooding. There is also no question that MSHA officials knew of or had reason to know of the flooding independent of Prairie State’s decision not to formally report it. (Stipulation 8) I am convinced that Prairie State’s decision not to report the flooding was the result of an honest assessment and seemingly reasonable, though incomplete, analysis of whether the facts dictated a formal report to MSHA per § 50.10. This and MSHA’s imputed knowledge of the violating conditions are mitigating factors which reduce the degree of negligence to “moderate” under the guidance of 30 C.F.R. § 100.3(d), Table X. Other mitigating facts bear on the severity of the violation and are discussed below.

Under the two prong analysis of both the definition and policy considerations underlying the obligation to report an unplanned inundation, it is relevant that MSHA is imputed with knowledge of the flooding as expressed in the stipulation. While it is of greater overall significance that Prairie State decided not to report the incident, it is nonetheless of some importance to my decision making that MSHA had reason to know of the events that, if properly reported, would have triggered its mandate to decide whether or not to launch a formal investigation. MSHA cannot claim to have been prevented from properly making that decision under these facts. In keeping with the broader analysis applied to whether Prairie State should have reported these events, it is appropriate to address the fact that MSHA’s imputed knowledge from Inspector Jones’ visit to the mine on June 9, 2009 (including photographs used as exhibits in this case) , mitigates any harm associated with MSHA’s loss of opportunity to timely decide whether to investigate the flooding. Prairie State’s responsibility or negligence is mitigated to the narrower issues of whether it should have reported and whether the report should have been made within the 15 minute window, not whether its failure to report cause any loss of opportunity on MSHA’s part. I conclude that Prairie State’s uncontested failure to report at all supports a finding of “moderate” negligence under these circumstances.

(b) Gravity (“Seriousness”)

The gravity penalty criterion under section 110(i) of the Miner Act, 30 U.S.C. § 820(i), is often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.*, 5 FMSHRC

287, 294-95 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987). However, the gravity of a violation and its S&S nature are not the same. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996). The gravity analysis should focus on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The analysis should not equate gravity, which is an element that must be assessed in every citation or order, with “significant and substantial,” which is only relevant in the context of enhanced enforcement. See *Quinland Coals Inc.*, 9 FMSHRC, 1614, 1622, n.1 (September 1987).

Gravity is “often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Miner Act's purpose of limiting violations and protecting the safety and health of miners. See *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986).

The gradual process of the flooding on June 8 - 9, 2009, and the deliberate, calm, and controlled response of the seven underground miners undercut the Secretary's allegation that injury to the miners was reasonably likely. It is appropriate in assessing gravity to consider the reasonable likelihood of serious injury as limited by the actual facts of this case. The assumptions on which Inspector Law based his decision to charge this violation as he did are set out above at footnote 17 and elsewhere. My findings of fact do not agree with most of the assumptions on which Law based his decision to allege this level of gravity. For instance, the only evidence in the record other than Law's thoughts about the gravity assessment, that relates to the volume of water coming into the mine at the time the miners were still in the mine was that the flow was limited to about one inch down an 8 percent incline. This is not a sufficient inrush to subject the miners to any significant risk of injury as they exited the mine. In fact, the miners were able to ride out of the mine on a mechanized transport vehicle. Law surmised that there would have been increased electrical hazard, but there is no evidence to support that or to support a reasonable inference. Law concluded that the men who stayed after their shift to monitor the pumping of the surface pit would be subject to increased electrical hazard as well, but the facts do not support his assumption. He believed that the water level in the surface pit had risen above the intake grate on the ventilation fan housing, but the photographic evidence simply does not bear this out. He also believed that the ventilation fan had been raised after the storm to make it less likely that storm water would flow into the mine through the ventilation tube. However, the evidence does not show that the water in the surface pit rose to that level, or that it entered the mine through the ventilation tube at all, or that the ventilation tube was in fact even raised.

In light of these facts, I conclude that injury to the seven miners was unlikely, therefore there would be no lost work days.

3. **Do The Facts Support A Finding Of S&S?**

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Federal Mine Safety and Health Review Commission (“Commission”) 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.

Id. at 3-4.

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125 (Aug. 1985), the Commission held:

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.”... 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.

Id. at 1129 (internal citations omitted) (emphasis in original).

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. See *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory standards. *Cyprus Emerald Res. Corp. v. FMSHRC*. 195F.3d42 (D.C. Cir. 1999)

As discussed above, § 50.10 is a mandatory standard and will support the enhanced enforcement associated with S&S. In applying the four elements of the *Mathies Coal* test, *supra*, it becomes apparent that under these facts and the logic of this decision this violation was not S&S. First, there was a violation of § 50.10 as discussed above. Second, the violation must contribute to a measure of danger to miners. Depending on how one reacts to the facts of this case, it is possible to conceive how such gradual flooding in a mine could result in a dangerous situation. However, such a danger is far from concrete. It is in the gray area in which a fact finder must reach to infer a danger and hypothesize how such a danger could exist. These facts do not convince me that I should lean that far. It is understandable how Inspector Law reached the conclusions on which this citation was based. The evidence he saw was stale, incomplete, and confusing to interpret. The evidence presented at trial was somewhat clearer and easier to

comprehend, but it still leaves this fact finder wishing for a clearer picture. As a result, I cannot find that the flooding here resulted in a concrete and discrete danger to the miners involved. Nor can I find that the failure to report caused any concrete and discrete danger. Failure to report is a violation of the standard, but it does not translate into a concrete danger to the miners in the Lively Grove mine. The third element of the test requires a finding that the danger or hazard created by the violation will likely result in injury. The fourth element requires that the injury will be of a reasonably serious nature. Because the second element of the *Mathies* test is not satisfied, it follows that the third and fourth elements will also fail. In sum, the Secretary has failed to prove that this violation was significant and substantial.

C. **What Penalty Is Appropriate?**

Applying the penalty regulations found at 30 C.F.R. § 100.3 and related tables, I conclude that an appropriate penalty for this violation is \$112.00.

ORDER

It is **ORDERED** that Citation No. 8417269 be **MODIFIED** to reduce the negligence assessment from “high” to “moderate,” the gravity assessment from “reasonably likely” to “unlikely,” and to remove the S&S designation.

It is further **ORDERED** that Prairie State pay a penalty of \$112.00 within 30 days of this order. Upon receipt of payment, this case will be **DISMISSED**.

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

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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

November 30, 2011

SECRETARY OF LABOR,	)	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH)	
ADMINISTRATION, (MSHA),	)	Docket No. SE 2010-38-M
	)	A.C. No. 09-01192-00189515
Petitioner,)	
	)	Docket No. SE 2010-741-M
v.	)	A.C. No. 09-01192-000216418
)	
ACTIVE MINERALS INTL,	)	Mine: Active Minerals Attapulgitite
LLC,)	
Respondent.)	

DECISION

Appearances: Benjamin A. Stark, Esq., U.S. Department of Labor, Atlanta, GA, and Melonie L. Paul, Esq., U.S. Department of Labor, Atlanta, GA on behalf of the Secretary
Carla J. Gunnin, Esq., Constangy, Brooks & Smith, LLP, Atlanta, GA on behalf of ActiveMinerals International, LLC.

Before: Judge Priscilla M. Rae

These dockets are before me on petitions for assessment of civil penalties filed by the Secretary of Labor (“Secretary”) acting through her Mine Safety and Health Administration (“MSHA”) against Active Minerals International, LLC (“Active”) 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. The alleged violations occurred at Active’s Attapulgitite Mine located in Climax, Georgia arising as a result of a fatal accident that took place on May 2, 2009.

The dockets were consolidated for hearing and, thereafter, the sole citation under Docket SE2010-163M was settled by the parties. Additionally, Citations 6117818, 6117821, 6117822 and 6117823in docket SE 2010-38M were also settled by the parties prior to hearing, leaving only one citation there under, Citation No. 6117817, and the two citations and two orders in docket SE 2010-741 to be decided by me at hearing. The settlements were approved and the matters will be dismissed upon payment of the agreed upon penalties. The remaining dockets were litigated before me in Atlanta, Georgia. The parties submitted post-hearing briefs.

I. Statement of the Case

Stipulated Facts:

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 these proceedings.
2. Active Minerals International, LLC (“the Respondent”) is a mine operator subject to the jurisdiction of the Federal Mine Safety and Health Administration.
3. Respondent is the owner and operator of the Active Minerals Attapulgitte Mine (“Mine”) located in Climax, Georgia.
4. Operations at the Mine are subject to the jurisdiction of the Act.
5. All MSHA Inspectors involved in this case were acting in their official capacities as authorized representatives of the Secretary of Labor.
6. The citations contained in these dockets were served on Respondent or its agent as required by the Act.
7. The citations contained in these dockets are authentic and many be admitted into evidence for the purpose of establishing issuance, not for the purpose of establishing the accuracy of any statements asserted therein.
8. The assessed penalties, if affirmed, will not impair Respondent’s ability to remain in business.
9. As of May 2, 2009, Innovative Environmental Construction (“IEC”) was a contractor hired by Respondent to perform hauling operations at the Mine.
10. Employees of IEC, including Carroll Collins, hauled material within the Mine using a front-end loader.
11. On the night of May 2, 2009, Carroll Collins – an employee of IEC – was killed at the Mine when he was run over by the front-end loader (the “loader”) he had been operating.
12. Immediately prior to the accident in which Mr. Collins was killed (the “Accident”), the wheels of the Loader were not chocked.
13. The Loader weighed between 33,180 and 34,017 pounds.
14. At the time of the Accident, the Loader was not being tested.
15. At the time of the Accident, no one was being trained in the operation of the Loader.

16. At the time of the Accident, maintenance work was not being performed on the Loader.
17. The Loader was owned by Respondent.
18. There was no seat for passengers to ride in the equipment operator's station of the Loader.
19. The Loader was designed for only one person to ride in it.
20. At the time of the Accident, Plant Operator Keith Goss was the only one of the Respondent's employees present at the mine site.
21. On the night of the Accident – but prior to the Accidents itself- Mr. Goss knew that Ms. Hartline was on the Mine's property.
22. On the night of the Accident, before the Accident took place, Mr. Goss did not contact any other employee of Respondent with respect to the Ms. Hartline's presence at the Mine.
23. Immediately prior to the Accident, Mr. Goss called Mr. Collins to come and assist him with equipment.
24. Mr. Goss was responsible for the operation of the plant on the mine site used to process material for the Mine (the "plant") during his shift on the night of the Accident.
25. The mine and the plant could not continue to run without someone being present to operate them and keep them running.
26. The front-end loader in question was a Volvo L90D (serial # L90DV64843).
27. Respondent submitted to MSHA Quarterly Mine Tonnage or Hours Worked Reports that reflected 253,450 controller hours worked for calendar year 2008. The same reports do not reflect any mine hours worked for the Mine, because Respondent only began operating the Mine on December 24, 2008. The mine reported 7,314 mine hours worked for calendar year 2009.

Secretary's Second Amended Prehearing Report at 6-7; Tr. 9-13

The Accident:

Active operates its Attapulgitte clay mining business in Climax, Decatur County, Georgia. At the time of this accident, they were running two shifts per day. The first shift (6am to 6pm) was a production shift during which the clay was mined and put it into large piles sorted according to its composition. The night shift (6 pm to 6 am) consisted of Donal O'Keith Goss, the plant operator, and Carrol Collins, the front-end loader operator. Collins, an employee of Innovative Environmental Construction (IEC), an independent contractor hired by Active, would

take loads of clay and dump them into a feed hopper. In order to access the hopper, Collins would drive up a ramp which connected to a truck bed imbedded in the dirt at the top of which was the hopper. (Photograph S- 28.) The ramp and truck bed were at an incline of about an 11 to 18% grade measured from the foot of the ramp to the location of the hopper. (Tr. 341.) The hopper had a red and green light signal system which would indicate when to stop pouring the clay into the hopper and when to continue. (Tr. 373.) The plant operator would be positioned to the left of the ramp/hopper area on level ground some distance away from the ramp, where the processing plant, laboratory/control panel trailer and the master control building were located. (Photograph S-30; Tr. 347.) As the clay was feeding into the plant from the hopper via conveyor belt driven by a screw motor, Goss would take samples of the clay every two hours which he would bring to the lab for composition analysis. Based upon the results, he would direct the front-end loader from which of the piles to draw clay to reach the desired mixture. (Tr. 87, 372.) He would communicate this information to the front-end loader operator via radio. (Tr. 351.)

On the night of May 2, 2009, Attapulgit Fireman Bill Hitson received an emergency call from the Active Attapulgit mine involving a miner being run over by a front-end loader. Hitson testified that when he arrived at the mine approximately five minutes after the call, he found the front-end loader had its bucket in the raised position partially full of material, in reverse gear with the engine running, the backup alarm sounding and parking brake fully engaged. Collins was in the position in which he died lying on the ground between the front and back wheels on the operator's side of the loader. Hitson lowered the bucket of the loader to the ground, put it in neutral and turned off the ignition to render it safe for arriving EMS personnel and investigators. (Tr. 29; S- 22 at 80.)Goss was the only other miner on the scene when Hitson arrived.

Julian Crowder of the Decatur County Sheriff's Office was assigned to the case as a crime scene investigator. His experience at the time included a four year criminal justice degree, specialized training in crime scene investigations and 17 years of overall law enforcement experience. (Tr. 35-36.)When contacted by his supervisor, he was informed that Collins had been killed at the mine and his girlfriend had been on the scene when the accident occurred but had subsequently left. (Tr. 37.)Upon arriving at the scene, Crowder put up crime scene tape to protect the area and began taking photographs assisted by Mr. Gale Bowyer, and interviewing persons on the scene. (Tr. 37-39.)He observed the position of the loader being about two-thirds of the way down the ramp with the bucket on the ground, the tires in a straight line with tire tracks on the ramp consistent in pattern with the loader tires. (Tr. 43-45, S-18 and 19.)Crowder spoke with Hitson who provided him with the information that he had secured the front-end loader. He also spoke with Collins' two brothers and Tina Hartline, Collins' girlfriend, when they were called back to the scene. (Tr. 38-39.)

According to Crowder's Criminal Investigation Report, when he interviewed Hartline at 12:45 am on May 3, she told him that Goss had called Collins to come and help him with a motor that was malfunctioning. Collins pulled the loader up almost to the hopper and started to exit the loader. As he did so, his leg hit hers and he stumbled out onto the platform just outside

the door and then he stepped on the rear tire to turn around so he could climb down the ladder but she bumped something on the dash and the loader began to roll backwards. She began to hit buttons and levers and sat in the operator's seat and stepped on the left foot peddle, believing it was the brake. She then looked back and saw that the tractor was on top of Collins so she released the parking brake until the loader rolled past the victim and then she re-engaged the brake. She was afraid she would be in trouble for being on the property and for leaving the scene. (Tr. 49-50; S-24 at 4-5.) During a second interview with Hartline on May 7, 2009, Hartline told Crowder that she came to the mine to discuss a family matter. She brought a pillow with her and sat in the cab with Collins. When Goss called Collins for help, the loader was parked either by the hopper or down the ramp; she couldn't be sure. Hartline backed up against the dashboard and when Collins tripped, she stumbled backwards and her elbow may have hit the gear selector or her hands hit the parking brake button. (Tr. 57-58; S-24 at 6-7.) When she hit something in the cab, Collins stumbled out onto the platform and then stepped on the rear tire to turn around when he fell back towards the rear of the loader. She did not see him hit the ground because she was trying to stop the loader. She first used the foot pedal and then hit the brake button. Crowder observed upon inspecting the cab, that if Hartline had been standing with her back to the windshield, the gear selector would have been to her left and the parking brake to her right. It was Crowder's opinion that Collins had properly stopped the vehicle, used the parking brake and that Hartline had accidentally hit the brake and released it. The parking brake is easily activated by pushing it. There is also a foot pedal in the cab that operates a service brake. (Tr. 100.) Hartline knew that Goss was aware of her being there because "he had seen them earlier in the day." (S-24 at 7.)

Crowder confirmed in his testimony that Hartline said she hit a lot of levers and buttons in the cab of the loader and also worked a foot pedal. During her second interview she said that her elbow hit the gear selector and her hands hit the parking brake button on the dashboard. (Tr. 57.) She stated that the loader had been stopped when Collins got up to exit the loader. (Tr. 60.) When asked about inconsistencies in Hartline's statement about Collins being seen walking down the ramp when she engaged the brake, Crowder could not recall having been told that. (Tr. 60-61.) Crowder did say that Hartline told him she was aware she was not supposed to be on the property because someone had told her not to be there at some point prior to the night of this accident. (Tr. 61.) Crowder was not able to make a determination how far the loader had rolled back when it finally came to rest but it would be a fair estimate that it rolled the distance measured from the back of the rear tire to the area between the back and front tires, where Collins' body was found. (Tr. 64-65.)

Jeffrey Phillips is a supervisory mine inspector for MSHA who had conducted approximately 30 inspections, two involving fatalities, in this position at the time he was called out to participate in this investigation. (Tr. 69-70.) He was a regular inspector for five years prior to his current appointment and had eight years of experience as a maintenance supervisor for a surface limestone quarry preceding his appointment as an MSHA inspector. (Tr. 72.) He

is experienced in the operation of a loader and testified that in his opinion, knowing how to operate one particular front-end loader does not necessarily qualify someone to operate a different make or model. (Tr. 76.)

Phillips was told upon arrival at the scene that Alex Glover, Operations Manager, and MSHA Inspector Fendly chocked the wheels of the loader. (Tr. 81.) Other than securing the wheels with a chock, the loader was in the same position as it had been immediately after the accident. It was located three-fourths of the way down the ramp and the wheels were straight with the bucket on the ground. (Tr. 97.) There was a lunch box and a pillow inside the cab. (Tr. 82-83.) Phillips established that to the side of the ramp is the white building that houses the plant control room and the lab from which Goss would be analyzing clay samples and operating the plant. (Tr. 86-87.) From the window of the lab, one could see the bottom three-fourths of the ramp. (Tr. 88, S- 31.)

Phillips was the second person to interview Hartline who told him that she was on the property because she had had some type of altercation with a family member and wanted to speak to Collins about it. He told her to bring a pillow. She rode with him for a little while when Goss had called Collins to assist him with a problem at the lab. Collins had gotten out of the loader to help Goss previously when Goss radioed Collins for assistance. (Tr. 104.) The second time Goss radioed Collins Goss saw Hartline inside the loader. (Tr. 105.) When Collins received the previous call, Hartline said he was parked outside of where the truck bed was on the ramp. (Tr. 105.) When the second call came, he kept the bucket in the air and backed up to that area on the ramp just beyond the truck bed. (Tr. 106-107.) She stated that she stood up and turned around with her back to the dashboard when Collins tripped. As he was stumbling out, the park brake was released and the loader started moving. She didn't know where Collins was at that moment so she jumped over into the operator's seat and thought she pressed the brake pedal but didn't feel the loader stop. She remembered seeing Collins using the parking brake, so she pressed the park brake button and stopped the loader. She looked down and saw the rear tire on top of him so she reached over and released the parking brake until it rolled off of him and then reset it. She then climbed out of the loader and ran for help. (Tr. 107-108.)

When questioned whether Crowder had told him that Hartline said she had seen Collins walking down the ramp before he was run over, Phillips stated that he had no recollection of that. (Tr. 174.) Furthermore, Phillips stated that when he spoke to Crowder, Crowder was in the county courthouse testifying in another matter and did not have his notes of the interview with him. Crowder was speaking only from memory. (Tr. 174-175; S-22 at 9-10 of 51.)

In Phillips' opinion, Hartline could have easily disengaged the parking brake when she had her back to the dashboard. Having tested the switch himself, he found the switch to be very sensitive. Hartline had stated that she had ridden with Collins in his equipment before but Phillips did not clarify whether she had ridden in this loader at this mine with him in the past.

(Tr. 109.) Phillips also confirmed through his own investigation that the loader was located at the end of the truck bed near the end of the ramp when Collins fell out of it. (Tr. 170.)

Goss was represented to Phillips as the “lead man in charge” on the night of May 2nd. (Tr. 110.) During his first interview, Goss said that he did not know that Hartline was on the property. Upon learning otherwise, Phillips re-interviewed him at which time Goss admitted he saw her the second time he called Collins on the radio. She was sitting in the cab with Collins. Goss radioed him and told him Hartline should not be on the property. He did not see her again until she came running for help. (Tr. 111-113; S-22 pg. 46 of 51.)

Goss testified on behalf of the operator, contrary to his statement to investigators, that when he first saw Hartline, she was in the loader and Collins was standing beside Goss near the lab. He stated that he told Collins at that moment that she did not need to be on the property and Collins responded by saying he would tell her to leave. He also told Collins that if a supervisor saw her, Collins could lose his job. Goss then went into the control room and did not see Hartline again until she came running for help. (Tr. 354.) He could not recall if the bucket was raised or where the loader was in relationship to the ramp when Collins left it to come to his assistance. (Tr. 359.) Goss’ statement to Phillips that Collins was in the loader with Hartline when he saw her is more credible as it was told to Phillips shortly after the events occurred and he was “coming clean” at the time in admitting what he knew about Hartline’s presence on the property.

As a result of the fatal accident and the ensuing investigation, Active was cited by the MSHA investigators who issued the citations and orders addressed herein.

The Secretary’s Theory

The Secretary advances the theory that on the night of the accident, Goss was having difficulty with the v-belt conveyor motor which tripped the electrical breaker shutting down the plant on two prior occasions. He radioed Collins to come and listen to the motor while Goss went into the control room to try to diagnose the problem. (Tr. 17-18.) At some inexact point in the evening, according to Goss, while Collins was assisting him with the motor, he looked over to the ramp area and saw Hartline in the cab of the loader. Goss told Collins that she didn’t need to be there and if his supervisors saw her, he (Collins) could lose his job. Collins said he would tell her to leave. (Tr. 354.) Goss did nothing more to have Hartline removed from the property. (Tr. 18.) Goss radioed Collins a third time and Collins parked the loader near the top of the ramp without chocking or turning the wheels into the bank or lowering the bucket. When Collins tried to exit the loader, he tripped over Hartline who bumped into the parking break. Collins stumbled out the door of the loader and stepped onto the rear tire just as Hartline disengaged the brake causing Collins to be taken under the tire with its rotation and crushed to death. (Tr. 18-19.) After securing the parking break, Hartline ran to Goss to call 911.

The Secretary has assessed four of the violations as an unwarrantable failure by Active based upon the theory that Goss, as the plant operator and the only Active employee on duty on

the night shift, was an agent for Active. She argues Goss's negligence in allowing Hartline to ride in the loader and not forcefully escorting her off the property and not correcting Collins' unsafe operation of the loader by not lowering the bucket or chocking or turning the wheels when parking on an elevated ramp rises to a level higher than ordinary negligence. (Tr. 19-20.)

