

**JULY 2012**

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## **COMMISSION DECISIONS AND ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

July 10, 2012

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

v.

STRACK EXCAVATING, LLC

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Docket No. CENT 2012-213-M  
A.C. No. 23-02231-268863

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 12, 2011, the Commission received from Strack Excavating, LLC (“Strack”) 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 the proposed assessment was delivered on October 11, 2011, and became a final order of the Commission on November 10, 2011. Strack asserts that its newly-hired safety coordinator assured the owner that she timely contested the penalty assessments, but did not do so. Strack's owner states that the safety coordinator was terminated on October 19, 2011. The Secretary does not oppose the request to reopen, and urges the operator to take all steps necessary to ensure that future penalty contests are timely filed.

Having reviewed Strack'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  
Washington, D.C. 20001-2021

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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July 10, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2012-112-M
v.	:	A.C. No. 01-01138-270663
	:	
ELMORE SAND AND GRAVEL, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 12, 2011, the Commission received from Elmore Sand and Gravel, Inc. (“Elmore”) 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 Proposed Assessment No. 000270663 was delivered to Elmore on November 8, 2011, and became a final order of the Commission on December 8, 2011. Elmore asserts that its safety director is recovering from a head injury and is suffering short term memory problems. The safety director states that he became confused when he received a second assessment, case No. 000273381, which referenced Assessment No. 000270663 as outstanding. Because the second assessment was dated November 29, 2011, the safety director believed he had 30 days from that date to contest the outstanding assessment. Elmore hired counsel on December 9, 2011, who discovered the error and filed this motion to reopen that same day. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that all penalty contests are timely filed.

Having reviewed Elmore'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

July 10, 2012

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

v.

MAPLE COAL COMPANY

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Docket No. WEVA 2012-405  
A.C. No. 46-04236-269689

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 12, 2011, the Commission received from Maple Coal Company (“Maple”) 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 the proposed assessment was delivered on October 18, 2011, and became a final order of the Commission on November 17, 2011. Maple asserts that its safety manager mistakenly date stamped the assessment as received on October 19, 2011. Maple's senior counsel was therefore under the mistaken impression that his November 18, 2011 contest was timely, until he received a delinquency letter dated November 22, 2011. The Secretary does not oppose the request to reopen, and urges the operator to adopt the necessary procedures to ensure that future penalty contests are timely filed.

Having reviewed Maple'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

July 12, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of	:	
REUBEN SHEMWELL	:	
	:	
v.	:	Docket No. KENT 2012-655-D
	:	
ARMSTRONG COAL COMPANY, INC.	:	
	:	
and	:	
	:	
ARMSTRONG FABRICATORS, INC.	:	

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

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2006) (“Mine Act”).<sup>1</sup> On June 28, 2012, the Commission received from Armstrong Coal Company, Inc. (“Armstrong Coal”) and

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<sup>1</sup> 30 U.S.C. § 815(c)(2) provides in pertinent part:

Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as [s]he deems appropriate. Such investigation shall commence within 15 days of the Secretary’s receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

Armstrong Fabricators, Inc. (“Armstrong Fabricators”) a joint petition for review of Administrative Law Judge Jerold Feldman’s June 21, 2012 Decision on Remand and Order of Temporary Reinstatement. On July 6, 2012, the Commission received the Secretary of Labor’s opposition to the joint petition. For the reasons that follow, we grant the petition for discretionary review and affirm the Judge’s order requiring the temporary reinstatement of Reuben Shemwell.

Mr. Shemwell worked as a welder from April 19, 2010, until his termination on September 14, 2011. 34 FMSHRC \_\_\_, slip op. at 2, No. KENT 2012-655-D (June 21, 2012) (ALJ) (“Dec. on Remand”). Mr. Shemwell worked at surface mines operated by Armstrong Coal and at a repair shop operated by Armstrong Fabricators. *Id.* The Secretary alleges that Shemwell’s dismissal was motivated by Shemwell’s complaints concerning the need for respirator protection from fumes that were generated during the welding process. *Id.* at 8. However, the operators assert that Shemwell was discharged for unauthorized personal cell phone use during working hours. *Id.*

On January 23, 2012, Mr. Shemwell filed a discrimination complaint with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) against Armstrong Coal. MSHA conducted a preliminary investigation of Shemwell’s discrimination complaint and found that it was not frivolously brought. On March 5, 2012, the Secretary filed an Application for Temporary Reinstatement, requesting an order requiring Armstrong Coal to temporarily reinstate Shemwell to his former position as a welder. On March 8, 2012, Armstrong Coal filed a Request for Hearing on the Secretary’s Application for Temporary Reinstatement.

On April 20, 2012, the Judge issued a summary decision in the Secretary’s favor, concluding that Mr. Shemwell’s discrimination complaint was not frivolously brought and directing Armstrong Coal and/or Armstrong Fabricators to immediately reinstate Mr. Shemwell no later than April 25, 2012. 34 FMSHRC \_\_\_, slip op. at 7-9, No. KENT 2012-655-D (Apr. 20, 2012) (ALJ). The Judge noted that there were issues concerning whether Armstrong Coal or Armstrong Fabricators was the proper party to be named in the proceeding and whether Mr. Shemwell had filed his complaint in a timely manner but reasoned that it was not his duty to resolve those issues in a temporary reinstatement proceeding. *Id.* at 3-7.

Armstrong Coal and Armstrong Fabricators filed a petition for review of the Judge’s temporary reinstatement order and a motion to stay the Judge’s reinstatement order. The Secretary opposed the petition and motion to stay.

On May 10, 2012, we issued an order granting the operators’ petition, vacating the Judge’s decision granting summary decision, denying the operators’ motion to stay, and remanding the matter to the Judge. We held that the Judge erred in granting the motion for summary decision and remanded the matter to the Judge for a hearing. 34 FMSHRC \_\_\_, slip op. at 4-5, No. KENT 2012-655-D (May 10, 2012). We reasoned that 29 C.F.R. § 2700.45(c) requires a hearing on an application for temporary reinstatement, if it is requested, and that the Judge failed to hold a hearing although Armstrong Coal had requested one. *Id.* at 4. We

determined that the issues regarding the timeliness of the filing of Shemwell's complaint and which operator is appropriately named as a party to the proceeding may be addressed and decided in the proceeding on the merits. *Id.* at 5-6. However, we noted some evidence in the record that the shop where Mr. Shemwell worked had been idled and the staff laid off. *Id.* at 5. We instructed the Judge on remand to take evidence regarding whether there was a layoff that would toll an operator's temporary reinstatement obligation, in addition to other evidence relevant to a temporary reinstatement proceeding. *Id.*

The Judge conducted a hearing on May 23, 2012. Consistent with our remand instructions, the Judge took evidence relevant to a temporary reinstatement proceeding and evidence regarding the layoff at Armstrong Fabricators' shop. The Judge concluded that the Secretary demonstrated that Shemwell's discrimination complaint was not frivolously brought. Dec. on Remand at 12. The Judge further found that regardless of the layoff, there is a suitable position to which Shemwell can be reinstated. *Id.* at 10. Accordingly, the Judge ordered Armstrong Coal and/or Armstrong Fabricators to immediately reinstate Shemwell, no later than June 27, 2012, to the welder position he held prior to his termination, or to a similar position as a laborer at the same rate of pay and benefits, and with the same or equivalent duties assigned to him. *Id.* at 12. The Judge also, in part, ordered Armstrong Coal and/or Armstrong Fabricators to provide back pay to Shemwell effective April 25, 2012. *Id.* at 13.

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990). The Commission applies the substantial evidence standard in reviewing the Judge's determination.<sup>2</sup> *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000).

The issues before us are: (1) whether substantial evidence supports the Judge's determination that Shemwell's discrimination complaint was not frivolously brought; and (2) whether the Judge erred in determining that the operators' obligation to temporarily reinstate Shemwell under section 105(c)(2) of the Mine Act is not affected by the layoff. After review of the pleadings and record evidence, we conclude that the Judge's determination that the complaint

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<sup>2</sup> When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938)).

is not frivolous is supported by substantial evidence and is consistent with applicable law. We further conclude that the Judge's finding that the layoff has no legal effect on the obligation to temporarily reinstate Shemwell is consistent with applicable law and supported by substantial evidence. We intimate no view as to the ultimate merits of this case.

Accordingly, we affirm the Judge's June 21 decision temporarily reinstating Shemwell.

/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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Administrative Law Judge Jerold Feldman  
Federal Mine Safety & Health Review Commission  
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Washington, D.C. 20001-2021



Performance's application for temporary relief should not be dismissed given the occurrence of intervening events that impacted this proceeding.

On June 27, 2012, the Commission received from Performance an Unopposed Notice of Withdrawals and Motion to Dismiss. In the motion, Performance states that it withdraws the petition for discretionary review filed in this case, withdraws its application for temporary relief from the contest of the section 103(k) order, and requests that the Commission dismiss the proceeding. The Secretary does not oppose the motion.

Upon consideration of Performance's motion, it is granted. We hereby vacate our October 27 Direction for Review, and dismiss Performance's application for temporary relief.

/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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July 18, 2012

SECRETARY OF LABOR,	:	Docket No. SE 2010-658-M
MINE SAFETY AND HEALTH	:	A.C. No. 08-00051-215587
ADMINISTRATION (MSHA)	:	
	:	
	:	Docket No. SE 2010-768-M
v.	:	A.C. No. 08-00051-218361
	:	
	:	
	:	Docket No. SE 2010-778-M
TARMAC AMERICA, LLC	:	A.C. No. 08-00931-218364

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On July 1, 2011, the Commission received from Tarmac America, LLC (“Tarmac”) three motions seeking to reopen three penalty assessment proceedings and relieve it from the default orders entered against it.<sup>1</sup>

On March 17, 2011, Chief Administrative Law Judge Lesnick issued three Orders to Show Cause, which by their terms became Default Orders if the operator did not file an answer within 30 days. These Orders to Show Cause were issued in response to Tarmac’s failure to answer the Secretary’s August 17 and 18, 2010, Petitions for Assessment of Civil Penalty. The Commission did not receive Tarmac’s answers within 30 days, so the default orders became effective on April 18, 2011.

Tarmac asserts that its previous safety manager failed to notify management or counsel of the petitions and orders. Tarmac states that it sent the orders to its counsel as soon as they were discovered after the safety manager left the company. The Secretary does not oppose the requests to reopen.

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2010-658-M, SE 2010-768-M and SE 2010-778-M, all captioned *Tarmac America, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). 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 Tarmac's requests and the Secretary's responses, in the interest of justice, we hereby reopen the proceedings and vacate the Default Orders. Accordingly, these cases are remanded 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.

/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  
Washington, D.C. 20001-2021

# **ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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Denver, CO 80202-2500  
303-844-3577/FAX 303-844-5268

July 2, 2012

TIFFANY MYERS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2011-1337-DM
	:	RM MD 2011-08
	:	
v.	:	Mine I.D. 02-00024
	:	Morenci Mine
FREEMPORT-MCMORAN MORENCI, INC.,	:	
Respondent	:	

**DECISION**

Appearances: Tiffany Myers, Fayetteville, Arkansas, *pro se*;  
Kristin R.B. White, Esq., and Michelle C. Witter, Esq., Jackson Kelly,  
PLLC, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Tiffany Myers against Freeport-McMoRan Morenci, Inc., (“Freeport”), under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (the “Mine Act”). Ms. Myers contends that she was discriminated against because she complained about safety issues at the Morenci Mine. An evidentiary hearing was held in Tucson, Arizona. Freeport filed a post-trial brief and Myers filed a post-hearing submission. For the reasons set forth below, the discrimination complaint is dismissed.

**I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT**

Freeport operates a large surface copper mine in Greenlee County, Arizona. Freeport hired Myers as a haul truck driver in July 2010. The haul trucks used at the mine are Caterpillar 793 trucks, which weigh about 260 tons. Each tire on these trucks is about 13 feet in diameter. At the time Myers was working at the mine, Freeport employed between 375 and 400 haul truck drivers. About 74 or more haul trucks were in operation during each shift. The mine operated 24 hours a day on two 12-hour shifts. The operation of the trucks was controlled by dispatchers and supervisors in the command center, also known as “the tower.” Driver fatigue was a concern to Freeport. It believed that fatigue-related haul truck accidents and injuries were a problem.

In August 2010, Freeport began placing Driver State Sensor devices (“DSS”) in the haul trucks. Based in part on the representations of the manufacturer, Freeport believed that these

DSS devices would help prevent fatigue and distraction-related accidents.<sup>1</sup> These devices are intended to monitor driver fatigue and inattention and warn the driver if it detects such events. The DSS system consists of a camera mounted on the dashboard of the truck that centers on the corners of the driver's eyes and the corners of the driver's mouth to create a model of that particular driver. The system then monitors the driver's eyelid closure rates and the direction that the driver is looking. The DSS device monitors three different events: fatigue events, distraction events, and tampering events. If the DSS device detects what may be a fatigue event, an alarm is sounded in the cab of the truck and the driver's seat vibrates. In addition, the DSS records a video of the driver's eyes for a short period of time. The video and nine still photos are immediately emailed to the tower. Examples of emails showing the still photos are in Respondent's Exhibit No. 33. (Tr. 263). The dispatcher then reviews the photos to make sure that the DSS did not record a "false-positive." If it appears to be a fatigue event, the dispatcher calls the driver on the radio to see how he or she is doing.

The second type of event is the "distraction event." Such an event occurs when the driver looks away from the center of the roadway for more than four seconds at a time. When the DSS detects a distraction event, an automated female voice says to the driver, "eyes on path" or "eyes forward." No alerts are sent to the dispatcher for distraction events. When the DSS devices were first installed in the trucks, they were calibrated differently so that a distraction event was triggered when the driver looked away from the road for a shorter period of time. If the camera is covered or unable to read the driver's face, the DSS device takes a snapshot of the driver's head and upper body. The dispatcher is required to address this situation by either radioing the driver or having someone intercept the truck.

There is no doubt that when the DSS devices were first installed, many of the drivers complained about them. Drivers believed that the devices invaded their privacy and that they were a nuisance because of the number of false-positive alarms. Freeport does not deny that, when the system was first introduced, it had some glitches. It also does not deny that the system will continue to produce false-positives from time to time when the driver is actually not starting to drift off to sleep. As would be expected, there were rumors that the DSS devices continuously digitally recorded the drivers so that the dispatchers could see what they were doing at any given time. There were a number of tampering events soon after the DSS system was installed in which drivers tried to disable the camera in their cab. No disciplinary notices were issued to drivers for tampering during this adjustment phase, but drivers were told that such tampering would not be tolerated in the future. Freeport contends that none of the complaints it received from other drivers alleged that the DSS system created a safety hazard.

As discussed below, based on the evidence presented at the hearing, I find that once the drivers got used to the DSS system and additional calibrations were made so that alarms and voice commands were not activating as frequently, many of the drivers came to the conclusion

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<sup>1</sup> Freeport's parent company had previously installed DSS devices at a smaller mine as a test of the system.

that the DSS system helped reduce the number of accidents and close calls. Based on information Freeport gathered concerning accident rates, it made a business decision that the safety benefits of the DSS system outweighed any of its drawbacks.

Ms. Myers distrusted the DSS system from the time the device was first installed in her truck. The first concerns that she communicated to Freeport and to Dean Croke, an executive at Seeing Eye Machines, the company that installed the devices at the mine, concerned whether the laser lights would hurt the driver's eyes, the intrusive nature of the devices, the fact that the alarm scared her, and her contention that the system simply did not work correctly. She contended that the system did not set off a fatigue alarm when she actually started to doze off but frequently sounded a fatigue alarm when she was totally alert. Freeport personnel met with Ms. Myers on a number of occasions to discuss the system.

### **A. Chronology of Events**

Ms. Myers testified that she started working at the mine in July 2010 driving haulage trucks. She stated that until Freeport installed the DSS system in the trucks she did not have any conflicts with management. In August 2010 she started driving trucks with the DSS system. She noticed that the DSS did not operate "anything like they claimed it works." (Tr. 16). Myers testified that as soon as Freeport started putting the devices in the trucks she immediately began to have physical symptoms that were "unbearable." *Id.* She suffered from migraine headaches, facial numbness, and her "nerves were beyond shot." (Tr. 16, 95). She testified that she nearly ran over other pieces of equipment because the DSS was distracting to her. She also believes that the DSS monitoring system gave her post-traumatic stress disorder ("PTSD").

She described the system as follows:

It's kind of like having a cattle prod in your truck and every time you blink or turn your head or look at your gages or look at [the truck's computer screen], the machine goes off and scares the living daylights out of you. You turn your head, you look in your mirrors, anything you do that is required of you as part of your job and the machine goes off. You jump sky-high. It's unbearable.

(Tr. 17). She testified that if she really was starting to nod off, the system did not activate. It only sounded the fatigue alarm when she was alert and doing her job. (Tr. 17-18). She described the alarm as being six to ten inches from her head and she stated that it "goes off like an air horn." (Tr. 18). James Hiler, a quality analyst at Freeport, described the alarm as a buzzing sound similar the buzzer on a door of a building when a person gets "buzzed in." (Tr. 259). Myers also said that "all day long your have to listen to a machine [voice] tell you not to do your job the way you're doing your job, which is very frustrating. . . ." (Tr. 19).

Myers testified that the first thing that she did after the DSS devices were installed was email the company that makes them. She was advised to share her concerns with Mark Bartlett,

who was the Freeport representative who coordinated the installation of the DSS devices. He worked at the company's technology center in Tucson. After about three months of email conversations with Bartlett, he advised her to speak with her supervisor at the mine about her problems with the DSS. (Tr. 22). Myers also communicated with Croke at Seeing Eye Machines on many occasions starting in August 2010.

Myers testified that all of the haul truck drivers began complaining about the DSS system among themselves.<sup>2</sup> (Tr. 25). She testified that she acted as the spokesperson for the drivers when complaints were made about the DSS system. As discussed above, she emailed the drivers' concerns to Croke and Bartlett.<sup>3</sup> *Id.* Bartlett told Myers that he would anonymously pass on the concerns of the drivers to mine management. (Ex. C-3).

Ms. Myers testified that as soon as she started complaining about the DSS, she was harassed by mine management. The harassment was subtle at first and she did not see it as harassment until she thought about it later. For example, Myers testified that Vicki Propes, her dispatcher, stopped answering the radio when Myers tried to call her. (Tr. 30, 55). Myers testified that Propes harassed her in a wide variety of ways although Myers attributed some of this harassment to the fact that Propes picked on female drivers. (*See* Ex. C-11). Myers believed that she had to abide by every company rule, such as removing jewelry while driving, but other employees were not required to follow company rules. (Tr. 81). She also testified that the company started putting her on trucks that had something wrong with them, whether it be bald tires or trucks that would not dump properly. (Tr. 31). Throughout the hearing, she provided examples of when she was assigned to trucks that she believes were not functioning properly.

Myers also alleges that management would take action that would cause her to get a late start on her shift so that her production was lower than it should have been. She would be put on a van to take her to her truck that traveled throughout the mine before it reached her truck, for example. (Tr. 63-64). Myers also stated that management would spare out her truck for no reason at all and order her to park for a while. Such instructions reduced her production levels.

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<sup>2</sup> She testified that the drivers were initially concerned that the LED lights on the camera were actually laser lights that could damage their eyes. She was advised that the lights were LED lights. (Tr. 148). They were also concerned that the DSS devices in their trucks were not calibrated correctly because they were going off for no reason. (Tr. 26). She also stated that the fatigue alarm scared the drivers, which raised a concern that they could have an accident. (Tr. 27). She testified that drivers told her that they did not want to raise these concerns with management because they could not afford to lose their jobs. (Tr. 28).

<sup>3</sup> Myers presented this email correspondence and her contemporaneous notes as exhibits at the hearing. These exhibits provide more detail as to this correspondence. For example, Bartlett advised Myers that one reason the DSS is calibrated to track the movement of a driver's eyes and to provide a reminder to keep his eyes on the road is because of management's concern that drivers were texting on their cell phones while operating the trucks. (Ex. C-1).

(Tr. 72). Myers said that when she complained to the mine's human resources department ("HR"), she was told that there was no evidence that Propes was ignoring her calls or that she was being treated unfairly or differently than other drivers. (Tr. 56). All of these annoyances started to add up in her mind. She documented these events in her notes. (Tr. 60; Exs. C-8, 10, 12-15, 21 ). After three months of this, she called Freeport's safety hotline as discussed below.

Ms. Vicki Propes was Myers' dispatcher between August and the end of October 2010. On October 10, 2010, Propes asked Myers to come to the safety office in the dispatch area so that Propes could show her what the DSS photos look like. (Tr. 381). Propes testified that the DSS registered a number of fatigue alerts with Myers during that shift. Propes testified that when she showed Myers the photos, Myers told her that she was just "screwing with" the DSS. (Tr. 382). In the statement that she signed that evening, Propes said that Myers responded that she was not tired at the time the photos were taken and Myers told her that she was "just testing the machine." (Ex. C-9). Propes told Myers that she should never tamper with the DSS. Myers denied ever telling Propes or anyone else that she was testing the machine. (Tr. 68). Propes testified that Myers never complained to her about any safety concerns with the DSS. Propes said that this event on October 10 was the only time she discussed the DSS with Myers. (Tr. 383). Propes also denied ignoring calls from Myers on the radio or that she treated Myers differently than the other haul truck drivers.

Robert Fohr, the mining operations supervisor, testified that trucks are frequently parked for a while for operational reasons and that he does not believe that anyone ever intentionally downed Myer's truck. (Tr. 355). Dale Lundeen, another dispatcher, testified that it was common for a shovel to go down during a shift and, when that occurs, several trucks may need to be parked for a while until they can be assigned to a different shovel. (Tr. 308-09). Truck assignments and operations are actually determined by a computer rather than individual managers. (Tr. 374).

Myers testified that on October 15, 2010, as she was driving around a corner, the alarm went off for no reason and she almost ran over the crawler because the alarm scared her.<sup>4</sup> (Tr. 74-75, 231; Ex. C-10 p. N26; Ex. R-38 p. 2). Myers used this incident as an example of how the DSS creates safety hazards for drivers. She said that her DSS constantly set off the alarm for no reason during October.

On October 27, 2010, Jay Hiler, who was a "quality leader" at the mine, called Myers into his office. Management believed that Myers deliberately covered the camera on that date. Myers testified that a roll of paper towels must have rolled in front of the camera. (Tr. 50). Hiler advised her that covering the DSS camera is considered to be tampering with a safety

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<sup>4</sup> Myers uses the term "alarm" to refer to both the fatigue alarm and the voice command for distraction events. It appears that the voice command activated as she was trying to pass the crawler. The use of the term "crawler" was not explained at the hearing but a crawler is generally used to describe a slow-moving track-mounted vehicle such as a bulldozer.

device, which can result in discipline or termination. (Tr. 277-78). He also attempted to calm her concerns that she was being watched by the camera all the time. He advised her that photos are taken only when the DSS is triggered by a “sleep event.” (Ex. C-4 p. 2). Myers believes that this warning actually occurred because Bartlett told mine management that she was complaining about the DSS system. (Tr. 48-49). She described the Morenci Statement Form signed by Hiler as the beginning of the “paper trail” management kept on her. (Tr. 49; Ex. R-29).

On October 31, 2010, Myers was transferred from Vicki Propes’s crew to Dale Lundeen’s crew. Myers testified that the harassment continued. (Tr. 94). The DSS continued to register false positive alarms for no apparent reason. *Id.* On November 4, 2010, Bartlett sent Myers an email telling her that the drivers need to leave the system alone. (Ex. C-6). “Too many people are removing the fuses and disabling the system.” *Id.*

Starting in October 2010, Myers started taking contemporaneous notes, while in the cab of her truck, documenting the events of the day. She took hundreds of pages of notes. On the days when she claimed that the DSS activated more frequently, she documented each event separately. In one of her notes dated April 18, 2011, she wrote, “I am trying to drive and document this stupid machine, this is unsafe! It is stressing me out!” (Ex. C-21, p. N188). She was obviously obsessed with the idea that the DSS did not work properly. Myers testified that on November 30, 2010, her face went numb near the end of her shift and she went to the emergency room. (Tr. 95, Ex. C-13 p. N67). She believes that her face went numb from all the stress caused by the DSS device. (Tr. 95).

On December 9, 2010, Lundeen called her to ask her if the camera in her truck was pointed to the ceiling. From this, Myers concluded that managers were able to look at her with the camera at any time and so she started giving a thumbs up sign whenever the DSS alarmed without reason to let management know that she is okay. (Tr. 96). Myers testified that if she told management that she was “testing” the DSS machine, what she meant was she testing to see how much of her they can see. *Id.* She testified that if management “can see my whole body, [they] can see my thumbs are up and I’m good to go.” (Tr. 96-97).

In her performance evaluation dated December 10, 2010, Myers was rated poorly with respect to her production. (Ex. C-7). She received the equivalent of a fully satisfactory rating for the other performance standards. Myers attributes this poor rating to the treatment she received after she complained about the DSS system. She contends that this element of her performance suffered because of all the actions management took “to mess with” her production. (Tr. 58).

Myers testified that the DSS system only kept her from falling asleep one time during her employment at Freeport. On January 19, 2011, she had only slept three hours the night before and the DSS alarm sounded for a legitimate reason because she was starting to nod off. (Tr. 100; Ex. C-13, p. N102).

On February 14, 2011, Ms. Myers was suspended with pay by Freeport. Freeport suspended her because its managers believed that she was closing her eyes on purpose to make the DSS activate. It appears that Myers told Dale Lundeen that she “made” the DSS “go off.” (Tr. 105). According to Myers, management interpreted this to mean that she was purposefully making the DSS anti-sleep alarm activate but what she actually meant was that her normal work activities made the alarm sound. *Id.* She characterized the meeting with management as follows: “[T]hey acted like a bunch of piranhas on this day and my anxiety level was out of this world.” *Id.* She gave a statement to mine management on a Morenci Statement Form at management’s request. (Ex. C-15). In the statement she reported that the DSS went off repeatedly during her previous shift. She further stated:

Since I have to work with the DSS, I want to know how it works and since the information I was given about the DSS is faulty – I tested the system myself to see how it works.

Conclusion – the system does go off when you close your eyes and are not sleeping. I feel like I have a right to know how the DSS works.

(Ex. C-15). At the hearing, Myers stated that management put words in her mouth and that her statement misinterprets what she meant. (Tr. 106, 251). She testified that all she meant was that the DSS does not function properly because it goes off all the time when drivers are simply trying to do their job.

Myers was given a written counseling as a result of these events. The counseling record, states in part:

On February 15, 2011, Ms. Myers was operating the 592 haul truck when she admitted to purposefully closing her eyes multiple times when driving on an active haul road. This is in violation of the General Code of Safe Practices; Code of Conduct. . . . Specifically, employees will not engage in distracting activities while operating a company vehicle or piece of equipment.

(Ex. C-16). Myers testified that she never used the words “on purpose” when she was called in by management to explain why there had been so many alarms during that shift. (Tr. 109-11). She complained that normal blinking sets off the alarm. (Tr. 110). She felt intimidated by the entire process and felt she was being held hostage until she signed a statement. (Tr. 111-14). Myers testified that she was suspended with pay for this infraction. (Tr. 113-14). She further stated that whenever her alarm went off and photos were sent to dispatch, the response from the dispatcher was that she must be doing her “eye exercises.” (Tr. 115). It became a joke at the mine.

Lundeen testified that dispatch received numerous alerts from Myers' truck during her February 14-15 shift. Gilbert Ruiz, her immediate supervisor, told Myers to park the truck and he went to visit her. (Tr. 321). He reported that she seemed to be fine. A few hours later, Myers had three alarm events in a row. At that point, Amy Pooler picked up Myers and brought her to the dispatch tower. Lundeen testified that as she walked into the office, Myers yelled out "I wasn't sleeping, I was doing it on purpose." (Tr. 322). When he tried to discuss it with her, all she could say was that something was wrong with her DSS, it was going off all the time, and she was not sleeping. She told everyone in the area that the DSS was "stupid" and unsafe. *Id.* Lundeen tried to tell her that she had been having "microsleeps" like drivers often have, that the DSS system was doing what it was supposed to be doing, and that maybe she was too sleepy to be driving.<sup>5</sup> (Tr. 323).