The Respondent's Theory

Active asserts that it was not employing unsafe practices at the time of this accident. Collins was the employee of an independent contractor. It is not possible to determine what caused the accident as Hartline is the only remaining eye witness and she did not testify at the hearing. Following the accident, she gave two statements to investigators which tend to contradict each other. In one, she says Collins fell out of the loader and she was unaware of his location until she looked out and saw the rear wheel on top of him. In another, she allegedly said that she saw Collins walking down the ramp when the loader started to roll backwards and it ran him over. Whatever occurred on May 2nd to cause the death of Collins, they argue, cannot be attributed to Active in any way. Collins was properly trained on parking procedures as well as general operating procedures on the loader and was observed by Active management following those procedures. There was no reason for them to believe Collins would not operate the loader in a safe manner, nor did they fail to properly task train him.

Hartline had been told by management to stay off the property in the past and was therefore an unwelcome visitor on the night of May 2nd. As such, she is not a miner whom the standard regarding transporting a miner in the loader without a seat pertains; therefore the standard does not apply in this instance.

With respect to Goss' involvement in the events that evening, Active argues that Goss was an hourly wage miner who was not an agent of the company and therefore any negligence on his part cannot be imputed to Active. He did not have the authority or the duty to take any further action than he did to remove Hartline from the mine property. He was not tasked with ensuring Collins was operating the loader in a safe manner and he was not directing Collins' work that night. Moreover, he could not have expected Hartline to remain in the loader after Collins said he would send her home and he could not have foreseen Collins tripping over her upon exiting the loader. He further could not have anticipated that Hartline would start pulling levers and pushing buttons in the loader causing it to run over Mr. Collins. Goss lied to investigators during the initial stages of the investigation when he denied that he saw Hartline in the loader. He later admitted his omissions and was disciplined by management for making a false statement as evidence of Active's view on safety.

Additional Evidence

As part of the autopsy performed on Collins, the medical examiner sent a blood sample to the lab for analysis. It came back with a finding the Collins had a Blood Alcohol Content (BAC) of .032 at the time of death. (S-24 at 7 and attached lab report.) The accident occurred at

approximately 9:40 pm. (S-7 at 1.) The night shift began at 6pm. (S-22 pg 3 of 51.) The autopsy report indicates that Collins weighed 232 lbs. I take judicial notice of the University of Oklahoma Police Department BAC Calculator (www.ou.edu/oupd/bac.htm), the Wisconsin Department of Transportation BAC calculator (www.dot.wisconsin.gov) as well as the BAC Calculator from Wikipedia (www.wikipedia.org) which state that a BAC of .032, based upon the metabolic breakdown of alcohol in a male weighing 230 lbs., can be achieved by the following consumption: 6 alcoholic drinks in 4 hrs., 4 alcoholic drinks in 2 hrs., or 3 alcoholic drinks in 1 hr. The body metabolizes (decreases the BAC) by approximately .015 (which is equal to about one drink) per hour. A BAC of .08 is legally drunk. Put another way, either Mr. Collins was intoxicated when he reported to work at 6pm and his BAC dropped to .032 nearly four hours later, or he was drinking on the job.

This information was in the investigator's possession during the investigation. (S-24 at 7). However, it was not addressed during the interviews of the witnesses. It raises questions whether intoxication was the direct or indirect cause of the accident and whether anyone knew about it at the time of the accident. It was also not raised by either party during the hearing.

I find, regardless of the question of the involvement of alcohol, it was Hartline's actions which directly lead to the death of Collins.

II. Findings of Fact and Conclusions of Law

Significant and Substantial (S&S)

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S, "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued

normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996).

Agent of the Operator/Unwarrantable Failure

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation was 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 unwarrantable failure 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.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Secretary has cited Active with unwarrantable failure to comply with mandatory safety standards in four of the violations discussed below. The basis for this assessment is that Goss was acting as an agent of Active thereby imputing the conduct of Goss to the operator.

In order for the operator to be held responsible for an unwarrantable failure, it must be proven that they were aware of the violative conduct either directly or through their agent. In *Emery* the Commission explored the meaning of the term unwarrantable failure and the legislative history bearing upon it to determine what conduct exemplifies greater than ordinary negligence. In that discussion, the opinion made clear that the operator had to demonstrate aggravated conduct in relation to the particular violation of the Act cited. *Emery*, 9 FMSHRC at 2004. In *San Juan*, 29 FMSHRC 125 (March 1997) the Commission remanded where the ALJ found the operator ignored the violative accumulations based upon the fact that it was not mentioned in the pre-shift examination report or orally reported to the shift boss. The Commission instructed the judge to make specific findings on whether the operator had knowledge of the accumulations for unwarrantable failure purposes. In *Coal River Mining*, 32 FMSHRC 82 (Feb. 2010), the Commission remanded for a specific determination of the extent of the operator's knowledge that batteries were being charged on the ground in an unsafe location taking into consideration evidence that supervisory personnel were aware that the battery charging station had been set up in that location.

Section 3(e) of the Act defines "agent" as "[a]ny person charged with responsibility for the operation of all or a part of a coal or other mine or the supervisor of the miners in a coal or other mine." 30 U.S.C. § 802(e). In considering whether an employee is an operator's agent, the Commission has relied, not upon the job title or the qualifications of the miner, but upon his function, and whether it is crucial to the mine's operation and involves a level of responsibility normally delegated to management personnel. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-38 (May 2000); *REB Enterprises, Inc.*, 20 FMSHRC at 211; *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996); *U.S. Coal Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995).

The Commission has relied upon precedent developed under the National Labor Relations Act, 29 U.S.C. § 141, et seq., to the effect that the authority to assign tasks and make schedules is not sufficient to afford an individual supervisory status. *Martin Marietta*, 22 FMSHRC at 638. In *Ambrosia* it was held that a "person in charge" was an agent because he performed functions that were crucial to the mine's operation and exercised responsibility normally delegated to management personnel. Those functions were: accompanying MSHA inspectors and attending close-out conferences as the operator's representative, conducting daily examinations and recording findings as a certified mine examiner, and issuing work orders to abate citations. There was also evidence that the agent held himself out as the employee in charge, signed documents as mine foreman and was viewed by other miners as a person with authority.

In *Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997), the Commission held that a “highly experienced repairperson who needed little supervision and helped less experienced employees [was not] a supervisor, much less a manger [because there was] no evidence that [he] exercised any of the traditional indicia of supervisory responsibility such as the power to hire, discipline, transfer, or evaluate employees [or that he] ‘controlled’ the mine or a portion thereof.” Similarly, in *Martin Marietta*, it was held that an employee who had the authority to tell other miners how he wanted a job done and to stop them if he did not like what they were doing was not an agent or supervisor. His control was tightly circumscribed and he could not hire or fire, evaluate or discipline miners and could not take any action to abate citations, or change a miner’s job or the equipment on a job, was paid at an hourly rate, and did not hold himself out as a supervisor or person in charge.

An employee’s functions, and status as agent, are considered as of the time of his allegedly negligent conduct. *Martin Marietta* at 638; REB at 194; *Whayne Supply* at 452; *U.S. Coal* at 1688. Consequently, even a rank-and-file miner can be found to be an agent while performing critical, management-related functions such as required safety examinations. *R&P* (rank-and-file miner who was a certified mine examiner was agent of operator when assigned to perform such inspections); compare *Mettiki Coal Corp.*, 13 FMSHRC 760 (May 1991) (certified electrician acts as an agent when performing monthly electrical inspections), with *U.S. Coal*, 17 FMSHRC at 1688 (certified electrician does not act as an agent when performing routine repairs). However, it must be pointed out that the Commission has held that the scope of the agency is limited. In *R&P*, the miner was certified by MSHA to conduct weekly ventilation examinations. He was found to be an agent for imputation of unwarrantable failure purposes when he failed to make the examinations and falsified the examination records. The Commission held that he became an agent “for the purpose of conducting the weekly examinations” only. He was responsible for operating all or part of the mine when carrying out the responsibility of making the weekly examinations and was an agent for that purpose. *R&P* at 195. The Commission has stated that the relevant inquiry is whether the miner exercised managerial conduct at the time of the negligent conduct. *Martin Marietta* at 638.

The Commission, in *Nelson Quarries, Inc.*, 31 FMSHRC 318 (Mar. 2009), again looked to the *Ambrosia Coal* inquiry of whether the function of the miner was “crucial to the mine’s operations and involved a level of responsibility normally delegated to management personnel.” *Ambrosia Coal* at 1560. In *Nelson*, the Commission upheld the judge’s determination that three employees were agents within the meaning of the Act based upon their functions at the mine. Specifically, the Commission focused upon the fact that all three conducted all of the daily examinations, they supervised and directed the work force assigned to them, they addressed problems the work force brought to them in attempting to abate citations, the work force treated them and regarded them as their supervisors, they held themselves out as foremen, and they were designated as the person in charge of health and safety on the legal identity and start-up and closure reports required to be filed with MSHA. The Commission also took note of their

involvement in making recommendations on hiring, firing and disciplining employees although the ultimate decision was left up to a higher level manager.

I find that the facts of this case, in light of Commission precedent lead me to the conclusion that Goss was not acting as an agent of Active. Goss was running the plant by himself on the night of the accident. (Stip. of Fact No. 20.) The Secretary asserts Goss was thereby in control of part of the mine “because neither the Plant nor the mine could continue to operate without someone to keep them running.” (Sec. Post-Hearing Brief at 12.) First, I find that running the plant is not analogous to being in control of the mine as contemplated by the Act. If it were so, then a continuous miner operator or a roof bolter would also be in control of a mine or part thereof as production cannot continue until they are finished with their tasks which directly affect safety and health. Moreover, the Commission has focused the inquiry on whether one is in control of the mine by determining whether the function is crucial to the mine’s operation and involves a level of responsibility normally delegated to management personnel. *Martin Marietta* at 637-38; *REB* at 211; *Ambrosia* at 1560; and *U.S. Coal* at 1688. Clearly, the function engaged in must be crucial but also it must be a function normally undertaken by management. The only function of Goss’ job that could possibly be considered crucial to the mine’s operation as defined by the Commission, was his responsibility to conduct the pre-shift safety examination of the plant. (He did not conduct the pre-shift examination of the loader, Collins did.) This function was contained in his Position Description (PD). (S-25.) The PD describes Goss’ job as an hourly position responsible for such things as daily housekeeping, minor repairs, cleaning, loading and unloading trucks, processing the clay to meet production goals for quality and quantity, performing routine checks and maintenance on equipment and taking and analyzing samples for quality control. It further required performing all duties as determined necessary by a supervisor. Necessary training was a high school diploma or equivalent. The Secretary presented no evidence that the running of the plant carried with it a level of responsibility normally delegated to management personnel. The PD indicates just the opposite. Even assuming for a moment that the function of performing of the pre-shift examination of the plant could, standing on its own, suggest that Goss was an agent, the Commission has made clear that the scope of the agency responsibility only extends to negligence committed while engaged in that managerial function. (See *Whayne Supply*, 19 FMSHRC at 451-53 and *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64.) Here, the negligence alleged by the Secretary is that Goss did not take additional steps to ensure Hartline was removed from the property and that he allowed Collins to operate the loader in an unsafe manner. Neither of these allegations have any correlation to Goss’s performance of safety examinations on the plant. I find the Secretary’s contention fails on this point.

Examining the other functions undertaken by Goss, the Secretary’s position is further unsubstantiated. Goss did not have a crew assigned to him; he did not have the authority to hire, fire or discipline other employees and despite the Secretary’s contention that he could assign tasks to Collins, he did not have that authority. He could tell Collins from which of the three

piles of clay to draw his next load so that the quality of the product was in line with the company's standards. This was required of Goss as set forth in his PD. He did not assign Collins to operate the loader, IEC did. He did not have the authority to take Collins off the loader and assign him to operate a different piece of equipment. He could not tell Collins to leave the plant for any reason. Tr. 346. He did request that Collins help him trouble shoot the v-belt motor by standing by and listening to it. However, I find that this is the typical sort of help that any rank-in-file miner would give to a co-worker in their operating area. It does not indicate that Goss was responsible for the assignment of tasks to Collins.

Goss testified that he had the authority to tell an unwelcome visitor to leave the mine and he could call 911 in case of a fire and would tell someone to stop engaging in dangerous horseplay if he saw it. (Tr. 370-71.) The Secretary asserts that this too indicates he was responsible for the health and safety of the mine conferring managerial duties upon him to take charge in the event of an emergency. I do not find this is of the same level of responsibility recognized by the Commission as normally undertaken by supervisory personnel. The Mine Act confers upon every miner the responsibility for his/her own safety as well as that of others. *See generally* Section 2 of the Mine Act. Calling 911 in case of a fire before contacting a supervisor makes imminent sense in preserving one's own life or that of others. The same holds true for telling untrained persons to leave the area or preventing others from engaging in obviously dangerous conduct. In contrast, in *Nelson Quarries*, the employee in question was listed on the legal identity, start-up and closure documents filed with MSHA as the person designated in charge of health and safety. This the Commission found was significant indicia that the employee held himself out as an agent, the company recognized his authority and it was a function normally assigned to supervisory personnel. Active, on the other hand, presented the Part 46 Training Plan submitted to MSHA which listed in Item 2, Alex Glover and Chris Watson as persons responsible for health and safety training at the mine in compliance with 30 C.F.R. §46.3. (R-13.) There is no evidence that Goss was so designated on any document required by MSHA or that he held himself out to be the person in charge of health and safety in any function required by MSHA.

Inspector Wriston testified that Goss told him he was in charge of the mine the night of the accident. However Wriston also stated that he considers a person to be in charge when the operator has designated that person as the competent person in charge. Generally, when Wriston makes his inspection of a mine, that designated competent person will accompany him on the inspection. Goss did not do so in this case. (Tr. 238.) Wriston also stated that there is a difference in the meaning of a competent person in charge for metal and non-metal mines for which there is no support in the Act or case law. I, therefore, give his interpretation and determination that Goss was an Agent little weight.

The Secretary argues that because Goss was the only Active employee on the property on the night shift, he had to be in charge as an agent of the company. He responded to Investigator Phillips, when asked who was in charge of the plant that night that he was. Watson and Glover

also so identified him during the investigation when questioned by Wriston.(Tr. 237.) Glover testified that he did in fact tell the investigators that Goss was in charge that night but he meant that Goss was an operator, not a supervisor. (Tr. 323.) I find their responses were correct in so far as Goss was in charge of running the plant that night. However, looking at the functions Goss performed, rather than any title he assumed, he was not an agent of the company. Furthermore, their response that he was in charge was not intended at the time to confer any particular legal standing on Goss and I do not find any evidence from which to conclude that they were aware of the legal definition of an agent at the time. Looking solely at the functions performed by Goss, he was not an agent within the legal meaning of the term.

Worthy of note, also, is the fact that Collins apparently did not regard Goss as his supervisor nor did Goss act as such. I conclude this in part from the fact that when Goss saw Hartline in the loader, he called Collins and told him that if a supervisor saw her, Collins would be fired. (Tr. 354.) Not only did he distinguish himself apart from the supervisors with this comment but he was clearly looking out for a fellow miner trying to keep him out of trouble. Goss testified that he considered Collins a friend. (Tr. 360.) Collins had been told by Nate Southerland previously to keep his girlfriend off the mine property. (Tr. 282-87.) Therefore, it would be very unlikely at best that Collins would allow his girlfriend to ride in the loader with him that night if he regarded Goss as having the authority of a manager to discipline or fire him. It would be equally highly unlikely that Collins would either report to work under the influence of alcohol or drink on the job if he had any indication that Goss had the authority to fire him. Goss' lying to Investigator Phillips during his first interview by denying he saw Hartline on the property and lying under oath at the hearing by saying Collins was standing beside him when he saw Hartline in the loader is further indicia that he was a rank-in-file miner. It appears that Goss was trying to protect himself from being disciplined by management. He was disciplined by Active for his false statements to the investigator with a memorandum placed in his personnel file. (Tr. 363.) I find this treatment of Goss by Active management personnel indicates that the company considered him to be a miner rather than a supervisor as well.

Finally, the Secretary has not presented any evidence that Active had independent knowledge of the violations committed on May 2, 2009 and she has failed to prove any other aggravating factors which would rise to a level of negligence beyond ordinary. There was no evidence that prior to the accident, the operator was on notice that similar violations had occurred or that additional efforts were needed for compliance. In fact the Secretary has conceded that there were no prior citations issued for any of the standards involved herein at this mine and has presented no evidence of similar citations at any other Active mines. (Sec's Post-Hearing Brief at 34.) Glover, Watson and Nate Southerland testified that they had all observed Collins operating the loader in a safe manner on every other occasion and had never seen him do otherwise. (Tr. 316-18, 301-03, 279.) The length of time the violative conditions existed was during the night shift of May 2, 2009.Hartline had been on the property before and Collins was told to keep her off the premises. The testimony was that since that warning, she had complied

and had not gone past the parking lot to drop Collins off at work. (Tr. 282, 287, 353.) It appears from the evidence that this was an isolated incidence which presented no opportunity for the operator to know of or reasonably foresee the violative conduct.

For all of these reasons, I do not find that Goss was an agent of Active. I find, instead, that the functions performed by Goss were comparable to those of a “lead man,” as described in *Wayne Supply* and *Martin Marietta*. I am constrained to find that Active cannot be held accountable for an unwarrantable failure to comply with the mandatory standards cited by the MSHA inspectors.

NEGLIGENCE FOR PENALTY PURPOSES

In a case of first impression on the issue of whether negligent conduct by a rank-and-file miner could be imputed to the operator for penalty purposes, the Commission found in the negative. *Southern Ohio Coal Co.*, 4 FMSHRC 1458 (Aug. 1982)(“SOCCO”). Quoting from the *NACCO* decision, the Commission reiterated that the “operator’s supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner’s violative conduct.” *SOCCO*, 4 FMSHRC at 1464, quoting *NACCO Mining Co.*, 3 FMSHRC at 850-51 (Apr. 1981). The operator must be found negligent in its own right based upon its supervision and training programs with a finding that they “directly or indirectly contributed to the violations at issue.” If so, such commissions or omissions are properly taken into account under section 110(c) of the Act for assessing penalties, rather than under section 104(d) of the Act. *SOCCO* at 1466. The Commission rendered a decision along the same lines in *Western Fuels*, 10 FMSHRC 256 (Mar 1988) and *Marland*, 14 FMSHRC 754 (Aug. 1992).

As the Secretary acknowledged in her Post-hearing Brief, 30 C.F.R. §56.18009 requires that a competent person designated by the mine shall be in attendance to take charge in case of an emergency. It is unconscionable that Active would leave hourly employees alone on shift without a foreman present while engaged in the ultra- hazardous activity of mining. This, however, they did as Goss was the only Active employee on the night shift which had started about one month prior to the accident.(Tr. 280, 315, 322.) While I find Hartline’s and Collins’ negligence was the proximate cause of the accident and was not foreseeable by management, it was Active’s failure to have a properly designated supervisor on-site that indirectly enabled this tragedy to occur. Had a foreman been present, it is extremely unlikely at best that Collins would have invited his girlfriend to ride in the loader with him which set the entire chain of events in motion leading to his death. It is impossible for any mine operator not to know that miners would engage in unsafe conduct when left unsupervised for 12 hour shifts night after night. This was an accident waiting to happen. I find Active engaged in a high level of negligence which indirectly led to each of the violations discussed below.

Docket No. SE 2010-741M

1. Citation No. 6091419

Investigator Phillips issued this section 104(d)(1)¹ citation for an alleged violation of 30 C.F.R. §56.9200(d). The citation is assessed as S&S, UF with a fatality resulting from a high degree of negligence. The penalty sought to be imposed is \$70,000. It states:

A fatal accident occurred at this operation on May 2, 2009 when a miner was run over by a front end (sic.) loader that he was operating. A person was being transported in the front-end loader with no seat provided. When the operator exited the cab, his feet became entangled with the passenger causing him to trip onto the left rear tire. Additionally the park brake disengaged allowing the front-end loader to move down a grade. Management engaged in aggravated conduct constituting more than ordinary negligence by allowing a person to ride in the front-end loader with no seat provided. This violation is an unwarrantable failure to comply with a mandatory standard.

(S-1.)

The cited standard provides that persons shall not be transported outside cabs, equipment operators' stations, and beds of mobile equipment, except when necessary for maintenance, testing, or training purposes, and provisions are made for secure travel.

The operator argues that this standard was improperly cited because Hartline was a trespasser and therefore she is not entitled to the protection afforded by the Act to miners. Secondly, Active asserts that the standard requiring a passenger to be secured does not contemplate a hazard posed while exiting the loader rather than while transporting persons. (Sec's Post- Hearing Brief at 7-8.) Neither of these arguments is persuasive.

Active cites *Peabody Coal Co.*, 7 FMSHRC 1357 (Sept. 1985) and *Extra Energy*, 1998 CCH OSHD 31,487 as authority for the position that only persons engaged in mining activities are entitled to the protection of the Mine Act. I find the issue in those cases entirely different from the situation here. Any person reasonably familiar with mining operations would be on notice that an unsecured passenger riding in a front-end loader could pose a danger to the

¹ Section 104(d)(1) of the Mine Act provides:

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 condition created by such violation do not cause imminent danger, such 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, 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.

30 U.S.C. §801.

operator during the normal course of operations. Active has not provided any authority for the proposition that this standard only seeks to protect the passenger. It is appropriate to give a mandatory standard the broadest interpretation of its terms to protect health and safety which would encompass an interpretation that the standard seeks to protect the operator as well as the passenger. *See Secretary of Labor v. Cannelton Industries Inc.*, 867 F 2d 1432 (D.C. Cir. 1989).

The operator incorrectly focuses on the cause of the fatal injury to Collins in support of their second argument. Collins was killed when he tripped over Hartline upon exiting the loader. The undisputed evidence is that Collins had been operating the loader for some period of time loading clay into the bucket, driving up the ramp and dumping the clay into the hopper with Hartline in the loader. The parties stipulated that Hartline was not secured with either a seat or a safety belt and that no testing, training or maintenance was being performed at the time of the accident. (Stip. of Fact Nos. 14, 15, 16, 18 and 19.) This is a strict liability mandatory standard and I find that it has been violated.

The Secretary has also established the S&S criteria. There was a violation of section 56.9200(d). The violation created a discrete safety hazard. The loader travels over uneven ground and up and down ramps and carries thousands of pounds of a material in the bucket. It is reasonably likely that running over a bump or into a ditch in the road could cause the loader to bounce or tip side to side throwing an unsecured passenger into the driver causing bodily injury or into any one of the control levers in cab causing the operator to lose control of the loader. This in turn could result in the loader rolling over causing even greater injuries to the driver.

I find this violation to be of very serious gravity but I do not find this violation to be an UF as discussed above. I find it to be the result of high negligence for the reasons set forth above. I assess a penalty of \$50,000.00.

2. Order No. 6091420

This section 104(d) order was issued by Investigator Phillips for a violation of 30 C.F.R. §56.14206(b) which he assessed as S&S, and UF with a fatal injury having occurred as the result of high negligence. The Secretary proposes a penalty of \$25,000. It states:

A fatal accident occurred at this operation on May 2, 2009 when a miner was run over by the end loader he was operating. The victim stopped on the elevated ramp with a loaded bucket in the raised position and exited the end loader. Management engaged in aggravated conduct constituting more than ordinary negligence by not correcting a known work practice. This violation is an unwarrantable failure to comply with a mandatory standard.

(S-2.)

The mandatory standard provides in relevant part that when mobile equipment is unattended or not in use, buckets shall be lowered to the ground.

Hitson testified that as the first responder, he found the loader in the position it had been in when the accident occurred. The loader was parked on the ramp with the bucket in the fully raised position. He got into the loader and lowered the bucket to the ground, put the loader in neutral and turned off the ignition to render the scene safe for persons investigating the accident. (Tr. 29.)

Deputy Crowder testified that when he arrived on the scene the loader was in the same location as it had been when the accident occurred. He was informed by Hitson that he (Hitson) had lowered the bucket. Crowder observed that there were no visible drag marks the ramp to indicate that the bucket was lowered before the loader rolled down the ramp crushing Collins. (Tr. 46-47.) This can be seen in the photographs S-16-19 which clearly depict tire treads in front of the bucket but no drag marks.

Inspector Phillips testified that when he interviewed Hartline, she told him that when Collins received the first call from Goss, he parked the loader on the ramp just below the truck bed. The next time he received a call, Collins backed up from the hopper and parked the loader in the same location towards the lower end of the ramp and left the bucket in the air. (Tr. 107-08.)

Active has made the argument that Hartline could have raised the bucket when she was fumbling with the controls in the cab. In light of Hartline's statement to Phillips, Crowder's and Hitson's testimony and the photographs of the scene, there is no basis to believe such a theory. I find the standard has been violated.

I also find this violation is S&S. The loader was used to transport clay up a ramp with an 11-18% incline to feed it into a hopper. Tr. 206-07. As Phillips explained, the hazard posed by leaving the bucket in the raised position, especially when loaded with material and parked on an incline, is that the hydraulics could fail causing the bucket to suddenly drop. With the bucket on the ground, the loader is far less likely to roll backwards. If it did roll, the bucket would slow or stop the loader if it is pressed to the ground. (Tr. 124-26.) Glover, Active's operations manager, confirmed that a lowered bucket could keep the loader from rolling and that is why he would lower the bucket. (Tr. 341-42.) Under continued mining operations, it is reasonably likely that the hazard would cause injuries and such injuries would be reasonably serious, including fatal crushing injuries. (Tr. 125-26.)

For the same reasons as set forth in the discussion above, I do not find this to be UF. This violation was very serious and as set forth above, the result of high negligence. I assess a penalty of \$10,000.00.

3. Order No. 6091421

This 104(d) order for a violation of 30 C.F.R. §56.14207 was assessed by Phillips as having resulted in a fatality, S&S, UF and the result of high negligence. The proposed penalty is \$25,000. The order reads:

A fatal accident occurred at this operation on May 2, 2009 when a miner was run over by a front-end loader he was operating. The victim stopped the end loader on the elevated ramp and exited the machine without turning the wheels into a bank or using wheel chocks to prevent the machine from rolling. Management engaged in aggravated conduct constituting more than ordinary negligence by not correcting a known work practice. The violation is an unwarrantable failure to comply with a mandatory standard.

(S-3.)

The standard covering parking procedures for mobile equipment provides “when parked on a grade, the wheels or tracks or mobile equipment shall be either chocked or turned into a bank.” 30 C.F.R. §56.14207.

The evidence is undisputed that Collins parked the loader on the ramp just below the truck bed when he exited to assist Goss with the belt motor. Photographs S-17 and S-20 show the area where the loader came to rest after crushing Collins. Hitson, Crowder, Phillips, Hartline and Goss described the area as the lower section of the ramp below the truck bed. Phillips testified that the grade on this part of the ramp was approximately 11%. This is a sufficiently steep grade to cause mobile equipment such as the loader to roll downhill if not properly secured. (Tr. 341.) The Respondent admitted that chocks were not available. (S-6; Stip. of Fact No. 34.) Active presented evidence that when Collins was observed operating the loader by Active and IEC supervisors, he always parked the loader to the side of the ramp on even ground. Never had he been observed parking on the ramp. (Tr. 301, 316-17.) Goss testified that he saw the loader on the ramp when Collins came to assist him but he could not or did not observe whether the wheels were turned into the side of the ramp. (Tr. 358-59.) Active’s defense of this violation is that there is insufficient evidence from which to draw the conclusion that the wheels were not turned into the bank at the time Collins exited the loader since Hartline admittedly moved the loader from the position in which Collins parked it.

I accept the expert testimony of the Secretary’s witnesses. Inspector Phillips stated that had the wheels been turned into the bank, the tracks that can be seen in photographs S-12, 17, 20, 28 and 29 would not have been in a straight line as they are. (Tr. 83.) Investigator Crowder provided the same opinion as Phillips that the loader was parked on the ramp and rolled straight

backwards when Hartline released the parking brake which accounts for the tracks being in a straight line. Tr. 46. The Secretary has proven the standard has been violated.

The violation is S&S. The violation, as Inspector Phillips explained, poses the discrete hazard of the loader rolling backwards down the grade which is more likely to occur if the wheels are not turned or chocked. If the loader did start to move, it would likely move only a foot or two before it stopped itself. In this case, Collins would not have been killed. (Tr. 141.) As is evident from this event, the hazard of the loader rolling straight backwards while unattended is reasonably likely to result in a very serious, if not fatal accident.

The Secretary alleges UF for this violation on the same agency theory and I therefore find it is not UF. The gravity is very serious and the negligence is appropriately assessed as high. I assess the penalty at \$15,000.00.

4. Citation No. 6091422

This alleged §104(a) violation of 30 C.F.R. §46.7(a) was assessed by Inspector Phillips as having caused a fatal accident and S&S resulting from moderate negligence. The proposed penalty is \$22,000.00. The citation reads:

A fatal accident occurred at this operation on May 2, 2009 when a miner was run over by the end loader he was operating. The victim parked the end loader on an elevated ramp with the bucket in the raised position, wheels not chocked, and an untrained passenger in the operator's compartment with no seat provided. He had not received adequate training to perform the task of operating an end loader in a safe manner.

(S-4.)

The cited section of this mandatory standard requires the operator to:

[P]rovide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task, information about; the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the miner's HazCom program. This training must be provided before the miner performs the new task.

30 U.S.C. §46.7(a).

The Secretary supports her position in her post-hearing brief by stating that Collins parked the loader on the ramp without lowering the bucket or securing the wheels on numerous occasions. He also allowed his girlfriend to ride in the loader. She also asserts that other loader

operators were not properly trained. “These numerous violations by multiple people” raise a logical inference that when “repeated violations are committed by more than one person...it becomes increasingly likely that the problem lies in the training.” (Sec’s Post-Hearing Brief at 26.) The problem with this argument is that the Secretary presented no evidence that any other loader operators worked for Active, that there were any other violations of this standard by anyone else prior to the accident, or that Collins operated the loader improperly at any time other than on the night of May 2, 2009, or that anyone was aware of the improper operation of the loader by Collins on that night.

Also problematic with the Secretary’s theory of the violation is the Operator’s position that Collins was not an inexperienced loader operator. Paragraph (c) of the standard states that new task training is not required under paragraph (a) if the miner has similar task experience and can demonstrate the necessary skills to perform the task in a safe and healthful manner by observation. Nathan Southerland testified that he hired Collins as a loader operator. At the time he took him on, Collins had approximately 25 to 30 years of equipment operating experience, including the operation of front-end loaders. (Tr. 278-79.) The Secretary offered nothing to rebut this information. Southerland stated that he observed Collins operating the loader when Collins was on the day shift for a period of three to four weeks for a total time of approximately 40 hours on the same loader involved in the accident. (Tr. 276, 278.) The Secretary’s response to this testimony was that Southerland could not present documentation to prove this claim. Instead, Southerland produced the New Miner Training document R-14, which they assert has an insertion in the right margin indicating Collins was tasked trained on the loader for 3.5 hours and that this notation was added sometime after the accident occurred making it wholly unreliable. (Sec’s Post-Hearing Brief at 26-27.) Phillips testified that the independent contractor has the primary responsibility of conducting task training for their employees. He admitted that when he reviewed the task training document during the course of his investigation, he did see that Collins had received task training for 3.5 hours by IEC. (R-14 line second to the bottom indicates “task training” for 3.5 hrs.) Phillips clarified with Southerland that this was done and annotated on the form in April 2009. (Tr. 399-403.) In fact, Phillips said that he learned through conversation during the investigation that “the only thing was (sic) verified was that 3.5 hours ... (sic) for moving rock around, plus the 25 years (sic) experience.” (Tr. 404.) Southerland testified that he had never completed these training forms before and there was likely a mistake made by him in their completion. (Tr. 280-82.) It is reasonable to draw the conclusion from the testimony of Phillips that the training was done and the notation on the side of the document that clarified that the task training was for the loader was added later; not that a falsification of a record took place. Since Collins apparently did not operate any other equipment beside the front-end loader or perform any other tasks for Active, it is reasonable to conclude that the “task training” that appeared on the document at the time of the accident referred to front-end loader training.

The standard cited does not specify the amount of time during which an experienced miner must be observed in order for management to make the determination that he can operate the equipment in a safe and healthful manner. With 25 years of experience and having been observed for the three weeks Collins was on the day shift, Southerland believed Collins demonstrated sufficient skills to operate the loader safely and healthfully. There is no evidence to establish that this is an unreasonable amount of time in which to make this determination under the circumstances. Phillips testified that under Part 46, New Miner Training, the task training must be recorded within 90 days and any training outside of the first seven categories on the form must be recorded within 60 days.

The time periods for recordation of training is contained in 30 C.F.R. §46.9. A new miner is defined as “a person who is beginning employment as a miner ... who is not an experienced miner.” 30 U.S.C. §46.2. On the other hand, an experienced miner is as one who fits into a number of categories requiring far less than the 25 years of experience Collins had at the time he was hired in February 2009. Under the recordation standard, new miner training must be completed within the time periods mentioned by Inspector Phillips. For newly hired experienced miners, recordation must be completed 60 days after the miner begins work at the mine **or upon completion of new task training**. According to the evidence and as reflected on the training document, Collins was hired on 2/11/09 and his task training was documented on 4/17/09. If Collins had been observed during the first two to three weeks of his employment on the Active mine site, I do not find this is an untimely recording of task training for an experienced newly hired miner. Furthermore, the section of the standard under which Active was cited applies to new miners, not experienced newly hired miners.

The Secretary has not met her burden of proving a violation of the mandatory standard cited and the citation is vacated.

Docket No. SE-2010-38M

5. Citation No. 6117817

This alleged violation of 30 C.F.R. §56.14107(a) was issued by MSHA Inspector Wriston as reasonably likely to result in a permanently disabling injury affecting one person, S&S and the result of moderate negligence. It was later amended from a section 104(a) citation to a section 104(d) citation and from moderate to high negligence and UF on the agency theory because Goss committed the alleged violation. The proposed penalty is \$2,000.00.

The citation states that “a guard to prevent persons from contenting (sic) the plant infeed (sic)screw motor v-belt and drive assembly was not in place.” The amended citation further added the words “Leadman Goss engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the missing guard, and allowing (sic) the machine to run.”

(S- 5.)

The standard, 30 C.F.R. §56.1410(a) states as follows:

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.

It was this v-belt motor assembly that Collins was assisting Goss with on the night of the fatality. On the third occasion when Goss called Collins for assistance, Collins tripped over Hartline and was killed.

Danny Wriston has been an MSHA inspector for 21 years. His mining experience includes 15 years in underground coal mines as a foreman and fire boss, electrician and maintenance man. He reported to the accident site and took numerous photographs including S-21 A-D of the v-belt motor assembly. He found the guard to the motor depicted in S-21 C lying on the ground leaving the moving parts of the motor exposed. As he explained, the clay travels from the hopper to the in-feed screw, as the screw turns the material is carried along the belt into the plant for processing. Along this assembly line, there are several pinch points at the upper and lower pulleys that make up the motor drive. The lowest moving exposed part was 18” off the ground, the second one approximately 36” off the ground and the third one another six inches higher. (Tr. 231-36.) Goss told Wriston that he had removed the guard at approximately 6pm because it was making noise. He ran the plant until the time of the accident without the guard in place. Goss confirmed by his testimony that he operated the motor for several hours after he removed the guard. (Tr. 374-76, 385-86.)

Active refers to a maintenance exception under a different standard than the one cited as a permissible justification for removing the guard while operating the motor. 30 C.F.R. §56.14105 provides that “machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.” They argue that the Secretary has cited the wrong standard and even if it she has not, there was little likelihood that anyone would be exposed to injury as Goss observed Collins standing a safe distance away from the motor when he was asked by Goss to listen to the motor.

The Secretary correctly refutes this argument by pointing out that the cited standard more specifically applies to guards and is therefore the controlling standard to cite in this situation. Furthermore, Goss went back into the laboratory building and Collins returned to the loader and continued to operate for some lengthy period of time while the guard remained on the ground. Tr. 257. Wriston testified that based upon his experience with this type of motor, there would be no need or it would be completely unsafe to try to adjust it while it was running. Tr. 261. I credit the experienced opinion of Inspector Wriston and find this standard has been violated.

Wriston testified that he assessed the violation as S&S because the unguarded condition of the motor created a hazard of exposing moving parts and pinch points which could cause the loss of a finger or limb given the height of the motor from the ground. (Tr. 236.) According to Wriston, the condition of the ground surrounding the motor was rocky and uneven and it was dark outside. (S-21; Tr. 243.) Wriston also stated that being five feet away from the motor would not be close enough to enable someone to determine what the cause of the malfunction. It would, however, be an unsafe distance to stand because it would be within the height of an average person plus the length of the arms meaning it was close enough for someone to come in contact with it if they tripped. (Tr. 263-64.) I give substantial weight to Inspector Wriston's opinion that it was reasonably likely that an injury of a reasonably serious nature would result from this violation and find it was properly assessed as S&S.

For the same reasons as set forth above, I do not find this violation to be UF but find it to be the result of a high degree of negligence. Not only was there a complete lack of supervision for the entire 12 hour night shift for a period of almost two months, but, Goss testified that the motor had been malfunctioning during the day shift and management had to be aware of this. (Tr. 349.) Still, knowing that Goss would have to fix the motor in order to run the plant, Active did not find it necessary to have a foreman present to oversee the shift. I find the proposed assessment of \$2,000 appropriate.

III. PENALTIES

Section 110(i) of the Act requires the Commission and its administrative law judges, through its delegation of authority, to consider the following statutory factors:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of 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. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to [her] and shall not be required to make findings of fact concerning the above factors.

30 U.S.C. §820(i).

The Secretary has submitted information that the Respondent had no prior violations in the prior five months that it had been in operation and had 32 violations in all of Respondent's mines combined in the past 15 months. The Respondent has stipulated that the mine reported

7,314 controller hours worked in calendar year 2009 and 253,450 controller hours in 2008 in other mines; and, that the proposed penalties will not affect the operator's ability to continue in business. The Secretary does not dispute the Respondent's good faith effort to achieve compliance after notification of the alleged violations. (Sec's Post-Hearing Brief at 34.)

The gravity and negligence have been addressed within the discussion under Findings and Conclusions of Law above. I have also found that the operator did not have knowledge of the violative conduct engaged in by Collins and Goss, however, I do not find that fact or any other factors argued by Active mitigates the high negligence in the total lack of supervision of the night shift by the operator.

The following penalties are assessed in consideration of the statutory factors under 110(i) of the Act: 1) Citation No. 6091419, \$50,000; 2) Order No. 6091420, \$10,000; 3) Order No. 6091421, \$15,000; 4) Order No. 6091422, Vacated; 5) Citation No. 6117817, \$2,000.

IV. Order

Citation Nos. 6091419 and 6091422 and Order Nos. 6091420 and 6091421 under Docket No. SE 2010 -741M are **Modified** to not UF with High negligence and are **Affirmed as modified**. Citation No. 6091422 under Docket No. SE 2010-741M is **Vacated**. Citation No. 6117817 under Docket No. SE 2010-38M is **Modified** to not UF with High negligence and is **Affirmed as modified**. Respondent is hereby **ORDERED** to pay the sum of \$77,000 within 30 days.

/s/ Priscilla M. Rae

Priscilla M. Rae
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th Street, Suite 443
Denver, CO 80202-2500
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November 10, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. CENT 2010-1270-M
Petitioner	:	A.C. No. 13-00733-227841
	:	
v.	:	Northern Filter Media Plant/Quarry
	:	
NORTHERN FILTER MEDIA, INC.,	:	

ORDER DENYING MOTION TO APPROVE SETTLEMENT

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 Northern Filter Media, Inc. (“Northern Filter”) 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 three citations issued under section 104(a) of the Mine Act. 30 U.S.C. § 814(a). When the case was filed, the Secretary proposed a total penalty of \$55,056.00 for the citations.

The citations were issued following a serious accident at the plant. Citation No. 6494552 alleges a violation of 30 C.F.R. § 56.14107(a) and states that a miner was seriously injured when he became entangled in the drive shaft and the stub on the main feed conveyor in a screen unit. The citation alleges that no guards were provided for the head pulley, the head pulley drive shaft, and the stub shaft of the main feed conveyor. The citation was specially assessed under 30 C.F.R. § 100.05 and the proposed penalty is \$52,500.00. In the motion to approve settlement, the Secretary simply states that the Northern Filter alleges that the injured miner “accessed the area contrary to all mine rules and procedures by climbing over a guard rail on the adjacent walkway and climbing out on an I-beam to try to manually work on cleaning the conveyor. . . .” (Sec’y Motion 2). She states that Northern Filter alleges that the miner’s actions were “completely unreasonable, unexpected, and without prior incident at this mine.” *Id.* In her justification for the 80% reduction in the penalty, the Secretary’s motion states: “Based on these allegations of the operator’s low negligence and the miner’s idiosyncratic behavior and the Secretary’s reevaluation of the 110(i) criteria, the Secretary proposes a revised penalty of \$10,000 with no changes to the paper, which is sufficient to ensure future compliance with the [Mine] Act.” *Id.*

Citation No. 6494548 alleges a violation of section 56.15005 because the injured miner was not wearing fall protection when he climbed onto the I-beam. The Secretary proposes to reduce the proposed \$1,026 penalty for this alleged violation by about 50% for the same reason as the guarding citation. Citation No. 6494551 alleges a violation of section 56.14105 because the injured miner accessed the head pulley of the subject feed conveyor without first shutting the

unit down and blocking it against motion. The Secretary proposes to reduce the proposed \$1,530 penalty for this alleged violation by about 50% for the same reason as the guarding citation.

Administrative law judges of the Federal Mine Safety and Health Review Commission have the duty to review proposed settlements in accordance with the provisions of section 110(k) of the Mine Act, which provides, in relevant part: “No proposed penalty, which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission.” 30 U.S.C. § 820(k). The Commission has held that section 110(k) “directs the Commission and its judges to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act’s objectives.” *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981). The Commission rejected the notion that “Commission judges are bound to endorse all proposed settlements of contested penalties.” *Id.* at 2479. “Rejections, as well as approvals, should be based on principled reasons.” *Id.*

In this case, the motion to approve settlement does not set forth sufficient information for the court to determine whether the proposed settlement is in the public interest or is consistent with the Mine Act’s objectives. The Secretary states that Northern Filter alleges that the behavior of the injured miner was idiosyncratic with the result that its negligence was low, but the Secretary has not proposed to reduce the negligence alleged in the citation. She seems to have accepted North Filter’s characterization at face value. Section 110(i) of the Mine Act sets forth the criteria to be used in assessing penalties. Did the Secretary rely on these criteria when formulating her proposal to reduce the penalty for Citation No. 6494552 by 80%? If so, what criteria did she take into consideration? For example, were such criteria as the size of Northern Filter or its history of previous violations factors? No such information is presented in the motion. She simply states that the reduced penalty of \$10,000 is “sufficient to ensure further compliance with the Act.” The motion does not set forth how she arrived at that conclusion or what factors she considered when she determined that \$10,000 was “sufficient.”

This court cannot approve the proposed settlement as submitted by the Secretary. The citations allege that a miner was seriously injured because Northern Filter violated three different safety standards, yet the motion fails to explain why the penalties were compromised to such an extent. Other Commission administrative law judges have denied motions to approve settlement because the Secretary’s motion did not provide sufficient detail to enable Commission review. *See, e.g. Alaska Mechanical, Inc.*, 32 FMSHRC 738 (June 2010) (Chief Judge Lesnick); *Marfork Coal Co.*, 32 FMSHRC 1919 (Nov. 2010) (Judge Moran); and *The American Coal Co.*, 33 FMSHRC 1033 (April 2011) (Judge McCarthy).

For the reasons set forth above, the motion to approve settlement is **DENIED**. The parties shall attempt to renegotiate a settlement and set forth the terms of that settlement in sufficient detail so that the terms of the settlement can be reviewed by this court. If the parties cannot reach an agreement within 40 days, they shall contact my office to schedule a conference call in order to set a hearing date.

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

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November 14, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2010-495
Petitioner	:	A.C. No. 15-19310-207048
	:	
	:	Docket No. KENT 2009-346
v.	:	A.C. No. 15-19310-204226
	:	
	:	CONTEST PROCEEDING
	:	Docket No. KENT 2010-249-R
	:	Order No. 8237126; 11/13/2009
	:	
AUSTIN POWDER COMPANY,	:	Mine: F10 Alum Luck
Respondent	:	

ORDER ON RESPONDENT’S MOTION FOR SUMMARY DECISION

Respondent Austin Powder Company (“Austin”), has filed a motion for summary decision, pursuant to 29 C.F.R. § 2700.67, pertaining to two violations cited by MSHA, Citation Number 8237123, (hereinafter “Citation”), a section 104(d)(1) citation¹ and Order Number 8235035, (hereinafter “Order”), a section 104(d)(1) order. Reduced to their essence, both matters involve alleged ground control violations; the Citation asserting that flyrock was ejected beyond the permit blast area; and the Order asserting that there was a failure to have highwalls “presplit.” Austin contends that “[b]ecause a flyrock event alone is not a violation of the Ground Control Plan, and because Austin Powder complied with every provision of [its] Ground Control Plan, the Orders (sic) must be vacated as a matter of law.” Motion at 2.² For the reasons which follow, Austin’s Motion is **DENIED**.

In a motion for summary decision, the moving party must meet its initial burden of demonstrating an absence of genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). If the moving party fails to meet this initial burden, the motion must be denied, *regardless of the nonmovant’s response*. *U.S. v. \$92,203.00 in U.S. Currency*, 537 F.3d 504,507

¹ Respondent incorrectly describes the actions as *two* Section 104 (d) orders when in fact there is only one order involved. Number 8237123, is a 104 (d)(1) citation, while the other, number 8235035, is a (d)(1) order.