Myers did not appear to be sleepy and she was taken back to her truck. Lundeen said that, with all the traffic and other obstacles on the haulage roads, Freeport could not allow drivers to close their eyes on purpose while driving. He discussed Myers' actions with Robert Fohr, the mining operations supervisor. They looked at the photos that were emailed from Myers' truck and they were particularly concerned that one event showed that her eyes were closed 2.57 seconds while she was driving 22.3 miles per hour. (Tr. 324; Ex. R-33). Lundeen wrote up a statement of these events. (Ex. R-25). Lundeen testified that when he received a DSS alert from another driver sometime later and he called this driver on the radio, the driver replied that he was okay, he was just doing his "eye exercises." (Tr. 326-27). From that point, many employees, including Lundeen, made jokes about eye exercises.

Fohr's testimony about these events was consistent with Lundeen's testimony. (Tr. 349-51). He told Myers that night that intentionally closing one's eyes was an unsafe act and it would not be tolerated. (Tr. 350). He also wrote a statement about the events. (Ex. R-36). He testified that a driver may not even be aware that he is experiencing a microsleep event. (Tr. 346). He could not recall any safety complaints concerning the DSS from other drivers and some have told him that the DSS helped keep them awake. (Tr. 345-48).

Amy Pooler, a mine operations technician, also was present on the evening of February 15. Pooler confirmed that Myers told everyone that she was closing her eyes on purpose. Myers' statement that she did not like the DSS and that she had been closing her eyes on purpose angered Pooler. (Tr. 404). Pooler often investigated accidents caused by sleepy drivers and had noticed a drop in such incidents after the DSS system was installed. (Tr. 402). Pooler uses pickup trucks to travel around the mine and she believes that the DSS helps ensure her safety because the haul trucks are so large.

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<sup>5</sup> Hiler defined a "microsleep" as what happens just before a person starts to fall into a deeper sleep. (Tr. 276). The DSS alarm is set to go off about 2.5 seconds into a microsleep. He based this testimony on the training he received when the DSS system was installed. After about 5 seconds, a person's neck muscles start to relax and his head will bob. *Id.*

On March 10, 2011, mine management participated in a problem-solving meeting with Myers because Myers did not believe it was fair that she was given a final written counseling as a result of the events of February 15. (Tr. 445). She had been disciplined for closing her eyes on purpose, which was considered to be a safety hazard for distracting activities. (Tr. 445-46). Tammy Lockmiller, an HR generalist, told Myers that, by closing her eyes on purpose, she had been tampering with the DSS equipment. Other employees had been disciplined for tampering with the DSS system. (Tr. 446; Ex. R-48). Ms. Lockmiller participated in the investigation of this incident along with Fohr, Lundeen and Ron McDaniel, another supervisor. They concluded that Myers closed her eyes on purpose. (Tr. 447; Ex. R-44). Myers also said that she gave the thumbs-up sign when she was in the truck to show dispatch that everything was okay. Fohr told her that she should not be driving with her eyes closed and one hand off the steering wheel to signal with her thumb. *Id.* Because Freeport considered Myers' behavior to be a very serious safety matter, she was issued a final written counseling. (Tr. 448-49).

At some point in February 2011, Myers called MSHA to file a hazard complaint about the DSS machines. (Tr. 129-30). The details of this complaint are not clear, but MSHA did not take any enforcement actions. Fohr testified that, when an MSHA inspector came to the mine to investigate a safety complaint about the DSS, no citations were issued and the MSHA investigator told him that he thought the DSS system "was a really good safety device." (Tr. 352).

On April 20, 2011, Myers picked up a load from a shovel pit that had been "freshly dug." (Tr. 116). Myers testified that there were many rocks in the area. As she was driving her truck up a ramp, she got a flat tire. According to Myers, the following day, Tammy Lockmiller from HR came into the lineup room, pulled her out, told her that she was suspended, took her badge and walked her to the mine gate. (Tr. 117).

Fohr testified that tires on the haul trucks cost between \$30,000 and \$50,000 each. (Tr. 352-52). As a consequence, Freeport makes every effort to protect them and get as much mileage out of them as possible. All flat tires are investigated, including the flat tire of Myers. (Ex. R-31). The flat tire was caused by a rock. Lockmiller testified that she was put on investigatory leave with pay because she had already been issued a final written counseling. Myers was allowed to return to work without receiving any discipline.

Myers testified that on May 4, 2011, she pulled her backpack out of her car and felt a "stretch" in her shoulder. (Tr. 123). It was not painful. When she went into the lineup room, she turned her head to the left and felt "unbearable, excruciating pain." *Id.* An EMT was brought in to examine her. The EMT asked her if she had been roughly loaded recently and she replied "yes." (Tr. 124; Ex. C-18). Myers testified that as soon as she said that, Freeport pursued it because you can be disciplined for failing to report that the shovel operator loaded a truck in a rough manner. (Tr. 124-25). It is clear that Myers does not believe that the rough loading caused her neck pain and the company pushed that theory in order to suspend her. Her truck was roughly loaded about six days earlier. She was suspended for two weeks with pay for this incident pending an investigation. (Tr. 124).

Myers testified that when a driver believes that a shovel operator loaded her truck too roughly, she has to make a quick decision whether she was injured by the incident and whether it should be reported. (Tr. 127). She testified that she determined that she was not hurt so she did not report it, but that she did tell the shovel operator about it and he apologized. A rough load can throw the driver around and cause an injury as well as damage to the truck.

Lockmiller testified that Myers complained about a hurt neck one morning in lineup and said that it was due to a rough load. (Tr. 450). Lockmiller testified that any type of safety incident that results in an injury must be reported by the employee to management. She was placed on investigatory leave because Myers did not report the injury. Investigatory leave is not considered to be discipline by Freeport but it gives the company the opportunity to investigate the incident. Following the investigation, she came back to work at the mine. (Tr. 451; Ex. R-49).

Myers testified that she frequently complained to Tiffany Ulibarri and Tammy Lockmiller in HR about the way she was being harassed. (Tr. 62, 130-31). She said that they both indicated that they investigated her complaints but Myers felt that they merely gave her sarcastic responses. Ms. Ulibarri testified that Myers did complain about being harassed but she did not give her any specific examples, except for the jewelry incident. (Tr. 419). Myers also complained to her that the DSS made her nervous. Myers told her about the incident where the DSS alarmed as she was trying to pass a crawler. Ulibarri testified that Myers complained that the system made her nervous but did not tell her that she almost hit the crawler. (Tr. 420). Ulibarri testified that Myers frequently complained about the DSS, but her complaints were of a general nature that did not include any specific safety complaints. She told her that it was "loud and obnoxious," it made her nervous, it never worked when it was supposed to, and it only worked when she was not falling asleep. (Tr. 421). Starting in March 2011, Myers complained that the DSS was giving her migraine headaches. Ulibarri testified that she told Myers about filing a workers compensation claim. She also had someone from the safety department check out the DSS system on Myers' truck, but the system was functioning properly in the same manner as on the other trucks. No other drivers made similar complaints to Ulibarri. (Tr. 422). One driver apparently was headed toward a berm when he started falling asleep but the DSS woke the driver before he went over it and he credits that system for saving his life. *Id.*

The Rocky Mountain District of MSHA received Myers' complaint of discrimination on May 4, 2011. (Ex. C-19). In the complaint, under the section of the form entitled Date of Discriminatory Action, Myers wrote: "From Aug. 2010 - April 2011; Feb 16, 2011 Suspended, April 21, 2011 Suspended." Under Summary of Discriminatory Action she wrote: "I have been suspended, harassed, and retaliated against for bringing up safety concerns." She attached a four-page typed statement that provided more details. *Id.* By letter dated June 16, 2011, Myers was advised that MSHA did not believe that Freeport discriminated against her.

Myers testified that on June 15, 2011, there was a great deal of smoke in the air from forest fires. (Tr. 132). Because she was having difficulty breathing, she asked the safety department for a respirator. She had to leave the mine site and go to a clinic to be fitted for a

respirator. Myers testified that Amy Pooler came to her and told her that if she left the property she would be fired. (Tr. 132). Myers went to the clinic with Pooler to get fitted. While she was waiting, she walked down the hall to her own personal doctor whose office was in the same building, to get a shot for her migraine headache. Myers testified that when she tried to return to the mine, she was denied entry. (Tr. 133).

On cross-examination, Myers agreed that she was put back on a truck when she returned after her request for light duty work was denied. (Tr. 188). Myers noted that the air conditioning was not working on the truck. Although she asked to be switched to a different truck, she did not ask that she be immediately assigned to another truck because of a medical condition.<sup>6</sup> (Tr. 190). She never provided Freeport with a note from her doctor seeking special accommodation on the basis of this condition.<sup>7</sup>

Pooler said that she took Myers to the clinic, had her fit-tested, had a respirator made, and returned to the mine. The entire process took about five hours. (Tr. 406). Sometime after Myers resumed driving a haul truck, Pooler received a call from a supervisor, Rene Varela, asking her to meet him and Myers. Varela told Pooler that he had observed Myers backing up her truck at a shovel with door open and she was not wearing a seatbelt. Pooler arrived at the meeting point before Myers and Pooler testified that she could see that the shoulder strap on Myers' seatbelt was behind her back. (Tr. 407). Pooler said that when she asked Myers whether she was wearing her seatbelt correctly, she replied "no." (Tr. 408). Pooler then drove Myers to the office where she was given an "investigation with pay" notice." (Tr. 409). Myers admitted again that she had not been wearing her seatbelt correctly. Failure to use the shoulder strap on the seatbelt in a violation of company policy. Pooler wrote up a statement on these events. (Tr. R-40).

Myers agreed that Freeport advised her that the reason for her termination was that she drove this truck with the door open without wearing her seat belt properly. (Tr. 181, 185, 189; Ex. R-20, 22). She admitted that she had the door open on her truck, but only when she was waiting in line at the shovel not when she was moving. (Tr. 193). She also admitted that she was not wearing the shoulder strap on the seatbelt.

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<sup>6</sup> Myers testified that she suffers from hypohydrosis, which she described as an inability to sweat or a reduced ability to perspire. (Tr. 216). It is clear the Freeport management was unaware that she had this condition. (Tr. 429).

<sup>7</sup> Normally, a driver is reassigned to an air-conditioned truck after driving a truck with a broken air-conditioner for no more than two hours, but accommodations can be made so that a the driver is reassigned to another truck right away. (Ex. R-14). Pooler testified that several truck drivers have been given special accommodation from the two-hour rule due to a medical conditions. (Tr. 412).

Lockmiller testified that Myers was put on investigatory leave following this incident. (Tr. 452). The failure to wear personal protective equipment almost always results in disciplinary action. (Tr. 452-53; Ex. R-47). Although Lockmiller was not directly involved in the investigation of this incident, she prepared the executive summary of the incident. (Tr. 453; Ex. R-50). Based on the company's investigation into this incident, Myers was discharged from her employment. (Tr. 453-54; Ex. G-21). Other drivers have been discharged for failure to wear a seatbelt. (Ex. R-47).

At the hearing, Myers repeatedly testified that she never used the words "on purpose" when discussing her eyes being closed. She feels that her actions did not create a safety hazard, she never started to veer off the road or run into anything. (Tr. 473). She feels that she was always in control of her truck and that the only hazard presented was the DSS alarms that scared her.

In her post-hearing submission as well as in her pre-hearing report, Myers asked that I issue an order granting her relief. Among other remedies, Myers asked that I reinstate her to her job as a haul truck driver, order that Freeport remove any documents from her personnel file that were used against her, order that she be awarded back-pay, order that Freeport draft a letter of recommendation for future employment, order that Freeport pay the cost of her moving expenses from Arizona to Arkansas and back, and order that the DSS machines be removed from the haulage trucks and replaced with Sirius radios.

## **II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW**

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181 at 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving

that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

### **A. Protected Activity**

Freeport argues that Myers did not engage in protected activity. It contends that her complaints lacked substance and clarity. It also contends that most of Myer's complaints were idiosyncratic and not shared by other drivers. Myers felt that the DSS machine was annoying and intrusive, but Freeport notes that many safety devices in the mining industry are annoying and intrusive. Freeport also maintains that Myers exaggerated her complaints for the court.

I find that the vast majority of Myers' complaints were not about her personal safety or the safety of other miners, but related to her personal dislike of the DSS machine and its effect on her. She believed that it did not work as it was supposed to and that it frequently went off when she was simply trying to do her job. She did testify that on October 15, 2010, the DSS scared her as she was passing another piece of equipment (a crawler) and she believed that, as a consequence, she could have had an accident. She wrote in her personal note: "3:40 EOP trying to pass 62 crawler by upper fuel dock." (Ex. R-7). In preparation for trial, she wrote a note on that page that said when the DSS machine went off as she was trying to pass the crawler on that day, it "scared me so bad that I took her eyes off the crawler and when I look back at him I am almost running him over which scares me even more."<sup>8</sup> *Id.* The note goes on to state she reported the event to Tiffany Ulibarri. Ms. Ulibarri testified that Myers mentioned the event to her and complained about the voice that kept saying "keep your eyes on the path," as she was trying to pass the crawler, but Ulibarri denied that Myers ever said that it almost caused her to have an accident. (Tr. 419-20). Near misses are required to be reported. I credit Ulibarri's testimony in this regard and find that Freeport was not aware that Myers believed that the DSS machine caused her to have a near miss with the crawler.

Many of Myers's complaints about the DSS directly concerned the effect that the DSS alerts were having on her personally. She complained that it gave her migraine headaches, made her nervous, and that she ended up with PTSD. There is no proof that these problems are directly related to the DSS except for her testimony. Myers said that she was suffering from

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<sup>8</sup> Freeport argues that the subsequent notes Myers' made in preparation for the hearing should not have been admitted into evidence and should not be relied upon by the court in reaching its decision in this case. (Freeport Br. 3-4). These handwritten notes are on the margins of the contemporaneous notes she took when she was a haul truck driver. Many of these notes were added after discovery was completed or were altered after discovery with the result that Freeport did not have the material in preparation for trial. The request to strike these additional notes is denied simply because Ms. Myers is proceeding *pro se*. I have not given the notes that she added in preparation for trial any weight except in those instances in which she offered testimony on the subject covered by these notes.

“massive, massive anxiety” and testified that she told her physician that her anxiety could be related to her recent divorce. (Tr. 90). Myers also testified that her PTSD may be linked with the abusive relationship she had with her ex-husband. (Tr. 161). Myers may well have been more sensitive to the DSS than other truck drivers because of the turmoil in her personal life. Her serious problems with the DSS appear to be rather idiosyncratic to her. Although some of the other truck drivers did not like the DSS, they did not lodge complaints that these devices created serious safety hazards. Other drivers who operated the trucks assigned to Myers did not complain that the DSS activated more frequently than such devices normally do on other trucks. Freeport’s safety department checked out her truck and the DSS to see if there were operational problems, but nothing about her truck was abnormal. The DSS in her truck operated in the same manner as the other haul trucks.

I do not credit Myers’ testimony that the fatigue alarm was loud like an air horn or that the vibration of the seat was like having a cattle prod in the truck. I find that Myers did not establish that the fatigue alarm and the distraction event voice command had a reasonable potential cause to cause accidents at the mine.

The Commission and its judges do not have the authority to provide relief to complainants with mental or physical disabilities that prevent them from performing the job duties normally assigned to miners. “It is clearly not the purpose of the Mine Act, but rather worker’s compensation, social security disability and other similar laws to provide loss of income protection” when a miner is unable to perform work normally assigned to miners. *Collette v. Boart Longyear Co.*, 17 FMSHRC 1121, 1126 (July 1995) (ALJ). Idiosyncratic complaints that arise from a miner’s unique physical, emotional, or mental capabilities are generally not protected by the Mine Act. *See Price v. Monterey Coal Co.*, 12 FMSHRC 1501 (Aug. 1990). Although Myers holds a good faith belief that the DSS creates a safety hazard, the evidence establishes that her problems with the DSS are a result of her particular emotional makeup. She did not like the voice telling her what to do or the alarm buzzing when she closed her eyes. More importantly, according to her testimony, the voice and alarm scared her to the extent she felt that she could no longer operate haul trucks in a safe manner. “[M]ining is not the most comfortable of professions.” *Price*, 12 FMSHRC at 1515. Safety equipment is often uncomfortable and inconvenient. Myers may simply not be well suited to being a haul truck driver. Although at least a few of the other drivers did not particularly care for the DSS system, especially when it was first installed, there has been no showing that the system created a significant safety hazard at the mine. Indeed, the evidence establishes that haul truck accidents decreased after the installation of the DSS system. I credit that evidence.

It is significant that Myers never sought accommodation for any of her alleged disabilities, including her PTSD and her hypohydrosis. At the hearing, Myers stated that this information was in her medical files in HR and implied that Freeport should have known of her need for accommodation. I find, however, that Myers did not take any steps to seek an

accommodation for these alleged conditions.<sup>9</sup> The procedure for bidding for other positions was explained to Ms. Myers by HR. “The Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator’s employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act.” *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990) (internal citations omitted). I find that her complaints were either not related to safety and health or that they were not communicated to mine management as safety concerns. As stated above, Freeport was not aware that the incident with the crawler created a safety hazard that needed to be investigated.

Given the above, I find that Myers did not establish that she engaged in activity that is protected by the Mine Act. Her complaints were of a personal nature and she did not communicate any specific safety complaints to management. Because Myers represented herself in this case, however, I will assume for purposes of discussion and resolving this case that at least some of the complaints Myers lodged about the DSS machine related directly or indirectly to her personal safety. At the hearing, she appeared to be a person that has a difficult time articulating her concerns.

## **B. Adverse Action**

### **1. General Considerations.**

Establishing a connection between the protected activity and the adverse actions is often difficult to establish. “Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . ‘intent is subjective and in many cases the discrimination can be proven only by use of circumstantial evidence.’” *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F. 2d 86 (D.C. Cir 1983). In evaluating whether a complainant has established a causal connection between protected activities and adverse actions, the following factors are generally considered: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment. *Id.*

There was certainly a coincidence in time between the protected activity and the adverse action. Although Myers alleged, in a general way, that other drivers were treated differently than she was after she started raising questions about the DSS devices, the evidence was insufficient to establish disparate treatment. Other haul truck drivers had been disciplined for tampering

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<sup>9</sup> I note that the medical records that Myers relied on at the hearing are mostly the notes taken by her physician as Myers described how she was feeling. (Ex. C-12, p. PTSD2). There was no diagnosis of PTSD, for example. Myers described her traumatic personal life to the physician and expressed her belief that she suffered from PTSD and the physician prescribed an antidepressant and recommended counseling. (Tr. 159-61; Ex. C-12).

with the DSS devices. (Ex. R-5 p. 17, R-48). As discussed herein, I credit the testimony of Freeport's witnesses that Myers was not singled out for discipline because she complained about the DSS machines.

Freeport certainly had knowledge that Myers did not like the DSS devices, that she considered them to be a nuisance, and that she considered them unsafe because of the number of false-positive fatigue alarms. Her complaints were of a general nature, she said that the DSS fatigue alarms scared her and that the distraction event voice commands were distracting to her. Freeport did not have any knowledge that Myers believed she almost had an accident with the crawler because the voice that said "keep eyes on path" distracted her. Freeport observed that she was having difficulty adjusting to the DSS system and its managers attempted to show her that the system was a safety device meant to prevent accidents. Freeport considered the DSS system to be a safety device that all haul truck drivers would need to adjust to. It did not consider her complaints to be protected activity.

I find that Freeport did not display hostility or animus toward any demonstrated protected activity, but it did display hostility toward what it considered to be her testing of the DSS. As discussed below, the evidence establishes that Myers frequently closed her eyes for periods of time that were significantly longer than ordinary blinking. The DSS camera only sends an email to the tower with a video and photos if the eyes remain closed for at least two and a half seconds. On the night of February 14, Myers had her eyes closed for long enough periods to send an email at least eight times. The objective evidence establishes that she was either closing her eyes on purpose or she was falling asleep. Because she denied to management that she was falling asleep and she told them that she was testing the machine, Freeport disciplined her. Such discipline did not establish animosity toward any protected activity.

## 2. Specific Allegations

The first adverse action Myers mentioned concerned harassment by Ms. Propes. I credit the testimony of Propes that she did not single out Myers or try to harass Myers for any reason. Myers testimony that she was harassed by Propes and others by transporting her to her truck late, sparing out her truck, and putting her on haul trucks that had some mechanical problem was not very convincing. All trucks were shut down from time-to-time for production reasons. It was her responsibility to make sure that she got on the correct van to take her to her haulage truck by the most direct route. Freeport investigated this alleged harassment when Myers called the Freeport hotline. (Ex. R-6). She did not mention the DSS in her hotline complaint. (Tr. 199; Ex. R-6). There is also no showing that any adverse action was related in any way to her lower evaluation for production.

On October 10, 2010, Myers was asked to come to the tower so that she could be shown photos of herself with her eyes closed. The DSS registered quite a few microsleep events during her shift that day. Propes signed a statement that evening in which she stated that Myers told her during this meeting that she was not tired and that the DSS was not working correctly. Propes testified that Myers told her that she was "testing the machine." (Exs. C-9, R-30). Propes

advised Myers that she should not test the machine because it is there for her safety. I credit the testimony of Propes on these events.

On October 27, 2010, the DSS in Myers' truck was not working properly because it appeared that the camera had been obscured. Hiler called her to the tower where Myers explained that paper towels must have rolled in front of the camera. Hiler explained that the DSS is a safety device, that she must keep the camera free of obstructions, and that employees can be disciplined for tampering with the DSS including the camera. (Ex. R-29). She was not disciplined for this event. Myers believes that she was given this warning to create a paper trail so that she could be disciplined for complaining about the DSS.

On February 14, 2011, Myers was suspended from work with pay because management believed that she was closing her eyes on purpose while driving her truck. Lundeen testified that Myers told him that she made the DSS alarm activate. There is a dispute as to what she meant by that statement. Myers argues that all she meant was that her normal work activities made the alarm sound. Freeport management believed that Myers was continuing to "test" the machine. (Exs. R-16, C-15). In her written statement, Myers stated: "I tested the system myself to see how it works." *Id.* In a separate paragraph she wrote: "Conclusion – the system does go off when you close your eyes and are not sleeping." *Id.* At the hearing, Myers testified that these two statements are not related and that is why she put them in separate paragraphs. (Tr. 109-14). She testified that whenever she closed her eyes, the alarm went off.

I recognize that people do close their eyes from time to time, and apparently when she did, the fatigue alarm would sound at least some of the time. Nevertheless, management reasonably concluded from her oral remarks and written statements that she was also closing her eyes on purpose to demonstrate that the alarm would sound when someone was not actually on the verge of falling asleep. She would give the thumbs-up sign in the mistaken belief that the dispatcher could see it and know that she was okay. Myers was suspended with pay for these actions and given a final written counseling. (Tr.114; Ex. C-16).

Myers protested this discipline and a problem-solving meeting was held on March 10, 2011, to discuss it. (Ex. R-42). Management explained that Freeport considered her act of closing her eyes on purpose to be a safety hazard that amounted to tampering with safety equipment. I credit the testimony of Freeport's witnesses that the company suspended her because management believed that she was purposefully closing her eyes to activate the DSS alarm. Freeport did not reduce the discipline following this meeting.

Her next suspension occurred after she had a flat tire on April 20, 2011. However, this was a suspension with pay pending an investigation. She returned to work without being disciplined for the flat tire.

On May 4, 2011, Myers suffered a pain in her neck. She attributes the pain to lifting her backpack out of her vehicle. She did tell the EMT, however, that her truck had been roughly loaded a few days earlier. She was suspended with pay pending an investigation because rough

loading events are required to be reported. Myers was allowed to return to work without any disciplinary action being taken.<sup>10</sup>

Myers filed her discrimination complaint with MSHA on or about May 4, 2011. She was interviewed by MSHA Special Investigator David B. Funkhouser on May 24. She advised Funkhouser that she wanted all of her previous discipline removed from her records and all of the DSS machines removed from the haul trucks at the mine. (Ex. R-2). Myers described the DSS system to Funkhouser, complained that the alarm is frequently triggered when she is not falling asleep, and she attributed her discipline to her complaints about the DSS. She told the investigator that she is the miner who phoned in the complaint to MSHA about the DSS machines being unsafe. *Id.* By letter dated June 16, 2011, MSHA determined that no discrimination took place.

MSHA did not consider the events of June 2011 that resulted in her termination when it investigated her discrimination complaint. Myers testified that she called Inspector Funkhouser to keep him up-to-date on the events that transpired after the May 24 interview including her termination. (Tr. 133-35). It does not appear that MSHA did any further investigation into her discrimination complaint. Myers did not file an amended complaint of discrimination with MSHA following her termination.

Freeport argues that the Commission does not have jurisdiction to consider the issue of her termination because MSHA never investigated the events surrounding her termination. The scope of MSHA's investigation establishes the extent of my jurisdiction in this case. *Hatfield v. Colquest Energy*, 13 FMSHRC 544 (April 1991); *Pontiki Coal Co.*, 19 FMSHRC 1009, 1017 (June 1997). It is clear that Myers did not file an amended complaint with MSHA and MSHA did not conduct an investigation based on her subsequent phone calls to Funkhouser. Thus, I do not have jurisdiction to order relief based on the events that occurred after MSHA's investigation.

I find that Myers did not establish that she was disciplined because of any safety concerns she may have expressed about the DSS. Instead, the discipline was given for the reasons described by Freeport. The only discipline involving the DSS was for her admitted act

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<sup>10</sup> Because she had been given a final written counseling on February 23, 2011, for the events of February 15, all subsequent events involving Myers were more thoroughly investigated than they would otherwise have been. She was given a final written counseling because Freeport considered her continued testing of the DSS to be a serious safety violation. Freeport's progressive discipline policy provides that an employee may be immediately discharged for "failure to follow safe procedures while operating heavy equipment, and inappropriate removal, alteration, or bypass of a safety guard." (Ex. R-5, p. 17). She was suspended with pay during the two investigations described above, but she was not otherwise disciplined. Ulibarri testified that this practice was standard procedure at the mine. (Tr. 426-27). I credit Ulibarri's testimony on this issue.

of testing the system. In reaching this conclusion, I assume that the DSS alarm produced some false-positives for Ms. Myers because she was closing her eyes for more than 2.5 seconds at a time. I assume that when she closed her eyes, whether she was in danger of falling asleep or not, the DSS would often set off an alarm. I credit the testimony of Fohr that someone may be entering a microsleep without realizing it. This fact is significant because, in many instances, Myers may have been entering a microsleep condition without realizing it. In the instances that occurred during her night shift February 14-15, 2011, her eyes were closed for 2.5 seconds or longer, in some instances her eyes were closed for more than 3.5 seconds, and one instance her eyes were closed for 4.5 seconds. (Ex. R-33). The DSS is designed to keep drivers awake and, in performing this function, it is likely to be irradiating to the driver if he or she is sleepy. I credit the testimony of Freeport's witnesses that the alarm and the computer voice were not so loud that it should unnecessarily scare someone. I note, however, if a driver is beginning to fall asleep at 1:00 a.m. and the alarm goes off, it may well be jarring to the driver because it is waking him up. There was no showing that being awakened or startled by the DSS fatigue alarm or the distraction command voice creates a safety hazard. Falling asleep while driving a haul truck certainly creates a significant safety hazard.<sup>11</sup>

### III. ORDER

For the reasons set forth above, it is hereby **ORDERED** that Complainant's discrimination claim be **DISMISSED**.

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

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<sup>11</sup> If I were to assume that MSHA had investigated Myers' termination and reached the conclusion that there was no violation of section 105(c) of the Mine Act and I were to assume that her termination was properly before me under section 105(c)(3) of the Mine Act, based on the record developed at the hearing, I would find that Myers did not establish that her termination violated section 105(c). My reasoning would be the same as set forth in this decision with respect to the other discipline that she received.

Distribution:

Tiffany Myers, 2816 W. Quail Drive, Fayetteville, AR 72704-5364

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

July 10, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2008-215
Petitioner	:	A.C. No. 44-06804-141359A
v.	:	
	:	
ERNEST B. MATNEY, Employed by	:	Tiller No. 1
KNOX CREEK COAL CORP.,	:	
Respondent	:	

**DECISION ON REMAND**  
**GRANTING THE SECRETARY’S MOTION**  
**TO APPROVE SETTLEMENT**

Appearances: Lucy C. Chiu, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;  
Timothy W. Gresham, Esq., Penn, Stuart & Eskridge, Abingdon, Virginia, for the Respondent.