² Citations to Austin’s Motion actually refer to its accompanying memorandum in support, an 18 page document.

(5th Cir. 2008). Upon review of Austin's Motion, it became clear to the Court that Respondent failed in its burden of establishing that there is no genuine issue of any material fact and further failed to demonstrate that it is entitled to summary decision as a matter of law. Here, the Motion was deficient to the point that there was no need for the Court to wait for MSHA's response.

Austin Powder's Motion

Austin relates that on August 28, 2009 a blasting at its mine caused a rock to exit the mine property, damaging a nearby home. A revised ground control plan resulted and, among other aspects, that revised plan "required that shots be designed and fired so as to not have 'direct backpressures towards any outside areas or open faces that do not have sufficient support to prevent material from being ejected from the permitted area or producing flyrock.'" Motion at 2-3. Respondent declares that "the plan was silent as to whether pre-split holes were required to be drilled and shot." *Id.* at 3. Austin further asserts that, after the remedial plan was in place, MSHA was present during "initial detonations" in which no pre-splitting was done and that MSHA did not inform Austin that pre-splitting was required. *Id.*

Respondent admits that less than 2 months after the August 2009 blasting event, as described above, another event occurred in which flyrock struck a home, causing a hole in the home's roof. However, Austin denies that hole in the home's roof was created by flyrock. That *disputed event* at least resulted in MSHA's issuance of Citation Number 8237123, the section 104 (d)(1) citation, issued on October 28, 2009. Then, two days later, MSHA issued Order Number 8235035, alleging the failure to pre-split before blasting.

As Respondent also admits, the remedial blast plan "begins on page 8 of [its] Revised Ground Control Plan." ("Revised Plan") *Id.* at 4. Austin then proceeds to relate various aspects of the Revised Plan. In that process, it describes paragraph 13 of the Revised Plan as "[p]erhaps most pertinent to the case at hand." *Id.* at 5. As referred to above, Austin acknowledges that the provision states, "[T]he Blaster will neither design nor fire any blast with direct backpressures towards any outside areas or open faces that do not have sufficient support **to prevent material from being ejected from the permitted area or producing flyrock.**" *Id.* (emphasis added). Not exactly accomplishing the presumed goal of Respondent's Motion, as the Court sees it, Respondent's quoted provision from the Revised Plan suggests that a motion for summary judgment indeed may be in order, but *against* Austin.

Elaborating upon its arguments, Austin revisits Order number 8235035, and notes that several pages of the Ground Control Plan, pages 2, 3 and 4, all make reference to 'pre-splitting,' but Austin's key point is that the Remedial Blast Plan makes no reference to 'pre-splitting.' *Id.* at 7-8. The obvious point of Austin is that because the Remedial Blast Plan does not refer to 'pre-splitting,' it no longer applies. To demonstrate that the plan no longer carried over the requirement for pre-splitting, Austin points again to "[t]estimony" of its employees that the Remedial Plan applied. *Id.* at 8-9. There, it relates that its witnesses stated that no MSHA representative told Austin that pre-splitting was required during the initial blasts following the implementation of the remedial blast plan. *Id.*

Later in its Motion, Austin shifts the direction that its argument had been taking, to “evidence in the record” that the blast responsibility lies with the “blaster in charge,” not Austin. *Id.* Austin does not point to the location of that “evidence.” Similarly, it refers to “evidence in the record [which] demonstrates that it is the responsibility of the blaster in charge . . .” *Id.* at 5. Later in the same paragraph the Motion refers to the blaster’s failure to notify Austin, with no cite to a deposition or any other evidentiary source and, regarding whether flyrock constitutes a violation, and acknowledges there is “*testimony*” to the contrary. *Id.* Conflicts in testimony are anathema to a motion for summary judgment.

Austin then moves to the second “Order,” Order number 8237126, this time referring to a section 104(b) Order, which was issued on November 13, 2009. That Order refers to a flyrock event, described in the Order as “flyrock . . . left the mine property, and struck the roof of a home in Ousley Branch” which event is alleged to have occurred on October 20, 2009. This is the Motion’s first reference to Order number 8237126, but at least it is the Order contained in Austin’s contest as set forth in KENT 2010 0249. Confusion aside, Austin makes two points. First it refers to the “testimony” of MSHA inspector Todd Belcher, who in his deposition apparently conceded that flyrock can occur under any Blast Plan. However, Mr. Belcher apparently also stated in his deposition that the blast in issue was not designed “with direct back pressures towards any outside area or open face.” *Id.* at 11. This issue, preventing “direct back pressures,” is part of the allegation within Citation No. 8237123. Accordingly, for this event too, Austin is maintaining that the Remedial Plan did not require pre-splitting and that, in any event, if blame is to be placed, it must be on the “blaster-in-charge,” which individual, Austin states, “was not an agent of the Operator.” *Id.* The problem for Austin is that, in its own Motion it acknowledges there is an evidentiary conflict.

The final parts of Austin’s Motion, as contained in parts “V” and “VI,” entirely leave the realm of summary judgment, asserting that the unwarrantable failure findings in Order 8235035 and Order 8237126, should be vacated. *Id.* at 12- 16. Here, Austin submits that “[e]ven if the first seven pages of the plan are ultimately deemed valid, it was a reasonable interpretation on the part of Austin Powder to strictly follow the Remedial Blast Plan beginning on page 8.” *Id.* at 13. This claim, literally using Austin’s own words, as just described above, contains an incredible assertion, as Austin has contended that the Blast Plan, in its Remedial form, starts on page 8, the previous 7 pages having vanished.³ To support this aspect of its motion for summary decision, Austin points to the “belief” of Mr. Dean and a Mr. Allen, two Austin employees, that pre-splitting was no longer required. When those beliefs are combined with MSHA’s apparent failure to cite Austin for a violation for failure to pre-split, until the orders which are the subject of this proceeding were issued, Austin maintains that this demonstrates an absence of unwarrantable failure, as there was no “reckless disregard, intentional misconduct, indifference, or lack of reasonable care.” *Id.* at 14. A similar argument that there was no unwarrantable

³ Further establishing that the Motion is not appropriate for summary judgment, Austin’s own Exhibit “A,” attached to its motion, which is a letter, dated September 11, 2009, from MSHA about the Revised Updated Ground Control Plan, states that “[t]he plan, *consisting of (26) pages*, is acknowledged.” (emphasis added). This cover letter, by itself, demonstrates a material fact in dispute as to the contents of the Plan and whether, as Austin submits, the plan now begins, not at the beginning, but on page 8.

failure follows for Order 8237126.⁴ It is hard to see how the Court is to deal with challenges to unwarrantable failure findings in the context of dealing with a motion for summary judgment seeking to have the violations vacated.

Reading Austin's Motion, it became clear to the Court that Counsel had confused the requirements necessary to prevail in a motion for summary judgment and then proceeded to jumble into the mix claims which inferentially concede the violations while asserting they were not unwarrantable. Acknowledging, as Austin's Motion does, conflicts in "testimony"⁵ are exactly the kind of problem that all summary judgment motions are to avoid. As Austin's counsel admits in its Motion, "there must be no genuine issue as to any material fact." *Id.* at 6. Further, Austin's motion glides between deposition statements and other, unspecified "evidence in the record" when in fact there is no evidence *in the record* at this point. Statements made during a deposition are not alternative "testimony" and are useful only when offered to show uncontested facts.⁶

These contentions, as with Austin's earlier arguments, are not appropriate for summary judgment. To be direct, through its own submission Austin has failed to establish that there are no genuine issues of dispute on these issues. Thus, as it concedes, there are facts in dispute.

⁴ MSHA certainly has not conceded that the facts warrant a finding that there is no "unwarrantable failure" on Austin's part.

⁵ As disconcerting feature of Respondent's Motion is its penchant for describing a deposition as "testimony." *See*, for example, Motion at 3. The Court assumes that Austin was really referring to depositions. *See*, for example, *Dembin v. LVI Services, Inc.* 2011 WL 5374148S.D.N.Y.,2011, (November 8, 2011) at n. 1.

⁶ In making this determination, the court must view all of the evidence "in the light most favorable" to the non-movant. *Breland-Starling v. Disney Publishing Worldwide*, 166 F.Supp.2d 826, 829 (S.D.N.Y.2001) In addition, the court must resolve all ambiguities and draw all inferences in favor of the party opposing the motion. *Ackerman v. National Financial Systems*, 81 F.Supp. 2d 434 (E.D.N.Y.2000).

More importantly, as explained *supra*, Austin has, from the start to the finish of its Motion, completely failed to establish that summary judgment is appropriate. Given the insurmountable deficiencies in its Motion, there is no need for the Court to await a response from the Secretary of Labor as the Motion fails on its own terms. Accordingly, it is DENIED.

The parties are directed to advise the Court not later than noon EST, Wednesday, November 16, 2011 as to whether these matters will still need to proceed to the hearing, as presently scheduled to commence on Monday, November 21st in Pikeville, Kentucky. The parties are directed to so inform the Court at the Court's email addresses, which addresses are known to them or they may arrange, also by email, for a conference call on November 16th.

SO ORDERED.

/s/ William B. Moran

William B. Moran
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 14, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2011-84
Petitioner	:	A.C. No. 05-04674-231645-01
	:	
v.	:	
	:	
OXBOW MINING, LLC.,	:	Elk Creek Mine
Respondent	:	

**ORDER DENYING SECRETARY’S MOTION
TO SUPPLEMENT THE RECORD**

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 Oxbow Mining, LLC, (“Oxbow”) 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”). An evidentiary hearing was held in this proceeding, along with other cases, on October 18 and 19, 2011. One of the matters that was adjudicated at the hearing was Citation No. 8469436, which alleges a violation of section 75.202(a) of the Secretary’s safety standards. 30 C.F.R. § 75.202(a). In that citation, MSHA Inspector Jack Eberling alleged that when the cited “rock was barred down, a large rock broke off and rolled into the walkway.”

On October 24, 2011, the Secretary filed a motion to supplement the record. In the motion, the Secretary alleges that two of Oxbow’s witnesses testified that the “uncontrolled material at issue in Citation No. 8469536 . . . remained against the rib wall and/or in the mesh screen after being barred down.” (Motion at 1). She avers that this testimony is directly contradicted by a response provided by Oxbow in the Secretary’s first request for admissions and first set of interrogatories. When asked to admit in Request for Admission No. 9 that “a portion of the loose rock . . . rolled into the walkway when it was barred down from the wire mesh,” Oxbow denied the request for admission. *Id.* When asked to explain its denial in Interrogatory No. 12, Oxbow objected to the interrogatory as overly “broad and burdensome” but then went on to state that “when the rock was barred down from the rib screen it hit the mine floor and that portions of it did roll toward the tailpiece.” *Id.* at 2.

The Secretary seeks to have Oxbow’s answer to Interrogatory No. 12 admitted into evidence. She states that the testimony of Inspector Eberling directly contradicted the testimony of Oxbow’s witnesses on “a number of important points,” including with respect to what happened when an Oxbow miner barred down the cited rock. Oxbow’s witnesses testified that

the rock fell behind the wire mesh that had been previously installed on the rib. The inspector testified that a large portion fell into the entry. The inspector relied on this fact when he determined that a significant and substantial violation of section 75.202(a) occurred. The Secretary argues that the “[a]ssessment of credibility is . . . one of the most important findings which the Court will be required to make in determining the fact of violation and the appropriate criteria alleged. . . .” *Id.* at 2.

Counsel for the Secretary admitted that she “erred” in failing to move the admission of the discovery responses into the record at the hearing. She argues that admitting the answer to interrogatories will not prejudice Oxbow because such answers are “Respondent’s own statements, the subject of which (how the rock fell) was examined by Respondent at the hearing.” *Id.* at 2.

Oxbow opposes the motion. Oxbow agrees the witness credibility was a key component in this case. It argues that Federal Rule of Evidence 613 (“Fed. R. Evid. 613”) allows for impeachment of a witness by proof of a prior inconsistent statement. In this instance, however, there is no basis for the Secretary’s assertion that Oxbow’s responses to interrogatories were ever adopted or ratified by the miners who testified. As a consequence, the interrogatory answer cannot be used to impeach these witnesses. More importantly, Fed. R. Evid. 613(b) prohibits “extrinsic evidence of a prior inconsistent statement of a witness unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to also question the witness about the alleged prior inconsistent statement.” (Oxbow Resp. at 2). Oxbow argues that, because counsel for the Secretary was in possession of the interrogatory response at the hearing and failed to question Oxbow’s witnesses about the response, it was “prejudiced by its inability to question the witness about the alleged prior inconsistent statement.” *Id.*

I find that the Secretary’s motion should be denied for three reasons. First, any matter admitted in a request for admission is “conclusively established for the purpose of the pending proceeding.” (Commission Procedural Rule 58(b); 29 C.F.R. § 2700.58(b)). In this case, Oxbow denied the request for admission. As stated above, in response to the Request for Admission No. 9, Oxbow denied that “a portion of the loose rock . . . rolled into the walkway when it was barred down from the wire mesh.” (Oxbow’s discovery responses at 8). As a consequence, I cannot deem that the facts contained in this statement were conclusively established.

Second, although Commission judges are not bound by the Federal Rules of Evidence, I believe that it is appropriate to take Rule 613 into consideration because it is an indication of what I will call Federal common law on evidentiary matters relating to the impeachment of witnesses. The rule states that “[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon” Fed. R. Evid. 613(b). The rule goes on to state that this “provision does not apply to admissions of a party-opponent” *Id.* In this instance, the miners who testified on behalf of Oxbow were not given the opportunity to explain or deny the response to the interrogatory.

Third, the interrogatory response that the Secretary seeks to introduce is not clear on its face. In the response to the interrogatory, Oxbow states that “when the rock was barred down from the rib screen it hit the mine floor. . . .” The response does not state where the rock hit the floor. In the same response, Oxbow stated that “portions of it did roll toward the tailpiece.” The response does not state how large these “portions” were or how far they rolled. These details are important and they illustrate why extrinsic evidence of prior inconsistent statements should not be admitted without complying with the requirements of Fed. R. Evid. 613(b). Further uncertainty as to the meaning of the interrogatory response is created by Oxbow’s denial of Request for Admission No. 9, quoted above. The response to the interrogatory and the denial of the request for admission appear to be at least partially inconsistent. For that reason, the interrogatory response the Secretary seeks to enter into the record has little, if any, evidentiary value.

For the reasons set forth above, the Secretary’s motion to supplement the record is **DENIED**.

/s/ Richard W. Manning

Richard W. Manning
Administrative Law Judge

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November 15, 2011

SECRETARY OF LABOR,)	CIVIL PENALTY PROCEEDING
UNITED STATES DEPARTMENT)	
OF LABOR (MSHA)	)	Docket No. WEVA 2011-1859
Petitioner	)	Case No. 000255393
)	
v.)	
	)	Mine: Seng Creek Powellton
ELK RUN COAL COMPANY,)	
Respondent)	

**ORDER GRANTING SECRETARY'S MOTION TO AMEND HER PETITION
FOR THE ASSESSMENT OF CIVIL PENALTY AND DENYING
RESPONDENT'S COUNTER-MOTION TO DISMISS**

The Secretary filed a Motion to amend her petition for the assessment of a civil penalty in the above-captioned matter. Thereafter, Elk Run Coal, through Counsel filed its Objection and Response to the Motion and a Counter-Motion to Dismiss. The Secretary then filed a Reply to Respondent's filing and Respondent, in turn, filed a Response. The Court fully considered all the submissions and rules that the **Secretary's Motion is GRANTED** and **Respondent's Counter-Motion is DENIED**.

The Court will not engage in a lengthy discussion of the Respondent's arguments in its Response to the Secretary's Motion to amend the petition, nor in its Counter-Motion to Dismiss, nor with its Response, except to state that the Respondent's arguments were read and considered and thereupon found to be *completely* without any merit. Rather than re-invent the wheel, the Court incorporates by reference the Secretary's Reply as an Appendix to this decision. Further comment from the Court is not warranted.

SO ORDERED.

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

APPENDIX

UNITED STATES OF AMERICA
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC

SECRETARY OF LABOR,	)	CIVIL PENALTY PROCEEDING
UNITED STATES DEPARTMENT)	
OF LABOR (MSHA)	)	Docket No. WEVA 2011-1859
Petitioner,	)	Case No. 000255393
)	
v.)	
	)	Mine: Seng Creek Powellton
ELK RUN COAL COMPANY,)	
Respondent)	

**SECRETARY OF LABOR’S REPLY TO ELK RUN COAL COMPANY, INC.’S
OBJECTION AND RESPONSE TO THE SECRETARY’S MOTION TO AMEND THE
PETITION AND COUNTER-MOTION TO DISMISS**

The Secretary of Labor (“Secretary”), by the undersigned attorney, hereby opposes Elk Run Coal Company’s (“Respondent”) Objection and Response to the Secretary’s Motion to Amend the Petition and Counter-Motion to Dismiss in the above-captioned matter. The Secretary respectfully requests that the Administrative Law Judge grant her Motion to Amend, which is hereby incorporated by reference, and deny Respondent’s motion to dismiss.

REPLY TO OBJECTION AND RESPONSE TO MOTION TO AMEND

Jim Reynolds, a section foreman employed by Respondent, was served with the original order on September 28, 2010, as well as with the April 11, 2011, and April 28, 2011, supplements, which modified the order to a significant and substantial (“S&S”) violation. MSHA’s Office of Assessments (“Assessments”) issued its proposed assessment for Order No. 8110602 on May 18, 2011, subsequent to the April modifications. This demonstrates that Respondent was on notice – prior to the issuance of MSHA’s initial, erroneous, proposed assessment – that the order should be assessed as S&S. The Secretary’s amended, proposed assessment of \$52,500.00 was calculated based on the modified order in accordance with Assessments’ procedures and is therefore justified by the facts and law. Respondent has not shown any legally cognizable prejudice as a result of this amendment.

Respondent confusingly argues that the Secretary cannot amend her proposed assessment for Order No. 8110602 prior to the Commission’s *de novo* review of that assessment. However, it is precisely because the Commission has the right of *de novo* review that amendments should be freely granted. *Accord Sec’y of Labor v. New Haven Trap Rock-Tomasso*, 1 FMSHRC 504, 504-506

(FMSHRC ALJ June 5, 1979). Neither Respondent nor the Commission is “bound” by the Secretary’s proposed assessment, and Respondent can seek the Commission’s review to prove that the Secretary’s proposal is not supported by the facts. *See id.* Consequently, Respondent is protected from any abuse of the assessment by the Secretary process because the Commission operates as a check on her power.

REPLY TO COUNTER-MOTION TO DISMISS

In its Counter-Motion to Dismiss, Respondent asks the Commission to dismiss the Secretary’s petition and vacate her proposed assessment because it was not issued within a “reasonable time,” as contemplated by § 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (“Act”).¹ Respondent relies almost exclusively on the August 22, 2011, Order of Dismissal issued by Administrative Law Judge Thomas P. McCarthy in *Secretary of Labor v. Long Branch Energy*, Docket Nos. WEVA 2010-467, *et al.* (FMSHRC ALJ August 22, 2011) (“Order of Dismissal”). This argument is baseless, as the *Long Branch* decision does not address the subject situation. Further, pursuing such a position demonstrates Respondent’s fundamental lack of understanding of the legal requirements for timeliness under the existing precedential Commission and federal appellate case law.

It is the Secretary’s position that her proposed assessment for Order No. 8110602 was issued within a “reasonable time.” The original, proposed assessment was issued within eight months of MSHA writing Order No. 8110602. Given the number of violations that Assessments must process, eight months is a typical – and reasonable – timeframe for the issuance of a special assessment. Specially assessing a violation involves numerous MSHA personnel located in various offices. The Commission is well aware that nothing like the current backlog of cases has been seen in the history of the Act. *See, e.g., Sec’y of Labor v. Maple Coal Co.*, 32 FMSHRC 726, 737 (Chief ALJ Lesnick June 15, 2010) (There is an “unprecedented number of cases” before the Commission and an “unprecedented number of penalty petitions pending before the Secretary . . .”). Before these violations become cases for litigation, they must be processed by Assessments. Accordingly, Assessments is directly impacted by the increased number of violations issued by MSHA and by the increased number of violations *contested* by operators like Respondent. Workload constraints and the logistics of coordinating among the offices involved in assessing proposed penalties demonstrate adequate cause for any alleged delay in the subject assessment’s issuance to Respondent.²

Even if an eight-month processing period were not reasonable, the remedy of dismissal sought by Respondent is unsupported by relevant law.

¹ Order No. 8110602 was written on September 28, 2010, and the Secretary issued her proposed assessment on May 18, 2011. She filed her motion to amend on September 6, 2011.

² The same justifications apply regarding amendment of the special assessment for Order No. 8110602. Once the Solicitor’s Office became aware of the inconsistencies regarding this proposed penalty, it worked with Assessments to properly assess the order in accordance with the relevant facts and law surrounding the subject violation.

Brock v. Pierce County Precludes Dismissal of These Proceedings

Respondent's Counter-Motion to Dismiss is subject to the principles set forth by the Supreme Court in *Brock v. Pierce County*, 476 U.S. 253 (1986). In *Brock*, the Court addressed whether the Secretary of Labor lost the authority to recover misused funds under the Comprehensive Employment and Training Act because he failed to issue a final determination of misuse within the 120-day period specified for such action in the statute. The Court began its analysis by stating:

This Court has frequently articulated the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided. We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.

476 U.S. at 260 (citations, internal quotation marks, and footnote omitted). The Court then analyzed the statutory language and design and the legislative history and determined that there was “simply no indication . . . that Congress intended to remove the Secretary’s enforcement powers” if he failed to issue a final determination within the 120-day period. 476 U.S. at 266. The Court concluded that Congress intended the 120-day period “to spur the Secretary to action, not to limit the scope of his authority.” 476 U.S. at 265.

Since *Brock*, the Supreme Court has never construed a “provision that the Government ‘shall’ act within a specified time, without more, as a jurisdictional limit precluding action later.” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158-159 (2003) (summarizing cases). Likewise, the D.C. Circuit Court of Appeals has followed suit and never construed such a provision as divesting the Government of authority to act. *See, e.g., Bro. of Railway Carmen Div., Transportation Communications Int’l Union v. Pena*, 64 F.3d 702, 704 (D.C. Cir. 1995); *Gottlieb v. Pena*, 41 F.3d 730, 733-37 (D.C. Cir. 1994) (summarizing cases). Underlying all of the case law is the principle that “[t]here is no presumption or general rule that for every duty imposed upon . . . the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent.” *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990) (citation omitted). When Congress has not affirmatively indicated that the Government's failure to act within a specified time limit precludes it from subsequently acting to enforce the law and protect the public, courts should not, and cannot, “invent a remedy to satisfy some perceived need to coerce . . . the Government into complying with the statutory time limit[.]” *Montalvo-Murillo*, 495 U.S. at 721. *Accord Brock*, 476 U.S. at 265-66; *Gottlieb*, 41 F.3d at 734, 736.³

³ In *Long Branch*, Judge McCarthy held that the *Pierce County* line of cases does not apply to the late filing of a penalty petition because the requirement regarding penalty petitions is a “claims processing” rule that regulates the timing of motions during litigation. Order of Dismissal at 9-11. The issuance of a penalty proposal is fundamentally different; it constitutes initial agency enforcement action before adjudication has commenced.