Before: Judge Feldman

The initial decision in this matter determined that Ernest Matney (“Matney”), as an agent of Knox Creek Coal Corporation (“Knox Creek”), was not personally liable under section 110(c) of the Mine Act, 30 U.S.C. § 820(c),<sup>1</sup> for failing to conduct an adequate preshift examination in violation of 30 C.F.R. § 75.360(a)(1), and failing to protect personnel from roof and/or rib falls

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<sup>1</sup> Section 110(c) of the Mine Act provides:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under [this Act] or any order incorporated in a final decision issued under [this Act], except an order incorporated in a decision issued under subsection (a) ... or section 105(c) ... , any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

in violation of 30 C.F.R. § 75.202(a).<sup>2</sup> 31 FMSHRC 1422, 1424, 1438 (Dec. 2009) (ALJ). On April 25, 2012, the Commission reversed the initial determination that Matney was not liable under section 110(c) for knowingly authorizing Knox Creek's violations and remanded for the assessment of a civil penalty. 34 FMSHRC \_\_ (Apr. 2012), slip op. at 11. The Commission found that Matney was personally liable for failing to address hazardous roof conditions that were readily apparent. *Id.* However, the Commission did not disturb the initial finding that the Secretary failed to demonstrate, by a preponderance of the evidence, that Matney knew, or should have known, that a crib had been built and then dismantled under a sheared roof bolt. Slip op. at 8, fn. 9. The Secretary initially proposed a civil penalty of \$2,700.00 against Matney for the two subject violations.

The Secretary now has filed a motion for the approval of settlement. Matney has agreed to pay a total reduced civil penalty of \$2,160.00 in satisfaction of the cited violations. The reduction in penalty is based on Matney's inability to pay the civil penalty initially proposed because he is currently a recipient of Social Security disability payments.

I have considered the representations submitted in this matter and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act, with particular emphasis on the ability to pay criterion. 30 U.S.C. § 820(i). **WHEREFORE**, the Secretary's motion to approve settlement **IS GRANTED**. Pursuant to the parties' agreement, Ernest Matney **IS ORDERED** to pay the \$2,160.00 civil penalty within 40 days of this order in satisfaction of the two violations at issue.<sup>3</sup> Upon receipt of timely payment, the captioned civil penalty matter **IS DISMISSED**.

/s/ Jerold Feldman  
Jerold Feldman  
Administrative Law Judge

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<sup>2</sup> 104(d)(1) Citation No. 7317341 and 104(d)(1) Order 7317342 were issued to Knox Creek for failure to conduct an adequate preshift examination, and for failing to protect personnel from unsafe roof conditions, respectively. The initial decision affirmed the 104(d)(1) Citation and Order against Knox Creek and was not appealed.

<sup>3</sup> 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. Please include the Docket No. and A.C. No. noted in the above caption on the check.

Distribution: (Certified Mail)

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
**Office of Administrative Law Judges**

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July 11, 2012

JEFF SCOTT,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. WEST 2012-79-DM
	:	WE MD 11-05
v.	:	
	:	Docket No. WEST 2011-269-DM
	:	WE MD 10-17
	:	
NEWMONT USA LIMITED,	:	Mine: Gold Quarry - South Area
Respondent.	:	Mine ID 26-00500

Appearances: Andrew L. Rempfer, Larson Welsh, Las Vegas, Nevada on behalf of the Complainant, Jeff Scott;  
Laura Beverage, Karen Johnston, Robin Repass, Jackson Kelly, PLLC, Denver, Colorado, on behalf of the Respondent.

Before: Judge Miller

**DECISION**

This case is before me on a Complaint of Discrimination brought by Jeff Scott against Newmont USA Limited, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c). The parties presented testimony and documentary evidence at a hearing commencing on April 11, 2012 in Salt Lake City, Utah.

**I. BACKGROUND**

Newmont USA Limited (“Newmont”), the Respondent, operates the Gold Quarry Mine (the “mine”) near Elko, Nevada. It. Stip. 1,2. Newmont hired the Complainant, Jeff Scott, as a haul truck driver on September 25, 2006. Scott’s last position prior to termination was equivalent to a “Technician 3” as listed in the Operating Engineers Local Union No. 3 agreement. It. Stip. 5. Scott worked as a haul truck driver until the time Newmont discharged him from employment at the mine on October 21, 2010. Scott filed his first discrimination complaint with MSHA, MSHA Case No. WE-MD 10-17, (Docket No. West 2011-269-DM) on March 3, 2010 while still employed by Newmont. He filed a second complaint of discrimination in September, 2010, also while still employed by Newmont. Subsequently, Newmont discharged Scott, after which he filed a third discrimination complaint with MSHA, MSHA Case No. WE-MD 11-05, alleging

that he was terminated for engaging in activity protected under the Act, pursuant to 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). The third complaint, filed in February, 2011, Docket No. West 2012-79-DM was the subject of a temporary reinstatement request. Scott was granted economic reinstatement in March, 2011 in Docket West 2011-739-DM. Scott seeks back pay in the amount of \$36,505.00 for the time he was unemployed from October to the time he was temporarily reinstated. Newmont has agreed to the amount of back pay owed as a result of the termination. All three discrimination complaints are the subject of this decision.

The parties have agreed upon the following stipulations:

1. Respondent is an operator within the meaning of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. §§ 801 *et seq.*
2. Newmont USA Limited; South Area Mine, Mine I.D. No. 26-00500, is subject to the jurisdiction of the Mine Act.
3. At all times relevant to this proceeding, Complainant, Jeff Scott, was a "miner" within the meaning of §§ 3(g) and 105(c) of the Mine Act, 30 U.S.C. §§ 802(g) and 815(c).
4. The Administrative Law Judge has jurisdiction in this matter to decide claims alleging protected activity under the Mine Act, pursuant to § 105(c)(3) of the Mine Act.
5. Jeff Scott began working at Newmont on September 25, 2006, as a haul truck trainee-operator at the South Area Mine. Scott was eventually promoted to a haul truck driver. Scott's last position was equivalent to a "Technician 3," entitled as of the 2010-2013 Collective Bargaining Agreement, Appendix A, of \$25.54 per hour, plus all other health, life, dental, perquisites and other benefits available to Technician 3-Level employees, in Year 1 of the Agreement.
6. Scott was a member of Operating Engineers Local Union No. 3.
7. Newmont and Local No. 3 are parties to a "Collective Bargaining Agreement." The parties hereby stipulate the CBA for the years 2010-2013 shall apply to this dispute.
8. Newmont has a progressive disciplinary policy.
9. On October 23, 2009, Scott submitted a "Talking Safety Feedback #468." Suggesting Newmont institute a "zero tolerance policy for operating equipment with coolant leaks." Newmont approved this Talking Safety Suggestion.
10. On November 13, 2009, Scott submitted "Talking Safety Feedback #515" and suggested "[Newmont] ensure that we have an effective solution to cleaning the dust out of 789 haul truck cabs. I recommend Shop Vacs (1 Gallon Size), Inverters and Hepa Filters." Newmont approved this Talking Safety Suggestion.
11. On November 14, 2009, Scott submitted a "Talking Safety" suggesting a change from the "after-market convex blind-side mirrors with the flat, glass mirrors that the trucks originally came with . . ." Newmont approved this Talking Safety Suggestion.
12. On January 18, 2010, Scott received a "written warning for excessive absenteeism." Scott previously received a written warning for being AWOL on February 8, 2007, and a recorded verbal warning for excessive absenteeism on July 16, 2008.
13. On February 17, 2010, Scott witnessed the Operator of a Hitachi Hydraulic Excavator ("Shovel") strike the bed of a haul truck driver's truck with the shovel bucket one time.
14. Regarding the incident referenced in paragraph 13, above, the parties stipulate Scott reported this incident to his Shift Foreman, Randy Hutsell. Scott was issued a written

- warning for using his cellular phone to report the incident. That written warning was later removed from Scott's file after further investigation into the matter.
15. On February 17, 2010, Scott was reassigned to the South Area.
  16. On or about March 3, 2010, Jeff Scott filed a discrimination complaint with MSHA pursuant to § 105(c) of the Mine Act, MSHA Case No. WE-MD 10-06.
  17. On March 9, 2010, Scott was seen by Shift Foreman Todd Fowers failing to yield his haul truck to Fowers' light vehicle on two separate occasions.
  18. On March 10, 2010, Scott received a "written warning" for (allegedly) "fail[ing] to yield to posted yield signs on two separate occasions during the shift, creating an unsafe working environment for others working in the area
  19. On March 15, 2010, Scott had a private meeting with Todd Fowers. During this meeting, Scott requested the following day off, March 16, 2010, so he could meet with the MSHA special investigator.
  20. On March 23, 2010, Scott nominated Fowers for an employee recognition award for turning the negative reinforcement of discipline (referenced in paragraph 19 above) into a positive event, by putting safety ahead of production. As a result, Fowers received a \$100 Spot Recognition Award.
  21. On June 8, 2010, Scott submitted "Talking Safety Feedback #648" and suggested "placing a computer with the necessary controls in the time shack line-out room. When operators are waiting for equipment they could utilize the computers to look-up STPs, SOPs, and training clips from our training department and from Caterpillar." Newmont denied this Talking Safety Suggestion and opted for placement of hard copies of STPs in the line-out rooms.
  22. On June 30, 2010, Scott received a write up for "inadequate job performance," which included a one-day disciplinary layoff for (allegedly) parking his truck too close to a shovel, which caused the shovel to strike Scott's truck. Both parties concede the shovel hit Scott's truck.
  23. On July 1, 2010, Scott submitted a "Talking Safety Feedback #679" suggesting Newmont make the "12 volt charger/cigarette lighter components a higher priority to fix on all our equipment" for emergency-related purposes. Newmont approved this Talking Safety Suggestion.
  24. On July 1, 2010, Scott submitted a "Talking Safety Feedback #680" suggesting Newmont "get some kind of dust suppression for the South Area Gyro. The Gyro is so old and has been hit so many times that it seems nearly impossible that it could be sealed. There are times when dumping a dry load of material into the Gyro after which you cannot even see the Gyro through the cloud of dust. This cannot be good for the Gyro operator; with the increasing clarity of ubiquitous internet satellite image services, it will eventually harm the company as well." Newmont approved this Talking Safety Suggestion.
  25. On August 25, 2010, Scott submitted a "Talking Safety Feedback #735" seeking a "computer in mine ops line-out room that is completely offline (not even connected to the intranet) for training videos, SOPs [and] other relevant to safe, efficient production. [Scott] demonstrated a training video [he] downloaded from cat.com at the last training safety mtg. [he] attended and was told to file another suggestion. I volunteer to load content (approved by mgmt.) [and] maintain this computer . . . on my own if necessary." Newmont approved this Talking Safety Suggestion.

26. On August 25, 2010, Scott submitted a “Talking Safety Feedback #736” requesting “[Newmont] set a minimum width for the roads we drive haul trucks on . . . [and] for narrow spots we can’t fix could we place appropriate signage [and] make sure we have enough support equipment [and] gravel during the winter months.” Newmont approved this Talking Safety Suggestion.
27. On August 25, 2010, Scott submitted a “Talking Safety Feedback #737” suggesting “[Newmont] post a list of equipment failures/conditions in mine control that would require a piece of equipment to be automatically downed . . . we need a list, readily available to mine control that is written in stone so these situations don’t erode into common practice.” Newmont approved this Talking Safety Suggestion.
28. On August 31, 2010, Scott reported to Newmont employees were allegedly verbally harassed and subject to a hostile work environment.
29. On August 31, 2010, MSHA determined that no discrimination occurred under § 105(c) of the Mine Act as alleged in MSHA Case No. WE-MD 10-06.
30. On September 8, 2010, Jeff Scott filed a discrimination complaint with MSHA pursuant to § 105(c) of the Mine Act, MSHA Case No. WE-MD 10-17.
31. On October 15, 2010, Scott met with Dave Sirotek and Todd Fowers to discuss alleged incidents regarding Scott’s work performance. Scott was then suspended pending investigation into his performance. Fowers testified he had already prepared a written disciplinary warning for Scott that day.
32. Jeff Scott was terminated from the position of haul truck operator at Newmont, effective October 21, 2010.
33. On or about November 8, 2010, MSHA determined that no discrimination occurred under § 105(c) of the Mine Act as alleged in MSHA Case No. WE-MD 10-17.
34. On or about February 11, 2011, Jeff Scott filed a discrimination complaint with MSHA pursuant to § 105(c) of the Mine Act, MSHA Case No. WE-MD 11-05.
35. On or about September 13, 2011, MSHA determined that no discrimination occurred under § 105(c) of the Mine Act as alleged in MSHA Case No. WE-MD 11-05.
36. On or about September 16, 2011, Jeff Scott filed a discrimination complaint with MSHA pursuant to § 105(c) of the Mine Act, MSHA Case No. WE-MD 11-21.
37. On or about December 2, 2011, MSHA determined that no discrimination occurred under § 105(c) of the Mine Act as alleged in MSHA Case No. WE-MD 11-21.
38. Jeff Scott did not request reimbursement for any MSHA-related or mine rescue-related training during the period of his temporary reinstatement.

## **II. FINDINGS OF FACT**

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration, or lack thereof, and consistencies or inconsistencies, in each witness’ testimony and between the testimonies of witnesses. In evaluating the testimony of each witness, I have relied on his or her demeanor. Any failure to provide detail on each witness’s testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not

considered. *See Craig v. Apfel*, 212 F.3d 433,436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

Mr. Scott and Newmont's witnesses testified at length regarding the events leading up to Scott's termination. The critical events discussed at hearing are summarized below in chronological order.

#### *August 2009 – November 2009*

Scott testified that he sent an MSHA fatalgram regarding highwall conditions to Newmont mine superintendent Randy Walund on August 17, 2009. (Tr. 23). The following day, on August 18, Scott had an angry exchange of words with Wade Stark, the shovel operator, over the radio. During cross-examination, Scott testified that Stark had called him an "idiot" because he backed his truck up after being parked at the loader and Scott responded by calling Stark a "moron." (Tr. 123-124). Soon thereafter, Wade struck Scott's truck with the shovel. (Tr. 25, 124). Scott raised the issue with his supervisor and refused to work with Stark the following day. When Scott was assigned to load with Stark, he felt it unsafe and, therefore, without seeking permission, changed his work assignment and loaded with another shovel operator. (Tr. 34). Subsequently, Scott received a written reprimand from his supervisor, Hutsell, in August, 2009. (Tr. 360). Scott believed that little, if anything, was done to investigate the incident involving Stark and so he sent emails to various Newmont management personnel expressing his concern. (Tr. 40-41). Scott had a meeting with his supervisor and others at the time the reprimand was issued and was warned not to go outside of his chain of command when seeking action. (Tr. 44). On cross-examination, Scott agreed that he was not aware of any other worker at the mine who had a problem with Stark or if Stark had been disciplined as a result of the incident. (Tr. 125).

In October, 2009, and twice in November, 2009, Scott submitted "Talking Safety" feedback forms to the safety committee. All three were accepted by the mine. "Talking Safety" is an employee operated program at Newmont, in place since 2008, which affords miners the opportunity to present safety suggestions to the mine. Miners submit a "Talking Safety" form to the safety committee for review and recommendation. Normally the forms are not passed through a foreman or supervisor, but supervisors do have the authority to view the submitted forms. Many suggestions are made each month by any number of employees and, for the most part, are kept confidential. Throughout his career, Scott submitted many suggestions, many of which were implemented at the mine.

#### *February 2010*

On Feb 17, 2010, Scott, via cell phone, reported hazardous machinery operation by fellow employees to a mine supervisor. (Tr. 63). Scott had observed Stark hit a haul truck driven by Paul Linenger with the shovel that Stark was operating. (Tr. 62). Linenger did not find Stark to be at fault and made his own report about the incident. (Tr. 392). He did not see a reason for Scott's involvement.

Scott stated that immediately following this report, he was written up by his supervisor for violating the mine's cell phone policy. The write up was subsequently removed from his file and, at about the same time, Scott was transferred to the South Area of the mine and provided with a new supervisor, Todd Fowers. (Tr. 65). Fowers recalls that he told Scott several weeks before the move to the South Area, that Scott was being reassigned. Fowers documented that conversation along with Scott's comment that Scott had a "bias" toward Stark. (Tr.342). Fowers understood that Scott believed Stark to be violent and in need of counseling, but Fowers received no other complaints about Stark. Fowers explained that Scott was transferred to the South Area, as many miners have been, because that area is the larger section and it was in need of EMTs. As a result of the move, Scott lost no pay, worked the same shift, experienced no change in status, but was placed under the supervision of Fowers.

Scott stated that he suffered emotional distress as a result of the discipline he received for using his cell phone and, because of such; he called in sick to work on February 18th. (Tr.71). Newmont issued disciplinary notices to him for the unexcused absence on Feb 18th. (Tr.72). These incidents formed the basis of Scott's initial complaint to MSHA, filed as MSHA Case No. WE-MD 10-17. (Tr.67). Scott argued that he did not violate the cell phone policy and eventually, the reprimand was removed from his file. (Tr.77). Moreover, in Scott's view, the unexcused absence notice was not appropriate since he had called in as required, and left a message that he was not able to sleep and wasn't feeling well. (Tr.71, 91). When questioned by his supervisor, Scott failed to mention that he was suffering from stress and that he had received treatment through the Newmont employee assistance program. (Tr.152). Much later, Scott provided information regarding his stress, depression and anxiety when he sought and was granted leave pursuant to the Family Medical Leave Act. (Tr.153).

Neither reprimand was used as a basis for Scott's termination, but Scott suggested that the process of permanently removing him from his position began with these actions. Scott testified that Newmont's progressive discipline policy was used, in his view, as a tool to systematically remove an employee who was not wanted at the mine. (Tr. 90).

### *March 2010*

Scott received the next disciplinary action for failure to yield to another vehicle on March 10, 2010. (Tr. 80). On two occasions during his shift, Scott observed Fowers in a pickup truck come to an intersection as Scott was approaching in a haul truck. (Tr. 78-79). On the first occasion, Scott saw that Fowers stopped, so Scott drove through, believing that haul trucks had the right of way in all instances. (Tr. 80). However, a few hours later, as Scott approached the yield sign, he described that he did not see the pickup until it was too late to stop and, again, he was under the impression that the company policy was that haul trucks, as large equipment, had the right of way. (Tr. 79-80).

Fowers' testified that Scott's truck was traveling too fast and, in Fowers' view, the driver should be driving in such a manner that he can stop if necessary. Fowers contacted the driver after observing him fail to yield at the sign in the first instance. He was not aware that Scott was the driver until he made contact through use of the number of the truck. (Tr. 346). Fowers

instructed Scott to yield at the signs as posted and believed this communication was understood by Scott. (Tr. 346). However, later in the shift, as Fowers drove out to evaluate the road conditions after it began to snow, he again observed Scott fail to yield at a sign. Scott asserts that the roads were wet and slick, making it difficult for him to stop. However, Fowers remembers that his purpose was to check road conditions, and he did not find them to be wet and slick at the time he observed Scott disregard the yield sign for the second time. (Tr. 349). The second time Fowers observed the activity, he again told Scott on the radio to follow the signs and yield as required. (Tr. 348).

Haul truck operator Paul Linenger testified that, as a haul truck driver, he understands that he must yield to oncoming traffic if there is a posted sign. (Tr. 396). If there is no sign, he explained, then the haul truck has the right of way.

The incident at the yield sign occurred during the night shift on March 10, 2010. On March 15, Scott approached Fowers to ask for the following day off so that he could meet with an MSHA investigator. (Tr. 257-258). There is some dispute as to what was said, but Fowers remembers that he told Scott he could have the day off. Scott recalls that Fowers was not happy about Scott's impending meeting. On March 18, 2010, when Scott returned to work, he was issued a disciplinary action for failing to yield at the posted sign. (Tr. 80); Resp. Ex. L. Fowers asserts that he intended to issue the reprimand prior to Scott seeking a day off to speak with an MSHA investigator.

On March 23, 2010, Scott nominated Fowers for an employee recognition award for turning the negative reinforcement of discipline into a positive event, by putting safety ahead of production. As a result, Fowers received a \$100 Spot Recognition Award. *Jt. Stip. 20.*

#### *June 2010*

On June 8, 2010, Scott suggested, through the "Talking Safety" program, that a computer be added to the shack line-out room, but the suggestion was denied. On June 19, 2010 Scott parked his haul truck at an angle to the shovel operated by Ken Schultz. He thought he might be close but Schultz did not ask him to move. (Tr. 93). Scott stated that once he was nearly loaded, the shovel counterweight grazed his truck, resulting in minor damage to both the shovel and truck. (Tr. 94). As a result, Newmont issued Scott a reprimand for parking too close to the shovel. (Tr. 96). Scott believed that he did not park too close and that the contact resulted from the shovel sliding toward him during the loading operation. (Tr. 97). During cross examination Scott confirmed that, after the contact, he said something over the radio to the effect of "I just hit a big orange thing" and chuckled. (Tr. 167-168).

Kent Schultz, a Newmont shovel operator, credibly testified that he observed Scott back a little too close to the shovel but, at least initially, he believed he could safely load Scott's truck. (Tr. 414). Schultz stated that his shovel was not "ratholed" as alleged by Scott, and there was no reason for Scott to have positioned the truck the way he did. Schultz explained the contact by stating that Scott's truck had settled at an angle due to its position and had leaned over into the shovel's swing radius. (Tr. 414). Schultz testified that, after being loaded, Scott contacted him on the radio and told him that he "got too close to [the] shovel and . . . had made contact." (Tr. 419).

Schultz testified that he has never known the several million pound shovel to slide as Scott claimed. (Tr. 420).

Newmont HR officer Mike Woodland investigated the truck/shovel contact incident and upheld the reprimand based in part on a determination made by the safety department. (Tr. 461). Woodland also explained that, during the course of his investigation, an equipment manufacturer's representative informed him that it was rare for a shovel of that size to slide. (Tr. 464). Newmont foreman Tim Wright also testified that he heard Scott on the radio after the contact say "I was too close to the shovel and I just got you." (Tr. 570). On June 20, 2010, Scott was given one day off as discipline for the incident.

### *July 2010*

On July 1, 2010, Scott submitted another "Talking Safety" suggestion about repairing the chargers in the haul trucks. The suggestion was approved.

### *August/September 2010*

On August 25, 2010, Scott presented three separate "Talking Safety" suggestions to the mine. The first one concerned a request for a computer in the line-out shack and the second requested setting a minimum width for the haul roads. Both were accepted by the safety committee. The third suggestion concerned the need for a list of standard items that would be used to determine if a haul truck should be put out of service. The suggestion was also accepted. Stips. 25, 26 and 27. On August 16, 2010, Scott sent an email to Mike Woodland in the mine's HR department and mine superintendent Jason Hill, in which he provided information about the "Mine Star" system and listed phone numbers that Hill might want to call. (Tr. 647); Resp. Ex. LL. Scott also mentioned the incident with the shovel calling it retaliation. Scott mentioned Todd Fowers, Hill's career, and provided information from an HR website. On August 26, 2010, Scott sent an email to Hill regarding dust in equipment. Hill forwarded the email to maintenance, asking them to check the trucks, and a sent a copy to Fowers, directing him to inform Scott that the trucks would be inspected and repaired. Resp. Ex. MM. A more troubling email from Scott to Jason Hill and a number of management personnel, including Sirotek and Fowers, Resp. Ex. HH, was titled "yesterday's dog and pony show." Scott complained that a meeting about the shovel incident was stacked against him and that he was not given a fair opportunity to present his position. In the two-page email, Scott indicated that he was going to file two grievances with the union. He also threatened to contact the higher management in Denver, and work his "way back down the ladder." He told Hill that, after a time, he would file another complaint with MSHA and, after that, a complaint with the EEOC if he was not heard and not satisfied with the results of his complaints. The tone of the email is one of anger and threats. Hill could not explain why Scott continually sent him emails, but he followed up on complaints by forwarding the message to the correct person and instructing his supervisors to look into the allegations. (Tr. 648).

On August 26, 2010, Scott also sent an email to Mike Woodland detailing the hostile work environment at the mine. Scott then met with two representatives from HR, Woodland and Vasquez. (Tr. 105). They discussed the complaints Scott made, including his accusations about being treated unfairly and the retaliation against him, as well as the treatment of another

employee, Phillip Medina. (Tr. 106). Vasquez met with Scott a second time and spent an additional three hours with him and then followed up and conducted interviews. (Tr. 106); Scott Exs. 25A, 25B and 25C. One subject of Scott's email, Phillip Medina, was interviewed and informed HR that he had already spoken to Fowers and the matter had been resolved. (Tr. 468-469). As a result of the investigation, Vasquez found no merit to the allegations raised by Scott. (Tr. 586).

#### *October 2010*

The final incidents prior to Newmont's termination of Scott occurred on October 10, 2010. Scott explained that, on that date, he parked his truck at 7:06, cleaned it out and quit at 7:10. (Tr. 359). Although the shift ends at 7:30, miners can begin shutting down at 7:10 in order to switch with the oncoming shift. (Tr. 192). Scott testified that he shut down just before 7:10 because an average haul cycle took over 20 minutes and he did not have time to complete another cycle before quitting time. (Tr. 111).

Fowers testified that, after Scott was warned at the morning safety meeting not to quit early, he observed Scott park his haul truck in the line of trucks at the end of the October 10<sup>th</sup> shift. (Tr. 356). On this particular shift, Fowers was in the "Mine Star" office talking to the operators when he observed, via camera, two vehicles, and then a third, pull into position to quit before 7:10. (Tr. 355). The first two vehicles rolled in shortly after 7:00 and Scott followed a few minutes later. (Tr. 355). Fowers got on the radio and told the three equipment operators, including the haul truck operator, who turned out to be Scott, to return to work. (Tr. 355-356). The two other vehicles who had pulled in ahead of Scott returned to work, but Scott remained parked. Fowers continued to call Scott on the radio and, via the camera in the office, could see Scott in his truck. However, Scott refused to answer the radio call on each of the three occasions. (Tr. 356). Although Scott argues that he was out of his truck and cleaning for the last few minutes, Fowers did not observe him get out of the truck and did not observe him engaged in cleaning activities. (Tr. 357).

Tim Wright was in the office with Fowers and supported the description of the incident provided by Fowers. Wright repeatedly reminded the crew that they could not quit until after 7:10 and he made a special point of reminding the drivers at the beginning of that shift on October 10th. (Tr. 571). A number of times, Wright has observed truck drivers pull in early and he has reminded them to return to work, even if it is for only a few minutes. (Tr. 571). He heard Fowers tell the drivers to move on and observed Scott park his truck and ignore the radio calls of Fowers. (Tr. 573:12-16).

On the same date, at the end of the shift, Fowers was approached by Cheney, who was visibly upset and who had been working with Scott in the pit that evening. Cheney, a colorful witness, asked Fowers to please instruct Scott to cooperate with him when working together in the pit. (Tr. 362). Cheney explained that on numerous occasions during the night, he had explained to Scott, the correct location for dumping, yet Scott continued to dump in other

locations.<sup>1</sup> Cheney testified that in his 23 years working at Newmont, he has not complained about a haul truck driver, but it was his view that Scott was purposefully dumping in the wrong area when Cheney was not looking, thereby making Cheney's job more difficult. (Tr. 627). Linenger confirmed that Cheney was obviously upset after working with Scott based upon his radio communication. (Tr. 399). Wright also observed Walter Cheney approach Fowers after the shift and confirmed that Chaney was upset. (Tr. 573-574).

Scott testified that he was dumping at the feed stockpile with Cheney that shift, and that he was unfamiliar with the dumping operations at that location. (Tr. 114). According to Scott, Cheney, the loader operator, mentioned to Scott near the end of the shift that there had been some problems related to where Scott was dumping that night. (Tr. 114). Scott asserts that he dumped as he should have that night, he was never warned that there was a problem, and he was just "filling in the holes" to accommodate the loader. (Tr. 113).

Scott explained that, as a result of shutting down before 7:10 and dumping in the wrong location, he was called into a due diligence meeting with Newmont management and a union representative on October 15, 2010. Stip. 31. Scott asserts that Newmont had determined to issue reprimands for dumping in the wrong location and quitting early during the October 10<sup>th</sup> shift prior to questioning him and calling him into the meeting. (Tr. 117). Scott also asserts that the disciplinary meeting was called without proper notice. Stip. 31. Scott testified that he had just met with the MSHA investigator the day before and, given that the mine had no documentation to demonstrate that he had quit early or dumped in the wrong location, there was no point to the meeting. (Tr. 117). Scott refused to respond to any allegations made at the meeting and was suspended pending investigation. (Tr. 117, 365). It was Scott's impression that the entire meeting was stacked against him. (Tr. 117).

Scott stated that Newmont terminated his employment on October 21<sup>st</sup> for the stated reasons of dumping in the wrong location, quitting early, and failing to cooperate at the due diligence meeting. (Tr. 119). Scott filed a grievance with the union regarding the actions and after a meeting with the board of adjustment, consisting of two management persons and two union persons, it was determined that Scott would be given the opportunity to resign, instead of being fired. (Tr. 181). Scott refused. (Tr. 181).

Fowers testified at length and agrees that Scott frequently raised issues of safety but he asserts that he did not make the decision to terminate Scott. He was, however, involved in meetings with the Human Resources Department and mine management about Scott's situation. Mike Woodland worked in the Newmont HR office during the time Scott was issued disciplinary actions and he was part of the discussion when the decision was made to terminate Scott. Woodland, had reviewed the disciplinary action that Scott received for using his cell phone in February, 2010 and determined that Scott did not violate Newmont's policy as alleged and had the action removed from Scott's file. (Tr. 440). Woodland did agree, however, with Fowers that in March, 2010 Scott was correctly warned about not yielding in posted areas. (Tr.445).

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<sup>1</sup> In his statement to MSHA, Chaney said that he did not go speak with Fowers that night, but during his testimony, which I find credible, he indicated that he had made an error when speaking to the inspector.

Woodland was also present when Scott was asked to explain to Fowers and Sirotek, the mine manager, his view of dumping in the wrong place with Cheney and taking his haul truck out of service early. A union rep was present, yet Scott became angry and refused to discuss the matter. (Tr. 473). Woodland indicated that no one person made a decision to terminate Scott and, instead, it was a collective consensus decision by Woodland, David Sirotek, Debbie Papparich, the Newmont HR manager for Nevada, Jason Hill, mine superintendent, and Fowers. (Tr. 554-555).

Fowers described that he believed Scott to be a problem employee because he was constantly going over his head with complaints. (Tr. 579). Fowers was unhappy with Scott for sending numerous emails directly to the mine manager and mine supervisor instead of giving Fowers the opportunity to address Scott's concerns. He admitted that Scott's complaints sometimes involved safety issues. If they were justified, Fowers said, they were addressed. (Tr. 579).

Jason Hill, the mine superintendent, explained that before taking any action against Scott, he carefully examined the entire record to be certain the proper procedures and policy were followed. (Tr. 662). Sirotek, the mine manager, agreed that the progressive discipline policy had been followed in Scott's case and confirmed that other employees had been terminated at Newmont based upon the same policy. Sirotek, while general manager, followed the discipline procedure for Glen Tervort, who was involved in an accident that injured three employees. (Tr. 678). He was not terminated, but the documents at Scott Ex. 39 show that he was suspended for three days by his supervisor, who coincidentally was his uncle. (Tr. 678:). Bobby Martinez had several accidents and was terminated through the progressive discipline policy. (Tr. 680). Martinez was initially given one day off for equipment damage, then, in November, 2008 after a second accident, he was given three days off. Later, in December, Martinez was given five days off for hitting a berm, and was subsequently terminated. (Tr. 681).

### III. ANALYSIS

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

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

*Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall*, 663 F.3d 1211 .

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Factors to be considered in assessing whether a prima facie case exists include the operator's knowledge of the protected activity, hostility or "animus" towards the protected activity, timing of the adverse action in relation to the protected activity, and disparate treatment. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 2 FMSHRC 2508 (Nov. 1981).

A. *Protected Activities and Adverse Actions*

In order to sustain his discrimination complaint, Scott must first demonstrate that he has engaged in an activity or activities that are protected by Section 105(c) of the Mine Act. The record before me clearly establishes that Scott has engaged in protected activity which include the filing of 105(c) complaints with MSHA on March 3, 2010 and again in October, 2010. *Rickey Joe Strattis v. ICG Beckley, LLC*, 32 FMSHRC 614, 616 (June 2010) (ALJ) (holding that filing a 105(c) discrimination complaint is a protected activity for which operators are barred from retaliating against).

Scott testified that he also engaged in protected activities when he submitted "Talking Safety" requests and sent emails to mine management about unsafe conditions. All such activities were known to the mine and in most instances Scott advised Newmont before he filed a discrimination complaint with MSHA and before meeting with investigators. Beginning in February, 2009, Scott complained about the unsafe activities of the shovel operator, Stark, and the following day refused to load with Stark because Scott believed him to be an unsafe equipment operator. As a result, Scott was reprimanded for changing the shovel operator assignment without seeking foreman approval. Following that incident, Scott provided a number of safety suggestions through the "Talking Safety" program in 2009. *Jt. Stip.* 9, 10 and 11. Scott continued to make safety suggestions through that program in 2010, primarily in June, July and August. *Jt. Stip.* 21, 23, 24, 25, 26, 27. Scott filed two discrimination complaints with MSHA prior to his termination and in each instance he made the company aware of the complaint. Finally, the record demonstrates that Scott sent emails to management and supervisors about various issues that were safety related, including exposure to dust by haul truck drivers.

Scott has also shown that he was subject to a number of adverse actions during his employment with Newmont and, according to Scott, these adverse actions were a direct result of the protected activities. I find that moving Scott to the South Area was not an adverse action, as many miners are routinely moved to the larger South Area from the North Area, and often times

the reverse. The cell phone write-up was an adverse action, but was remedied by Newmont prior to this hearing. The write-up that Scott received for an unexcused absence in February, 2010 constitutes an adverse action, as do a number of the disciplinary actions, including those on March 10, 2010 (allegedly in response to the failure to yield at an intersection), June 20, 2010 (allegedly in response to being hit by the shovel) and October 11, 2010 (allegedly in response to parking early and inadequate dumping). The termination of Scott was the final adverse action taken by Newmont.

*B. Discriminatory Motive*

The connection between the protected activities and the adverse actions is a difficult issue. The Commission has determined that the hostility or “animus” towards the protected activity, timing of the adverse action in relation to the protected activity, and disparate treatment may all be considered in determining the connection between the protected activity and the adverse action. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 2 FMSHRC 2508 (Nov. 1981).

Having found that Scott engaged in protected activity, and that Scott was subject to adverse actions by Newmont, it is necessary to determine whether Newmont was motivated, at least in part, by those protected activities when it issued disciplinary actions and eventually terminated Scott’s employment. As previously stated by the Commission, direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–11 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C.Cir. 1983); *Sammons v. Mine Services Co.*, 6 FMSHRC 1381, 1398–99 (June 1984). As the Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir.1965):

It would indeed be the unusual case in which the link between the discharge and the (protected) activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner or miners includes hostility towards the miner because of his protected activity and disparate treatment of the complaining miner by the operator. *Chacon*, supra at 2510.

Scott described how the actions taken by the mine were close in time to safety complaints that he had made and to complaints he made to MSHA. In one instance Scott informed Fowers that he needed time off to meet with an MSHA investigator and Scott understood Fowers to be upset about the request. Thereafter, Scott received a written reprimand. At least two of the write-ups were handed to Scott shortly after he met with an MSHA investigator. Other actions on

the part of Scott, such as sending an email regarding safety issues were all close in time to the adverse actions.

There is no question that Newmont, and particularly Fowers, found Scott to be a problem employee. Fowers, in the self-assessment portion of his performance appraisal for the year 2010, wrote that he “helped Newmont achieve great results with one of its most difficult employee problems. I provided most of the documentation; this took a great deal of personal time, and resulted in a great outcome.” (Tr. 579). That outcome was that Scott was terminated from his employment. The question is, did Fowers seek to terminate Scott, at least in part, due to his protected activity. It is a very close question but given the timing of the reprimands and disciplinary actions, along with the hostility demonstrated toward Scott, I find that the mine took actions against Scott based in part upon his protected activity.

However, I do not find that Scott was treated differently from other employees as he alleges. I have reviewed the evidence with regard to other similarly situated Newmont employees, particularly those who have a comparable work history. Scott raised several instances of discipline or failure to discipline in this regard. In each instance the employee engaged in some conduct that was more serious than any action taken by Scott. For example, Tervort was in an accident that injured several people, yet he was only given days off. The same is true of Martinez, who was involved in several accidents and, after three incidents, was fired. Both miners violated company policy that resulted in injury or damage and each received a progressive discipline. It appears that, even though the events were more serious, the mine followed the progressive discipline policy in terminating the employment of the other employees. While I find that in some measure, Newmont discriminated against Scott, I cannot rely on the theory of disparate treatment to support the discrimination. Instead I rely upon hostility toward Scott and the timing of the events.

Newmont management’s interactions with Scott indicate definite hostility towards Scott’s safety related activities. Fowers admits that Scott caused problems for him and for other supervisors, and part of those problems related to the many safety complaints made by Scott. Given that hostility, I find that Newmont terminated Scott, at least in part, because of his protected activities. Therefore, I find that Scott has met his burden of demonstrating a prima facie case of discrimination. I find further that the mine operator has not produced sufficient evidence to rebut the prima facie case by showing either that there was no adverse action or that the actions were taken for reasons wholly outside the protected activity.

C. Affirmative Defense of Operator.

Having found that Scott has established a prima facie case of discrimination, I must now consider evidence that indicates that Newmont issued disciplinary citations to and eventually terminated Scott due to unprotected activity and “would have taken the adverse action for the unprotected activity alone.” *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-818 (1981); *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980).

The Commission has enunciated several indicia of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. *Id.* The Commission has explained that an affirmative defense should not be “examined superficially or be approved automatically once offered.” *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must “determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.” *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Commission has held that “pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices.” *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

Upon review, it is obvious that Scott's work history with Newmont is far from exemplary. Witnesses for the company testified that Newmont has a policy of progressive discipline and that Scott was issued reprimands in accordance with that policy. The progressive discipline policy has a rolling 12 month lag period, meaning that if there is no discipline in one year, the last discipline falls off the record and the progression of discipline begins anew. Some of the discipline warnings are for being absent from work, however, those had little bearing on the termination of Scott. The notices are as follows.

August 22, 2009	Verbal reprimand for refusing to load with assigned operator.
January 18, 2010	Written warning for excessive absenteeism. Jt. Stip. 12.
February 18, 2010	Written warning for an unexcused absence (called in).
March 10, 2010	Written warning for inadequate job performance (failed to yield at an intersection).
June 20, 2010	Written warning and one day suspension for inadequate job performance (parking truck too close to shovel, shovel hit his truck). Jt. Stip. 22.
October 11, 2010	Inadequate job performance (Fower saw Scott quit several minutes early and ordered him back to work; Scott did not respond. Cheney complained about Scott's refusal to cooperate in dumping in the correct area. Scott also refused to discuss complaint from operator when asked to do so.)

The early write ups were issued by Hutsell, but after Scott was moved to the South Area in February, 2010, the reprimands were issued by Fowers, the senior pit foreman. Fowers testified that he first investigated each incident with Scott and would not have issued any write up without the approval of HR. (Tr. 222).

In slightly more than one year, Newmont issued Scott five warnings (four written and one verbal) primarily for subpar job performance. Scott argued that some of these disciplinary actions, particularly the ones immediately preceding his termination, were merely retaliation for his safety related activities at the mine. I might agree that the final incident, Scott parking his truck before the end of shift, was a minor violation, particularly if Scott were cleaning his truck

as he alleges. The difficulty for Scott is that Fowers told two others that it was too early to quit just prior to Scott and then called Scott on the radio three times. Fowers was in a good position to see that Scott was in his truck, and not out cleaning as Scott alleged. Also, all employees on the shift had been warned earlier to not to stop before 7:10, yet Scott decided to quit a few minutes early. In many instances, stopping work a few minutes ahead of time would not be worthy of discipline, but this instance was different, given the prior warning and Scott's obvious decision to ignore his supervisor. I credit Cheney's testimony that, on that same night, Scott would not cooperate with him and that it appeared Scott was purposefully dumping in the wrong location. While Scott admits to no wrongdoing that night, I find that there is credible evidence to support Newmont's position that the reprimand was warranted.

I also find Fowers to be a credible witness. He admits that he thought Scott was a problem at the mine, and understood that Scott made a number of safety complaints. Fowers explained that he carefully documented and reprimanded Scott as appropriate and followed the steps of the progressive discipline policy in order to terminate his employment. Fowers' testimony is not only supported by Cheney, who is not a supervisor, but also by Tim Wright, who observed a number of the incidents that involved Scott.

The incident with the cell phone, which was removed from Scott's file, was not a legitimate exercise of the disciplinary process. Nor was the warning for being absent without a good reason in February, 2010. However, the remaining disciplinary actions have a real basis in fact and the mine has shown that those disciplinary actions against Scott were warranted. Admittedly, Fowers wanted to get rid of Scott, but that was due, at least in part, to the fact that Scott continued to go above him in the chain of command with complaints and suggestions without giving Fowers the opportunity to respond. A review of some of the emails to mine management sent by Scott demonstrates an angry and sometimes threatening attitude on his part. In addition, it has been shown that Scott routinely interjected himself into matters that Fowers believed did not concern him, such as alleged harassment against Medina or making a complaint on behalf of Linenger. Fowers saw these actions as interfering with management prerogatives. Given the actions of Scott, I find that Newmont not only had legitimate concerns, but legitimate reasons to terminate Scott's employment and that, even without the protected safety activity, Scott would have been terminated.

I find no evidence that Scott was treated any differently than other employees with respect to the reprimands, both verbal and written, he received or the company's enforcement of its progressive discipline policy. Therefore, I agree with Newmont that Scott would have been terminated based upon his unprotected activity alone.

#### **IV. ORDER**

As discussed above, I find that Jeff Scott has demonstrated a prima facie case of discrimination based upon his many protected activities and the mine's response. Further, I find that Newmont has presented a credible and legitimate basis for disciplining and eventually terminating the employment of Jeff Scott based upon actions other than his protected activity. Therefore, Mr. Scott's discrimination complaints are **DISMISSED**.

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, NW, SUITE 9500  
WASHINGTON, DC 20001-2021  
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July 13, 2012

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2009-1213-M
Petitioner	:	A.C. No. 10-01911-187445
	:	
v.	:	Docket No. WEST 2010-405-M
	:	A.C. No. 10-01911-205342
HIGHLAND ENTERPRISES, LLC,	:	
Respondent	:	Docket No. WEST 2011-261-M
	:	A.C. No. 10-01911-237626
	:	
	:	Mine: Mt. Solo Pit

**DECISION AND ORDER**

Appearances: Emily B. Hays, Esq., Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado for Petitioner

Don Blewett, *pro se*, Highland Enterprises, LLC, Grangeville, Idaho for  
Respondent

Before: Judge McCarthy

**I. Statement of the Case**

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (MSHA), against Highland Enterprises, LLC (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). Five 104(a) citations remain at issue.<sup>1</sup>

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<sup>1</sup> At the hearing, the parties made a joint motion on the record to settle all three citations at issue in Docket No. WEST 2011-261-M, i.e., Citation Nos. 8562410, 8562411, and 8562412 . See Tr. 13-14. At the hearing, the parties also made a joint motion to settle four of the eleven citations at issue in Docket No. WEST 2010-405, i.e., Citation Nos. 6483465, 6483466, 6483467, and 6483468. See Tr. 14-15. After the hearing, pursuant to ongoing settlement negotiations, the parties settled four of the remaining seven citations in Docket No.

(continued...)

An evidentiary hearing was held in Moscow, Idaho. The parties introduced testimony and documentary evidence, and witnesses were sequestered. On the entire record, including my observation of the demeanor of the witnesses,<sup>2</sup> and after considering the post-hearing briefs, I make the following:

## **II. Factual Background**

### **A. Stipulated Facts**

The parties stipulated to the following facts, which were received into evidence as Joint Ex. 1.<sup>3</sup> Tr. 10-11.

1. These dockets involve a surface crushed and broken-stone mine known as the Mt. Solo Pit, which is owned and operated by Respondent.
2. The mine location changes. When the citations in the above-captioned dockets were issued, the mine was located near Lewiston, Idaho.
3. The mine, MSHA ID 10-01911, is subject to the jurisdiction of the Federal Mine Safety Act and Health Act of 1977 (the Mine Act), 30 U.S.C. §§ 801 through 965.
4. The Administrative Law Judge has jurisdiction over these proceedings pursuant to § 105 of the Mine Act.
5. Respondent is an operator as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d).

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<sup>1</sup>(...continued)

WEST 2010-405, i.e., Citation Nos. 6483470, 6483471, 6483472, and 6483475, and also settled three of the five citations at issue in Docket No. WEST 2009-1213, i.e., Citation Nos. 6475789, 6475790, and 6475791. As set forth in Section III below, I have considered the representations presented and conclude that the proposed settlements are appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, those settlement agreements are approved.

<sup>2</sup> In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, and consistency or lack thereof within the testimony of witnesses and between the testimony of witnesses.

<sup>3</sup> In this decision, “Tr.” refers to the hearing transcript; “J. Ex. #” refers to the parties’ joint exhibits; “P. Ex. #” refers to the Secretary’s exhibits; “R. Ex. #” refers to the Respondent’s exhibits; “Sec’y Br.” refers to the Secretary’s Post-Hearing Brief; and “Resp’t Br.” refers to the Post-Hearing Brief of Highland Enterprises, LLC.

6. Respondent is engaged in mining operations in the United States and its mining operations affect interstate commerce.
7. Kenneth Poulson and Scott Amos are authorized representatives of the United States Secretary of Labor assigned to MSHA's Boise, Idaho field office and were acting in an official capacity when the citations were issued.
8. Respondent demonstrated good faith in abating the violations at issue in these dockets.

**B. Findings of Fact and Conclusions of Law Regarding Unsettled Citations**

**1. Docket No. WEST 2009-1213-M<sup>4</sup>**

**a. Citation 6475792**

Citation 6475792 alleges that Respondent violated 30 C.F.R. § 56.11027 by failing to provide a handrail on a work platform at the portable crusher plant. The cited standard at 30 C.F.R. 56.11027 provides that “[s]caffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition . . . .” The citation alleges the following condition or practice:

There were no handrails provided on the elevated work platforms for the cedar rapids roll crusher on both sides. The work platform measures approximately 50 inches above the ground. The work platform was approximately 24 inches wide and 9 feet long. There were sets of access steps provided on both sides to access the work platform. Miners would access this area to perform maintenance work as needed. This condition exposes persons to serious fall related injuries.

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<sup>4</sup> At the outset of the hearing, Respondent moved for summary judgment on all citations in Docket No. WEST 2009-1213-M because Respondent had not completed its pre-operational inspection and the generator for the electric motors had not been started and was locked and tagged out when the MSHA inspector arrived at the Lewiston, Idaho mine site on the morning of April 14, 2009. Tr. 16. Counsel for the Secretary opposed the motion and argued that the cited conditions had existed when the plant was last operating. Tr. 17. I denied the motion because general issues of material fact were in dispute, but permitted Respondent to revisit the substance of its argument in its post-hearing brief, after I heard the evidence. Tr. 17-19. Respondent did not raise this argument again in its post-hearing brief. Furthermore, as explained below, record evidence and admissions from Respondent support the Secretary's position.

The violation is alleged to be significant and substantial (S&S),<sup>5</sup> with gravity alleged to be reasonably likely to result in lost workdays or restricted duty, and one person affected. Negligence is alleged as moderate. The Secretary proposes a penalty of \$585.00.

On April 14, 2009, MSHA inspector Kenneth Poulson<sup>6</sup> inspected Respondent's roll crusher at the Lewiston, Idaho location and issued the instant citation because an alleged work platform did not have handrails. Tr. 117-18; P. Ex. 4, pp. 5-6. Respondent argues that the cited area is a trailer fender, not a work platform, and the fender is required by the Department of Transportation for safety during transport. Respondent further argues that inspector Poulson conceded that there would be no violation if Respondent's miners tied off when using the alleged platform (Tr. 165-170), and the testimony of Respondent's foreman, Colby Blewett, established that Respondent did so. R. Br. at 2; Tr. 355, 398, 408-09.

At the hearing, Colby Blewett admitted that the cited area was used on rare occasions as a work platform. See Tr. 345-355, 408-09. It is undisputed that the work platform had no handrails. Tr. 117; P. Ex. 4, pp. 5-6.

Blewett further testified, however, that Respondent's miners always tied off with a one-foot lanyard, and he informed inspector Poulson of this practice. See Tr. 345-55, 408-09. By contrast, inspector Poulson testified that Blewett told him during the inspection that Respondent did not use the cited area as a work platform, and if Respondent needed to access the area, it would use a ladder. Tr. 129-130. Poulson testified that the issue of tying off was not broached by Blewett. Tr. 170.

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<sup>5</sup> The S&S terminology is taken from section 104(d)(1) of the Mine Act, which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d)(1).

<sup>6</sup> Poulson has worked for MSHA as an inspector since July 2001 and received his authorized representative card in April 2002. Tr. 104-05. He primarily inspects surface sand and gravel operations and a handful of underground metal/non-metal mines throughout Idaho, eastern Washington, eastern Oregon and Hawaii. Tr. 105. Poulson received classroom and on-the-job field training at MSHA's training academy in Beckley, West Virginia, and returns every two years for refresher training. Tr. 106. He is also a trained accident investigator. Prior to joining MSHA, Poulson was employed at an underground silver mine (Sunshine Mine) for twenty-four years. He worked underground and at the surface crushing plant, performed maintenance work at the antimony plant, performed mechanic functions, and was foreman of the maintenance crew in the mill. Tr. 107-08. I note that credible testimony from an experienced MSHA inspector, such as Poulson, is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (1998); *Buck Creek Coal, Inc.*, 52 F.3d 133, 135-36 (7th Cir. 1999).

R. Ex. 1, an April 21, 2009 letter to the MSHA Conference and Litigation Representative, contesting the violations in Docket 2009-1213, does not mention the tie-off rationale as a basis for the contest of this citation. There is no mention of tying off or using a safety lanyard in the letter. Rather, Respondent states in said letter that the platform was not a work platform and that “no maintenance work” was done on the platform. As noted, Blewett’s admission at trial established that this was not the case. In these circumstances, I credit Poulson that the “tying off” defense was not raised before trial. Rather, it was developed at trial, is unsupported by Respondent’s own prior statements, and I give it little weight.<sup>7</sup>

Section 56.11027 unambiguously requires working platforms to have handrails. The standard has no provision exempting a work platform from the handrail requirement because miners allegedly tie off when accessing the platform. The standard covering “tie offs” is set forth in 30 CFR § 56.15005. It provides: “[s]afety belts and lines shall be worn when persons work where there is danger of falling.” Section 56.15005 does not provide any exemption from required safety lines when a handrail is in place. The standards are mutually exclusive. See *Northwest Aggregates*, 20 FMSHRC 518, 525-526 (May 1998)(ALJ Manning). To the extent that inspector Poulson testified to the contrary at trial (Tr. 166-69), I agree with the Secretary that such testimony represents a misunderstanding of Commission case law.<sup>8</sup>

In short, even the alleged use of safety lines where there is a danger of falling does not obviate the requirement for handrails on work platforms under the cited standard. Accordingly, I find that Respondent violated 30 C.F.R. § 56.11027 by failing to provide handrails on the work platform on the roll crusher.

The citation was terminated when Respondent chose to cut off the platform, after receiving MSHA approval, because it was the quickest and easiest way to get back to work and

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<sup>7</sup> See, e.g., *LAC Bullfrog, Inc.*, 18 FMSHRC 422, 430-31 (March 1996) (ALJ Hodgdon) (statements given by witnesses close to the time of the incident, when details are fresh and there has been no opportunity to formulate statements favorable to their cause, are more reliable than later embellished or inconsistent statements).

<sup>8</sup> Handrails are an engineered safety requirement that remain in place no matter who is using the platform. Tying off depends on the cognitive action of the person working on the platform, both in making the decision to use such personal protection and the ability to use it properly. As this Court has stated, “the Commission interprets safety standards to take into consideration ordinary human carelessness.” *Beckley Crane & Construction, Inc.*, 33 FMSHRC 372, 382 (Feb. 2011)(ALJ McCarthy), citing *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). “Consequently, the construction of mandatory safety standards, which involve miner behavior cannot ignore the vagaries of human conduct.” *Id.*, citing, e.g., *Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (Nov. 1981).

fill production orders. Tr. 130, 133, 348-349. Therefore, I reject Respondent's argument that MSHA is financially responsible for re-installing the work platforms. Although I receive R. Ex. 3 into evidence, I find that this estimate of \$600.00 to re-weld the work platform back on the roll crusher is immaterial. I conclude, contrary to Respondent's argument, that MSHA is not responsible to compensate Respondent for such cost.

I also find that the failure to place handrails on the work platform was S&S. The Mine Act defines an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the *Mathies* test: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. See *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); accord *Buck Creek Coal v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria). An evaluation of the reasonable likelihood of injury is made assuming continued normal mining operations. *U.S. Steel Mining Co. (U.S. Steel III)*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co. (U.S. Steel I)*, 6 FMSHRC 1573, 1574 (July 1984)).

The third element of *Mathies*, which requires "a reasonable likelihood that the hazard contributed to will result in an injury," is often the most difficult element for the Secretary to establish under the *Mathies* test. See *U.S. Steel Mining Co. (U.S. Steel IV)*, 18 FMSHRC 862, 870 (June 1996) (Marks, Comm'r, concurring in result) (observing that during the 12-year period immediately following *Mathies*, over 93% of the Commission's 47 decisions involving an S&S issue concerned the third element). In *U.S. Steel IV*, the Commission held that "the third element of the *Mathies* test does not require the Secretary to prove it was 'more probable than not' an injury would result." 18 FMSHRC at 865 (citation omitted).

At the same time, the Commission has long held that "[t]he fact that injury [or a condition likely to cause injury] has been avoided in the past or in connection with a particular violation may be 'fortunate, but not determinative.'" *U.S. Steel IV*, 18 FMSHRC at 867 (quoting *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (Feb. 1986)). See *Elk Run Coal Co.*, 27 FMSHRC 899, 906–07 (Dec. 2005) (holding that absence of adverse roof conditions at time of or prior to violation does not preclude establishing S&S violation); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996) (noting that absence of accidents involving violative equipment does not preclude S&S finding).

The Commission recently reiterated these principles in *Cumberland Coal Resources, LP*, 2011 WL 5517385 (Oct. 5, 2011),<sup>9</sup> and *Musser Engineering, Inc.*, 32 FMSHRC 1257 (Oct. 2010). The Commission emphasized that the test under the third prong of *Mathies* is whether the hazard fostered by the violation is reasonably likely to cause injury, not whether the violation itself is reasonably likely to cause injury. *Cumberland Coal Res.*, 2011 WL 5517385, at \*5; *Musser*, 32 FMSHRC at 1280–81, citing *Elk Run Coal* and *Blue Bayou Sand & Gravel*, *supra*.

Applying these principles, I have found the underlying violation of a mandatory safety standard. I also find that the missing handrails, which protect persons from falls, created a discrete fall hazard or measure of danger to safety. With respect to the third and fourth *Mathies* elements, the Secretary has established that the fall hazard was reasonably likely to cause injury and that such injury would be of a reasonably serious nature. In this regard, I give substantial weight to Poulson’s testimony that even a one-time exposure to the hazard was too great as it was reasonably likely that a miner working off the platform, which lacked handrails and was 50 inches off the ground person would easily fall off either backwards or forwards and receive serious injuries, such as a broken leg, resulting in lost work days or restricted duty. Tr. 120, 127. The record further establishes that miners are exposed to the fall hazard when they access the work platform to adjust a bolt holding tension on the roll crusher (Tr. 121, 125-26; P. Ex. 4, p. 6), or to work on the electrical motor, wiring, v-belt, pulleys, trough and rollers, and Marco cans. Tr. 119-20, 347, 350, 354-55. Given these reasons for miners accessing the work platform, and given Poulson’s testimony concerning the serious injury likely to result from a fall from the platform, the Secretary has established the third and fourth element of the *Mathies* test and shown that the violation is S&S.