The question in this case is whether there is “a clear indication,” *Railway Carmen*, 64 F.3d at 704, that Congress intended to authorize the Commission to remedy the Secretary's purported failure to propose a penalty “within a reasonable time” under Section 105(a) of the Mine Act by refusing to assess a penalty and thereby depriving the Secretary of the power to enforce the Act through the imposition of a penalty. The Secretary submits that there is “simply no indication,” *Brock*, 476 U.S. at 266, that Congress intended to authorize the Commission to devise such a drastic remedy.⁴ On the contrary, the Secretary submits, there are a number of strong indications that it did not.

The foregoing analysis is supported most explicitly by the text and the legislative history of Section 105(a) itself. Section 105(a) merely states that the Secretary shall propose a penalty “within a reasonable time after the termination of [an] inspection or investigation” that results in the issuance of a citation or order. Section 105(a) specifies no consequence if the Secretary fails to propose a penalty “within a reasonable time.” Significantly – indeed, the Secretary submits, dispositively – the report of the Senate Committee that drafted the provision that became Section 105(a) stated:

After an inspection, the Secretary shall within a reasonable time serve the operator by certified mail with the proposed penalty to be assessed for any violations. The bill requires that the representative of miners at the mine also be served with the penalty proposal. To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and the miner representative promptly. The Committee notes, however, that there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and *the Committee does not expect that the failure to propose a penalty promptly shall vitiate any proposed penalty proceeding.*

S. Rep. No. 95-181, 95th Cong., 1st Sess. 34, *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 622 (1978) (emphasis added). Refusing to assess a penalty for an affirmed violation is “vitiat[ing] [a] proposed penalty proceeding,” as is dismissing a penalty proceeding outright, the action Respondent moves for here.

In addition, the Secretary’s analysis is supported by Sections 110(a) and 110(i) of the Mine Act. Section 110(a) states that “[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of th[e] Act, shall be assessed a civil penalty by the Secretary” The first sentence of Section 110(i) states that “[t]he Commission shall have authority to assess all civil penalties provided in th[e] Act.” Both the courts and the Commission have interpreted the quoted provisions to mean that a penalty must be assessed

⁴ In this case, as in *Brock*, there were “less drastic remedies available for failure to meet a statutory deadline.” *Brock*, 476 U.S. at 260. If Respondent was concerned that the Secretary's delay in proposing a penalty was defeating its ability to obtain a penalty proposal that could be reviewed by the Commission and a court of appeals, it could have applied, for example, for a court order compelling the Secretary to propose a penalty. *See Gottlieb*, 41 F.3d at 734 (citations omitted).

for every violation of a standard. *Asarco, Inc.-Northwestern Mining Dept. v. FMSHRC*, 868 F.2d 1195, 1197-98 (10th Cir. 1989); *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Sec’y of Labor v. Spurlock Mining Co.*, 16 FMSHRC 697, 699 (1996); *Sec’y of Labor v. Tazco, Inc.*, 3 FMSHRC 1895, 1896-97 (1981). As the Commission explained in *Tazco* after analyzing the quoted provisions and the relevant legislative history:

The language of the two subsections – indeed, the language of all of section 110 – is plainly based on the premise that a penalty will be assessed for each violation at both the Secretarial and Commission levels.

...

[B]oth the text and legislative history of section 110 make clear that the Secretary must propose a penalty assessment for each alleged violation and that *the Commission and its judges must assess some penalty for each violation found.*

3 FMSHRC at 1896-97 (emphasis added). *Accord Sec’y of Labor v. Old Ben Coal Co.*, 7 FMSHRC 205, 208 (1985), and cases there cited. “When a violation occurs, a penalty follows.” *Asarco*, 868 F.2d at 1197.

The Secretary’s analysis is also supported by the second sentence of Section 110(i). That sentence states that, in assessing penalties, the Commission “shall consider” six factors: (1) the operator’s history of previous violations, (2) the appropriateness of the penalty to the size of the operator’s business, (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 operator’s good faith in attempting to achieve rapid compliance after notification of the violation. It is an established principle of statutory construction that the “mention of one thing implies the exclusion of another thing.” *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061 (D.C. Cir. 1995)). Because Section 110(i) specifies the six factors the Commission shall consider in assessing penalties, the Commission may not consider others. *See Ethyl*, 51 F.3d at 1058, 1061 (because the statute specified the factors on which EPA was to base its decisions, EPA could not consider others). The Commission has recognized as much and has repeatedly held that, in assessing penalties, it and its judges may not consider factors other than the six factors specified in Section 110(i). *See, e.g., Sec’y of Labor v. RAG Cumberland Resources LP*, 26 FMSHRC 639, 658-59 (2004) (The judge erred in considering “a breach of a fundamental Mine Act purpose[.]”), petition for review denied by *Cumberland Coal Resources v. FMSHRC*, 171 Fed.Appx. 852 (D.C. Cir. 2005); *Sec’y of Labor v. Ambrosia Coal & Construction Co.*, 18 FMSHRC 1552, 1565 (1996) (the judge erred in considering deterrence). If the Commission may not assess a penalty on the basis that that penalty will deter the operator from committing future violations, accordingly, it may not refuse to assess a penalty on the basis that that refusal will coerce the Secretary into acting more promptly in future cases.

When the first sentence of Section 110(i) is read in context – that is, read in conjunction with Section 110(a) and with the second sentence of Section 110(i) – it compels the conclusion that the Commission must assess a penalty for every violation. The fact that Section 110(i) gives the Commission the authority *to* assess penalties does not mean that the Commission has the authority *to refuse* to assess penalties. Balancing of interests under the Act “is a task for Congress,” *Brock*, 476 U.S. at 266, not a task for the Commission. Had Congress intended to authorize Section 105(a)’s “reasonable time” provision to be applied as Respondent would have it applied here – an application that “bestow[s] upon the [mine operator] a windfall” and makes the safety of miners “forfeit to the accident of noncompliance with statutory time limits,” *Montalvo-Murillo*, 495 U.S. at 720 – Congress would have said so. It did not.⁵

Congress intended the imposition of a sufficient civil penalty to be “*the mechanism for encouraging operator compliance with safety and health standards.*” *Coal Employment Project v. Dole*, 889 F.2d 1127, 1132 (D.C. Cir. 1989) (internal quotation marks and citation to legislative history omitted) (emphasis added);⁶ *see also* 26 FMSHRC 666, 696 (2004) (Jordan and Young, Commissioners, dissenting) (Refusal to assess a penalty “can only erode a miner’s confidence in the agency’s ability to ensure that violations of mandatory health and safety standards will be subject to an appropriate sanction.”). Given the civil penalty’s role in encouraging compliance, refusal to assess a penalty would fundamentally undercut the mine safety and health program.

In sum, the Secretary submits that the meaning of the statute is plain: Congress did not intend to authorize the Commission to remedy the Secretary’s failure to propose a penalty “within a reasonable time” by resorting to the drastic remedy of refusing to assess any penalty at all. If the meaning of the statute is not plain – that is, if Congress’ intent is not unambiguous – the Secretary’s analysis is entitled to acceptance because it is reasonable.

⁵ Respondent notes that the Secretary would seek to hold it to the Commission’s filing deadlines if the parties roles were reversed, implying that fairness requires dismissal of the instant proceeding; however, such an implication represents “a classic apples-and-oranges-mix[.]” *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir.), *cert. denied sub nom. Consumer Federation of America v. FCC*, 534 U.S. 1054 (2001). In deciding what penalty to propose, the Secretary must carefully consider and weigh the six factors specified in Section 105(b)(1)(B) of the Act (the same factors specified in Section 110(i)); in deciding whether to contest a proposed penalty, the operator need only make a yes-or-no litigation decision and file a brief notice of contest. *See* Section 105(a) of the Act. In proposing a penalty, the Secretary acts to enforce an important public interest; in contesting a penalty, the operator does not. For both of these reasons, the fact that Congress imposed a 30-day requirement on the filing of penalty contests is in no way inconsistent with the conclusion that Congress intended to impose a longer, and directory rather than mandatory, time period on the issuance of penalty proposals. *See Gottlieb*, 41 F.3d at 735-36 (To accommodate the Secretary of Transportation’s stated need for flexibility “to ensure the just and fair handling of cases[.]” and “[i]n view of the complexities likely to be presented in individual cases and the competing interests at stake, Congress understandably required the Secretary to act promptly, but also declined to dictate what would happen if the Secretary failed to do so.”).

⁶ The Secretary fully appreciates the importance of the prompt imposition of penalties, and has implemented several measures to ensure that MSHA proposes penalties promptly. The statutory responsibility for ensuring that MSHA proposes penalties promptly, however, is vested with the Secretary, not with the Commission. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 64-65 (1993).

Secretary of Labor v. Twentymile Coal Company Precludes Dismissal of These Proceedings

The D.C. Circuit Court of Appeals ruled in *Secretary of Labor v. Twentymile Coal Company* that the Secretary's interpretation of the phrase "reasonable time," contained in § 105(a) of the Act, was deserving of deference. *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (The Secretary of Labor's issuance of a proposed civil penalty was made within a reasonable time when approximately 11 months elapsed between the conclusion of MSHA's accident investigation and the assessment of a civil penalty; approximately 17 months had elapsed between issuance of an order and the proposed assessment.). Concurring in the Commission's decision in *Secretary of Labor v. Marfork Coal Co.*, 29 FMSHRC 626, then Chairman Duffy observed that: "it is essentially the Secretary, not the Commission, and *certainly not the operator* who determines what time is 'reasonable' for purposes of Section 105(a)." 29 FMSHRC at 637-638 n.10 (2007) (Duffy, Chairman, concurring) (citing *Twentymile Coal Co.*, 411 F.3d at 261-62) (emphasis added).

The Operator alleges that approximately eight months elapsed between the issuance of the subject violation and the assessment of its proposed civil penalty. As the Commission and Respondent are both fully aware, MSHA has enhanced its enforcement efforts over the past five years and increased the number of inspectors employed nationally. As a result, the number of violations issued by inspectors has risen substantially; operators' contest rates of those violations have also increased dramatically. Consequently, the MSHA Office of Assessments must process civil penalties for an unprecedented number of violations. Under these circumstances, there was no unreasonable delay in MSHA's proposal of a penalty, and it is the Secretary's position that the Operator was notified about the proposed civil penalty within a reasonable period of time.

Respondent Cannot Show Legally Cognizable Prejudice

Even assuming the Commission could lawfully refuse to assess a penalty for a violation of the Act based on the Secretary's unreasonable delay in assessing such penalty, relevant law suggests that it should not do so without first considering whether the operator was prejudiced by that alleged delay. In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), the Supreme Court addressed when to excuse a party's failure to comply with a court-ordered filing deadline under the Bankruptcy Code – an issue analogous to the one in this case. The Court concluded as follows:

Because Congress has provided no other guideposts for determining what sorts of neglect will be "excusable," we conclude that the determination is at bottom an equitable one, taking into account *all relevant circumstances* surrounding the party's omission. These include . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

. . .

[T]he lack of any prejudice to the debtor or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, *weigh strongly* in favor of permitting the tardy claim.

507 U.S. at 395, 398 (citation and footnotes omitted) (emphases added). In so concluding, the majority specifically rejected the dissent's position that the Court should “permit judges to take account of the full range of equitable considerations only if they have first made a threshold determination that the movant is ‘sufficiently blameless’ in the delay” *Id.* at 395 n.14. Lower courts have applied the principles set forth in *Pioneer* to a variety of procedural situations and have emphasized that, under *Pioneer*, the absence of any prejudice to the moving party or the interests of efficient judicial administration, and the good faith of the nonmoving party, should be given particular consideration in deciding whether to grant a motion to dismiss. *See, e.g., George Harms Construction Co. v. Sec’y of Labor*, 371 F.3d 156, 163-64 (3d Cir. 2004) (applying Fed. R. Civ. P. 60(b)(1) to an Occupational Safety and Health Review Commission proceeding); *United States v. Brown*, 133 F.3d 993, 996-97 (7th Cir.) (applying Fed. R. App. P. 4(b) to a criminal appeal), *cert. denied*, 523 U.S. 1131 (1998)).

Courts have likewise held that prejudice is a critical factor when considering whether to impose dismissal or default for procedural errors under Federal Rules of Civil Procedure 55 and 60(b). *Draper v. Coombs*, 792 F.2d 915, 924-925 (9th Cir. 1986); *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 930 (5th Cir. 1976). In cases involving delay in issuing criminal indictments, the courts have consistently held that the objecting party must show prejudice. *See, e.g., United States v. Rein*, 848 F.2d 777, 781 (7th Cir. 1988).

Finally, the Commission itself has employed a similar analysis in addressing a similar situation under the Mine Act. In *Secretary of Labor v. Old Dominion Power Co.*, 6 FMSHRC 1886 (1984), *rev'd on other grounds*, 772 F.2d 92 (4th Cir. 1985), the operator argued that a citation should be dismissed on the ground that it was not issued with “reasonable promptness” within the meaning of Section 104(a) of the Mine Act, 30 U.S.C. § 814(a). The Commission rejected the operator's argument and emphasized:

Most important, . . . Old Dominion has not shown that it was prejudiced by the delay. Indeed, Old Dominion was aware from the time of its employee’s fatal accident that an investigation involving its actions was being conducted by MSHA, and it has been given a full and fair opportunity to participate in all stages of this proceeding.

Id. at 1894 (emphasis added).

In contravention of the principles set forth above, the Commission in previous cases has held that a showing of prejudice to the operator is not a prerequisite to an action by the Commission vitiating a proposed penalty proceeding, and that such prejudice is to be considered only after a

finding of adequate cause for delay in proposing the penalty. *See Sec’y of Labor v. Steele Branch Mining*, 18 FMSHRC 6, 14 (1996) (adopting the two-step analysis set forth by the Commission in *Sec’y of Labor v. Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089, 2092-93 (1993), *aff’d on other grounds*, 57 F.3d 982 (10th Cir. 1995)).

The Secretary respectfully suggests that the approach in *Steel Branch* and *Rhone-Poulenc* should be altered. Vacating a civil penalty is particularly inappropriate under the Mine Act because it represents a “drastic course . . . [that] would short circuit the penalty process and, hence, a major aspect of the Mine Act’s enforcement scheme.” *Rhone-Poulenc*, 57 F.3d at 984 (quoting *Salt Lake County Road Dept.*, 3 FMSHRC 1714, 1716 (1981)). Further, the *Twentymile* Court noted “that it would be particularly inappropriate to set aside the Secretary’s recommendation for penalty in this case given that Twentymile, after repeated opportunity, has yet to show any prejudice to itself from whatever delay in fact occurred.” 411 F.2d at 262. Respondent has not shown any legally cognizable prejudice based on the alleged delay in finalizing the proposed assessment of Order No. 8110602, as the Secretary calculated her amended “recommendation for penalty” based on the relevant facts and law, and the Commission’s *de novo* review provides protection against arbitrary actions on the Secretary’s part. Formal discovery has not commenced, an administrative law judge had not been assigned to preside over the case when the Secretary filed her Motion to Amend,⁷ and the facts upon which Respondent will base its defenses have not changed.

ALJ McCarthy’s Long Branch Decision is Inapplicable to the Instant Proceedings

On August 22, 2011, Administrative Law Judge McCarthy dismissed seven Long Branch Energy civil penalty dockets because the petitions for assessment of civil penalty had been filed after the submission deadline set forth in Commission Rule 28, which provides that “[w]ithin 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty.” *See* Order of Dismissal; 29 C.F.R. § 2700.28. In the subject case, the Secretary complied with both Commission Rule 28 and § 105(d) of the Act: the Operator contested the proposed civil penalty on May 27, 2011; forty-five days later, on July 11, 2011, the Secretary filed its petition for assessment of civil penalty. Accordingly, the *Long Branch* decision has no bearing on the instant matter; further, the decisions of Commission administrative law judges have no precedential value, and Judge McCarthy’s *Long Branch* opinion is on appeal at this time.

Given the parties’ responsibility to cite contrary precedents when presenting arguments to the Commission or its judges, we can only assume that Respondent overlooked or was not familiar with the *Twentymile* decision, a decision that actually addresses the legal concerns at issue here. Respondent’s specific references to Judge McCarthy’s Order of Dismissal belie such an oversight, as Judge McCarthy explicitly referred to the *Twentymile* decision in that order:

The standards pertaining to a proposed penalty under section 105(a) of the Act and a proposed penalty under section 105(d) starkly differ

⁷ An Order of Assignment and Prehearing Order, dated September 13, 2011, were stamped as received in the undersigned’s office on September 29, 2011. As noted above, the Secretary filed her Motion to Amend on September 6, 2011.

as to their purpose and implementation. A proposed penalty under section 105(a) is submitted to the operator once the process of inspecting or investigating the alleged violation is completed under section 104 and the assessment of monetary penalty is completed under section 110(a). *See* 30 U.S.C. §815(a). *Such a process potentially can take an extended period of time and thus Section 105(a) affords a more generous allowance for the Secretary to submit the proposed penalty within a “reasonable time.” Id. See generally Sec’y of Labor v. Twentymile Coal Co.*, 411 F.3d 261-62 (D.C. Cir. 2005) (examining the “reasonable time” standard as it applies to the untimeliness of the Secretary to submit the proposed penalty)

Order of Dismissal, at 6 n.5 (emphasis added). In short, Judge McCarthy himself not only referred to the *Twentymile* decision; he recognized, correctly, that it applies to the very issue presented here. By filing its motion to dismiss, Respondent has needlessly cost the Secretary and the Commission valuable time and resources that could have been better spent working towards resolution of legitimate legal disputes.

CONCLUSION

In light of the foregoing, the Secretary respectfully asserts that the Commission does not have the authority to dismiss this case for failure to comply with the timeliness requirements set forth in § 105(a) of the Act.

WHEREFORE, the Secretary respectfully requests that the Administrative Law Judge grant her Motion to Amend and deny Respondent’s Counter-Motion to Dismiss.

/s/ A. Scott Hecker
A. Scott Hecker
Attorney, United States Department of Labor

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

November 28, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-562
Petitioner	:	A.C. No. 15-18861-137278
v.	:	
	:	Docket No. KENT 2008-782
CONSHOR MINING, LLC,	:	A.C. No. 15-18861-143281
Respondent	:	
	:	Mine No. 1

ORDER

Before: Judge Feldman

These matters present novel issues concerning the appropriate standard for imposing enhanced civil penalties under the flagrant violation provisions of section 110(b)(2) of the Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006 (“Act,” “Mine Act,” or “New Miner Act”), 30 U.S.C. § 820(b)(2). Section 110(b)(2), which became effective on August 17, 2006,¹ following the Sago Mine disaster, increases the maximum civil penalty for extremely hazardous violations deemed “flagrant.” Section 110(b)(2) provides:

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

30 U.S.C. § 820(b)(2).²

¹ The language in section 110(b)(2) was initially the second and third sentences in section 110(b) of the New Miner Act enacted on June 15, 2006. On August 17, 2006, Congress passed a “technical correction” separating section 110(b) into the current paragraphs (1) and (2), with no substantive change in the statutory provision. See Pension Protection Act of 2006, Pub. L. 109-280, § 1301(3), 120 Stat. 780 (Aug. 17, 2006). Section 110(b)(1) is not in issue.

² The current maximum civil penalty for a violation of a mandatory standard that is not deemed flagrant is \$70,000. 30 U.S.C. § 820(a)(1).

I. Background

The issue of the applicable evidentiary requirements to support a flagrant violation based upon a “reckless failure” to eliminate a known violation is currently before the Commission. *Stillhouse Mining, LLC*, 33 FMSHRC 778 (Mar. 2011) (ALJ), *PDR granted* May 6, 2011. These proceedings concern the necessary evidentiary requirements to support a flagrant violation based on a “repeated failure” to eliminate a known violation. The Secretary seeks to impose an enhanced penalty for each of three violations deemed flagrant based, in substantial part, on Conshor Mining, LLC’s (“Conshor’s”) history of violations. The “flagrant” designations rely on tests articulated in two Mine Safety and Health Administration (“MSHA”) Procedure Instruction Letters (“PILs”) that have expired, and an MSHA April 19, 2011, News Release. As a general matter, this test deems a violation as flagrant if the cited violation is attributable to an unwarrantable failure of a mandatory standard and there have been two prior unwarrantable violations of the same mandatory standard within the prior 15 months.³

Specifically, with respect to these proceedings, the Secretary contends that three alleged unwarrantable violations of section 75.220(a)(1), which governs roof control plans, are “repeated” flagrant violations based on Conshor’s payment of civil penalties for two unwarrantable section 75.220(a)(1) violations that occurred within 15 months of the three subject violations.⁴ 30 C.F.R. § 75.220(a)(1). The alleged violations, as well as the previous final predicate violations relied on by the Secretary, all concern different provisions of Conshor’s roof control plan.

Whether a “repeated” flagrant violation can be based on a history of previous violations is a matter of first impression. Judge Manning rejected an operator’s assertion that the failure to abate a violation within the time limits set forth in the citation was a prerequisite to a repeated flagrant violation. *Bowie Resources LLC*, 33 FMSHRC __ (July 2011) (ALJ), *slip op.* at 12. Having determined that the subject violation was neither S&S nor attributable to an unwarrantable failure, Judge Manning vacated the flagrant allegation brought by the Secretary. *Id.* at 18. However, Judge Manning noted that he was not addressing whether a history of violations could be a basis for enhanced penalties under section 110(b)(2). *Id.* at 16-17.

³ A violation is attributable to an unwarrantable failure when it is caused by aggravated conduct rather than ordinary negligence. *Emery Mining*, 9 FMSHRC 1997, 2001 (Dec. 1987).

⁴ The three subject 104(d)(2) Orders are Order Nos. 7502867 and 7502879 issued in May 2007 contained in Docket No. KENT 2008-562, and Order No. 7503222 issued in June 2007 contained in Docket No. KENT 2008-782. The predicate final 104(d) Orders are Order No. 6663986 issued on March 19, 2007, and Order No. 7551844 issued on April 10, 2007. The Secretary seeks to impose civil penalties of \$94,900.00 for Order No. 7502867, \$110,900.00 for Order No. 7502879, and \$122,200.00 for Order No. 7503222.