I further find that the failure to place handrails on the work platform was the result of Respondent's moderate negligence.<sup>10</sup> I have credited inspector Poulson’s testimony that the only

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<sup>9</sup> The Commission in *Cumberland Coal Resources* remanded to the Administrative Law Judge for a reassessment of civil penalties, as it vacated the Judge’s conclusions on the issue of S&S. 2011 WL 5517385, at \*11. *Cumberland Coal Resources* appealed the Judge’s Decision on Remand to the Commission, which denied its Petition for Discretionary Appeal. *Cumberland Coal Res., LP*, Docket No. PENN 2008-189 (FMSHRC Nov. 14, 2011). The Administrative Law Judge’s decision is currently on appeal before the United States Court of Appeals for the D.C. Circuit. *Cumberland Coal Res., LP*, Docket No. PENN 2008-189 (FMSHRC Oct. 25, 2011) (ALJ), *appeal docketed*, No. 11-1464 (D.C. Cir. Nov. 29, 2011).

<sup>10</sup> Under the Mine Act, an operator is held to a high standard of care, and the failure to exercise this high standard of care constitutes negligence. 30 C.F.R. § 100.3(d). A mine operator must 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. *Id.* The Mine Act's regulations define four different negligence levels: 1) reckless disregard occurs when the operator displays conduct which exhibits the absence of the slightest (continued...)

mitigating factor that Respondent offered during the inspection was that the cited platform was not a work platform, when Blewett, in fact, knew that he had used the platform for work purposes based on his inconsistent trial testimony. Moreover, I have found that Respondent's alleged tying-off policy, even if credible, is not a substitute for handrails, and I note that even trained employees violate established company policy. See Tr. 192. In these circumstances, I conclude that Respondent has not shown considerable mitigating circumstances sufficient to establish low negligence. Accordingly, I affirm inspector Poulson's designation of negligence as moderate. In sum, Citation 6475792 is affirmed, as written.

I next address the appropriate penalty. A mine operator is subject to a civil penalty for any violation occurring at its mine. 30 U.S.C. § 820. Such penalties provide a "strong incentive for compliance with the mandatory health and safety standards." *Nat'l Independent Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 401 (1976). In enacting the Mine Act, Congress aimed to set sufficiently high penalties to effect deterrence. "To be successful in the objective of including [sic] effective and meaningful compliance, 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 90 (1977).

The Court has broad discretion to assess penalties *de novo*. See, e.g., *Spartan Mining Co.*, 2008 WL 4287784 at \*22 (2008) (affirming ALJ's 800 percent increase of proposed penalty based upon gravity and negligence factors); *Mountain Edge Mining, Inc.*, Docket No. WEVA 2009-1617 (ALJ, May 19, 2011) (imposing a penalty amount eight times that originally assessed by MSHA). In assessing penalties, the Commission and its judges must "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).

I have reviewed the Certified Assessed Violation History Reports in the record. Respondent has about 18 paid violations, three of which were issued as S&S, at the Mt. Solo Pit Mine during the 24 months preceding April 4, 2009. Respondent is a small mine operator. The violations herein were abated in good faith. Respondent does not argue that the penalties proposed will have an adverse effect on Respondent's ability to remain in business, and two of

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<sup>10</sup>(...continued)

degree of care; 2) high negligence occurs when an operator knew or should have known of a Mine Act violation, and there are no mitigating circumstances; 3) moderate negligence occurs when an operator knew or should have known of a violation, but there are mitigating circumstances; and 4) low negligence occurs when an operator knew or should have known of a violation, but there are considerable mitigating circumstances. 30 C.F.R. § 100.3(d), Table X.

the proposed have penalties at issue herein have been slightly reduced. My gravity and negligence findings for each violation are discussed herein. Accordingly, applying the penalty criteria set forth in section 110(i), I find that the proposed penalty of \$585.00 is appropriate for the violation set forth in Citation 6475792.

**b. Citation 6475793**

Citation 6475793 alleges that Respondent violated 30 C.F.R. § 56.14107(a) by failing to guard the #10 conveyor head pulley on the roll crusher. The cited standard at 30 C.F.R. § 56.14107(a) provides that “[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.” The citation alleges the following condition or practice:

The #10 conveyor head pulley drive v-belts and sheaves was not guarded on the backside to prevent accidental contact with the moving machine parts. The v-belts and sheaves were approximately 42 inches above the work platform deck. The v-belts and sheaves were provided with guarding on all sides except the back side. This area would be accessed on an as needed basis to perform maintenance work. This condition exposes persons to serious injuries should they accidentally contact the moving machine parts.

The violation is alleged to be non-S&S, with gravity alleged to be unlikely to result in an injury or illness that could reasonably be expected to result in a permanently disabling injury, and one person affected. Negligence is alleged as moderate. The Secretary proposes a penalty of \$176.00.

Respondent argues that there is no access to the cited area while equipment is running and that all equipment must be shut down before an employee could be within close range of the head pulley. Respondent further asserts that the pulley had never been cited before,<sup>11</sup> and it is more than seven feet above a walkway. R. Br. at 2.<sup>12</sup>

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<sup>11</sup> To the extent Respondent has raised a fair notice argument, I reject it. MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator. *See Emery Mining Corp. v. Sec’y of Labor*, 744 F.2d 1411, 1416-17 (10<sup>th</sup> Cir. 1984). More importantly, the plain language of the guarding regulation provides adequate notice of the regulated conduct and thus satisfies due process. *See Mainline Rock and Ballast, Inc. v. Sec’y of Labor*, 2012 WL 1111258, at \*5 (10<sup>th</sup> Cir. 2012).

<sup>12</sup> The parties agree that the unguarded head pulley components were 42 inches above the work platform cited in Citation 6475792. Tr. 141, 409; *see also* P. Ex. 5, p. 4. 30 C.F.R. 56.14107(b) states that guards are not required where the exposed moving parts “are at least  
(continued...)

During his April 14, 2009 inspection of the # 10 conveyor head pulley, Poulson observed that the back side of the area containing the head pulley components (v-belt, pulleys on the drive motor, and sheaves) for the No. 10 belt was not guarded. Tr. 139; P. Ex. 5. Head pulley components are moving parts that present an entanglement hazard and risk of injury. Tr. 142; P. Ex. 5, p. 1. Respondent admits that the head pulley components were not guarded on the back side. Tr. 409. In addition, Respondent admits that the plant had operated the day prior to the inspection (Tr. 397), and that the roll crusher, including the head pulley components, had been in the identical condition since March 24, 2009. Tr. 357-58. Accordingly, because Respondent admitted to operating the #10 conveyor head pulley in the cited condition, I find the violation of 30 C.F.R. § 56.14107(a).

The citation was terminated by the termination of the previous citation, Citation 6475792. That is, by removing the work platform, the head pulley components were more than seven feet above ground with no intermediate platform to stand on, and, therefore, no longer required guarding. Tr. 146; P. Ex. 5, p. 5.

I further find that the citation is non-S&S,<sup>13</sup> and the result of Respondent's moderate negligence. Inspector Poulson recognized that the failure to guard the back side of the head pulley was unlikely to cause an injury because of infrequent access while the equipment was running, but he also recognized that any such injury was reasonably likely to be permanently disabling. Tr. 143. Thus, even though the exposure was minimal, a permanently disabling entanglement hazard was present.

I find that negligence was designated properly as moderate. Poulson credibly testified that Respondent should have known about the unguarded back side of the head pulley components (Tr. 143), and Respondent admitted to accessing the work platform (while allegedly tied off), but also admitted that there was a hazard if one was standing on the work platform without the conveyor being locked and tagged out. Tr. 354-55. The head pulley was accessible from the work platform and Respondent used the work platform to access it. In these circumstances, I again conclude that Respondent has not shown considerable mitigating circumstances sufficient to establish low negligence. Accordingly, I affirm inspector Poulson's designation of negligence as moderate.

In sum, Citation 6475793 is affirmed, as written. Applying the penalty criteria set forth in section 110(i) and outlined above, I find that the proposed penalty of \$176.00 is appropriate.

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<sup>12</sup>(...continued)  
seven feet away from walking or working surfaces.” 30 C.F.R. 56.14107(b) (emphasis added). Because 42 inches is less than seven feet, Respondent's argument that the cited area does not require guarding lacks merit.

<sup>13</sup> I have no authority to modify the citation to S&S. See *Mechanicsville Concrete, Inc., t/a Materials Delivery*, 18 FMSHRC 877, 880 (June 1996).

**2. Docket No. WEST 2010-405-M**

**a. Citation 6483469**

Citation 6483469 alleges that Respondent violated 30 C.F.R. § 56.14107(a) by failing to guard the head pulley on the #7 conveyor belt. The cited standard is set forth above. The citation alleges the following condition or practice:

The head pulley of the #7 belt on the screen plant was not guarded on the side. The head pulley was approximately 1 foot above and 20 inches away from the end of the walkway. Miners access this area for maintenance work on occasion. Contact with head pulley would result in entanglement type injuries.

The violation is alleged to be non-S&S, with gravity alleged to be unlikely to result in an injury or illness that could reasonably be expected to result in a permanently disabling injury, and one person affected. Negligence is alleged as moderate. The Secretary proposes a penalty of \$100.00.

Respondent argues that this area was guarded, pursuant to the directions of a previous inspector, when a chain was installed at the end of the walkway, and the area passed all subsequent inspections prior to the instant one. Respondent further argues that no access is allowed in the area when the crusher is operating. Rather, the cited area is only accessed during shut down for maintenance or repair, thus precluding access to the head pulley when equipment is moving. R. Br. at 2-3.

During his October 20, 2009 inspection<sup>14</sup> of the #7 conveyor belt, Poulson observed that the head pulley of the # 7 belt at the screen plant was not guarded on the side. Tr. 182; P. Ex. 12, pp. 1 and 4. Respondent admits that the cited pulley was not guarded (Tr. 411), but disputes that the cited pulley needed guarding. Tr. 358, 413. In this regard, Respondent first argued that the pulley did not require a guard because it was more than seven feet in the air. Tr. 358. The record establishes, however, that the walkway that accessed the pulley was eight feet above the ground. Tr. 359. The pulley itself was approximately one foot above that walkway. P-12, p. 1. As discussed previously, section 56.14107(b) states that guards are not required where the exposed moving parts “are at least seven feet away from walking or working surfaces.” 30 C.F.R. 56.14107(b). Because the pulley was within one foot of a walkway, guarding was required.

Respondent also argues that guarding was not necessary because mine policy prohibited access while the plant was running. Tr. 360. The walkway that accesses the pulley, however, remained in place at all times. Tr. 411. Placing a ladder by the elevated walkway is all that was required for access. Tr. 412. In addition, the record confirms that there was considerable work to

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<sup>14</sup> This inspection occurred at the Winchester, Idaho location.

be done via the walkway. Miners use it to access the screens and the screen decks. Miners often repair holes in screens, or change screens depending upon the size of the product they are crushing. Tr. 185, 360. Miners also access the elevated walkway to ensure that the screen boxes have an oil lubricated bath, or to repair wires when a large rock is crushed. 186-87, 360-61.

The unguarded pulley was “finned,” as opposed to smooth, and the finned nature of the pulley heightened the hazard because it could “grab” an exposed miner more easily than a smooth pulley. Tr. 184. Most likely one miner at a time would be exposed to the hazard. Tr. 187. The pulley had operated in the same unguarded condition at its previous Lewiston, Idaho location. Tr. 413-14. Respondent does not contend that it failed to run the unguarded pulley while the plant was operating. Tr. 412-413. Rather, the record establishes that the plant was running the day of the inspection, prior to MSHA’s arrival. Tr. 188-89.

The unguarded pulley was located approximately 20 inches from the end of an elevated platform walkway (“walkway”). Tr. 185-87. Inspector Poulson testified that the chain in the photograph (P. Ex. 12, p. 4) was present as fall protection from the elevated walkway and was not a substitute for a guard. Tr. 186. The proximity of the unguarded pulley to the walkway placed miners at risk of a slip, trip or fall entanglement injury that could be permanently disabling. Inspector Poulson determined that a miner was unlikely to be injured by the cited condition, however, because miners did not frequently access the walkway while the plant was operating. Tr. 189.

Given the unlikely risk of injury, Inspector Poulson gave Respondent 24 hours to terminate the citation. Tr. 193; P-12, p.1. When Poulson returned the next day (October 21, 2009) to terminate the citation, the mine was preparing to move its location. Tr. 193. After confirming that the plant moved, Poulson terminated Citation 6483469 on October 22, 2009. Tr. 194.

Because the head pulley of the #7 belt on the screen plant was not guarded on the side, thereby creating a hazard that could cause a entanglement injury, I find that Respondent violated 30 C.F.R. § 56.14107(a). I find that the failure to guard the head pulley of the #7 belt was designated properly as non-S&S. I have no authority to modify the citation to S&S. *See Mechanicsville Concrete, Inc., t/a Materials Delivery*, 18 FMSHRC 877, 880 (June 1996). Even though the exposure was minimal, a permanently disabling entanglement hazard existed. Each time a miner accessed the walkway when the plant was running, he was exposed to the entanglement hazard.

I reduce the negligence, however, from moderate to low. I credit Respondent’s testimony that employees were trained not to access the walkway when the plant was running. I further note that the cited area was chained off at the end of the walkway. I conclude that Respondent has not shown considerable mitigating circumstances sufficient to establish low negligence.

In sum, Citation 6475793 is affirmed, as modified, to reflect low negligence. Applying the penalty criteria set forth in section 110(i) and outlined above, I reduce the proposed penalty of \$100.00 to \$65.00.

**b. Citation 6483473**

Citation 6483473 alleges that Respondent violated 30 C.F.R. § 56.14107(a) by failing to guard the fan blade on the bulldozer. The cited standard is set forth above. The citation alleges the following condition or practice:

The fan blade, v-belts and sheaves located on the engine of the Cat D9H Dozer, SN 90V1009, are not properly guarded to protect persons from accidental contact with the moving machine parts. The fan is missing a section of guard on one side. The hazards are located inside the engine compartment and next to the tracks of the dozer. Persons are occasionally in the area exposing them to entanglement injuries.

The violation is alleged to be non-S&S, with gravity alleged to be unlikely to result in an injury or illness that could reasonably be expected to result in a permanently disabling injury, and one person affected. Negligence is alleged as moderate. The Secretary proposes a penalty of \$100.00.

Respondent argues that the dozer is equipped with a reversible fan and that access to the cited area is required to reverse the fan and make air flow through the radiator more effective during certain times of the year. Respondent further argues that the models of dozers equipped with a reversible fan did not have fan guards installed in the cited area in order to permit an operator to reverse the fan, as needed. Respondent also notes that the cited area is so far down in the engine compartment that the inspector's pictures taken with a digital camera would not turn out. R. Br. at 2.

On October 20, 2009, Inspector Poulson inspected the Cat D9H Bulldozer head pulley. Tr. 223; P. Ex. 16, p. 1. Respondent operated the secondary dozer in question during the production of gravel and Anti-Skid, because the primary dozer had been buried in a landslide. Tr. 224-25, 376-77. The guard on the fan blade on the engine was missing a pie-shaped piece, which exposed v-belts and sheaves. Tr. 227; P. Ex. 16, pp. 1 and 3.

Although the Secretary claims that Respondent admitted that the fan blade on the dozer engine was missing a portion of the guard (citing Tr. 375, 429), Colby Blewett qualified his testimony by noting that the manufacturer makes a gap in the guarding so one can reverse the fan blades to turn the heater on. Tr. 375-76. Blewett explained that there is no cab in older dozers, so Caterpillar designed a "high-tech heater by simply reversing the fan blades that typically blew through the radiator to cool the engine off. . . ." Blewett further testified that the cited area was very difficult to get to, and one would have to pull other guarding off to lay down and reach in to reverse the blades. Tr. 375-429.

The portion of the fan blade which is unguarded is located inside the engine compartment and next to the tracks of the dozer. P. Ex. 1. A dozer operator occasionally would be exposed to an entanglement hazard as the miner entered or exited the dozer, or checked the engine while running, should the miner contact the moving v-belts and sheaves. Tr. 225-27; P. Ex. 16, p. 1. Moreover, a dozer operator who stumbled, fell or tripped over the three-inch lugs on the track, could stick his hands into the unguarded fan blade, and suffer a permanently disabling injury of the hand or fingers. Tr. 227. Inspector Poulson determined, however, that it would be unlikely for a miner to be injured because most of the guard was present. Tr. 226. Due to the unlikely risk of injury, Poulson terminated the citation on October 22, 2009, when the plant shut down and moved. P. Ex. 16, p. 2.

I find that Respondent violated 30 C.F.R. § 56.14107(a) because a portion of the fan blade on the Cat D9H Bulldozer was not guarded, thereby creating a hazard that could cause an entanglement injury. An operator is strictly liable under the Mine Act for exposing a miner to the hazard notwithstanding any manufacturing design flaw. I further find that the failure to guard the dozer's fan blade was non-S&S. As Inspector Poulson recognized, the failure to adequately guard the fan blade was unlikely to cause an injury because most of the guard was present, but any injury would be reasonably likely to be permanently disabling. Tr. 226.

Thus, even though the exposure was minimal, a hazard with the potential of a reasonably serious and permanently disabling injury was present.

Based on Colby Blewett's testimony, however, I find that Respondent in good-faith believed that Caterpillar manufactured the dozer fan blade with a gap in the guarding so that one could reverse the fan blades to turn on the heater. Moreover, this dozer was an older model used on a secondary basis, and this violation apparently not been cited previously. In these circumstances, I conclude that Respondent has shown considerable mitigating circumstances and I reduce Respondent's negligence from moderate to low.

In sum, Citation 6475793 is affirmed, as modified, to reflect low negligence. Applying the penalty criteria set forth in section 110(i) and outlined above, I reduce the proposed penalty of \$100.00 to \$65.00.

**c. Citation 6483474**

Citation 6483474 alleges that Respondent violated 30 C.F.R. § 56.14100(b) by failing to maintain and correct the rear-facing flood lights on its dozer. The cited standard provides, "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The citation alleges the following condition or practice:

The Cat D9H Dozer, SN 90V1009, does not have rear facing flood lights. The lights have been removed and not replaced. The dozer operates on a daily basis at the feed

end of the plant away from other equipment. This condition exposes the operator to injuries due to visibility issues in inclement weather when lighting is necessary.

The violation is alleged to be non-S&S, with gravity alleged to be unlikely to result in an injury or illness that could reasonably be expected to result in lost work days or restricted duty, with one person affected. Negligence is alleged as moderate. The Secretary proposes a penalty of \$100.00.

Respondent argues that its plant operated only during daylight hours and that any inclement weather sufficient to darken the sky would result in a complete shutdown of the small crusher operation due to safety concerns for crew members. R. Br. at 2.

During Inspector Poulson's inspection of the dozer discussed above (see Citation 6483473), Poulson observed that the dozer lacked rear-facing floodlights. Tr. 223; P. Ex. 17, p. 1. Poulson testified that the wiring was still there, but the lights had been broken or were missing and had not been replaced. Tr. 236. Poulson testified that because the dozer was initially manufactured with rear-facing floodlights, the lights constituted safety equipment that must be maintained under the cited standard. Tr. 235-36.

Poulson further testified that Respondent's failure to correct this condition exposed the dozer operator, and any miners in the dozer's path, to a collision hazard, particularly during dusty, rainy, snowy or dark conditions when visibility was impaired. Tr. 234, 237-38. Inspector Poulson recognized that any injury would be reasonably serious and anyone working at the mine site was exposed to the hazard in the event that the dozer was backing up and collided with a miner that the operator did not see, due to poor visibility. Tr. 238. He found it most likely that only one miner would be affected at a time, although he noted that the dozer operator was also exposed to the hazard. Tr. 238, 240. For example, if the dozer operator was backing up and could not see properly, he could hit something and receive a jarring injury. Tr. 240. He further concluded that the most likely injury would be lost workdays or restricted duty. Tr. 240. He designated the citation as non-S&S after essentially concluding that the failure to maintain rear-facing floodlights was unlikely to cause an injury because the dozer operator normally operated in daylight hours in decent weather away from other miners. Tr. 240.<sup>15</sup>

Inspector Poulson attributed moderate negligence to Respondent. Tr. 240; P. Ex., 17, p. 1. In this regard, he concluded that Respondent knew that the dozer lacked rear-facing floodlights. Tr. 430. As proffered mitigating circumstances, Respondent argued at the hearing that the mine did not operate at night or in inclement weather. Tr. 376, 380. I note, however, Respondent's concession that depending on the size of the job, the mine sometimes operates two shifts, including one that starts before the sun comes up, and another that continues after the sun goes down. Tr. 391-92. Respondent also acknowledged that inclement weather, such as snow

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<sup>15</sup> As noted in note 12, above, I have no authority to modify the citation to S&S. See *Mechanicsville Concrete, Inc., t/a Materials Delivery*, 18 FMSHRC 877, 880 (June 1996).

and rain, occurs in Idaho in early fall when the citation was written, and that weather changes can occur suddenly, during mid-shift . Tr. 430. In these circumstances, I find that the dozer needed rear lights for safety purposes in the context of Respondent's normal and continued mining operations and that Respondent's failure to maintain the rear-facing flood lights on its dozer in contravention of 30 C.F.R. § 56.14100(b) was the result of moderate negligence.

Accordingly, I affirm the citation as written and find that the Respondent's failure to have rear-facing flood lights on the dozer was non-S&S and the result of Respondent's moderate negligence. Applying the penalty criteria set forth in section 110(i) and outlined above, I find that the proposed penalty of \$100.00 is appropriate.

### **III. Motion To Approve Partial Settlement Agreements**

At the hearing, the parties made a joint motion on the record to settle all three citations at issue in Docket No. WEST 2011-261-M, i.e., Citation Nos. 8562410, 8562411, and 8562412 . See Tr. 13-14. The parties propose that Citation Nos. 8562410 and 8562412 be modified to reduce the level of negligence from "moderate" to "low;" and that Citation No. 8562411 be modified to reduce the injury or illness that could reasonably be expected to occur from "fatal" to "permanently disabling", and to reduce the proposed penalty from \$243.00 to \$200.00.

At the hearing, the parties also made a joint motion to settle four of the eleven citations at issue in Docket No. WEST 2010-405, i.e., Citation Nos. 6483465, 6483466, 6483467, and 6483468. See Tr. 14-15. The parties agreed to reduce the proposed penalty in Citation No. 6483465 from \$873.00 to \$786.00; and to accept Citation Nos. 6483466, 6483467, and 6483468, as written.

After the hearing, pursuant to ongoing settlement negotiations, the parties moved for an Order approving settlement of four of the remaining seven citations in Docket No. WEST 2010-405, i.e., Citation Nos. 6483470, 6483471, 6483472, and 6483475. The parties proposed that Citation 6483470 be modified to reduce the level of negligence from "moderate" to "low;" to reduce the proposed penalty in Citation No. 6483471 from \$392.00 to \$372.00; to reduce the proposed penalty in Citation 6483472 from \$117.00 to \$105.00; and to accept Citation 6483475, as written.

Also after the hearing, the parties moved for an Order approving settlement of three of the five citations at issue in Docket No. WEST 2009-1213, i.e., Citation Nos. 6475789, 6475790, and 6475791. The parties proposed to reduce the proposed penalty in Citation 6475789 from \$176.00 to \$155.00; that Citation 6475790 be modified to reduce the level of negligence from "moderate" to "low," and to reduce the proposed penalty from \$176.00 to \$130.00; and to reduce the proposed penalty in Citation 6475791 from \$873.00 to \$785.00.

The parties stipulated that payment of the amended proposed penalties will not impair Respondent's ability to continue in business, that Respondent exhibited good faith in abating the cited violations, and that information pertaining to the operator's history of previous violations and size are contained in Exhibit A, which was filed by the Secretary along with the petition in the above-captioned proceedings.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

### III. ORDER

**WHEREFORE**, the proposed settlement agreement is **APPROVED** and the citations shall be modified as set forth above. It is **ORDERED** that the operator pay a total penalty of \$1,747.00 in four consecutive monthly installments of \$436.00 each, and a forth and final payment of \$439.00, with the first payment due within thirty days of the date of this decision and each subsequent payment due every thirty days thereafter until paid in full.

In Docket No. WEST 2009-1213-M, Citation Nos. 6475792 and 6475793 are affirmed, as written, with assessed penalties of \$585.00 and \$176.00, respectively. In Docket No. WEST 2010-40-M, Citation Nos. 6475793 and 6475793 are modified to reduce the level of negligence from moderate to low and the proposed penalties are reduced in each citation from \$100.00 to \$65.00; and Citation No. 6483474 is affirmed, as written, with an assessed penalty of \$100.00. Within thirty days of the date of this decision, Highland Enterprises, LLC is **ORDERED** to pay a civil penalty of \$991.00 for those violations found herein.

Upon payment of the penalties assessed herein or agreed to in the approved settlement agreements, this proceeding is **DISMISSED**.

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

Distribution: (E-Mail and Certified Mail)

Emily B. Hays, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5708

Don Blewett, *pro se*, Highland Enterprises, LLC, PO Box 356, Grangeville, ID 83530

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

July 17, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2009-870-M
Petitioner	:	A.C. No. 01-02738-194100-01
v.	:	
	:	
WEST ALABAMA SAND & GRAVEL, INC.,	:	Mine: West Alabama Sand & Gravel
Respondent	:	
	:	

**ORDER GRANTING IN PART AND DENYING IN PART**  
**SECRETARY’S MOTION FOR SUMMARY DECISION**  
**AND**  
**ORDER GRANTING RESPONDENT’S**  
**MOTION FOR SUMMARY DECISION**

Before: Judge Feldman

This civil penalty proceeding concerns a Petition for the Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 820(a), by the Secretary of Labor against the Respondent, West Alabama Sand & Gravel, Inc. (“West Alabama”). The petition seeks to impose a civil penalty of \$15,971.00 for an alleged violation of section 56.15005 of the Secretary’s mandatory safety regulations governing metal and nonmetal surface mines. 30 C.F.R. § 56.15005. This mandatory standard, in pertinent part, requires that “[s]afety belts and lines shall be worn when persons work where there is danger of falling.”

I. Background

The material facts in this matter are not in dispute. On July 1, 2009, Mine Safety and Health Administration (“MSHA”) Inspector Michael Evans conducted a regular biannual inspection of the West Alabama Sand and Gravel mine facility in Fayette, Alabama. While at the West Alabama mine site, Evans witnessed a driver for an independent trucking company who was situated on top of his haul truck, ten feet above the ground. The truck driver, Johnny Koger, was an employee of Denbar Transportation (“Denbar”).<sup>1</sup> Koger was in the process of installing

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<sup>1</sup> Whether Denbar trucking was an independent contractor, or a customer of West Alabama, is not material to the disposition of this matter. For the purposes of this (continued...)

tarp in order to secure his load. He was not wearing a safety belt, lanyard, or any other type of fall protection while he was observed crawling and extending his body over the side of his truck. Clay Junkin, West Alabama's Vice President, was present at the mine at the time Koger was observed by Evans.<sup>2</sup>

As a result of Evans' observations, 104(d)(1) Citation No. 6511548, and contemporaneous imminent danger Order 6511547,<sup>3</sup> were issued by Evans to Junkin citing a violation of the mandatory standard in section 56.15005. The imminent danger order has not been contested and is not a subject of this proceeding.<sup>4</sup> Order No. 6511548 states:

A customer truck driver was observed climbing on top of the loaded trailer. The driver was not wearing a safety belt and lanyard or any other type of restraining device to prevent a fall to the ground below. The truck driver was on his knees pulling on tarp within inches of the side of the trailer. The truck driver was exposed to a fall of ten foot to ground level. Clay Junkin (Vice President) engaged in aggravated conduct constituting more than ordinary negligence by his statement of knowing this was a hazard, and allowing this practice to continue for several years. This violation is an unwarrantable failure to comply with a mandatory standard.

This violation is a factor cited in imminent danger order No. 6511547 issued 07/01/2009. Therefore, no abatement time was set.

Although no abatement time was specified in view of the imminent danger order, the citation was abated by West Alabama's posting of a sign that prohibited drivers from climbing on trucks. The cited violation was designated as significant and substantial ("S&S"). Junkin told Evans that truck drivers "have been climbing on the trucks since 1985." Evans' *Addendum*

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<sup>1</sup>(...continued)  
decision, Denbar will be considered an independent contractor.

<sup>2</sup> To avoid confusion, Clay Junkin was present at the mine site at the time Evans observed the subject fall protection violation. Clatus Junkin, the father of Clay Junkin, is the president of West Alabama and is representing the company in this matter. Clatus Junkin was not present at the mine site at the time the subject citation was issued. *See* fn. 4 *infra*.

<sup>3</sup> An imminent danger order is issued pursuant to section 107(a) of the Mine Act. 30 U.S.C. § 817(a). The term "imminent danger" is defined in section 3(j) of the Act to mean the "existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j).

<sup>4</sup> Civil penalties are not imposed for imminent danger orders issued pursuant to section 107(a) of the Mine Act.

to Citation No. 6511548. West Alabama had never been cited for a failure of truck drivers to tie down during previous MSHA inspections. Although Junkin conceded that he believed the practice was hazardous, Junkin told Evans that “he couldn’t make truck drivers not climb [sic] on the trucks [-] that it was their truck.” *Id.* Evans responded that “[Junkin] was responsible for what is done or happens on mine property.” *Id.* As a result of Evans’ conversation with Junkin, the cited violation was attributed to an unwarrantable failure.

Section 3(d) of the Mine Act defines an “operator” as “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). (Emphasis added). It is well settled that the Secretary has the unfettered discretion to cite an owner-operator of a mine, an independent contractor working on mine property, or both, for violations committed by a contractor. *Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 152, 158 (D.C. Cir. 2006) *rev’g Twentymile Coal Co.*, 27 FMSHRC 260 (Mar. 2005) (reversing the Commission’s decision that mine operators are not responsible for violations committed by contractors where such operators do not directly contribute to the violation or have significant control over the independent contractor’s activities).

The Secretary filed a Motion for Summary Decision on October 4, 2011, seeking the affirmance of 104(d)(1) Citation No. 6511548 that characterized the cited violation as S&S and attributed the violation to an unwarrantable failure. The Secretary seeks the imposition of a \$15,971.00 civil penalty.

West Alabama opposed the Secretary’s motion on October 24, 2011. It does not dispute the fact of the violation or the significant and substantial designation. However, it opposes the size of the \$15,971.00 proposed civil penalty that primarily is based on West Alabama’s alleged unwarrantable failure. I construe West Alabama’s opposition as a motion for summary decision on the unwarrantable issue.

West Alabama is a small operator that has employed no more than eight employees during the last three years.<sup>5</sup> *Sec’y Resp. Br.* at 4. West Alabama does not dispute the essential facts underlining the citation, namely, that Koger failed to tie down while positioned on top of the loaded haul truck. However, West Alabama, relying on *Lime Mountain Co.*, 30 FMSHRC 1192 (Oct. 1998) (ALJ Manning), asserts that the proposed \$15,971.00 civil penalty is

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<sup>5</sup> The Secretary believes that West Alabama’s president Clatus Junkin is also a principal of Johnco Materials, a mine operator located in Lowndes County, Alabama. Johnco Materials has approximately eight employees. *Sec’y Resp. Br.* at 3-4. However, the Secretary asserts that West Alabama should be considered a large mine operator for civil penalty purposes because “Clatus Junkin is a shareholder in Junkin, Pearson, Harrison, Junkin and Pate, LLC, a law firm which has reported multi-million dollar settlements.” *Id.* at 3. Clatus Junkin’s interest in a law firm is not a relevant consideration with respect to the application of the penalty criteria under section 110(i) of the Act. 30 U.S.C. § 820(i).

“unreasonable and extreme” in light of prior Commission cases involving violations of section 56.15005. *West Alabama Opp.* at p. 4. In *Lime Mountain*, a truck driver for an independent contractor was observed on top of his trailer using a compressed air hose without wearing any fall protection. Consequently Lime Mountain was cited for a violation of section 56.15005 for which the Secretary proposed a civil penalty of \$240. *Id.* at 1193. Judge Manning ultimately assessed a civil penalty of \$150.00. *Id.* at 1197.

During a conference call with the parties, West Alabama also relied on *CEMEX Inc.*, 33 FMSHRC 1169 (May 2011) (ALJ Paez). CEMEX, a publicly traded company, had posted signs at entrances to its mine facility that contract drivers were required to use safety platforms to access the tops of tankers. *CEMEX*, 33 FMSHRC at 1171. Despite the written warnings, a contract truck driver was observed standing on top of his tractor-trailer tanker instead of using the required safety platforms. *Id.* Judge Paez assessed a civil penalty of \$500.00 for the subject section 56.15005 violation. *Id.* at 1173.

## II. Disposition

Disposition by summary decision is appropriate provided (1) the entire record establishes that there is no genuine issue as to any material fact; and (2) the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b). *See Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). There is no dispute as to any issue of material fact with regard to the fact of the cited violation and the likelihood of serious injury.

It is undisputed that Koger was positioned on top of his loaded haul truck in danger of falling ten feet to the ground without utilizing any fall protection. A violation is properly designated as S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981). West Alabama does not deny that it is reasonably likely that the continued practice of working on an uneven surface elevated ten feet above the ground will result in an accident involving a fall that is reasonably likely to result in serious injury. Consequently, the cited violation is properly designated as S&S.

The remaining issue is the allegation of an unwarrantable failure. Unwarrantable failure is “aggravated conduct, constituting more than ordinary negligence . . . in relation to a violation of the Act.” *Emery Mining*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by conduct including “reckless disregard,” “intentional misconduct,” “indifference” or a “serious lack of reasonable care.” *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991). In resolving an unwarrantable failure issue, the Commission has noted that it is significant to determine whether the operator has been placed on notice that greater efforts are necessary for compliance. *Enlow Fork Mining Co.*, 19 FMSHRC at 1, 5-6; *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).

Thus, the dispositive issue is whether Junkin's asserted lack of awareness that West Alabama was responsible for contract employees should be viewed as a mitigating circumstance with respect to the alleged unwarrantable failure. Regarding actual knowledge, 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 mandatory standard. *Peabody Coal*, 14 FMSHRC at 1261. Significantly, there is no history of similar violations. Despite biannual MSHA inspections dating back to approximately 1985, the Secretary does not contend, and MSHA's data retrieval system does not reflect, that West Alabama was ever cited for a fall protection violation of section 56.15005. Thus, there is no evidence of actual knowledge to refute Junkin's asserted lack of awareness of West Alabama's responsibility for the conduct of contract employees.

Lacking actual notice, the focus shifts to the validity of Junkin's claim that he believed that West Alabama was not responsible for contractor employee conduct. Examining the sincerity of Junkin's claim requires considering whether it is reasonable and whether it has been made in good faith. This test contains the subjective element of whether Junkin's claim can be viewed as an honest belief, as well as satisfaction of the objective requirement that Junkin's belief is reasonable. *I.O. Coal*, 31 FMSHRC 1346, 1357-58 (Dec. 2009) (noting that a defense against an unwarrantable failure designation requires not only a finding of good faith but also a finding that the belief was reasonable under the circumstances); *see also Bryce Dolan v. F & E Erection Co.*, 22 FMSHRC 171, 177 fn. 7, (Feb. 2000), *citing Sec'y of Labor o/b/o Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 810 (Apr. 1981). The absence of a relevant history of citations issued for fall protection violations committed by contractor truck operators, who undoubtedly routinely secure loads at West Alabama's mine facility, adequately supports a good faith claim. So too, the absence of relevant previous citations provides a reasonable basis for Junkin's belief that West Alabama was not responsible for the acts of truck operators it did not employ on equipment it did not own.

Thus, Junkin's reasonable and apparent good faith belief, albeit wrong, that West Alabama was not responsible for Koger's failure to use fall protection is an appropriate mitigating factor that reduces the degree of negligence under the threshold required for an unwarrantable failure. Consequently 104(d)(1) Citation No. 6511548 shall be modified to a 104(a) citation by deleting the unwarrantable failure charge to reflect that the degree of negligence attributable to the violation was no more than moderate.

Turning to the remaining issue of the appropriate civil penalty, the Mine Act requires that, “[in assessing civil monetary penalties, the Commission [ALJ] shall consider” the following six statutory penalty criteria:

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

30 U.S.C. § 820(i).

With respect to the relevant violation history, West Alabama was issued 17 citations during the 24-month period from June 30, 2007, through June 30, 2009, the 24-month period preceding the subject citation. Sec’y Resp. Br, Gov. Ex. 7. Of these 17 citations 14 were designated as non-significant and substantial. *Id.* The penalty range proposed by the Secretary for each of the 17 citations was from \$100.00 to \$425.00. *Id.* Thus, it is clear that the history of violations is not an aggravating factor. West Alabama Sand is a relatively small operator, and, the civil penalty imposed in this matter will not affect its ability to continue in business. As noted above, the negligence attributed to the mine operator is no more than moderate and West Alabama has provided a sign to deter further violations by contract employees on its mine property. In consideration of the appropriate civil penalty criteria in section 110(i) of the Act, a civil penalty of \$760.00 shall be imposed for 104(a) Citation No. 6511548.<sup>6</sup>

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<sup>6</sup> The Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* At 294, *Canera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the *de novo* assessment of civil penalties does not require “that equal weight must be assigned to each of the penalty assessment criteria.” *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). The penalty criteria in section 110(i) of the Act include consideration of the degree of negligence and the appropriateness of the civil penalty to the size of the business. The significant reduction in civil penalty primarily is based on the reduction in the degree of negligence attributable to West Alabama and the relatively small size of its business.

**ORDER**

In view of the above, the Secretary's motion for summary decision on the fact of the violation and S&S **IS GRANTED**. West Alabama's motion for summary decision with respect to the question of unwarrantable failure **IS GRANTED**. Consequently, 104(d)(1) Citation No. 6511548 is modified to a 104(a) citation to reflect that the citation was not the result of an unwarrantable failure.

Consistent with the application of the penalty criteria to the facts of this case, **IT IS ORDERED** that West Alabama Sand shall pay a civil penalty of \$760.00 within 40 days of the date of this decision. Upon timely payment of the \$760.00 civil penalty, the captioned civil penalty **IS DISMISSED**.

/s/ Jerold Feldman \_\_\_\_\_  
Jerold Feldman  
Administrative Law Judge

Distribution: (Certified Mail)

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Fayette, AL 35555

/jel

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19th STREET, SUITE 443  
DENVER, CO 80202-2500  
303-844-5266/FAX 303-844-5268

July 23, 2012

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MSHA, on behalf of	:	PROCEEDING
DUSTIN FLENER,	:	
Applicant	:	Docket No. KENT 2012-1157-D
	:	MADI-CD-2012-11
v.	:	
ARMSTRONG COAL COMPANY, INC.,	:	
And ARMSTRONG FABRICATORS, INC.	:	Mine ID No. 15-19356
Respondents	:	Parkway Mine Surface Facilities
	:	
SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MSHA, on behalf of	:	PROCEEDING
JARRED B. ADAMS	:	
Applicant	:	Docket No. KENT 2012-1158-D
	:	MADI-CD-2012-12
v.	:	
ARMSTRONG COAL COMPANY, INC.,	:	
And ARMSTRONG FABRICATORS, INC.	:	Mine ID No. 15-19356
Respondents	:	Parkway Mine Surface Facilities
	:	
SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MSHA, on behalf of	:	PROCEEDING
RONNIE BURDEN,	:	
Applicant	:	Docket No. KENT 2012-1250-D
	:	MADI-CD-2012-13
v.	:	
ARMSTRONG COAL COMPANY, INC.,	:	
And ARMSTRONG FABRICATORS, INC.	:	Mine ID No. 15-19356
Respondents	:	Parkway Mine Surface Facilities

**DECISION AND ORDER OF TEMPORARY REINSTATEMENT**

Appearances: Matt S. Shepard, Angele Gregory, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for the Applicants;  
Tony Opegard, Lexington, Kentucky for the Applicants;  
Wes Addington, Whitesburg, Kentucky for the Applicants;  
Adam K. Spease, Alex L. Scutchfield, Miller Wells PLLC, Louisville, Kentucky for the Respondents;

Daniel Z. Zaluski, Armstrong Coal Company Inc., Madisonville, Kentucky for the Respondents.

Before: Judge Simonton

## **I. INTRODUCTION**

These cases are before me on applications for temporary reinstatement filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Armstrong Coal Company, Inc., and Armstrong Fabricators, Inc., hereinafter referred to jointly as Respondents, pursuant to section 105(c) (2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2) (“Act” or “Mine Act”). On June 15, 2012, pursuant to 29 C.F.R. § 2700.45(c), Respondents requested a hearing on these matters. On June 18, 2012, a preliminary status conference was held wherein all parties stipulated to a brief extension to allow for scheduling a hearing outside the 10-day window required under 29 C.F.R. § 2700.45(c). A hearing was conducted on July 6, 2012, in Madisonville, Kentucky. The record closed on July 13, 2012, after allowing for submission of post-hearing briefs.

## **II. ANALYSIS AND FINDINGS**

### **i. Background**

The parties stipulated to the following facts:

Armstrong Coal Company, Inc. is an “operator” as defined in Section 3(d) of the Mine Act. Respondent’s operations affect interstate commerce. As such, Respondent is subject to the jurisdiction of the Mine Act, and the presiding Administrative Law Judge has the authority to hear and issue a decision regarding these cases.

In the event it is determined that temporary reinstatement is appropriate relief to be ordered in these cases, and that the right to such relief is not tolled, such relief may be ordered against Respondents jointly. Respondents agreed to this stipulation for the sole purpose of this temporary reinstatement proceeding only and to avoid the time and expense of fact-finding on this issue at the hearing in this matter. Respondents reserve the right to challenge Mine Act or MSHA jurisdiction over Armstrong Fabricators, Inc., at any subsequent hearing on the merits of the Applicants' claims or in any other proceeding or for any other purpose.

During the hearing, the parties also agreed to stipulate that, for purposes of the hearing, Applicants Dustin Flener, Jarred Adams, and Ronnie Burden are “miners” as defined by the Mine Act. Respondents reserved the right to challenge that designation at any subsequent hearing on the merits of the Applicants’ claims or in any other proceeding or for any other purpose.

Unless otherwise specified the following facts are undisputed:

Applicants Jarred Adams, Dustin Flener and Ronnie Burden, hereinafter referred to jointly as Applicants, were employed by Respondents. Tr. 108, 137 and 155-56. Flener and Adams worked as welders at the fabrication shop, which was located at Armstrong's Parkway Mine Surface Facilities. Tr. 108, 137. The men welded equipment, such as draglines, blades, and buckets, used by Armstrong Coal Company in their surface and underground mines. Tr. 111-12, 139-140. The men always reported to the fabrication shop on workdays, but several times a week they would travel to work on-site at Armstrong Coal Company's mines. Tr. 111-14, 140-41. Burden worked as an electrician in the electrical shop, which was located behind the fabrication shop at Parkway. Tr. 155-60. His job involved repairing and testing transformers, working on substations, and collecting samples of transformer oil to submit for testing by a local lab. *Id.*

In January 2012, another fabrication shop employee, Reuben Shemwell, filed a discrimination complaint against Respondents. Tr. 48. Shemwell alleged that he was terminated, in part, because of safety complaints he made about the type of respirators being used at the shop. Tr. 48-50. Prior to that complaint, MSHA had not been conducting regular E01 inspections of the fabrication shop. Tr. 50. Vice President of Operations Kenny Allen explained that when Respondent Armstrong Coal Company, Inc., purchased the Parkway Mine the company took steps that it believed would insulate the shop from MSHA jurisdiction and eliminate the need to maintain the shop to "MSHA standards." Tr. 255. Following the filing of Shemwell's discrimination complaint, however, MSHA attempted to assert jurisdiction over the fabrication and electrical shops. Tr. 48-50.

On February 23, 2012, MSHA inspectors Eddie Nichols and Gene Wright reported to the fabrication shop to conduct an E01 inspection. Tr. 74. Nichols testified that they initially met with Safety Manager Rick Brothers and advised him that they were there to conduct an inspection. Tr. 77. Brothers said that Armstrong opposed the inspection and would send the workers home if MSHA continued with the inspection. *Id.* Nichols then called MSHA's District Office to find out what actions the inspectors should take. Tr. 78-79. Nichols' supervisor said that he would get an answer and call back. *Id.*

While Nichols waited for a return phone call, the miners working at the fabrication shop were sent home. Tr. 80. Inspector Nichols saw the workers leave the shop, and Adams and Burden both testified that they were sent home on February 23<sup>rd</sup> when MSHA arrived. *Id.*, Tr. 117, 174. Burden recalled being in the break room when Shop Foreman Oscar Ramsey came in and told them that MSHA had "showed up" and they should "get their stuff and go home." Tr. 174.

During the wait, Brothers received a phone call from Dan Zaluski, Respondent's corporate counsel. Nichols testified that he also spoke to Zaluski, who said that he didn't understand why MSHA was there to inspect but it must be in reference to the 105(c) complaint. Tr. 80. Zaluski then said that he would allow the inspection but opposed it. *Id.* However, Inspectors Nichols and Wright were instructed by their supervisors to return to the district office, and they did not conduct an inspection on February 23<sup>rd</sup>. *Id.*

The following day, February 24, 2012, a meeting was called at the fabrication shop. Several members of Armstrong management were present at the meeting, including Kenny Allen and Oscar Ramsey. Applicant Burden testified that during the meeting Allen said that someone had called in, there had been a citation and that if MSHA showed back up Armstrong was going to close the shop down and outsource everything. Tr. 176. Burden further explained that Allen made it “pretty clear” that if MSHA showed up again at the fabrication shop, the men would not have a job. Tr.177-178. Allen testified that he told the men at the meeting if MSHA asserted its jurisdiction over the shop the company would be forced to close it for economic reasons. Tr. 250-51.

On February 27, 2012, MSHA received the following anonymous complaint about Parkway Mine Surface Facilities: “The mine is dumping the contents of transformers on the ground around the shop building.” Applicants’ Ex. 2. Supervisory Special Investigator Kirby Smith explained that the complaint was cause for concern due to the potential for PCBs in the spilled oil. Tr. 56. PCBs are dangerous, cancer-causing agents often found in oil that was used in older transformers. *Id.* Applicant Adams testified he previously had asked supervisors Oscar Ramsey and Terry Fulkerson about the possibility of PCBs being present in the oil of some of the transformers onsite because he was concerned about him and his men working on them. Tr. 124. He was told by Fulkerson that all the transformers had been tested and “they were on file.” *Id.* Applicant Burden testified that he had knowledge of oil being spilled at the shop during the time he worked there and that he discussed the oil spills with Supervisor Ramsey. Tr. 169-170. Specifically, Burden recalled once receiving a phone call about a transformer being struck and oil spilling from it. Tr. 168. He told a co-worker to contact Oscar Ramsey about the spill. *Id.* In addition, he approached Ramsey about oil leaking from transformers stored on a skid behind the shop. Burden explained that between 300 and 400 transformers were stored on concrete pads behind the shop, and he voiced his concern about oil leaking from them. Tr. 169-70. Burden explained that any transformer that is not in use should be tested and should bear a sticker that says “Non-PCB.” Tr. 166-67. He recalled that there were transformers on the skid that did not bear a “Non-PCB sticker.” *Id.* Although he confronted Ramsey, to his knowledge, no action was taken. Tr. 170.

Applicant Flener testified he and a coworker, Ben Bowers, had concerns about potential exposure to PCBs after draining the oil out of a transformer. Tr. 145-46. Flener was present when Bowers asked Supervisor Fulkerson if the oil had been tested for PCBs. Tr. 146. Fulkerson told them the transformers had all been tested. *Id.* Ramsey, on cross examination, acknowledged his awareness that Flener is “kin” to Reuben Shemwell, the Complainant in the precursor discrimination case. Tr. 220.

On February 28, 2012, Inspectors Ray Cartwright and Louis Adams arrived at the fabrication shop to investigate the anonymous complaint. Tr. 90; Gov’t Ex. 2. They first met with Supervisor Ramsey and told him the purpose for their visit. Tr.92. They then provided him with a copy of the complaint, and Ramsey responded that the investigation would have to be conducted “under protest.” Gov’t Ex. 1; Tr. 93. Within minutes, Manager of Surface Safety Richard Hicks arrived and told the inspectors he had spoken with Kenny Allen and that Allen told him to oppose the inspection. Tr. 96.

Inspector Cartwright explained to Hicks that they were not there to conduct an inspection of the shop but to walk around the back of the shop to investigate the complaint regarding oil spillage. Tr. 95. They also provided Hicks with a copy of the complaint. *Id.* Hicks then took a phone call from Kenny Allen. Tr. 97. When Hicks got off the phone, he advised Inspectors Cartwright and Adams that Allen had just given orders to turn off the lights, lock the doors, and send everyone home. Tr. 98. In his testimony, Kenny Allen confirmed that he gave those instructions after learning that the MSHA inspectors were at the shop to investigate a complaint. Tr. 252.

All of the shop workers were then called together by Ramsey, who told them that they were laid off “indefinitely.” Tr. 121. Jarred Adams recalled Ramsey saying in a phone conversation with him later that day that Kenny Allen was “pulling the plug on the shop.” Tr. 122. Ronnie Burden recalled that the men were told to “get their stuff,” file for unemployment, and get a job application if they wanted to reapply with Armstrong. Tr. 178-179. Flener, who was not working on February 28<sup>th</sup>, phoned Ramsey to find out what was going on and was told that he had been laid off. Tr. 142-43. On March 16, 2012, Flener contacted John Bruce, the Superintendent of Surface Operations, to ask why the shop workers had been laid off. Tr. 144. Bruce told Flener, he had “MSHA to thank for coming out and closing the shop down.”

Both Ramsey and Allen testified they had discussions when the shop opened back in 2008 or 2009 that if MSHA ever tried to exert jurisdiction over the shop it would not be economically feasible to keep the shop open. Tr. 202, 235, 265-66. In addition, they had no idea who filed the anonymous complaint, nor did they have any reason to believe it was Applicants Adams, Flener or Burden. Tr. 205, 207, 210, 211, 212, 256-58. Ramsey confirmed that an oil spill had occurred several years ago and they had a local environmental engineering firm, Associated Engineers, clean up the area. Tr. 216. He avowed that the material that was spilled did not contain PCBs. *Id.*

ii. Applicable Law

Section 105(c)(1) of the Mine Act provides that no person shall discharge or otherwise discriminate against a miner for exercising rights under the Act.

It states in pertinent part:

No person shall discharge or in any manner discriminate against . . .  
. . . *or otherwise interfere with* the exercise of the statutory rights of  
any miner . . . because such miner . . . has filed or made a  
complaint under or related to this Act, including a complaint  
notifying the operator or the operator’s agent . . . of an alleged  
danger or safety or health violation in a coal or other mine.

30 U.S.C. § 815(c)(1)(Emphasis provided by the Commission in *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982)).

Pursuant to 105(c)(1), if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the reinstatement of the miner pending final order on the complaint. 30 U.S.C. § 815(c)(1). The Commission has noted that the parameters of a temporary reinstatement hearing are narrow, being limited to a determination with respect to whether a miner's discrimination complaint has been frivolously brought. *See Sec'y of Labor o/b/o Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd.*, 920 F. 2d 738 (11<sup>th</sup> Cir. 1990). Accordingly, it is only necessary to determine whether the Applicants' complaints *appear* to have merit. (Emphasis added). *See* S. Rep. No. 181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, 94<sup>th</sup> Cong., 2d Sess., at 624 (1978). In *Jim Walter Resources, Inc. v. FMSHRC*, the Eleventh Circuit found the "not frivolously brought" standard comparable to a "reasonable cause to believe" standard. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11<sup>th</sup> Cir. 1990). The Eleventh Circuit concluded that the low burden imposed by the "not frivolously brought" standard reflects clear Congressional intent to make temporary reinstatement relatively easy to obtain. *Id.* at 748.

The Commission has consistently and historically found that Congress intended section 105(c) to be broadly construed to afford maximum protection for miners exercising their rights under the Act. *See Sec'y of Labor o/b/o Charles H. Dixon et. al. v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997) *citing* *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 212 (Feb. 1994) ("the anti-discrimination section should be construed 'expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.'")(quoting S. Rep. No. 181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, 94<sup>th</sup> Cong., 2d Sess., at 624 (1978) (emphasis added)).

Although the Secretary is not required to present a prima facie case in a temporary reinstatement proceeding the Commission has determined it useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. *Sec'y of Labor o/b/o Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085 (Oct. 2009). In order to establish a prima facie case under Section 105(c), a miner must show: (1) that he engaged in a protected activity; and (2) that his termination was motivated, at least in part, by the protected activity. *See Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980).

The Commission has held that evidence of motivation may be shown by circumstantial evidence. *See, e.g., Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (Nov. 1981), *rev'd on other grounds sub nom., Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983) (holding that illegal motive may be established if the facts support a reasonable inference of discriminatory intent); *Schulte v. Lizza Industries, Inc.*, 6 FMSHRC 8 (Jan. 1984). Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include: (1) knowledge by the operator of the protected activity, (2) hostility toward the miner because of his protected activity, (3) coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complaining miner. *Jungers v. Borax*, 15 FMSHRC 300, 308 (Feb. 1993).

iii. The Solicitor Has Met Her Burden of Proof to Establish a Non-Frivolous Allegation

As far as I have been able to determine, the cases before me present a novel question of law, i.e., is it necessary for a specific miner subject to adverse action to be identified in an anonymous health and safety complaint in order to meet the non-frivolous temporary reinstatement standard? For the following reasons I find that in order to preserve the spirit and intent of the law protecting miners from unlawful reprisal the answer can and must be a resounding, “No”.

Here, it is undisputed that in January 2012, former employee Shemwell filed a discrimination complaint against the Respondents after he was removed from employment.<sup>1</sup> On February 23, 2012, MSHA attempted to conduct an inspection of the fabrication shop where Shemwell and the Applicants worked. This was the first time since Respondents began operating the shop that MSHA had attempted to conduct an inspection there. Supervisory Special Investigator Kirby Smith testified MSHA’s actions were prompted by Shemwell’s discrimination complaint and the health and safety issue raised by Shemwell regarding respirators used at the shop. Tr. 48-50. The evidence also suggests that is what Respondent believed. *See* Inspector Nichol’s un rebutted testimony that Respondent’s attorney Zaluski stated to him that the inspection must have been prompted by Shemwell’s 105(c) complaint. Tr. 80. Respondent’s reaction to the attempted inspection was to shut off the power and send the employees home for the day in order to avoid the potential liability that might arise from MSHA’s inspection. Respondent’s Vice President of Operations Allen made that clear in his testimony. Tr. 248.

The following day, February 24, 2012, Allen called a meeting with the shop employees and expressly told them that if MSHA returned to exercise jurisdiction over the shop they would shut it down because it would be economically unfeasible to operate. There is no question those employees knew after that meeting that any complaints about health and safety issues prompting an MSHA inspection would lead to a permanent closure of the shop and loss of their jobs. I can think of nothing more chilling on an employee’s inclination to report possible health and safety issues than the threat imposed on them by Allen at that meeting, whether he intended it that way or not.

Three days after the meeting, February 27, 2012, an anonymous complaint that “the mine is dumping the contents of transformers on the ground around the shop building” was received by MSHA on its hotline. In response, MSHA inspectors returned to the shop the next day, February 28, 2012, to conduct an inspection. True to his February 24th threat Allen, that very day, ordered the shop closed. All three applicants along with eight other miners lost their jobs. Facially, the undisputed facts regarding Respondent’s resistance to MSHA jurisdiction and their response to the exercise of that jurisdiction *based on protected activity* (Shemwell’s articulated

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<sup>1</sup> In a June 21, 2012, decision Judge Feldman ordered Respondents to temporarily reinstate Shemwell. *Secretary of Labor o/b/o Reuben Shemwell v. Armstrong Coal Co., et al.*, Docket No. KENT 2012-655-D. The Commission affirmed Judge Feldman’s decision on July 12, 2012. *Id.*

respirator concerns and the anonymous oil dumping complaint) clearly meets the minimal non-frivolous burden required of the Applicants in these cases.