During the course of several telephone conferences, Conshor raised issues concerning the validity of the Secretary's PIL criteria for a flagrant violation based on a repeated failure to eliminate a hazard. By Order dated July 8, 2011, the parties were requested to address several issues in writing, including the validity of the PIL criteria, and, whether *Chevron* deference applied. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). The Secretary responded on August 9, 2011, stating that the PIL criteria only "establishes uniform procedures and guidelines for enforcement personnel to follow in evaluating potential flagrant violations and . . . it [does] not purport to bind the Administrators or the Office of Special Assessments." *Sec'y Resp.* at 3. In addition, the Secretary asserted that the operative statutory language contemplates a prior history of similar violations because the term "repeated" means "done, or happening again." *Id.* at 7 (dictionary citation omitted).

Conshor responded to the Order Seeking Comment on August 10, 2011. As an initial matter, Conshor asserts the PIL criteria have no legal effect because it was not promulgated pursuant to the notice-and-comment provisions of the Administrative Procedure Act ("APA"). *Conshor Resp.* at 19-22. With respect to *Chevron*, Conshor argues that the Secretary's test for a repeated flagrant violation is not entitled to deference because it is contrary to the plain meaning of the statute. *Id.* at 31-33. Alternatively, even if the provisions of section 110(b)(2) are ambiguous, Conshor contends that the Secretary's interpretation is not entitled to deference because it is based on an informal policy letter that was not the subject of a rulemaking. *See United States v. Mead Corp.*, 533 U.S. 218, 229, 231 (2001) (noting that agency policy statements far removed from the notice-and-comment process lack the force of law and may be denied *Chevron* deference). *Id.* at 13.

As discussed below, the Secretary's proffered statutory interpretation of the provisions of section 110(b)(2) with respect to a "repeated failure" cannot be given effect because: (1) the PIL and News Release criteria for repeated flagrant violations are substantive rules that were not promulgated in accordance with the notice-and-comment provisions of section 553 of the APA, 5 U.S.C. § 553; (2) in *Berwind Natural Resources Corp.*, 21 FMSHRC 1284, 1317 (Dec. 1999), the Commission declined to extend *Chevron* deference to specific tests for charges brought by the Secretary; and, (3) notwithstanding *Berwind*, the Secretary's interpretation of section 110(b)(2) is not entitled to *Chevron* deference because the language of the section is unambiguous, and, alternatively because the Secretary's interpretation is arbitrary and unreasonable.

It is axiomatic that examination of the statutory or regulatory language "is the starting point for its interpretation." *See Nally & Hamilton*, 33 FMSHRC __ (Aug. 2011), *slip op.* at 4, (citations omitted). The term "flagrant" is defined as "conspicuously bad, offensive, or reprehensible." *The American Heritage Dictionary* 667 (4th ed. 2009). The plain language in section 110(b)(2) reflects that a flagrant violation is based on either a reckless or repeated failure to eliminate a known violative condition that can proximately cause serious injury or death.

Although the terms “reckless” and “repeated” both describe underlying conduct that supports a flagrant violation charge, they are distinguishable. A flagrant violation based on repeated conduct is, at a minimum, also reckless. However, a repeated failure to eliminate the condition deemed flagrant may constitute even greater culpability that evidences a conscious disregard warranting the maximum civil penalty under section 110(b)(2).

II. PIL Validity

At issue are PIL Nos. I06-III-04 effective October 26, 2006, and I08-III-02 effective May 29, 2008, that set forth MSHA’s criteria for evaluating flagrant violations. PIL No. I06-III-04 expired on March 31, 2008, and PIL No. I08-III-02 expired on March 31, 2010. The Secretary does not contend, and MSHA’s retrieval system does not reflect, that any subsequent relevant PILs have been issued addressing the issue of flagrant violations. See <http://www.msha.gov/regs/complian/pils/pil.htm>.

The PILs specifically outlined the requirements for a violation to be deemed flagrant based on a mine operator’s “**repeated failure** to make reasonable efforts to eliminate a known violation.” PIL Nos. I06-III-04 and I08-III-02 (emphasis in original). The requirements are:

1. Citation or order is evaluated as significant and substantial,
2. Injury or illness is evaluated as at least permanently disabling,
3. Type of action is evaluated as an unwarrantable failure, and
4. At least two prior “unwarrantable failure” violations of the same safety or health standard have been cited within the past 15 months.

Id.

The PILs were followed by a News Release issued on April 19, 2011. Although the PILs have expired, the Secretary continues to advance MSHA’s PIL criteria for a flagrant violation in the News Release. Consequently, the issue of the validity of the PIL criteria is relevant in these proceedings. With one exception, the News Release essentially repeated the PIL criteria. The News Release stated:

Flagrant violations cited by MSHA inspectors must meet *specific evaluation criteria for reckless or repeated failure* violations, including:

- A citation or order is evaluated as significant and substantial.
- An injury or illness is evaluated as at least permanently disabling.
- A citation or order is evaluated as an unwarrantable failure.
- Negligence is evaluated as reckless disregard.
- At least two prior “unwarrantable failure” violations of the same safety or health standard have been cited within the past 15 months.

(Emphasis added).

Unlike the PIL repeated flagrant criteria that do not specify reckless conduct as an essential element, the News Release criteria apparently require evidence of a reckless disregard to support a charge that the cited condition constitutes a repeated flagrant violation.

Section 8(b) of the New Miner Act required the Secretary to “promulgate final regulations with respect to penalties” to codify the new enhanced penalty structure. Pub. L. 109-236, § 8(b), 120 Stat. 501 (2006). To implement special assessments for flagrant violations, MSHA issued notices of proposed rulemaking for section 100.5(e) in the Secretary’s Part 100 Criteria and Procedures for Proposed Assessment of Civil Penalties. 30 C.F.R. §100.5(e), 71 Fed. Reg. 53054 (Sept. 2006); 71 Fed. Reg. 62572 (Oct. 2006). The notice-and-comment provisions of the APA requires the Secretary to provide “[an adequate] description of the subjects and issues involved” to support a flagrant violation. 30 U.S.C. § 553(b)(3). However, contrary to section 553(b)(3) of the APA, the proposed provisions of section 100.5(e) essentially repeated section 110(b)(2) of the New Miner Act.

On March 22, 2007, MSHA issued a final rule regarding the criteria and procedures for its proposed assessment of civil penalties in 30 C.F.R. Part 100. 72 Fed. Reg. 13592. Consistent with the prior notices seeking public comment, the final provisions of section 100.5(e), in essence, repeated the statutory language in section 110(b)(2) of the New Miner Act without any reference to the PIL criteria as the basis for a flagrant violation. *Id.* at 13622. Section 100.5(e), as promulgated, provides:

Violations that are deemed to be flagrant under section 110(b)(2) of the Mine Act may be assessed a civil penalty of not more than \$220,000. For purposes of this section, a flagrant violation means “a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.”

30 C.F.R. §100.5(e).

The Commission has determined it has subject matter jurisdiction to consider the validity of MSHA Program Policy Letters. *See Drummond Company*, 14 FMSHRC 661 (May 1992). *Drummond* dealt with policy letters that established criteria for implementing the Secretary’s program for higher civil penalty assessments at mines with an excessive history of violations. *Id.* at 667. The Secretary sought to create standards for imposing higher penalties for an excessive history under the general provisions of Part 100 of the regulations that allows MSHA to waive regular assessments if a violation warrants a special assessment. *Id.* at 680. 30 C.F.R. Part 100. The excessive history guidelines were not published in the Federal Register or otherwise adopted in accordance with the notice-and-comment requirements of section 553 of the APA. *Id.* at 668.

APA section 553 provides, in pertinent part:

§ 553. Rule Making

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

- (1)** a statement of the time, place, and nature of public rule making proceedings;
- (2)** reference to the legal authority under which the rule is proposed; and
- (3)** either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

- (A)** to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice;

5 U.S.C. § 553(b). (Emphasis in original).

In *Drummond*, the Commission noted that “the notice-and-comment process does not apply to ‘interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.’” 14 FMSHRC at 683 *quoting* 5 U.S.C. § 553(b)(3)(A). Interpretive rules are non-binding and merely seek to clarify or explain existing law rather than create new law. *Id.* at 685. However, substantive or legislative rules require advance notice and public comment. *Id.* at 684. Both substantive and legislative rules impose obligations or otherwise affect private interests, the latter implementing congressional intent to effectuate a statutory purpose. *Id.* 684-85. *Drummond* invalidated the excessive history policy letters because they were deemed to be substantive in nature and there was no opportunity for public comment. *Id.* at 692.

As in *Drummond*, the subject PILs and subsequent News Release were not published in the Federal Register. The criteria they seek to implement clearly are not exempt from notice-and-comment requirements. They are not interpretive because they do not purport to explain or remind operators of their exposure to flagrant violation penalties under section 110(b)(2) of the New Mine Act. Rather, the PILs are both substantive and legislative in design in that they seek to implement the new elevated operator liability contained in Section 110(b)(2) of the New Miner Act. In this regard, the PILs subject mine operators to enhanced penalties

that are as much as three times greater than the maximum \$70,000 civil penalty that is currently in effect for a non-flagrant violation. 30 U.S.C. §§ 820(a)(1) & (b)(2).

Having concluded the PILs and News Release are substantive rather than interpretive, the focus shifts to whether they are exempt from APA requirements based on the second exception in section 553(b)(3)(A) as statements of general policy. The Secretary relies on *National Mining Ass'n v. Sec'y of Labor*, 589 F.3d 1368 (11th Cir.), for the general proposition that agency policy procedures articulated in PILs are not subject to the APA because they do not establish a binding norm. *Sec'y Resp.* at 3-4. The Secretary's reliance is misplaced. The PIL in *National Mining* related to extended cut plans, which by their very nature, are exceptions to the mandatory requirement in section 75.330(b)(2) that requires ventilation devices within ten feet of working faces. 589 F.3d at 1372. The PIL provided general procedures District Managers should consider when evaluating, on a case-by-case basis, whether to waive the provisions of section 75.330(b)(2). *Id.* The Court noted the PIL encouraged District Managers "to consider the individual facts" when evaluating each specific mine. *Id.* at 1372-73.

Unlike the instant case where adjudicative authority is delegated to the Commission, the PIL in *National Mining* implemented the authority to approve ventilation and dust control plans delegated to the Secretary under section 303(a) and (b) of the Mine Act. 30 U.S.C. § 863(a) and (b). Additionally, unlike the instant case where the subject PILs "establish[ed] uniform procedures for . . . personnel to properly evaluate flagrant violations," the PIL in *National Mining* encouraged individual case-by-case discretion. PIL Nos. I06-III-04, I08-III-02. Consequently, the Secretary's assertion that the PIL criteria in *National Mining* and the PIL flagrant criteria are analogous is unavailing.

Moreover, in characterizing the PIL flagrant penalty criteria as expressions of policy that do "not mandate that any particular violation be assessed a flagrant penalty," the Secretary, in effect, argues that the criteria do not affect operator rights given the *de novo* assessment authority of the Commission. *Sec'y Resp.* at 3. However, the Commission has recognized that the application of penalty criteria articulated in non-binding policy letters affects operator rights because the vast majority of cases are settled rather than contested. *Drummond*, 14 FMSHRC at 687. The exposure of operators to enhanced penalties under section 110(b)(2) in uncontested cases clearly affects private pecuniary interests. *See Conshor Resp.* at 22, citing, *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806-07 (D.C. Cir. 2006) (noting that agency guidelines alleged to be "general statements of policy," are not exempt from the APA's notice-and-comment requirements if they "determine rights or obligations [or] occasion legal consequences").

Pronouncements affecting fundamental rights and liabilities are not relieved of their substantive effect simply because the actions are committed to agency discretion. In the final analysis, the Secretary may not escape notice-and-comment requirements by, in effect, labeling a major substantive addition to section 100.5(e) of her regulations governing special assessments as a mere interpretation. *See Rag Shoshone Coal Corp.*, 26 FMSHRC 75, 83 (Feb. 2004).

Accordingly, the subject PILs and News Release are substantive in nature and not otherwise exempt from the notice-and-comment requirements of the APA. Although the special assessment provisions of section 100.5(e) of the Secretary's regulations were the subject of a rulemaking, the Secretary admits the PIL criteria were not open to public comment as that special assessment rulemaking did not explicitly identify MSHA's test for flagrant violations. In this regard, the Secretary states:

We are unaware of any legislative history expressly addressing the Secretary's authority to promulgate criteria for implementing the MINER Act's flagrant penalty provisions. The Secretary does not claim that the PIL was promulgated pursuant to any statutory authority; rather, it merely provided guidelines for MSHA personnel to determine whether to recommend assessment of a violation as flagrant.

Sec'y Resp. at 5-6.

In view of the above, the Secretary's assertion that the PIL criteria are non-binding guidelines that are exempt from APA rulemaking proceedings must be rejected. Consequently, as an invalid substantive rule, the PIL criteria cannot be given any legal effect in these matters. *See Drummond*, 14 FMSHRC at 690. Having determined that the PIL criteria are not binding, the analysis shifts to whether the Commission must defer to the Secretary's flagrant violation test.

III. The Commission's Delegated Statutory Authority

The Commission discussed its delegated authority to adjudicate disputes arising under the Mine Act in *Drummond*. The Commission stated:

The Mine Act expressly empowers the Commission to grant review of "question[s] of law, policy or discretion," and to direct review *sua sponte* of matters that are "contrary to . . . Commission policy" or that present a "novel question of policy." Sections 113(d)(2)(A)(ii)(IV) & (B), 30 U.S.C. § § 823(d)(2)(A)(ii)(IV) & (B). Since Congress authorized the Commission to direct such matters for review, we infer that Congress intended the Commission to possess the necessary adjudicative power to resolve them. . . . The reason the Commission was created by Congress and equipped with broad remedial powers and policy jurisdiction was to assure due process protection under the statute and, hence, to enhance public confidence in the mine safety and health program. *See* S. Rep. at 47, reprinted in Legis. Hist. at 635. Addressing claims of arbitrary enforcement by the Secretary is at the heart of that adjudicative role.

14 FMSHRC at 674-75 (footnote omitted).

Drummond was followed by the Supreme Court's recognition of the Commission as an independent review body created by Congress to "develop a uniform and comprehensive interpretation" of the Mine Act. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994). The Court in *Thunder Basin* held that "exclusive review before the Commission [of novel issues concerning matters of statutory interpretation] is appropriate" given the Commission's "particular expertise" in construing the Mine Act. *Id.* at 215.

Under the Act, the Secretary proposes, and the Commission assesses, all civil penalties for contested violations of the Act and the Secretary's regulations. *See* 30 U.S.C. §§ 815(a) & (d), 820(a) & (i). Under Part 100 of the Secretary's proposed assessment procedures, regular assessments are calculated in accordance with the statutory penalty criteria in section 110(i) of the Act. 30 C.F.R. § 100.3(a)(1); 30 U.S.C. § 820(i). However, the Secretary may propose a special assessment if she determines that conditions warrant greater penalties. 30 C.F.R. §§ 100.3, 100.5(a).

In exercising its delegated authority, the Commission must evaluate the Secretary's proposed higher special assessments in contested cases. Increased penalties are warranted based on the gravity of the violation and the degree of negligence attributable to the operator. Likewise, the terms "significant and substantial," "unwarrantable failure," and "flagrant" are designations by the Secretary that elevate the degree of gravity, thus subjecting operators to increasing liability. The Secretary has the burden of proving every element of a violation. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). Consequently, the outcome of a civil penalty proceeding before the Commission is dependent on whether the Secretary can satisfy her burden of proving that a cited violation has been properly designated as S&S, unwarrantable and/or flagrant.

Despite the Supreme Court's recognition in *Thunder Basin* of the Commission's role in resolving mine industry disputes, the Commission frequently defers to the Secretary's interpretations of regulatory and statutory provisions under the two step formula in *Chevron*, 467 U.S. at 842-44 (1984). However, the Commission has elected to retain the authority, rather than defer to the Secretary, in matters concerning the appropriate tests for evaluating specific charges brought under the Act. The Commission in *Berwind* stated:

[W]e are not bound to defer to any specific test proposed by the Secretary It is hardly open to question that this Commission has the authority to interpret the Mine Act and adopt a specific test or standards for adjudicating charges arising thereunder. *See, e.g., Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (adopting four-part test for determining whether a violation is "significant and substantial" under section 104(d) of the Mine Act); *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981) (adopting standard for determining liability under section 110(c)), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

Berwind, 21 FMSHRC at 1317; *see also Emery Mining*, 9 FMSHRC at 2001. So too, the Commission must retain the authority to establish the parameters for demonstrating a repeated flagrant violation under section 110(b)(2).

It is significant that the Supreme Court's 1984 *Chevron* analysis predates its 1994 holding in *Thunder Basin*. Thus, when read in the context of *Thunder Basin*, *Chevron*'s core holding that deference should be given to reasonable agency interpretations of ambiguous statutory provisions they administer can apply to interpretations of either the Secretary or the Commission.

In the final analysis, neither the Commission nor its judges are "authorized representatives of the Secretary and [they] do not have the legal authority to charge an operator with violations of . . . the Mine Act [by modifying a citation]." *Consolidation Coal*, 20 FMSHRC 1293, 1298 (Dec. 1998) quoting *Mettiki Coal Corp.*, 13 FMSHRC 760, 764 (May 1991). Given the distinct enforcement and adjudicatory authority delegated to the Secretary and the Commission, respectively, declining to defer to the Secretary for specific tests or standards for adjudicating charges brought under the Mine Act does not contravene *Chevron* deference commonly accorded to the Secretary. Significantly, the legislative history reflects "that an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program." Human Resources Committee, S. Rep. No. 95-181, *Mine Safety and Health Act of 1977*, at 47 (May 16, 1977). In light of the bifurcated statutory authority delegated to the Secretary and the Commission, authorizing the Secretary to define the requisite evidentiary parameters necessary to satisfy her burden of proof is anathema to the Mine Act's goal of ensuring due process.

IV. Statutory Interpretation

a. Plain Meaning

As discussed below, the plain meaning of "flagrant violation" is a reckless or repeated failure to eliminate a known violative condition that can proximately cause serious injury or death. Whether a violation is properly designated as flagrant is based on the material facts concerning the degree of an operator's negligence and the degree of gravity with regard to the hazard posed by the violation. *See Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988) (noting that S&S designations are evaluated based on the particular facts of the violation). Although the Secretary's proffered flagrant test is not controlling, a traditional *Chevron* analysis is helpful in arriving at the meaning of the language in section 110(b)(2). *See Berwind*, 21 FMSHRC at 1317.

As an initial matter, the threshold issue in any case involving statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842 (1984); *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008); *Thunder Basin*,

18 FMSHRC 582, 584 (Apr. 1996). In determining whether legislative provisions are clear, the Commission has recognized that “[w]hen the meaning of the language of a statute . . . is plain, the statute . . . must be interpreted according to its terms, the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning.” *Western Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (Sept. 1996). It is a fundamental principle of statutory and regulatory interpretation that words that are not technical in nature “are to be given their usual, natural, plain, ordinary, and commonly understood meaning.” *Western Fuels*, 11 FMSHRC at 283 (citation omitted).

In analyzing whether Congress expressed a specific intent on a particular issue, “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.’” *Twentymile Coal Co.*, 30 FMSHRC at 750 (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). The statute’s legislative history and purpose, as well as related judicial precedent are also relevant to this analysis. *Twentymile*, 30 FMSHRC at 750-52; *Emery*, 9 FMSHRC 1997, 2001-04 (Dec. 1987). The examination of whether the statute expresses such a clear congressional intent is commonly referred to as a “Chevron Step One” analysis. *Coal Emp’t Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989); *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

Focusing on the statutory language of section 110(b)(2), as found by Judge Paez, a “reckless or repeated failure to make reasonable efforts to *eliminate a known violation* of a mandatory health or safety standard” occurs when:

. . . in light of all the facts and circumstances surrounding the violation, the operator does not take the steps a reasonably prudent operator would have taken to eliminate the known violation of a mandatory health or safety standard and consciously or deliberately disregards an unjustifiable, reasonably likely risk of death or serious bodily injury.

Stillhouse Mining, 33 FMSHRC at 805 (emphasis added).

The operative statutory language contains two essential elements: (1) a repeated failure to eliminate a known violation; and, (2) the hazard posed by the violation reasonably could be expected to cause death or serious injury. Words must not be read in isolation. The first element of a repeated flagrant violation requires both knowledge of the violation and a repeated failure to eliminate it. With regard to scienter, an operator has knowledge of a violation if the violation remains unabated despite facts available to the operator that would provide a reasonable person with knowledge that the violation continues to exist. *See Roy Glen*, 6 FMSHRC 1583, 1586 (July 1984).

The Secretary asserts that a history of similar violations constitutes “a repeated failure” under the provisions of 110(b)(2). However, the plain statutory language in section 110(b)(2) with respect to “repeated conduct” refers to a singular known violation, rather than a series of

recurring violations. Thus, the phrase “repeated failure,” when read in context, refers to current repeated conduct evidenced by a failure to eliminate the hazard posed by the discrete violation alleged to be flagrant, rather than a past history of violations. Relying on a violation history as a required element of a repeated flagrant violation, as the Secretary suggests, would superimpose an additional test that is not articulated in the statute. Simply put, the analysis must be guided by what Congress said in enacting section 110(b)(2), rather than by what the Secretary believes Congress meant to say. *2A Sutherland Statutory Construction* § 46:3 at 165-69 (7th ed.).

Turning to the second element of the subject provision, it is apparent that “flagrant” violations are egregious violations that expose miners to serious bodily injury or death. Flagrant conduct is defined as conduct that is “[c]onspicuously bad, offensive, or reprehensible.” *The American Heritage Dictionary* 667 (4th ed. 2009). The American Heritage Dictionary includes the following discussion of relevant synonyms:

flagrant, glaring, gross, egregious, rank: [t]hese adjectives refer to what is conspicuously bad or offensive. *Flagrant* applies to what is so offensive that it cannot escape notice: *flagrant disregard for the law*. What is *glaring* is blatantly and painfully manifest: *a glaring error; glaring contradictions*. *Gross* suggests a magnitude of offense or failing that cannot be condoned or forgiven: *gross ineptitude; gross injustice*. What is *egregious* is outrageously bad: *an egregious lie*. *Rank* implies that the term it qualifies is as indicated to an extreme, violent, or gross degree: *rank stupidity; rank treachery*.

Id. (Emphasis in original).

It is a general canon of statutory construction that “a word may be defined by an accompanying word, and ordinarily the coupling of words denotes an intention that they should be understood in the same general sense.” *2A Sutherland Statutory Construction* § 47:16 at 352-53 (7th ed.) (footnotes omitted). The terms “reckless” and “repeated” are coupled to describe conduct that is flagrant. Although these terms are similar, they are different in degree. A flagrant violation based on repeated conduct is, at a minimum, also reckless. However, the repeated conduct may also evidence a conscious disregard warranting the maximum civil penalty of \$220,000 provided in section 110(b)(2).