What is left then is the Respondents' argument that there is no evidence Applicants Adams, Flener or Burden actually engaged in protected activity; thus they fail to meet the statutory requirement of Section 105(c)(1) and the prima facie elements of a discrimination case. This is a more difficult question and one which appears to be of first impression for the Commission. Critical to my analysis is the fact that the proceeding before me involves applications for temporary reinstatement which, as noted above, require a minimal showing that the miners' discrimination complaints are non-frivolous. As Respondents point out in their post-hearing brief the Applicants must demonstrate that their complaints "appear to have merit," i.e., that there is reasonable cause to believe that the miner was discriminated against *in part* due to protected activity in which he has engaged. *Sec'y of Labor v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000); *CAM Mining* at 1088.

The Commission clearly recognized in *Moses* that a violation of 105(c)(1) could be found based on a suspicion that the miner had reported to MSHA an accident which led to an MSHA investigation. Specifically, it stated:

Section 105(c)(1) was intended to "be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the Act. Miners would be less likely to exercise their rights if no remedy existed for discriminatory action based on an operator's mistaken belief that a miner had exercised a protected right. . . . An equally important consideration is that an affected miner suffers as much by mistake as he would if he were discriminated against because he had actually engaged in protected activity. We conclude that discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1).

*Moses*, 4 FMSHRC at 1480; *see also Sec'y of Labor on behalf of Dixon, et al. v. Pontiki Coal Corp.*, 19 FMSHRC 1009 (June 1997) (finding that the Secretary has the authority to bring a 105(c) complaint on behalf of all miners affected by alleged discriminatory conduct); *Sec'y of Labor on behalf of Green v. D&C Mining Corp.*, 33 FMSHRC 243 (Jan. 2011) (ALJ) (holding that Respondent violated section 105(c) by discriminating against Applicants for the mistaken belief that they had called MSHA inspectors to the mine).

Further, in another 105(c) case, *Sec'y of Labor on behalf of Caudill v. Leeco, Inc. and Blue Diamond Coal Co.*, 24 FMSHRC 589 (May 2002) (ALJ), Judge Zielinski rejected Respondent's argument that the protected activity must be that of the miner complaining of adverse action. The judge held that Caudill's allegation that he suffered adverse action as a result of the protected activity of his father stated a cause of action under section 105(c). The judge rejected Respondent's reliance on *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561 (3<sup>rd</sup> Cir. 2002), and rejected the same attempt as that made in the instant case to analogize 105(c) to discrimination cases filed under the ADA or ADEA. The judge found that a strict literal

interpretation of section 105(c)(1) would be inconsistent with the legislation's purpose and that "refusing to allow Jimmy Caudill's claim of retaliation based upon protected activity by his father would nullify some of the most important protections intended by Congress." *Caudill*, at 591. While I am not bound by Judge Zielinski's decision I find it supportive of the concept that rejects a strict reading and interpretation of 105(c) which would require that the complaining miner be the only individual who is protected from reprisal for complaining about a health and safety concern.

Here, the Solicitor proffered evidence that Adams cooperated in the Shemwell investigation by providing a statement to MSHA Special Investigator Kirby Smith on February 6, 2012, with Respondent's attorney present.<sup>2</sup> Tr. 116-17. Furthermore, both Adams and Burden testified they expressed concerns to Respondent's management officials, Supervisors Ramsey and/or Fulkerson about the presence of PCBs in oil used in on-site transformers. Tr. 124, 168-70. Flener and coworker Ben Bowers had concerns about potential exposure to PCBs after draining the oil out of a transformer. Tr. 145-46. Flener was present when Bowers asked Fulkerson if the oil had been tested for PCBs. Tr. 146. Fulkerson told them the transformers had all been tested. *Id.* Further, Ramsey, on cross examination, acknowledged his awareness that Flener is "kin" to Reuben Shemwell, the Complainant in the precursor to the instant discrimination cases. Tr. 220. All of this evidence provides a basis for concluding that management could have reasonably suspected that any of the Applicants called in the anonymous complaint which triggered the MSHA inspection and layoff of the shop employees on February 28, 2012.<sup>3</sup>

The fact of the matter remains that, if Respondents are to be believed, they had no inclination or suspicion as to who made the anonymous complaint. That is precisely the point and the vexing problem these cases present. It appears that, rather than pinpoint one miner for retribution, the Respondents, in response to the anonymous complaint and MSHA's February 28, 2012, inspection to investigate the complaint, took it upon themselves to punish everyone by closing the facility and remove the livelihood of all 11 shop employees. Allowing Respondents to escape a test of the merits of these Applicants' cases by finding their complaints to be frivolous would do nothing more than thwart the very purpose of the 105(c) non-retaliation provisions Congress enacted. Worse yet, it would invite every operator to take action against entire groups of miners when anonymous complaints are brought forth to MSHA, only to claim

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<sup>2</sup> Respondent argues in its post-hearing brief that there is a lack of temporal proximity between Adam's participation in the MSHA investigation on February 6, 2012, and his layoff on February 28, 2012. This argument is best preserved for the case on the merits. I find it sufficient given the minimal burden of demonstrating a non-frivolous complaint in a temporary reinstatement proceeding to conclude Adam's participation reasonably could have led Respondents to suspect he made the anonymous complaint on February 27, 2012.

<sup>3</sup> To the extent that Respondent cries foul and objects to reliance on this evidence I would point out that our discussions during the prehearing regarding scope of evidence relate to that which would tend to support any inference that Respondent suspected that any one of the Complainant's may have lodged the anonymous complaint not to establish separate and independent claims of protected activity. Such evidence however, may be relevant for those purposes in the merits based cases which may follow.

they had no idea who filed the complaint so no individual protected activity could be found and thus, escape liability entirely for what could be unmitigated reprisal for reporting health and safety concerns. As a matter of public policy this cannot be what Congress intended when it passed the non-retaliation provisions of the Mine Act.

Unrefuted evidence presented at hearing shows that at a minimum Supervisor Ramsey and Manager of Surface Safety Richard Hicks were aware of the February 27, 2012, anonymous complaint when Respondents took action to close the fabrication shop on February 28, 2012, because a copy of it was handed to them by MSHA Inspector Louie Adams. Vice President of Operations Allen's testimony alone unequivocally establishes he never wanted MSHA at the shop and, as soon as MSHA appeared to conduct an inspection Allen, immediately shut the shop down and laid off 11 miners demonstrating hostility or animus toward the protected activity and by extension any miner who may have engaged in the activity. Finally, temporal proximity of a single day between the anonymous complaint and the layoff has been unequivocally established. Such evidence is sufficient to find the Applicants claims non-frivolous.

iv. Respondents' Economic Feasibility Argument

The Respondents argue that reinstatement of the Applicants is barred because the February 28, 2012, layoff was conducted for bona fide economic reasons. They presented the same argument to Judge Feldman in *Sec'y of Labor o/b/o Reuben Shemwell v. Armstrong Coal Co., Inc., et al.*, Docket No. KENT 2012-655-D. Judge Feldman rejected their argument as did the Commission on appeal. Because this issue has already been decided by the Commission I find it unnecessary to address it in this decision.

### III. DECISION AND ORDER

For all of the reasons articulated above I find that the Applicants presented sufficient evidence at hearing to render their discrimination complaints non-frivolous. Accordingly, **IT IS ORDERED** that Respondents Armstrong Coal Company, Inc., and/or Armstrong Fabricators, Inc., immediately reinstate the Applicants Jarred Adams, Dustin Flener and Ronnie Burden, **no later than Monday, July 30, 2012**, to the positions they held immediately prior to the February 28, 2012, layoff, or to similar positions at the same rate of pay and benefits and with the same or equivalent duties assigned.

**IT IS FURTHER ORDERED** that Respondents Armstrong Coal Company, Inc., and/or Armstrong Fabricators, Inc., provide back pay and relevant benefits, less deductions for taxes and any other appropriate payroll deductions, to the Applicants Adams, Flener and Burden **effective February 28, 2012**, until the date preceding their reinstatement.

/s/ David P. Simonton

David P. Simonton

Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE  
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WASHINGTON, DC 20001-2021  
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July 23, 2012

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner,	:	Docket No. VA 2009-211
	:	A.C. No. 44-04856-178738
v.	:	
	:	Buchanan Mine #1
CONSOLIDATION COAL CO.,	:	
Respondent.	:	

**DECISION**

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

Billy R. Shelton, Esq., Jones, Walter, Turner & Shelton, Lexington, Kentucky, for Respondent

Before: Judge Tureck

This case is before me on a *Petition for Assessment of Civil Penalty* filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Consolidation Coal Company (“Consol”), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§815 and 820 (“the Act”). The Secretary proposes assessing penalties against Consol totaling \$199,300 for five alleged violations of mandatory safety standards at Consol’s Buchanan #1 coal mine (“Buc1”). The Secretary contends that each of these violations was significant and substantial, involved high negligence, and was an unwarrantable failure to comply with mandatory standards. Consol challenges both the occurrence of the violations and the severity of the assessed penalties.

A formal hearing was held in Jonesborough, Tennessee on July 12 and 13, 2011. At the hearing, Government Exhibits 1-10 and 12, and Respondent's Exhibits 1-5, were admitted into evidence,<sup>1</sup> and each party provided testamentary evidence. At the conclusion of the hearing, a deadline of September 13 was set for the parties to file briefs. That deadline was subsequently extended by 30 days. On October 3, the *Secretary's Motion to Amend Petition for Assessment of Penalty* was filed. That motion sought to amend Order No. 8157102 to change the safety standard allegedly violated from 30 C.F.R. §75.1103-3 to §75-1100.1(a). Respondent opposed the motion, and I denied it by order issued on October 18, 2011. Both parties then filed post-hearing briefs and reply briefs, the last of which was received on November 14.

### **Findings of Fact and Conclusions of Law**

At the start of the hearing, the parties stipulated that: Consol is subject to the Act and the jurisdiction of the Federal Mine Safety and Health Review Commission; Consol and Buc 1 are engaged in interstate commerce; Consol is an operator under the Act, and Buc 1 is a coal mine; the imposition of the proposed assessed penalties will not affect Consol's ability to stay in business; Consol is a large operator; and the citations were properly served. TR12, at 6-7.

Buc 1 is a very large, deep underground coal mine located in Southwest Virginia. It has been in operation since 1984. TR13, at 25. It employs about 700 miners and generally operates 24 hours a day on three shifts: 7:30 a.m. - 3:30 p.m. (the day shift); 3:30 p.m. - 11:30 p.m. (the evening shift); and 11:30 p.m. - 7:30 a.m. (the owl shift). There are 16 miles of beltline in Buc 1. TR 12, at 167. As an underground mine, Buc 1 is subject to quarterly inspections by MSHA's coal mine inspectors. Due to its size, these quarterly inspections of Buc 1 generally take the full quarter to complete, at which time the next quarterly inspection begins. TR12, at 29-30. Accordingly, MSHA inspectors are in the mine almost all the time. *Id.* at 122.

*Citation 8157100; Orders 8157101, 8157102*

On July 2, 2008, MSHA coal mine inspector John Hughes arrived at Buc 1 at 9:00 a.m. TR 12, at 43. Hughes has been an MSHA coal mine inspector since 2005. *Id.* at 27. His last jobs prior to coming to work for MSHA were pre-shift examiner and then section foreman for Massey. *Id.* at 22-23. He never worked at a mine with a longwall, and Buc 1 is the only mine he has inspected with a longwall. *Id.* at 113, 116. Hughes was at Buc 1 on July 2 to follow up on a citation he issued the previous day regarding a leak in a water line. *Id.* at 45-46; RX 2, at 44. He was accompanied on his inspection by Dave Lambert, Respondent's shift foreman on the Page

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<sup>1</sup> Citations to the record of this proceeding will be abbreviated as follows: GX – Government's Exhibit; RX – Respondent's Exhibit; TR12 – July 12 Hearing Transcript; TR13 – July 13 Hearing Transcript.

side.<sup>2</sup> Hughes testified that when he arrived at the mine, Lambert informed him that the water line was down. *Id.* at 46. However, his inspection notes indicate that Lambert did not inform him that the water was off until 11:00 a.m. GX 6, at 8. Since he could not close the citation he had issued the previous day until the water line was back up, Hughes decided to pass the time by inspecting some mine equipment and taking some air readings. *Id.* Then he and Lambert went to the control room, a very small room with monitors displaying, among other things, whether the belts are moving. *Id.* at 51-52. Hughes observed that the tripper conveyor belt, which transports coal to the Grassy Bunker, a storage area for coal before it is brought to the surface, was operating. *Id.* at 52. Since the water line there was down, he believed that if a fire occurred on the belts there would be no way to put it out. *Id.* at 53. However, he did not believe that this situation presented “a real fire hazard or imminent danger type situation . . . .” TR12, at 56. So instead of going right to the tripper belt to abate the problem, he went to the number 2 vent to obtain air readings. *Id.* He explained that this got them closer to the area by the Grassy Bunker without tipping his hand that he suspected a violation was occurring. *Id.* at 54-55. He believed that if the miners knew he suspected there was an ongoing violation, it would be corrected before he could witness it taking place. *Id.* at 55-56.

When Hughes and Lambert arrived at the belt line, a little less than an hour after they left the control room (TR12, at 249), the tripper belt was not running. TR12 at 61. If that belt was not operating, production at the mine had to be reduced because all the mined coal had to be sent to the main line; it could not go to the Grassy Bunker for underground storage. TR 12 at 215-16. Hughes testified that he observed that that the belt rollers had frozen in place (*id.* at 88), a determination he made solely through a visual inspection of the rollers. *Id.* at 158-59. He did not touch the rollers, nor did he see them while the belt was operating. *Id.* at 93, 159. But he stated that the rollers were so eroded away that they could not turn. *Id.* at 159-60, 169. Further, he stated that virtually the entire belt rollers located within 70 feet of the tripper conveyor belt tail piece was severely flattened. *Id.* at 88. He stated that the moving conveyor belt dragging across the stuck rollers created heat and friction, a potential fire hazard. They also cause coal fines to build up on the rollers, which could serve as a fuel source in the event of a fire. Nevertheless, despite that there were probably over 50 rollers within this 70 foot length of belt,<sup>3</sup> and that he found virtually all of them to be severely flattened, Hughes testified that initially he indicated that only five rollers needed replacing. *Id.* at 166. According to Lambert, who was with Hughes when he inspected the belt line, Hughes identified only three rollers – two top and one bottom – that had to be replaced. *Id.* at 251-52. Hughes testified that after receiving input from the miners at the site, he ultimately found seven more rollers which he believed had to be replaced. *Id.* at 166; GX 1, at 1. Lambert agrees that the miners at the belt told Hughes that they were going to change nine additional rollers, but he testified that Hughes did not inspect these rollers. *Id.* at 252.

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<sup>2</sup> For reference purposes, the mine is divided into the Page side and the Contrary side. Page and Contrary are the locations of the mine portals.

<sup>3</sup> Hughes testified that there were seven rollers for every ten feet of belt. TR 12, at 167.

Hughes determined that the condition of the rollers constituted a violation of 30 C.F.R. §75.1725(a), which states: “Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.” Therefore, he issued Citation No. 8157100. GX 1. Further, he determined that “[t]he condition of the belt rollers indicates the condition has existed for a [*sic*] extended period of time.” *Id.* at 98; GX 1, at 1. Because of this, he believed that “adequate pre-shift examinations are not being conducted on the Tripper Conveyor belt.” In fact, he believes that the pre-shift examiners deliberately ignored the problems with the rollers. TR 12 at 169. He contended that this failure to conduct an adequate pre-shift inspection constituted a violation of 30 C.F.R. §75.360(a)(1). That section requires “a pre-shift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground.” He issued Order No. 8157101 due to this alleged violation.

Respondent, while not contesting that bad rollers can be a fire hazard (TR12, at 220), disputes that the rollers were unsafe. There has never been a belt fire at Buc 1. TR 13, at 25. The belts are fire resistant, although not fire proof. TR 12, at 176-77. Buddy May worked for Consol at Buc 1 from 1997 until he retired in April 2009. TR 202. He was classified as a general laborer and belt man, but occasionally he performed pre-shift inspections. TR 203-04. On July 2, 2008, he was working as the Grassy Bunker operator on the owl shift. He performed the pre-shift inspection of the tripper belt and bunker area for the day shift at about 4:30 a.m. on July 2. TR 206. He did not find any problems with the belt rollers. TR 12, at 212-13. However, it was noted on the pre-shift examination report from the owl shift on July 2, 2008 that the tripper belt needed additional cleaning, and there is no notation that the additional cleaning was performed. RX 1. May testified that when he did his inspection not only was the tripper belt down, but the take up rope was down; and when the take up rope is down, the belt sags, making it harder to see the rollers. TR12, at 213-14. Further, he testified that it cannot be determined if a roller is frozen if the belt is not operating. TR12, at 214. Finally, May testified that rollers with flattened spots can still work well, although it was Respondent’s policy to change flattened rollers. TR 214-16.

When Hughes got to the belt line, he did not check the water line to see if the repairs had been completed. TR12, at 61. But the three miners working at the site informed Hughes that the belt had been running while the water line was shut off as it was being repaired. TR12, at 67. That the belt was operating while the water was shut off was acknowledged by the mine superintendent, Bill Meade, and the shift foreman who was repairing the water line, Lee Daniel. The inoperative water line supplied the water for the automatic fire suppression systems at the conveyor belt heads and the fire hoses along the 4 North belt. TR12, at 59-60. Meade testified that Daniel made a mistake by keeping the belt operating while the water was off, and Daniel corroborated Meade’s testimony. TR 13, at 47-48; RX 2, at 22, 45-46. Hughes determined that

operating the belt while the water was off was a violation of mandatory standard 30 C.F.R. §75.1103-3, and issued order number 8157102. Section 75-1103-3 states:

Automatic fire sensor and warning device systems installed in belt haulageways of underground coal mines shall be assembled from components which meet the minimum requirements set forth in §§75-1103-4 through 75-1103-7 unless otherwise approved by the Secretary.

Hughes determined, for each of these alleged violations, that injuries resulting in lost workdays or restricted duty were reasonably likely; that the violations were significant and substantial; and that they resulted from high negligence. He based these determinations on the extent of the damage to the rollers; his belief that belt rollers are the leading cause of mine fires; and that in the absence of an operating water line a fire was reasonably likely. Further, he found that these violations constituted unwarranted failures to comply with mandatory standards. All of these violations were terminated expeditiously. The Secretary's proposed penalties for these alleged violations are as follows: Citation 8157100 - \$27,900; Order 8157101 - \$23,800; and Order 8157102 - \$23,800.

*Orders 8157127, 8157128*

On July 24, 2008, Hughes was again engaged in inspecting Buc 1. On this date, he was accompanied by a coal mine inspector trainee, Brian Keith Ray, and Kim Noah, the chief safety supervisor at Buc 1 at the time. Noah also was a certified mine foreman in Virginia. Hughes and Ray arrived at the mine at 8:00 a.m. Hughes, Ray and Noah were riding on the manbus in the 3 East Mains on the way to O Panel when Hughes noticed that a layer of black float coal dust had settled on everything, from rib to rib and on all surfaces and equipment. He stated that it was obvious and extensive. GX 4, at 2; GX 5, at 2. The accumulation of float coal dust began at break 103 and got worse to break 107, where the manbus stopped. EX 8, at 4; TR13, at 205. Hughes then walked the rest of the way to break 115, where, he stated, the accumulation was even worse. TR13, at 90, 93. The distance between breaks 103 and 115 was about 1400 feet. GX 4. Hughes stated that he measured these accumulations with a ruler and they averaged 1/16 of an inch deep. TR13, at 89-90. He added that based on the extent of the area affected and the amount of float coal dust which had accumulated; the condition had to have existed for more than one shift. TR13, at 105; EX 8, at 6. Hughes's testimony was supported to some extent by the testimony of Ray. Ray only observed the area from break 107 back to break 103. TR13, at 206. He stated that he stopped at break 103 because that was where the mine surface started transitioning from white to a darker color. *Id.* at 205. "And then, as I walked back toward [break] 107, it, it was getting darker and darker, and it was black." *Id.* But he did not measure the depth of the float coal dust, nor did he accompany Hughes past break 107. *Id.* at 206.

Hughes testified that float coal dust is combustible and an explosive hazard. TR13, at 85; *see also* TR13, at 207-08, 274. Respondent does not contest this point. Rather, respondent contends that there was no significant accumulation of float coal dust in the location indicated in

the order. Respondent points to the testimony of Mike Ellis, a certified foreman in Virginia (TR13, at 233) who conducted the pre-shift examination of that part of the mine less than five hours before Hughes and Ray got there. TR13, at 127, 235; GX 4. Ellis testified that he saw no accumulations of coal float dust in the areas of breaks 103 to 115. TR13, at 237. Further, Noah testified that “[t]he offside of the belt naturally was, you know, it was a little bit gray, but in no means had float coal dust built up in, in black in color like he stated. . . . [I]t looked good.” TR13, at 264. Respondent points out that Hughes inspected the same area the previous day and did not find an accumulation of float coal dust (TR13, at 135-36), and other inspectors went by the same area and did not issue citations for accumulations of float coal dust. Further, respondent contends that the mine was shut down from the end of the day shift on July 23, 2008 until 6:00 a.m. the next morning due to electrical and ventilation problems. TR13, at 266-67, 314-19. According to Respondent, from the time Hughes left the mine on July 23 until he returned to the site of the alleged violation at 9:30 a.m. on July 24, mining would not have been going on long enough to have produced the amount of float coal dust Hughes alleges was present. Finally, Respondent contends that even if there was an accumulation of float coal dust, it would not have been hazardous because it was too far away from the face to have ignited. TR13, at 289.

Hughes determined that the accumulation of float coal dust that he found was a violation of §75.400, which prohibits the accumulation of float coal dust and other combustible materials. He also believed that the accumulation of float coal dust should have been noted in the pre-shift inspection conducted at 4:30 that morning because he believed the float coal would have taken at least a shift or more to have accumulated to that extent. Therefore, he found that Respondent also violated §75.360(a)(1), by conducting an inadequate pre-shift examination. Hughes found that both of these violations were reasonably likely to cause injury leading to lost workdays or restricted duty, and that these violations were significant and substantial. Further, he found both involved a high degree of negligence and were unwarrantable failures to comply with mandatory standards. Both violations were terminated by 11:30 a.m., by rock dusting and conducting a proper pre-shift inspection, respectively. The Secretary’s assessed penalty for the alleged violation of §75.400 is \$70,000, and the assessed penalty for the alleged violation of §75.360(a)(1) is \$53,800.

### *Proof of Violations*

#### Citation 8157100

The Secretary alleges that respondent violated §75.1725(a), which states:

Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

The citation states that this standard was violated because 12 belt support rollers on the tripper conveyor belt - 11 top and one bottom - “were frozen in place and would not rotate.” GX 1. It goes on to state that these frozen rollers created a fire hazard by producing heat and friction when the belt dragged across them. *Id.* Although there was considerable testimony regarding whether some rollers had sizable flat spots and whether these flat spots, without more, can be hazardous, the citation clearly rests on the allegation that rollers were frozen in place, not just that they had flat spots.<sup>4</sup> Therefore, to prove that Respondent violated this standard, the Secretary must first prove that rollers were frozen in place.

There is a clear conflict in the testimony regarding this issue between Hughes, on the one hand, and May and Lambert on the other. When Hughes inspected the belt line, he stated that initially he found only five rollers which he believed had to be replaced. He did not try to turn the rollers, nor did he see the belt in operation. Therefore, he could only surmise, although he did so emphatically (*see, e.g.*, TR 12, at 170), that those five rollers could not turn. He testified that some of these rollers were so worn that the outer shell of the rollers – about a quarter-inch thick metal – had eroded through. But he could not say how many of the total of 11 or 12 rollers he ultimately found were frozen were that badly worn. TR12, at 161, 165-66. Hughes’s inspection notes, prepared shortly after his inspection concluded on July 2<sup>nd</sup>, state that the rollers were “deformed” and had flat spots, but did not state that the outer shells had eroded through. GX 6, at 18-20. Moreover, his testimony is confusing regarding whether the rollers were so worn that the internal parts of some rollers were visible. *See* TR12, at 165.<sup>5</sup>

Lambert, who accompanied Hughes on his inspection on July 2<sup>nd</sup> and has worked for the Respondent for close to 40 years, testified that Hughes initially said two top rollers and one bottom roller were in violation. *Id.* at 250-51. According to Lambert, neither of these rollers had

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<sup>4</sup> In this regard, *see* Secretary’s Brief at 28-29.

<sup>5</sup> One aspect of Hughes’s testimony which I find particularly troubling is his belief that it was more important to catch Respondent red-handed in a safety violation than in abating the violation as soon as possible. *See* TR 12 at 56. Not only did he fail to point out to Lambert that the beltline was operating despite the absence of a water supply as soon as he discovered this condition while he was in the control room, but he deliberately took his time – about an hour (TR 12 at 249-50) - getting to the site where this violation was taking place. He did so to mislead Lambert regarding his ultimate destination in the mine, causing Lambert not to warn the miners at the beltline that a mine inspector was on his way there. In that way, he hoped to catch Respondent continuing to engage in the violation when he arrived at the scene. It seems to me that Hughes could have been endangering the very miners he is supposed to be protecting by his failure to point out the problem as soon as he became aware of it. Moreover, since he believed the violation that was occurring was operating the beltline without a water supply (at this point he had no knowledge of the condition of the rollers), he already had the evidence to prove that violation while he was in the control room. *See id.* at 51-53.

It is hoped that Hughes’s actions are not a reflection of a policy endorsed by MSHA.

worn through the outer surface. TR13, at 10-11. One of these rollers “had a fairly decent flat spot on it” and another “had a flat spot starting to wear on it pretty good”. TR 12, at 251. Nevertheless, he stated that both could have been reused. *Id.* at 253. He stated that Hughes concluded that there were 11 or 12 stuck rollers rather than just two or three because shortly thereafter, when he and Hughes returned to the bunker area, the miners working there told him they were going to replace eight or nine other rollers. According to Lambert, Hughes never looked at these rollers. Lambert added that some of these rollers were cleaned up and reused. *Id.* at 252; TR 13, at 21.

May, who was retired for over two years at the time he testified at the hearing, stated that it cannot be determined whether a roller is stuck if the belt is not moving. TR12, at 214. During the pre-shift inspection he conducted at 4:30 a.m. on July 2<sup>nd</sup>, he did not see any rollers which were flattened down. *Id.* at 212.

Hughes testified that he did not have a camera and therefore could not take photographs of the allegedly defective rollers while he was in the mine. Nor, apparently, did he obtain any of these rollers after they were removed so they could be photographed outside the mine. Obviously, photographs would have been a great help in determining the extent of the wear on the rollers. Without photographs or other corroborating evidence, the Secretary’s case regarding Citation 8157100 is dependent solely on Hughes’s testimony. I find that Hughes’s testimony regarding this issue is not persuasive.

First, that Hughes believes he can tell that a roller is frozen in place simply by looking at it while the beltline is not operating strains credibility.

Second, Hughes’s testimony regarding the number of frozen rollers he saw is inconsistent. He testified that:

*practically all* of the rollers within the first 70 feet of the tail piece . . . was [*sic*] just gone completely. They was [*sic*] all frozen and had just been worn so much by the belt, . . . now the tops of them were flatten [*sic*] severely and not just a small amount. The rollers had been cut into by the belt severely.

TR12, at 88 (emphasis added). Yet initially, he told Respondent that only three (according to Lambert) or five (according to him) rollers had to be replaced, and both he and Lambert agree that he upped the total to 11 or 12 after one of the miners told him there were more than just three or five that they were going to replace. In any event, neither the citation nor Hughes’s inspection notes indicate that more than 11 or 12 rollers were frozen. As was noted above, there were approximately 50 rollers within the first 70 feet of the tail piece.

Third, Hughes’s inspection of the rollers was extremely brief. According to Hughes’s inspection notes, he issued a citation at the Page service shaft bottom regarding a battery charger at 11:00 a.m. GX 6, at 7; *see also* TR12, at 126. Since at that time he still could not inspect the

water line he had come to inspect in order to terminate the violation he had identified the previous day, Hughes decided to take some intake air readings at the bottom of the service shaft to pass the time. GX 6, at 8-10; TR12, at 46. He and Lambert then went over to the production shaft, which is closer to the portal (*see* GX 9), where he took more intake air readings. Each of these intake air readings took several minutes. TR12, at 127. Hughes then went into the control room, which is right by the production shaft, where he found out that the tripper belt was running. Then almost an hour elapsed before they arrived at the bunker and tripper belt area. Hughes issued Citation 8157100 at 12:15. It is irrefutable that Hughes could not have spent more than a few minutes at the tripper belt before he issued the citation. It is doubtful that he could have performed more than a cursory inspection of the rollers in that short time.