Ultimately a flagrant violation is one that is conspicuous and egregious. Whether the mine operator has committed previous unwarrantable violations of the same mandatory standard may affect the appropriate civil penalty. However, it is not material in determining whether the surrounding facts underlying the subject violation are “offensive” or “outrageously bad.” Rather, the specific facts related to the cited violation must be evaluated to determine if the mine operator recklessly or consciously disregarded an extremely hazardous condition. Thus, the Secretary’s emphasis on an operator’s past rather than current conduct to support a repeated flagrant violation is misplaced.

b. Legislative History and
Statutory Scheme

It is fundamental that:

A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.

2A Sutherland Statutory Construction § 46:5 at 189-201 (7th ed.).

Although enhancement of safety is a fundamental concern, it is clear that the New Miner Act, which was enacted in the aftermath of the Sago and Darby Mine disasters, is directed at preventing violations that will proximately cause future tragedies. The Senate Report that accompanied the New Miner Act stated:

The year 2006 began with the tragic loss of 12 miners at the Sago Mine in West Virginia, followed closely by the deaths of two miners at the Alma Mine, also in West Virginia; and some 4 months later by the deaths of 5 miners at the Darby Mine in Harlan County, Kentucky. The death toll in the first 5 months of the year was nearly 50 percent higher than the entire previous year. Additionally, the rise in coal production in the last few years raises the committee's concerns that there is the potential for a return to higher numbers of accidents and fatalities. Improvements in safety come about because of a continued re-examination and revision of safety and regulatory practices in light of experience. These tragedies serve as a somber reminder that even that which has been done well can always be done better.

Committee on Health, Education, Labor, and Pensions, S. Rep. No. 109-365, *Mine Improvement and New Emergency Response Act of 2006*, at 2 (Dec. 6, 2006).

Obviously, the general goal of the Mine Act is to enhance safety and deter unsafe conduct. However the purpose of section 110(b)(2) enhanced civil penalties is to provide an additional means to deter flagrant violations, *i.e.*, known violations that could proximately cause death, rather than to promote mine safety in general. If the intent of Congress was to create a safer mining environment by deterring repeated unwarrantable violations, it would have amended section 110(a)(1) to raise the general statutory penalty ceiling of \$70,000 currently in effect for each violation. It is clear that Congress was focused on the potential tragic consequences of extremely hazardous violations, rather than a history of unwarrantable conduct that is already addressed in section 104(d) of the Act, as the basis for a flagrant designation based on repeated conduct.

Finally, the Secretary's suggested inclusion of a 15 month schedule with respect to prior unwarrantable violations as predicates for a flagrant violation is inconsistent with the structure of the Mine Act. Section 104(d) of the statute already provides deterrence for repeated unwarrantable violations. Under section 104(d), after an inspector issues a citation for a violation that is S&S and is attributable to an unwarrantable failure, any subsequent citations issued for an unwarrantable failure during the same inspection, or within 90 days of the issuance of the initial predicate unwarrantable citation, result in a withdrawal order. Any unwarrantable citations thereafter also subject the mine operator to withdrawal orders until an inspection of the entire mine reveals no further unwarrantable conduct. This probationary period, during which operators are subject to withdrawal orders, is "among the Secretary's most powerful instruments for enforcing safety." *Greenwich Collieries*, 12 FMSHRC 940, 945 (citing *UMWA v. FMSHRC*, 768 F.2d at 1479). If Congress intended to create a "super 104(d) chain" by elevating the penalties for repeated unwarrantable violations within a designated probationary period it would have amended section 104(d).

c. Commission's Existing Adjudicative Tests or Standards

Furthermore, a disproportionate reliance on a previous history of violations is inconsistent with Commission tests for resolving charges under the Act such as S&S and unwarrantable failure. For example, in determining S&S the Commission's focus is on the particular facts surrounding a violation to determine whether there is a "confluence of factors" that make serious injury or death more likely. *Texasgulf*, 10 FMSHRC at 501.

With respect to unwarrantable failure, the Commission considers a variety of factors. Namely, the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the violation poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12, 17 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). While repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard, the history of violations is not determinative. *Peabody*, 14 FMSHRC at 1263-64. Thus, relying on a history of violations to support a flagrant designation is inconsistent with the Commission's tests for S&S and an unwarrantable failure.

d. Chevron Step Two Analysis

As a final matter, assuming the operative statutory language is ambiguous, attention shifts under a “*Chevron Step Two*” analysis to whether the Secretary’s test for a flagrant violation is entitled to deference because it is a reasonable interpretation of the statutory provisions. *Chevron*, 467 U.S. at 843-44. Fundamentally, the Secretary’s proffered prerequisite for a repeated flagrant violation based on the selection of *two prior violations* within the *previous 15 month period* is arbitrary. Moreover, as discussed above, it is unreasonable because applying the term “repeated” to prior violations cannot be reconciled with the statutory language that a flagrant violation is manifest by a “repeated failure to make reasonable efforts *to eliminate a known violation*,” rather than a recurring failure to eliminate a series of violations.

The Secretary’s proffered interpretation is further undermined by the facts in this case where the purported predicate violations of section 75.220(a)(1), as well as the subject violations, all concern different provisions of the approved roof control plan. Section 75.220(a)(1) is a general standard that applies to all provisions of an approved roof control plan. Section 75.220(a)(1) provides:

Each mine operator shall develop and follow a roof control plan, approved by the [MSHA] 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.

It is true that provisions of approved roof control plans are enforced like mandatory standards. *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 408-09 (D.C. Cir. 1976). However, it is unreasonable to consider a history of failing to adhere to different sections of an approved roof control plan as violations of the same standard, given the plan’s numerous and varying provisions.

ORDER

Relying on a history of violations rather than focusing on the facts surrounding a violation to support a flagrant designation is inconsistent with the plain language of the statute, the legislative history, and the Commission’s tests for S&S and an unwarrantable failure. Rather, a “reckless or repeated” failure to eliminate a flagrant violation means what it says. Namely, a violation is deemed to be flagrant if it is caused by egregious conduct evidenced by a reckless or repeated failure to eliminate a known violation that could substantially and proximately cause death or serious injury. Examples of repeated flagrant conduct are conspicuous dangerous violative conditions that are either indifferently overlooked during a series of pre-shift and on-shift examinations, or are reported and ignored. In sum, a violation is flagrant if, based on the facts surrounding the violation, the violative condition is “conspicuously bad, offensive, or reprehensible,” regardless of a mine operator’s record of prior violations. *See The American Heritage Dictionary* 667 (4th ed. 2009).

In light of the above, the PIL test as summarized in the April 19, 2011, News Release, can be given no legal weight or effect in these proceedings because it is an invalidly issued substantive rule that is contrary to the plain language of the statute. Consequently, the evidence in these proceedings regarding whether the cited conditions constitute flagrant violations under section 110(b)(2) will be limited to the facts surrounding the violations as they relate to the degree of Conshor's culpability.

Accordingly, the Secretary **IS DIRECTED**, consistent with this Order, to provide in writing, within 21 days, a prehearing statement specifying whether the flagrant allegations remain. Specifically, the prehearing statement should address whether the particular facts surrounding the subject cited violations evidence, at a minimum, the requisite reckless conduct necessary to support flagrant designations, and if so, the basis for such allegations. The prehearing statement may facilitate a settlement in these matters, and it will narrow the issues, avoid the unnecessary introduction of non-relevant evidence, and establish parameters for rulings on questions of admissibility. *See* 29 C.F.R. §§ 2700.53(a)(2), (a)(6) and (b).

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 30, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2011-297-M
Petitioner,	:	A.C. No. 34-01487-240699
	:	
v.	:	
	:	
FITTSTONE, INC.,	:	MINE: Fittstone Mine
Respondent.	:	

**ORDER GRANTING THE SECRETARY’S
PARTIAL SUMMARY JUDGMENT MOTION**

This case is before the court on a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (the “Act”). The parties filed cross-motions for summary judgment. The underlying controversy involves citations issued by the Department of Labor's Mine Safety and Health Administration (“MSHA”) under Section 104(a). The issue the parties argued in their cross-motions is whether MSHA has jurisdiction to inspect the Respondent’s limestone gravel operation. A telephone hearing on this issue was conducted on September 28, 2011.

The Respondent argues that its limestone gravel facility is not subject to MSHA’s jurisdiction because it does not “substantially” affect interstate commerce. This position is based on the Respondent’s interpretation of the Supreme Court’s decision in *United States v. Lopez*, 514 U.S. 549 (1995). Respondent argues that after *Lopez*, a mine must satisfy a “substantial qualifier” test before MSHA can exert its inspection jurisdiction. This interpretation is plausible because in *Lopez* the Supreme Court stated that “the proper test requires an analysis of whether the regulated activity *substantially affects* interstate commerce.” *Id.*, 559 (*emphases added*) The Supreme Court also said that “where economic activity *substantially affects* interstate commerce, legislation regulating that activity will be sustained.” *Id.* (*emphases added*)

However, by placing so much weight on the word “substantial,” the Respondent misinterprets *Lopez*. The *Lopez* decision resolves the issue of whether a federal law banning possession of a firearm on public school property, 18 U.S.C. § 922(q)(1)(A), the Gun-Free School Zones Act of 1990, could be applied under a Commerce Clause argument when there was no discernable nexus between a student’s possession of a firearm and any commercial or economic activity.

While it is true that in order for an activity to come under the Commerce Clause, there must be a showing that the activity “substantially affects” interstate commerce, i.e., the activity must first be shown to be commercial in nature. *Lopez* determined that possession of a firearm was not commercial or economic in nature, therefore there was no need to move to the secondary issue of whether the commercial activity had a substantial impact on interstate commerce.

In short, the *Lopez* decision did not elevate the “substantial qualifier” test to primary importance as the Respondent argues, but affirmed that laws and/or regulations promulgated via the Commerce Clause need to have some basis in commerce. By validating *Wickard v. Filburn* 317 U.S. 111 (1942) in its *Lopez* decision, the Supreme Court made it clear that if an economic activity is involved, the level of activity needed to justify extension of Commerce Clause authority is indeed quite minimal. The Supreme Court cited *Wickard* as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity.” *Id.*, at 560 Accordingly, *Wickard* is still good precedent, and we are bound by it in this matter.

Comparing the facts in *Wickard* with the facts in this case, there is no question that the Fittstone facility affects commerce and is under the Mine Act’s jurisdiction. In *Wickard*, a law was established to limit wheat production based on acreage owned by a farmer in order to drive up wheat prices during the Great Depression. A farmer grew more than the limits permitted and was ordered to destroy his crops and pay a fine, even though he was producing the excess wheat for his own use and had no intention of selling it. The Supreme Court found that “[e]ven activity that is purely intrastate in character may be regulated by Congress, where that activity, combined with like conduct by others similarly situated, affects commerce among the States [. . .].” *Fry v. United States*, 421 U.S. 542, 547 (1975) citing *Wickard*, at 127-128

Here, the Respondent’s total facility sales were \$358,901.00 for the time period February 23, 2010, to August 24, 2010.¹ In addition, the Research and Innovative Technology

¹ Additional undisputed facts:

- Fittstone had \$310,631.00 in total sales for the time period May 10, 2010, to November 16, 2010.
- Fittstone sold \$202,353.00 worth of limestone to Hull’s Environmental Services for the time period February 23, 2010, to August 24, 2010, and \$163,900.00 worth of limestone for the time period May 10, 2010, to November 16, 2010. Hull’s Environmental Services provides services throughout the country.
- Fittstone sold \$36,418.00 worth of limestone to Citation Oil & Gas for the time period May 10, 2010, to November 16, 2010, and \$29,817.00 from time period May 10, 2010, to November 16, 2010. Citation Oil & Gas operates in 13 states, including Oklahoma, and is headquartered in Houston, Texas.
- Fittstone sold \$11,442.00 worth of limestone to Wynn Construction for the time period February 23, 2010, to August 24, 2010, and \$11,442.00 for the time period May 10, 2010, to November 16, 2010. Wynn Construction does work in a number of states.

Administration (“RITA”) survey² cited by the Respondent in support of its position, confirms that there is only a small amount of gravel and stone included in the total freight transported in the United States. This demonstrates that even a relatively small amount of gravel production can have a disproportionate effect on interstate commerce for purposes of jurisdictional analysis, and it bolsters the Secretary’s argument.

In addition to *Wickard* and *Fry*, there are numerous decisions that support the argument that MSHA has jurisdiction over the Respondent’s Fittstone facility. For instance, in *Jerry Ike Harless Towing, Inc. and Harless Inc. v. Sec’y of Labor*, the Commission stated that the “Commerce Clause of the Constitution has been broadly construed [. . . and that] Commercial activity that is purely intrastate in character may be regulated by Congress under the Commerce Clause, where the activity, combined with like conduct by others similarly situated, affects commerce among the states.” *Jerry Ike Harless Towing, Inc. and Harless Inc. v. Sec’y of Labor*, 16 FMSHRC 683, 686 (April 1994), citing *Fry v. United States*, 421 U.S. 542, 547 (1975); *Wickard*, at 111. The Commission continued by saying that “Congress intended to exercise its authority to regulate interstate commerce to the ‘maximum extent feasible’ when it enacted section 4 of the Mine Act.” *Id.*, citing *Marshall v. Kraynak*, 604 F.2d 231, 232 (3d Cir. 1979), cert. denied 444 U.S. 1014 (1980) Though *Harless Towing* was published a year prior to *Lopez*, the Commission has not changed its stance on the matter.

In a Second Circuit decision issued in 2004, the court affirmed *Wickard* and *Fry v. United States* when it found that a gravel mine that did business only in New York was under the Mine Act’s jurisdiction. *D.A.S. & Gravel v. Sec’y of labor*, 386 F. 3d 460, 463 (2nd Cir. 2004). The court stated that “the Commerce Clause does not preclude Congress from regulating the activities of an economic actor whose products do not themselves enter interstate commerce, where the activities of such local actors taken together have the potential to affect an interstate market the regulation of which is within Congress' power.” *Id.*

In *United States v. Lake*, 985 F.2d 265, 267-69 (6th Cir. 1993), which the Commission cited in *Harless Towing* above, a mine operator sold all its coal locally and purchased mining supplies from a local dealer. *Id.*, at 269. The court found that the operator was engaged in interstate commerce because “such small scale efforts, when combined with others, could influence interstate coal pricing and demand.”

The Secretary has also argued and provided evidence that the Respondent’s use of machinery and equipment bought from out-of-state manufactures affects interstate commerce, also bringing respondent under MSHA’s jurisdiction. Though there is abundant precedent

² RITA released a report analyzing a Commodity Flow Survey (“CFS”) which states that “[a]lthough gravel and crushed stone was 16 percent of total CFS tons, shipments in this category accounted for less than 1 percent of the value and about 3 percent of the ton-miles of all CFS shipment, impacting mostly local transportation. Gravel and stone shipments traveled an average of about 57 miles per ton.”

supporting the Secretary's assertion on this point,³ it only serves to bolster my decision. I conclude, therefore, that the Respondent's gravel operation affects interstate commerce and comes under MSHA's inspection authority.

Accordingly, the Secretary's Motion for Partial Summary Judgment is **GRANTED** and the Respondent's summary judgment motion is **DENIED**. Further, the parties are **ORDERED** to continue settlement negotiations on the underlying citations and to file a status report within 60 days.

/s/ L. Zane Gill

L. Zane Gill

Administrative Law Judge

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³ In *United States v. Dye Construction Company*, 510 F.2d 78, 83 (10th Cir. 1975), the Tenth Circuit held that a pipe-laying company fell under the Occupational Safety and Health Act because it "purchased several items of heavy equipment, trucks and several insurance policies produced by out of states sources." The court stated that "[t]he use of supplies which are part of commerce has been held sufficient." *Id.*, citing *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 11, 13 L.Ed.2d 20 (1964) and *Von Solbrig Hospital, Inc. v. NLRB*, 465 F.2d 173 (7th Cir. 1972), see also *Sec'y of Labor v. Shine Quarry, Inc.*, 17 FMSHRC 1397 (Aug. 15, 1995), *Sec'y of Labor v. Cobblestone, LTD*, 10 FMSHRC 731 (June 1988), and *Sec'y of Labor v. Southway Construction Company, Inc.*, 6 FMSHRC 174, 175 (Jan. 1984).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 30, 2011

PATTISON SAND COMPANY, LLC,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	
v.	:	Docket No. CENT 2012-137-RM
	:	Citation No. 8659952; 11/09/2011
	:	
SECRETARY OF LABOR	:	Docket No. CENT 2012-138-RM
MINE SAFETY AND HEALTH	:	Order No. 8659953; 11/09/2011
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine: Pattison Sand Company, LLC
	:	Mine ID: 13-02297

ORDER DENYING REQUEST FOR DECISION WITHOUT BRIEFING

The above-captioned matter is before me on a Notice of Contest filed by the Contestant pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(d). On November 9, 2011, MSHA conducted an inspection and issued Citation No. 8659952 for an alleged violation of ground support use standard 30 C.F.R. §57.6360. That same day, MSHA also issued Order No. 8659953 under section 103(k) of the Act based on an alleged roof fall “accident” that occurred at Pattison Sand Company Mine on November 7, 2011. The 103(k) Order alleges:

A roof fall accident occurred at this mine on November 7, 2011. A roof estimated at 20 to 30 tons occurred in 12 AR, an unbolted area of the mine and a portion of the fall landed on top of the scaling equipment being operated by a miner causing extensive damage to the equipment. This could have resulted in a fatality. This order is issued to assure the safety of persons at this operation. It prohibits all activity in all areas of the mine South of crosscut L that are not bolted and meshed until an MSHA examination and/or investigation has determined that it is safe to resume mining operations in the area. The mine operator shall obtain prior approval from an authorized representative for all actions to restore operations to the affected area.

On November 11, 2011, Contestant filed a Motion for Emergency Expedited Hearing based on the 103(k) withdrawal order, which closed those portions of the underground operation south of crosscut L that were not bolted or meshed. On November 15, 2011, Contestant filed a Supplemental Motion for Emergency Expedited Hearing based on a November 15, 2011 modification of the order. I convened a conference call with the parties on November 16, 2011 and set this matter for expedited hearing on November 18, 2011.

An expedited hearing took place on November 18, 2011. At the close of the hearing, the parties agreed to an expedited briefing schedule and Contestant requested that if any aspect of my decision is adverse to Pattison, that I certify the matter for “emergency appeal.” Accordingly, a short briefing schedule was set with briefs due on December 2, 2011, one week after receipt of the expedited transcript on the penultimate eve of the Thanksgiving holiday. Tr. 339-43.

Thereafter, on November 21, 2011, Contestant filed a Motion for Decision without Briefing on the Scope of the 103(k) Order, Based Upon Record Evidence. Contestant moves to invalidate the 103(k) order or limit its scope to the particular area (“12-AR”) affected by the roof fall, or alternatively for temporary relief from that Order by restricting it to the location of the ground fall.¹ Contestant also argues that the ongoing closure beyond the limited area impacted by the ground fall is a deprivation of property in violation of due process, and the modifications to the Order are unduly restrictive. In addition, Contestant “requests certification of any remaining issues for immediate appeal, should the court rule against Pattison, to help accelerate review of the mine closure if necessary.” Pattison argues that my failure to “rule immediately, and reopen the mine areas not affected by the fall, would sanction this mine closure, and the seizure of private property based upon the pure speculation of agency personnel, through administrative fiat, rather than through actual and specific factual findings, consistent with authority of Congress, while denying Pattison its constitutional and statutory rights, including its right to due process of law.” Motion at 3. Moreover, Contestant argues that it is pure speculation by MSHA “that a ground fall in a unique area of a mine authorizes and justifies a mine-wide closure” Given the emergency nature and the alleged extraordinary seizure of the mine based on an allegation that an MSHA-approved ground control plan is inadequate and constitutes a violation of a regulation, Contestant requests that the Court rule on the scope of the 103(k) order and limit briefs to other issues. Motion at 4.

The Secretary opposes the motion claiming that Contestant’s mine closure and concomitant due process “taking” arguments are factually and legally insufficient. First, the Secretary emphasizes that no evidence at the hearing established that the 103(k) Order closed the mine or effectively closed the underground portion of the mine. Second, the Secretary asserts that Contestant’s due process “taking” argument is unsupported by evidence at the hearing and

¹ At the hearing, I determined that under section 105(b)(2) of the Mine Act, Contestant was entitled to seek temporary relief from a modification or termination of any order, including the 103(k) order at issue. Tr. 44-47. *See Performance Coal Company v. Federal Mine Safety and Health Review Com’n*, 642 F. 3d 234, 239 (D.C. Cir. 2011). I sought clarification from Contestant as to what specific modification(s) Contestant was challenging under its written request for temporary relief under section 105(b)(2). At first, Contestant asked for temporary relief from a closure order of the entire mine (Tr. 45-46), and then argued generally that there was a modification to the order that only permitted Contestant’s expert to gain restricted access to the mine and that similar modifications were going to be repeated whenever Contestant’s agents needed access to evaluate the mine, or to abate concomitant Citation No. 8659952. Tr. 46-47.

inapposite to the relief sought. The Secretary argues that the Fifth Amendment proscription that "private property shall be taken for public use, without just compensation" is not designed to limit governmental interference with property rights *per se*, but to secure compensation in the event of proper interference amounting to a taking. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). The Secretary further argues that there is no evidence of a physical invasion or appropriation of Contestant's property, or permanent denial of all economically beneficial use of Contestant's property. Consequently, any Fifth Amendment "taking" analysis must rely upon (1) the economic impact of the 103(k) order upon Contestant, (2) the extent to which the order has interfered with distinct investment-backed expectations, and (3) the character of the government actions. *Id.* at 539-540. The Secretary notes that Contestant presented no evidence with regard to the first two factors. On the third factor, the Secretary argues that the 103(k) order was issued to arrest the exposure of miners to conditions injurious to their safety, and that valid legislation that prohibits actions injurious to the health, morals or safety of the community is not a taking. See *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 488-489 (1987), citing *Mugler v. Kansas*, 123 U.S. 623, 668-669 (1887). The Secretary concludes that Contestant's motion lacks sufficient factual and legal support and should be denied.

On November 28, 2011, Contestant filed a reply. Contestant's reply sideswipes the Secretary's assertion that there is no evidence that the section 103(k) Order either closed the mine or effectively closed the underground portion of the mine. Contestant argues instead that the Secretary fails to understand the primary reasons for the expedited hearing, to wit, the impact of the 103(k) Order, which closes "all areas of the mine south of cross cut L that are not bolted and meshed (Sec. Ex. 4)," and the fact that record evidence (the MSHA-approved ground control plan and mine map (Sec. Exs. 5 and 6) shows that vast areas of the mine are not bolted and meshed. Contestant contends that these areas were stable and safe before the 103(k) closure Order issued, and now have been closed improperly for 19 days, even though the ground control plan continues to be valid and effective. Further, Contestant challenges the Secretary's argument that there was "no taking" of Pattison's property, and argues that the Order was not authorized by Section 103(k) since no accident occurred. Alternatively, Contestant argues that even if statutorily authorized, the Order improperly extends to areas of the mine that are safe and not impacted by the alleged remote and unique location where the ground fall occurred. In addition, Contestant argues that the Order contradicts a valid and effective, MSHA-approved ground control plan that declares vast areas of the mine safe, without bolting and meshing, and permits scaled, stable cap rock with and/or without shotcrete to provide safe ground support. See Sec. Ex. 6. Finally, Contestant argues that the Secretary has abused her statutory authority, which constitutes a compensable taking, and notes that this "argument is preserved for another day and another venue with jurisdiction over such issues." See, e.g., *A. A. Profiles, Inc. v. City of Ft. Lauderdale*, 253 F.3d 576 (11th Cir. 2001); see also *Recent Cases, Constitutional Law – Regulatory Takings – Eleventh Circuit Finds Public Purpose Determination Irrelevant to Damages Calculation*, 115 Harv. L. Rev. Vol. 899-906 (2002). Accordingly, Contestant renews its request for a ruling vacating the 103(k) Order or limiting its scope to the area actually impacted by the ground fall, pending further relief.

Having duly considered the matter, Contestant's Motion for Decision without Briefing is **DENIED**. The court declines on motion to invalidate the 103(k) order or limit its scope to the

particular area (“12-AR”) affected by the roof fall, or alternatively, to grant temporary relief from the 103(k) Order by restricting it to the location of the ground fall. In this regard, I find that Contestant has not shown that there is a substantial likelihood that the findings of the Commission on the validity and scope of the 103(k) Order will be favorable to the applicant under section 105(b)(2)(B), and has failed to establish that the requested relief will not adversely affect the health and safety of miners under section 105(b)(2)(C). Furthermore, Contestant’s Fifth Amendment taking argument relies on the Secretary’s alleged abuse of authority, which I reject below. Further, that argument is inchoate and ripe for full briefing.

The record evidence establishes that an “accident” occurred within the meaning of section 103(k). Section 103(d) of the Mine Act specifies that an unplanned roof fall, except in abandoned panels or in areas inaccessible or unsafe for inspections, is an accident for purposes of section 103. *Emerald Coal Resources, LP*, 30 FMSHRC 122, 124 (Jan. 2008)(ALJ Zielinski). The November 7, 2011 roof fall did not occur in an abandoned panel or inaccessible area. In fact, the fall landed on the top of the scaling equipment being operated by a miner and caused extensive damage to the equipment. Tr. 144-45; Sec. Ex. 4. Accordingly, I find that an accident occurred which satisfies the precondition for issuance of an order pursuant to section 103(k).

With regard to the scope of the Order, the Court finds that expedited briefing will be helpful. Section 103(k) gives an inspector the authority to issue a 103(k) order “as he deems appropriate to insure the safety of any person in the coal or other mine.” 30 U.S.C. § 813(k).² The Ninth Circuit has described MSHA’s authority to manage accidents pursuant to Section 103(k) as one of “plenary power” and “complete control.” See *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983) (“[s]ection 103(k) gives MSHA plenary power to make post-accident orders for the protection and safety of all persons.”)

Contrary to Pattison’s initial Motion, neither the entire mine nor the underground portion of the mine was shut down. The sandstone mine operates above and below ground. Tr. 134. The scope of the 103(k) Order affected only areas underground that were south of crosscut L and not bolted or meshed. Tr. 161, 236; Sec. Ex. 4. Underground areas north of crosscut L, and

² Section 103(k) provides:

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 recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

areas bolted or meshed, are not affected by the 103(k) Order, including the area where the primary crusher and wet screen operate. Tr. 165.

Based on personal observation involving a lot of roof falls at the Pattison mine that were in cap rock,³ certified MSHA Inspector Jim Hines credibly testified that he issued the 103(k) Order to keep miners out from under unsupported top that had been mined up to cap rock because the ground control plan, which MSHA had approved in settlement of an imminent danger order involving another roof fall at the mine in August 2011, did not work. Tr. 152-161; see also Tr. 224-25 (MSHA inspector Anthony Runyon testifying about August 3, 2011 imminent danger order). Under the roof support provisions of the ground control plan, all areas covering AQ and South and all areas to be mined in the future, would be mined up to the cap rock and carefully monitored and routinely scaled, as needed. Much of this area was already mined to cap rock. Only areas with less than 4 feet of cap rock thickness, or which have brows or potholes, would be bolted, meshed and shotcreted. Sec. Ex. 5, p. 2. MSHA District Manager Steven Richetti credibly testified that there were about 10 roof falls in August 2011, some of which were similar in appearance to the instant fall. Tr. 261. Secretary Exhibits 11 and 12 document two of these additional August 2011 roof falls in areas south of AQ where mining was up to cap rock. Tr. 212-25.

Based on the instant roof fall under the approved ground control plan and the history of roof falls in cap rock at the mine, MSHA's ground support expert, Dr. Chris Mark, and other witnesses concluded that MSHA had erred in approving the plan as a result of the imminent danger order settlement because cap rock was not effective support in areas covered by the 103(k) Order. Tr. 98-101, 159, 161-62, 233-37, 250, 258. In fact, MSHA District Manager, Steven Richetti, candidly admitted on cross examination that the ground control plan was a settlement of the prior imminent danger order, which he felt was the best he could do at the time, but in hindsight, he should not have agreed to the plan because miners were exposed to the hazard of roof falls from cap rock. Tr. 237, 250. When asked on cross examination whether the 103(k) Order was an attempt to undo the 107(a) imminent danger order settlement that was approved only a month earlier in October 2011, District Manager Richetti further credibly testified:

- A. No. The 103(k) order is trying to protect the miners. The citation for [56.3360] is trying to undo the settlement or trying to correct the ground control plan. The 103(k) is to issue – it was issued to protect the miners in the rest of the mine from the same type of hazard that the scaler operator was exposed to in 12 AR.
- Q. Okay. And its your intention not to lift the 103(k) order until the entire mine is bolted and meshed, correct?

³ Cap rock is a stronger, harder, or more resistant rock type overlying the weaker ore body or less resistant rock type. Tr. 88, 282.

- A. The 103(k) order could be modified as it's bolted and meshed or some other type of ground support that our experts would feel would be sufficient, yes.

When further asked on cross examination to point out any particular areas of the mine that are in danger of ground fall, Richetti referenced “[a]ny unsupported part of that mine could fall at any time without warning to people that are traveling in the mine or working under it” and that “[b]olting and meshing will correct the immediate hazard” and “shotcreting would be a plus.” Tr. 251-52. Richetti’s conclusion that the cap rock was unsafe without these precautions was based on the history of falls in the mine. Tr. 258. Dr. Mark, who observed roof falls in areas mined to cap rock when visiting the mine as MSHA’s expert in August 2011, corroborated the conclusions of Hines and Richetta that cap rock, without engineering support, could not provide effective roof support. Tr. 98-100. Dr. Mark opined that an unacceptably high risk of roof falls, akin to the instant fall of November 7, 2011, existed anywhere in the underground mine where an engineered roof support system was not in place, as demonstrated by the failure of cap rock as roof support during the instant fall. Tr. 114.

By contrast, Mr. David West, Contestant’s international expert in mining engineering and ground control in sandstone mines (Tr. 275) offered a different opinion.⁴ West testified that reports from Contestant’s ground control consultants (Maochen Ge and John Head),⁵ who contributed to Contestant’s ground control plan, led him to suspect a close correlation between the material properties and behavior of the St. Peter sandstone at the Pattison mine and the Athabasca sandstone deposit throughout Northern Canada, where West worked in just about every operating mine on ground control, support, and design issues. Tr. 273-74, 283-84, 289. West’s testimony relied heavily on an unspecified publication by Professor Morgenstern at the University of Alberta, whom West described as a well-recognized guru in soil mechanics. West endorsed Morgenstern’s description of both the Athabasca sandstone and the St. Peter sandstone as “locked sand,” which West testified was an excellent geotechnical material for excavating holes, until it gets wet or moist and becomes extremely friable, a phenomenon dubbed “air slaking.” Tr. 284-85.

Initially, on direct examination, West had difficulty directly answering counsel’s question about whether the Pattison cap rock would form a good roof or whether additional work for ground control was necessary. Tr. 286-290. He then testified that the zone of anchorage is the

⁴ West was retained by Contestant on November 14, flew to the mine on November 15, reviewed MSHA technical reports and Contestant’s MSHA-approved ground control plan on the plane, visited with mine management and rank-and-file, and spent most of November 16 underground examining the geological conditions of the mine. Tr. 277-82. West was paid his standard hourly rate for his services. Tr. 320-21. West was Contestant’s representative under the sequestration rule, and thus was present throughout the hearing. Tr. 53.

⁵ West testified that he had a long and close personal relationship with Head, spoke to Ge about this matter, and had firsthand knowledge of how they work. Tr. 304, 311-12. He obviously had a favorable opinion of their work.

cap rock and that his investigation revealed that the Contestant tried to quantify the consistency or variability of the cap rock by drilling 50 test holes (“scratch tests”) to probe the thickness and strength of the cap rock throughout the mine, and the results were pretty consistent based on West’s discussion with the bolting supervisor, who performed the tests. Tr. 291-92. West initially testified that the extant ground control plan was sufficient (Tr. 292), but retreated somewhat from this view when describing improvements that should be made to the plan, as discussed below. Tr. 307-311, 316.

West then proffered the opinion that the cap rock in the area of the fall (12 AR) was different than the cap rock in other areas because it had been locally compromised by the presence of a gully on the surface topography. Tr. 293, 323.⁶

What I read about all this stuff on Morgenstern, the locked sand, the air slaking and discussions with the crews, I started thinking, well, hang on. This has got something to do with it, the failure mechanism that we are seeing.

Tr. 323. West testified that there were a number of parameters involved in the failure and he tried to narrow it down and determine the main driver that caused the problem and whether there were similar conditions or a combination of parameters elsewhere in the mine. He determined that the presence of the gully on the topography, which *might* allow the preferential ingress of water or moisture and cause an air-slake problem, was a *somewhat* unique combination relative to the rest of the mine such that the extrapolation of those factors to other areas mined up to cap rock is a bit of a quantum leap. Tr. 294-96. West did acknowledge, however, “that there are areas in the mine that are susceptible to air-slake within the St. Peter sandstone.” Tr. 295.

West further opined that the milling equipment and mining and milling methods used by Pattison were safe for miners. Tr. 297-99. That conclusion, however, appears to be undercut by the instant roof fall and the prior imminent danger order. West further opined that the ground control plan was a dynamic document that was actually an Excel spreadsheet with an attached schedule, which was constantly changing and provided for appropriate contingencies, such as potholes and brows in the roof, and which provided design drawings (C. Ex. 2) for implementation of the plan where bolting was required. Tr. 330-03.

Contrary to MSHA representatives, West testified that if Pattison implements the ground control plan, it will be safe for miners to work in the mine. In response to counsel’s questions, West reiterated that 12 AR is not indicative of ground or cap rock conditions anywhere else in the mine, that the roof fall that happened there was anomalous based upon his observations of the gully while on the surface, and that there is no basis for the closure of any area of the mine other than 12 AR. Tr. 304-05.

⁶ West testified that the gully was not in direct vertical line from the ground fall in AR-12, but about 60-70 feet away. Tr. 322.

In response to relatively open-ended cross examination, West testified that there was no basis to clearly determine that the cap rock is unstable throughout the whole mine. He acknowledged, however, that there are specific areas where there has been failure into the cap rock. Tr. 306. He then hedged, stating that Pattison was an extensive mine where one tries to manage and minimize the risk to maintain safety and “it’s not a negligent process because the mine has maybe one failure.” Tr. 306-07. On further cross, West again acknowledged that there are specific areas where he has seen failures to a certain degree in the cap rock, but it is not ubiquitous throughout the mine. Tr. 307.

When asked by the Court what was needed going forward, given those areas of cap rock failure, West opined that the essence was already in the plan, but he would divide the mine into three or four areas of similar properties or structure, which vary throughout the mine, and then tweak the plan with periodic inspection, documentation and testing. If further deterioration occurred, he suggested that the operator’s stakeholders and production crew conduct an operational meeting to discuss increasing the level of ground control.⁷ Tr. 309-310. When asked by the court whether he would make any modifications to the plan, West suggested improving the collective understanding of the air-slaking process and adding some simple, robust instrumentation to the ventilation provisions of the plan, akin to tempering the air to try and take the moisture out of it. Tr. 310-11, 314; Sec. Ex. 5, p. 4, VI.

On redirect, West conceded that some of the failures could have resulted from moisture in the atmosphere moving into the cap rock, but he testified that bolting and meshing would not prevent slaking from the moisture in the air. Tr. 313. Rather, West opined that a very thin layer of shotcrete would be the best way to seal off the surface of the sandstone and prevent the absorption of moisture from the ventilation system. Tr. 316. Then, however, when asked whether shotcreting over the cap rock would be a more effective solution than bolting and meshing, West equivocated. “It could be. Right now I don’t know. But I think that’s part of the – the basket of things to investigate. And that should be part of the ground control plan.” Tr. 316.

Finally, West testified that owner Kyle Pattison told him that the mine had an underground grain storage area, and if the moisture content of the grain reached a certain level, it would ferment and more moisture would be given off. Based on his conversation with Pattison, West testified that there were ground problems in the grain storage area associated with humidity brought in by the grain. Tr. 329. Upon further probing from the court, West could not recall where the grain storage area was located on the map of the underground workings. Tr. 330.

In addition to West, Pattison also called assistant mine manager, Jack Porter, as a witness. Tr. 331-32. Porter testified that he felt safe walking in and around areas of the underground operation that were mined up to cap rock. Tr. 334. With respect to ground control methods used for areas not mined to cap rock, Porter testified that Pattison milled with a

⁷ I note that West did not specifically discuss MSHA when referencing the stakeholders. Tr. 309-10.

mechanical scaler, performed hand scaling with a scaling bar, used some shotcreting with pins and rebar, and "just lately" started doing bolting because of the new ground control plan. Tr. 335.⁸ Porter further testified that he felt safe walking under those areas, and added, "They look good to me, and nothing has fell [sic] on me." Tr. 336.⁹

Based on the foregoing record evidence, the court is not persuaded by Respondent's motion and evidence that the Secretary abused her discretion in issuing the 103(k) order to encompass those areas underground that are south of crosscut L and not bolted or meshed. Tr. 161, 236; Sec. Ex. 4. This is particularly true prior to full briefing of the issues. By its plain terms, Section 103(k) gives the Secretary the power to accept or reject a plan submitted by the operator to resume mining, as the Secretary "deems appropriate" (see 30 U.S.C. § 813(k)), and the Ninth Circuit has described MSHA's authority to manage accidents pursuant to Section 103(k) as one of "plenary power" and "complete control." See *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983).

Given the testimony and/or documentary evidence regarding the instant November 7, 2011 roof fall, the August 2011 imminent danger order, and the history of other recent roof falls in areas mined to cap rock, the Secretary has demonstrated that an accident has occurred and that Contestant's ground control plan is no longer deemed sufficient to protect the safety of miners working in underground areas south of crosscut L that are not bolted or meshed. Even Contestant's expert West eventually conceded that the ground control plan should be revised to provide greater protection from failures resulting from moisture in the cap rock, i.e. air-slaking. In this regard, West conceded that some of the failures could have resulted from moisture in the atmosphere moving into the cap rock, and that shotcreting should be included in the ground control plan. Tr. 313, 316. Furthermore, even were I to credit West's testimony that the cap rock failure in the area of the instant roof fall (12 AR) was unique and likely resulted from the presence of the gully on the surface topography, some 60-70 feet away from the compromised area, substantial record evidence, including West's own testimony, demonstrates that there is a moisture problem in the underground workings that extends beyond 12 AR and would cause cap rock in unbolted and unmeshed areas to become friable and subject to "air slaking," thereby creating an ongoing hazard of additional roof falls, the gully theory notwithstanding.

⁸ Contestant had ordered a new bolting machine, which had not arrived yet, as the existing bolting machine was not ideal. Tr. 326.

⁹ After Contestant's case, the Secretary proffered no rebuttal witness. Tr. 339.

In light of the foregoing, Contestant's motion for decision on the record without briefing is **DENIED**. My complete decision on the merits will issue shortly after expiration of the abbreviated briefing schedule. Respondent's motion for certification of this interlocutory ruling is **DENIED** as it will not materially advance the final disposition of this matter and may actually hinder accurate adjudication of the complex legal issues raised. As stressed repeatedly before and at the expedited hearing, it behooves the parties to begin negotiating a mutually agreeable plan to safely recover the affected area of the mine.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 30, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2011-1543
Petitioner	:	A.C. No. 46-05252-250990-01
	:	
v.	:	Docket No. WEVA 2011-1544
	:	A.C. No. 46-05252-250990-02
ICG BECKLEY, LLC,	:	
Respondent	:	

ORDER OF CONSOLIDATION,
ORDER DENYING STAY OF ASSIGNMENT,
ORDER GRANTING LATE FILING,
AND
ORDER DENYING STAY OF ALL PROCEEDINGS

Before: Judge Barbour

These civil penalty proceedings arise under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977. (“Act” or “Mine Act”). 30 U.S.C. §§815, 820. In Docket No. WEVA 2011-1543, the Secretary of Labor, on behalf of her Mine Safety and Health Administration (“MSHA”) petitions for the assessment of a civil penalty of \$16,867 for an alleged violation of 30 CFR §75.220(a)(1). In Docket No. WEVA 2011-1544, she petitions for the assessment of civil penalties totaling \$8,439 for 7 alleged violations of various mandatory safety standards for underground coal mines. The alleged violations in Docket No. WEVA 2011-1544 were cited on September 11, 13, 14 and 28, 2011. The Secretary’s petition was received by the Commission on September 6, 2011. Accompanying the petition was a motion to permit its late filing and a motion to stay assignment of the case to a Commission Administrative Law Judge. On September 13, the Commission received the operator’s opposition to the motion to permit the late filing and a motion to dismiss the Secretary’s petition because it was late filed.¹

¹

The petitions and motions are signed by the district manager for MSHA’s Coal Mine Safety and Health District 4, but they do not include certificates of service. The operator’s counsel filed an answer to the petitions and an opposition to the motions. Therefore, the court infers copies of the documents were in fact served on the operator. Nonetheless, the Secretary is reminded of the requirements of Commission Rule 7(a). 29 CFR §2700.7(a).

On October 20, 2011 the Office of the Chief Judge assigned Docket No. WEVA 2011-1543 to the court along with Docket No. WEVA 2011-1544. In assigning the cases the chief Judge's Office did not reference the pending motions in Docket No. WEVA 2011-1544.² The two cases were assigned jointly and the court herein formally **CONSOLIDATES** them for hearing and decision. The Chief Judge's decision to assign the case elicited from the Secretary a motion to stay Docket No. WEVA 2011-1544. The motion was received by the Commission on November 1, 2011. Counsel for the operator filed an opposition to the motion. It was received by the Commission on November 15, 2011.

After considering the various motions, the court rules as follows:

MOTION TO STAY ASSIGNMENT

Although the Office of the Chief Judge did not mention the pending motions when it assigned WEVA 2011-1544, the court views the assignment as an implied denial of the motion to stay. The court now reiterates that **DENIAL**.

MOTION TO PERMIT LATE FILING

The Secretary's motion requests permission to file her petition outside the 45-day period for filing prescribed in Commission Rule 28(a). 29 CFR § 2700.28(a). The motion is necessitated by the fact that on April 14, 2011, the operator timely contested the penalties as proposed by the Secretary. Thus, the Secretary was slightly more than 3 months late in filing with the Commission. In moving that it be permitted to file late, the Secretary states that the delay was caused by the "high rate of contests coupled with MSHA's limited staff." Motion 1. The operator does not view this reason as "adequate cause" and maintains that dismissal of the petition is warranted. The operator states that to have the court "accept that a high rate of contests and limited staff should overcome [the Secretary's] lengthy delay of more than three months . . . is simply inadequate." Response to Motion to Permit Late Filing 2. The operator asks the court to note the decision of Commission Judge Thomas McCarthy in *Long Branch Energy*, WEVA 2009-1492-R *et al.* in which Judge McCarthy dismissed petitions that were 7 ½ to 11 ½ months late.³ The operator also asserts that even if the reasons for the delay noted by the Secretary are found by the court to be "adequate cause," dismissal is still appropriate because the operator has been prejudiced. "Memories of the individuals who may have knowledge of the facts and circumstances surrounding the allegations . . . have undoubtedly faded since the issuance of the citations." Response to Motion to Permit Late Filing 6.

²

In most instances when a motion is pending and a case has not been assigned, it is helpful to the court if the Office of the Chief Judge rules on the motion prior to assigning the case.

³

Long Branch was appealed to the Commission by the Secretary and review was granted on September 22, 2011.

The motion is **GRANTED**. The court respectfully disagrees with the operator about the applicability of Judge McCarthy's *Long Branch* ruling. The court takes that Secretary at her word and finds that she was in fact delayed by a high rate of contests and a limited staff. Given the fact the delay in this case is moderate, less than double the shortest delay in *Long Branch*, and given the fact that the Secretary was and continues to be trying to meet a significantly increased case load with what may well be inadequate resources, the court is loath to deny the Secretary and, ultimately, the public, of the chance to resolve the merits of her allegations.

Nor is the court persuaded that the operator has been prejudiced. The operator is large. It is not new to the Act and its requirements. Served with the citations in September, 2010, it was aware of the allegations. It also was aware that under the Mine Act, penalty proposals based on the allegations would be forthcoming. While it is indeed likely that the memories of those whom the operator will call as witnesses will have faded in the interval between the issuance of the citations and the trial, this is almost always the case in civil penalty proceedings. The court observes that in order to better fix recollections both mine officials and MSHA's inspectors frequently keep contemporaneous notes and take contemporaneous photographs and that the Commission's rules provide for the discovery of such materials and for the deposition of those with knowledge of the events in question.

MOTION TO STAY

The Secretary's motion to stay is based on her belief that a decision by the Commission in *Long Branch* will "inform [the] court's factual and legal analysis of late-filed penalty petitions." Motion to Stay 1. Without being presumptuous the court will simply state that it believes it has an adequate understanding of the legal analysis required when ruling on issues involving late-filed petitions, and it sees no reason for further delay. The motion is **DENIED**.

PREHEARING REQUIREMENTS

The court reminds counsels and the Secretary's certified legal representative that under the prehearing order issued on October 20, 2011, they are required to report to the court by Tuesday, January 3, 2012, whether these cases can be settled. If they cannot be settled, the cases will be set for hearing. It is possible that the court will enter an order limiting discovery when the cases are scheduled.

/s/ David F. Barbour

David F. Barbour
Administrative Law Judge
202-434-9953

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