Buddy May, who performed the pre-shift inspection at 4:30 on the morning of Hughes's inspection, retired in April, 2009, over two years before he testified at the hearing. Further, he was a laborer, not a management employee. He should have little incentive to sugar-coat his testimony to aid the Respondent's case. His testimony shows that he conducted a pre-shift examination on the morning of July 2, 2008, and did not find any problems with the tail belt rollers that he failed to report. However, it is unclear from his testimony whether he actually observed all of those rollers during his inspection because the take up rope was down, which caused the beltline to sag.

Dave Lambert was still working for Consol when he testified at the hearing, and had for almost 40 years. TR12 at 242. As a shift foreman, he was part of management and could be expected to testify in a light most favorable to the Respondent. Nevertheless, his testimony is consistent with the time line of events, and he testified clearly and without equivocation or self-contradiction.

I find that the evidence fails to establish any of the belt support rollers were frozen in place. It is the secretary's burden of proof, and Hughes's testimony on this issue simply is not persuasive. Therefore, this citation must be dismissed.

#### Order 8157101

The Secretary alleges in this order that Respondent violated §75.360(a)(1), which states in relevant part:

[A] certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground.

It is the Secretary's position that because 12 support rollers "were damage[d] to the extent that the belt rollers had frozen in place and would not rotate", adequate pre-shift examinations of those rollers had not been conducted "for an extended period of time." GX 2, at 2. But again, this citation rests on Hughes's belief that many rollers were frozen in place, which I found has

not been proven. Further, I credit May's testimony that he conducted a timely pre-shift examination that morning. Therefore, Order 8157101 must be dismissed.

#### Order 8157102

The Secretary alleged in this order that Respondent violated §75.1103-3. This section states:

Automatic fire sensor and warning device systems installed in belt haulageways of underground coal mines shall be assembled from components which meet the minimum requirements set forth in §§75-1103-4 through 75-1103-7 unless otherwise approved by the Secretary.

As I held in the October 18, 2011 *Order Denying Motion to Amend Petition for Assessment of Civil Penalty* (hereafter "Order Denying Amendment"),<sup>6</sup> that section of the regulations has nothing to do with any allegations in this case. Accordingly, this order is dismissed.

#### Order 8157127

In this order, the Secretary alleges that Respondent violated §75.400, which 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.

This order was issued at 9:30 a.m. on June 24. Hughes was present at the mine doing an inspection the previous day and did not encounter the same condition regarding accumulated float coal dust at that time. TR13, at 114, 172. He left the mine on June 23 sometime before the start of the evening shift, which began at 3:30 p.m. *Id.* at 166-67.

Hughes stated that the amount of float coal dust he found on June 24 must have accumulated over at least a full shift or more, and could not have been caused solely by restarting the belt after a period of idleness. *Id.* at 115. Because of this, he also believed that the float coal dust present should have been noted on the pre-shift examination report, and the failure to do so indicated that the pre-shift examination was inadequate.

Michael Ellis was a pre-shift examiner on the owl shift for the Respondent on July 24, 2008. He had worked for Consol for six or seven years at the time he testified at the hearing. TR13, at 232-34. Ellis conducted the pre-shift examination of the area of the

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<sup>6</sup> The Order Denying Amendment is incorporated by reference into this decision.

mine in question at about 4:30 a.m. He testified that he believes the belts were running that morning, although he is not sure because the inspection occurred three years ago. *Id.* at 241-42. He added that “most of the time, we are producing coal.” *Id.* at 238. Although he testified that he did not see any evidence of float coal dust during his pre-shift inspection that morning (*id.* at 237, 239), he also testified that he cannot specifically recall that morning. *Id.* at 249. However, he stated that he probably did not see any, since he did not record it in the pre-shift report. *Id.* at 249.

Kim Noah’s testimony is in stark contrast to that of Hughes. Unlike Ellis, Noah remembered specific details from the July 24, 2008 inspection because “it was very serious.” TR 13, at 282. Noah worked for Consol for 33 years. (TR 13, at 260). Although he retired in May, 2009, and therefore should have nothing at stake in this case, it is not hard to conceive that his memory of what occurred on that date might favor Respondent’s position. Nevertheless, his testimony that there was no accumulated float coal dust from breaks 103 to 115 was unequivocal and is entitled to considerable weight.

Craig Dickerson has worked for Respondent since 1990. On July 24, 2008, he was the longwall coordinator. At the time of the hearing he was the assistant mine superintendent. TR13, at 295-96. On July 24, he entered the mine at 7:30 a.m., accompanying MSHA inspector Joe New, who was to perform a health inspection at the longwall. *E.g., id.* at 304. Dickerson and New rode the manbus to break 103, where they had to turn off to get to the longwall. *Id.* at 300. It takes the manbus about 30-35 minutes to get from the portal to break 103. *Id.* at 306. At break 103, Dickerson stated that he could see an additional 200 feet down the main vent shaft, to between breaks 104 and 105. *Id.* at 300. He testified that he did not see “1/16 of an inch [of] float coal dust from rib to rib, the roof, the ribs, the floor . . . .” *Id.* at 301. Such a condition “would have been obvious.” *Id.*

He added that New did not point out a problem to him regarding float coal dust or issue a citation. *Id.* at 301-02.

Finally, Elmer Deel was an assistant general maintenance foreman at Buc 1 in July, 2008, and is still employed there by Consol. TR13, at 311. Deel was called to testify by Respondent on one issue – how long the mine was in production on July 23 and July 24. It is Respondent’s position that the mine was out of production for so much time from the end of the day shift on July 23 through the time of Hughes’s inspection on July 24 that it would have been impossible to have produced the amount of float coal dust Hughes alleges he saw at 9:30 a.m. on July 24.

I give Deel’s testimony little weight. He admitted that he has no recollection of the events that transpired over that period. TR13, at 314, 320. His testimony consisted of explaining notations made by him and other assistant general maintenance foremen in a notebook kept at the mine. *Id.* at 312-13. He did not look at any other records in preparation for testifying at the hearing. *Id.* at 320-22. He stated the notebook, relevant

excerpts of which are in evidence as Respondent's Exhibit 5, is a written record of maintenance at the mine which is filled in after every shift. *Id.* He wrote the notes for the July 23, 2008 day shift and, judging by the handwriting, the July 24 day shift as well; but the notes for the evening shift on July 23 and the owl shift that followed were written by others.<sup>7</sup> These records, whether written by him or someone else, are very sketchy. Most important, they are silent regarding the time when anything was done. The following entries are paramount:

July 23, 2008 day shift: "Fan went down Pulled the Mine did not get done evening Shift to follow up"

July 23, 2008 evening shift: "Put HV Back in underground".

There is no indication in these records of when, during the day shift, the ventilation fans went down and the mine was evacuated. Nor is there any indication of when the fans were turned back on during the evening shift. But according to these records, the fan went down, the mine was evacuated, and possibly repairs had started before the day shift ended, and production had started again during the evening shift. Accordingly, even if Deel's testimony that shutting down the fans would have caused production to have stopped for at least six hours is accurate, production could have been going on for at least 12 hours – one and a half shifts - by the time Hughes inspected the area from breaks 103 to 115 at 9:30 a.m. on July 24.

Deel also pointed out that the notes from the evening shift on July 23 show that a take-up motor on the main beltline was changed, and while that was being accomplished the mainline belts could not have operated. TR13, at 318-19. This would have stopped production. But again, these notes do not indicate the time at which this repair was made or how long it took.

Further, Deel admitted that the Respondent maintained records which would have pinpointed the hours during which the fans were operating and the mine was in production on July 23 and 24, 2008, but he did not review those records. TR13, at 320-22. Moreover, the Respondent did not offer these records into evidence, relying instead on vastly inferior documentary evidence and Deel's imprecise testimony.

There is no way to reconcile all this contradictory testimony. The testimony of Hughes and Ray is totally inconsistent with that of Noah and Dickerson regarding the condition of the mine at 9:30 a.m. on July 24. Since Ray saw only a limited part of the 3 East Mains area in question, and Dickerson saw even less, determining whether Order 8157127 is valid essentially boils down to Hughes's testimony versus that of Noah.

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<sup>7</sup> In fact, the notes for the July 23-24 owl shift were undoubtedly written by two different people.

I find that the Secretary's evidence does not outweigh the Respondent's because Hughes's opinion is jaundiced. Hughes has a very negative opinion of coal mine operators. Despite the fact that it is a criminal violation of the Mine Act (*see* §110(e)) to provide anyone with advance notice of an inspection, he is convinced that Dave Lambert, Respondent's shift foreman, would have notified the miners at the beltline that Hughes was coming to inspect it if he was given the chance to do so. *See* TR 12, at 55-56. Moreover, Hughes believes that all of Respondent's pre-shift examiners acted in bad faith, deliberately ignoring the violations of safety standards that he found. *See* TR 12, at 169; TR 13, at 128-29. In addition, Hughes appears to be intent on finding violations regardless of whether he has reliable evidence to support them, as the evidence regarding Citation 8157100 demonstrates. Finally, as was noted in Footnote 5 above, Hughes was more concerned with catching Respondent engaging in a violation than in having the violation corrected as soon as possible, potentially endangering the safety of the miners. Because of these factors, I do not trust Hughes's determinations.

Therefore, I give more weight to the testimony of Kim Noah and find that there were no accumulations of float coal dust from crosscuts 103 through 115 along the 3 East Mains at 9:30 a.m. on July 24, 2008. Accordingly, Order 8157127 is vacated.

#### Order 8157128

This order also alleges a violation of §75.360(a)(1), contending that an inadequate pre-shift examination was conducted along the 3 East Mains because the hazardous accumulations of float coal dust between breaks 103 and 115 were not recorded or corrected. However, since I have found that the Secretary has not proven the existence of these hazardous accumulations of float coal dust, she has also failed to prove that the pre-shift examination should have identified this condition. Therefore, this order is vacated.

Since I have vacated all of the citations and orders comprising this docket, it must be dismissed in its entirety.

**ORDER**

***IT IS ORDERED*** that Citation 8157100 and Orders 8157101, 8157102, 8157127 and 8157128 are ***VACATED***, the proposed penalties are ***DENIED***, and this case is ***DISMISSED***.

/s/ Jeffrey Tureck  
Jeffrey Tureck  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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Denver, CO 80202-2500  
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July 24, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2011-957-M
Petitioner,	:	A.C. No. 05-00864-252219
	:	
v.	:	
	:	Morrison Plant
AGGREGATE INDUSTRIES WRC, INC.,	:	
Respondent.	:	

Appearances: Amanda K. Slater, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
Al Quist, Safety Manager, Aggregate Industries WRC, Inc., Golden, Colorado, for Respondent.

Before: Judge Manning

**DECISION**

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Aggregate Industries WRC, Inc., (“Aggregate Industries”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Denver, Colorado. In lieu of filing post-hearing briefs, the parties presented oral argument at the hearing. This case involves Citation No. 6581985 issued under section 104(a) of the Mine Act at the Morrison Plant.

**I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On March 9, 2011, MSHA Inspector David Grosek issued Citation No. 6581985 under section 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 56.11012. The citation alleges the following:

The Atlas Copco Drill has 2 elevated work platforms, and the platform around the cab area does not have a fall prevention barrier to prevent miners from falling and being injured. Also the work platform around the actual drill mechanism has rails and chains at the access ladders, but an approximate 15 inch gap between the rails, at the top, which would allow a miner to fall and be injured. These platforms are approximately 4 ft. above the ground and have

ladders accessing them. The machine is not running today. Miners use the platforms when the machine is operating. This standard was not cited at this mine during the past two years.

(Sec'y Ex. 1). Inspector Grosek determined that an injury resulting in lost workdays or restricted duty was reasonably likely to occur, that the violation was of a significant and substantial ("S&S") nature, that one person would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a penalty of \$687.00 for this alleged violation.

**A. Summary of Testimony**

Inspector Grosek inspected Aggregate Industries' Morrison Plant for an E01 inspection. (Tr. 16-17). This mine has two E01 inspections every year. (Tr. 17). An E01 inspection includes inspecting the subject drill. (Tr. 34). He issued Citation No. 6581985 for a violation of § 56.11012. (Tr. 18-19; G. Ex. 1). The citation was issued because the drill had an elevated platform that did not have a barrier across the ladder access. (Tr. 19; Ex. G-1). Inspector Grosek took photos of the condition, which the Secretary submitted as Exhibit 2. (Tr. 19-20; Ex. G-2). Inspector Grosek was concerned that there were two openings on this platform that a person walking by could fall through. (Tr. 24). The first opening for the ladder access was two feet wide. (Tr. 24, 39). The second opening, on the other side of the drill, was ten inches wide. (Tr. 27). The platform was four feet above the ground. (Tr. 25). The operator terminated the citation by putting chains across the openings. (Tr. 28).

Inspector Grosek testified that he believed previous inspectors had failed to cite an obvious hazard. (Tr. 32, 35). It was his opinion that a reasonably prudent person familiar with the mining industry would have known that this area should have been protected. (Tr. 29). He also believes that the chain does not create an additional safety hazard because it is possible to unhook the chain and climb the ladder while maintaining three points of contact. (Tr. 45-46).

Robert Gentry, a quarry supervisor for Aggregate Industries, testified that the Atlas Copco, Ingersol-Rand DM45 drill was delivered to the Morrison Plant in 1995. (Tr. 55-56). He moved the cab access from the original location to its current location to make it safer when drilling at the highwall. (Tr. 57-58). He did not feel that a barrier across the ladder was necessary. (Tr. 58). When operating the drill, Mr. Gentry would walk past the opening once per shift, but never believed he would fall through the opening. (Tr. 59). The walkway surface is expanded metal that provides a lot of grip. (Tr. 60). In inclement weather, miners take extra care because there is a slight chance that a miner could slip. (Tr. 60). Gentry noted that a Caterpillar 988 front-end loader used at the quarry had a ladder attached to a small, raised platform from which stairs led to the operator's cab. (Tr. 69-70; Ex. R-A7). A miner would have to travel through the area to access the cab and, more importantly, maintenance would sometimes have to be performed at that location. There is no fall protection barrier at the top of the ladder, yet MSHA has never issued a citation for the lack of a fall protection barrier.

Mr. Gentry testified that he believes the chain is a hazard because it cuts off the miner's emergency access from the cab should the drill sink while on the highwall. (Tr. 61-62). Also,

having a chain at the top of the ladder creates a hazard by forcing the miner to unhook the chain while on the ladder, exposing the miner to the risk of losing his grip and falling. (Tr. 67).

## **B. Summary of the Parties' Arguments**

### **1. Secretary of Labor**

The Secretary argues that the standard is clear and most of the elements of the standard are not in dispute. (Tr. 80). The opening was at least two feet wide. (Tr. 80). It was reasonably likely that a person could fall through this opening because once a shift a person must walk by the opening and a person could trip on a nearby step and inclement weather could make the walkway slippery. (Tr. 81). A "travelway" is "a passage, walk or way regularly used and designated for persons to go from one place to another." 30 C.F.R. § 56.2. A person falling from an opening four feet high may have serious, even fatal, injuries, resulting in lost workdays (Tr. 82). As a preliminary matter, the Secretary lowered the negligence from "high" to "moderate." (Tr. 5).

Next, the Secretary argues that MSHA inspectors miss things, but this does not excuse the mine from recognizing hazards and complying with standards. (Tr. 82-83). She relies on the decisions in *Blue Mountain Production Company* and *Main Line Rock & Ballast* to support this argument. See *Mainline Rock & Ballast, Inc.*, 33 FMSHRC 307, 326 (Jan. 2011) (ALJ); *Blue Mountain Production Company*, 32 FMSHRC 1464, 1474 (Oct. 2010) (ALJ).

Finally, in response to the operator's argument that it lacked notice, the Secretary argues that a reasonably prudent person familiar with the mining industry would have recognized this as a hazard. (Tr. 83). She relies on the testimony of the MSHA inspector and evidence that similar openings on this drill had chains in place. (Tr. 83-84).

### **2. Aggregate Industries**

Aggregate Industries argues that the issuance of this citation was a subjective decision by the MSHA inspector. (Tr. 85). The drill at issue has been through 30 previous inspections from several different inspectors and no citation was ever issued for the two openings. (Tr. 85). Aggregate also has other machines with similar configurations that were not cited. (Tr. 85). Further, Aggregate Industries argues that it was not reasonably likely that a person would fall through the opening because there is no evidence that anyone has fallen through similar openings at the quarry or at any other quarry. (Tr. 85). Finally, Aggregate Industries argues that the chain creates an additional safety hazard by forcing the operator to take his hands from the rail to remove the chains to access the platform. (Tr. 11). The chain also prevents the operator from leaving the drill cab area quickly in the event of an emergency. (Tr. 11).

## **C. Analysis of the Issues**

The cited standard requires that "openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers." 30 C.F.R. § 56.11012. A "travelway" is defined as "a passage, walk or way regularly used and designated

for persons to go from one place to another.” 30 C.F.R. § 56.2. The danger of materials falling from the platform through the openings is not an issue in this case.

I find that Aggregate Industries violated this standard. The platform on the drill extending from the cab and along the side of the drill was a travelway and the drill operator walked along it at least once a day. (Tr. 23, 59). Any miner walking along the decking from the cab to the back of the drill would pass by the access opening which was not equipped with any protective device to prevent the miner from falling. (Tr. 19). The drill operator walked in that direction once a day to check the fluid level in the radiator. The other opening was very narrow. At only 10-inches wide, it was highly unlikely that anyone could fall through that opening even if he tripped or stumbled. (Tr. 67; Ex. R-B4). A miner was in that area very infrequently to perform maintenance on an air compressor. I find that the Secretary did not establish that the opening was along a travelway used by miners “to go from one place to another.” *Id.* As a consequence, I conclude that this second opening did not violate the safety standard.

The Atlas Copco drill had been at the Morrison Plant for 15 years before this citation was issued. (Tr. 56). The Morrison Plant has had two E01 inspections every year since that time. (Tr. 17). At least 30 inspections of the Morrison Plant, by various MSHA inspectors, had occurred without a citation being issued for this condition. (Tr. 8, 17, 35). Thus, until this inspection, MSHA had not considered the drill platform to be a travelway and had not recognized the access opening as a hazard.

The Commission test for whether an operator had notice of an interpretation is “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.* 12 FMSHRC 2409, 2416 (Nov. 1990). In *Ideal Cement*, the Commission held that this test is an objective standard. *BHP Minerals International Inc.* 18 FMSHRC 1342, 1345 (Aug. 1996).

Prior inconsistent enforcement of a safety standard is a factor the Commission considers when evaluating whether a mine operator has received fair notice of the Secretary’s interpretation of an ambiguous regulation. *Alan Lee Good d/b/a Good Construction*, 23 FMSHRC 995, 1006 (Sept. 2001) (“*Good Construction*”). In *Good Construction*, the mine had maintained the cited areas for 18 years, with up to 20 MSHA inspections, without an MSHA citation for the conditions at issue. The Commission’s decision was split on the issue of how that particular case should be handled. The holding is essentially the same in both opinions with respect to how this issue should be analyzed in future cases, as summarized in the opinion of Commissioners Jordan and Beatty:

In applying the reasonably prudent person standard to a notice question, the Commission has taken into account a wide variety of factors, including the text of a regulation, its placement in the overall enforcement scheme, its regulatory history, the consistency of the agency’s enforcement, and whether MSHA has published notices informing the regulated community with “ascertainable certainty” of its interpretation of the standard in question. Also relevant is the testimony of the inspector and the

operator's employees as to whether the practices affected safety. Finally, we have looked to accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine.

*Id.* at 1005 (citations and footnote omitted).

I find that the cited standard was ambiguous with respect to the openings cited by Inspector Grosek. The opening of particular concern to the inspector was at the top of the ladder. The drill operator would only pass near this opening once a shift. The decking was expanded metal and the guardrails on both sides of the openings were very substantial. (Ex. G-2). The two openings did not create an obvious hazard. In addition, there is a similar opening at the top of the ladder on at least one front-end loader that has never been cited by MSHA. (Ex. R-A7). Parts on the loader must be serviced in the area immediately adjacent to that opening. Given these facts, the applicability of the safety standard to the cited openings was very ambiguous especially considering the history of enforcement at the quarry.

Aggregate Industries was led to believe by about 30 prior citation-free inspections that the two cited openings did not violate the safety standard and that the openings that required protection were adequately secured. There is nothing in the record that indicates Aggregate Industries knew or should have known that the unchained openings might be considered a violation of this safety standard. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have reached the same conclusion as Aggregate Industries. As a consequence, I am vacating the citation.

It is important for Aggregate Industries to understand that by vacating the citation, I am not holding that the safety standard does not apply to the opening at the top of the ladder. I am only holding that Aggregate Industries was not provided with the notice that is legally required to assess a civil penalty for violating the safety standard. As a result of this decision, Aggregate Industries has now been provided such notice and it is required to comply with the requirements of section 56.11012 at the top of the ladder. As stated above, I find that the safety standard does not apply to the cited 10-inch wide gap in the railing because there was no danger of someone falling through the opening and the platform was not a travelway.

## II. ORDER

For the reasons set forth above, Citation No. 6581985 is hereby **VACATED** and this proceeding is **DISMISSED**.

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

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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July 26, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Docket No. LAKE 2011-206-M
Petitioner,	:	A.C. No. 20-00422-239358 Y173
	:	
	:	Mine: Tilden Mine
v.	:	
	:	
DAWES RIGGING & CRANE RENTAL,	:	
Respondent.	:	

**DECISION**

Appearances: Natalie E. Lien, Esq., U.S. Department of Labor, Denver, CO, on behalf of the Secretary

Tod T. Morrow, Esq., Morrow & Meyer, LLC, North Canton, OH, on behalf of Stansley Mineral Resources, Inc.

Before: Judge David F. Barbour

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) acting through the Mine Safety and Health Administration (“MSHA”) against Dawes Rigging & Crane Rental (“Dawes” or “the company”) pursuant to sections 105 and 110, 30 U.S.C. §§ 815, 820, of the Federal Mine Safety and Health Act of 1977 (the “Mine Act”). 30 U.S.C. § 801, *et seq.* The Secretary seeks the assessment of a civil penalty of \$3,000 against Dawes for one violation of the Secretary’s mandatory safety standards for surface metal/nonmetal mines. Dawes was cited for the violation while performing contract work on the south side of the Tilden Mine pellet plant, which is owned and operated by Cliffs Natural Resources, and is located in Marquette County, Michigan. The violation is alleged in Citation No. 6502467, which was issued pursuant to section 104(d)(1) of the Mine Act. 30 U.S.C. § 814(d)(1). The Secretary asserts that the operator violated 30 C.F.R. § 56.16009, that the violation was a significant and substantial contribution to a mine safety hazard (“S&S” violation), and that the violation was caused by Dawes’s unwarrantable failure to comply with the cited standard. Section 56.16009 requires that “all persons . . . stay clear of suspended loads.” In answering the petition, the company argued that it did not violate section 56.16009 and that the Secretary wrongly characterized the violation as S&S and unwarrantable. The case was heard in Madison, Wisconsin.

## STIPULATIONS

The parties have stipulated as follows:

1. In May 2010, Dawes . . . was assembling a crane at the Tilden [M]ine . . . in Marquette County, Michigan.
2. [The] Tilden [M]ine is a surface metal/nonmetal mine.
3. On May 27, 2010, MSHA issued to Dawes . . . Citation Number 6502467, alleging a violation of 30 C.F.R. § 56.16009.
4. At the time the citation was issued, [Dawes] was engaged in operations in the United States, and its operations affected interstate commerce.
5. Dawes . . . is subject to the jurisdiction of the Mine Act.
6. The Administrative Law Judge has jurisdiction over these proceedings pursuant to Section 105 of the Mine Act.
7. A true copy of the citation at issue in this proceeding, Government Exhibit Number 1, was served on Dawes . . . , as required by the Act.
8. Dominic Vilona was an authorized representative of the . . . Secretary of Labor assigned to the Marquette, Michigan, field office of MSHA's Metal/Nonmetal Division at the time the citation was issued, and was acting in his official capacity when the citation was issued.
9. The proposed penalty will not affect [Dawes]'s ability to remain in business.
10. The certified copies of the MSHA Assessed Violations History reflect the history of the mine for 15 months prior to the date of the issuance of the citation at issue, and may be admitted into evidence without objection by Respondent.
11. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.

Jt. Ex. 1; Tr. 13-14.

## THE TESTIMONY

### SECRETARY'S WITNESS

Dominic Vilona

Dominic Vilona has worked for MSHA for 17 and a half years, first as an inspector in training, then as an inspector and as a supervisory inspector. Tr. 19-20. As an inspector, Vilona inspected about 45 metal/nonmetal mines a year, most of them surface mines. Tr. 21. As part of inspecting these mines, Vilona, under MSHA's direction, also inspected contractors operating at mine sites. Tr. 21. Vilona has no experience or training in actually operating or assembling a crane. Tr. 68-69, 70. However, Vilona has witnessed a few cranes being assembled. Tr. 85.

The citation in question was issued May 27, 2010. Inspector Vilona was dispatched to conduct an inspection at the Empire Mine, a sister mine to the Tilden Mine. Tr. 24. The two mines, owned by the same operator, abut each other. Tr. 24. Vilona knew that Cliffs Natural Resources was having a crane constructed at the Tilden mine and that Dawes had been hired to do the work. Tr. 25. Vilona was interested, and he had mine personnel take him in a company van to observe the crane assemblage. The van stopped at the top of a hill where the group could look down on the assembly site. Tr. 26-29. Vilona estimated that when he was in the van at the top of the hill, he was about 50 yards away from the crane assembly operation and that the hill was about 75 feet high.<sup>1</sup> Tr. 61.

At the crane assembly site, a Manitowoc 14,000 crane was suspending the boom of the much larger Manitowoc 21,000 crane that the Dawes crew was assembling. Tr. 26. The crew consisted of several men, one of whom was William "Bill" Rahmlow. Vilona later learned that Rahmlow was the crew foreman of the crane assembly. Vilona believed Rahmlow was standing under the suspended boom of the larger crane, signaling to the other men, and apparently directing the operation. Tr. 27, 33, 35. Vilona observed another man, whom he later learned was Jeffrey "Jeff" Eick, holding a tag line on the opposite side of Rahmlow. Tr. 27, 35. Vilona did not see any other tag lines. Tr. 73-74. He saw another man, whom he later learned was John Schlieve, a crane assembly foreman like Rahmlow, on the large crane body waiting to place a pin that would secure the crane boom to the crane body. Tr. 27.

Vilona sat in the van, observing the scene below him, for 15 to 20 seconds. Tr. 54. He testified that he could see clearly from his vantage point on the hill. Tr. 83. However, Vilona did not have binoculars to view the progress of the crane assembly from the top of the hill, and he did not get out of the vehicle. Tr. 60-61.

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<sup>1</sup> William Rahmlow, testifying for the company, disagreed with these figures. He estimated that the hill was 150 yards away from the road and that it was 80 feet high. Tr. 170. I credit Rahmlow's estimation because while testifying, Vilona was not entirely clear on the layout of the area.

Vilona asked the van driver to proceed down the hill and to approach the crane. Tr. 31. By the time Vilona reached the crane assembly site a minute-and-a-half later, Rahmlow was slightly to the side of the boom, and Eick, who had been on the opposite side of the boom from Rahmlow, was now on the same side as Rahmlow, still holding the tag line. Eick had clearly walked under the suspended boom to change sides. Tr. 31-33.

Vilona introduced himself to Rahmlow and asked why he, Rahmlow, had been under the boom. Tr. 33. At the court hearing, Vilona recalled that Rahmlow replied, “[s]ometimes you have to get under the boom to . . . get the job done, or something to that effect, to get it lined up.” Tr. 33-34. Vilona also read from his contemporaneous field notes that Rahmlow claimed that “[h]e need[ed] to be under [the boom] to see everything.” Tr. 35. When Vilona asked Rahmlow why Eick had crossed under the suspended load, Rahmlow responded that Eick had crossed under “because he needed to hold [the load] steady.” Tr. 36. Vilona testified that Rahmlow never directly admitted to being under the boom, nor did he deny it. Tr. 66, 83.

In the citation, Vilona determined that the violation affected two people, that serious injuries were reasonably likely to result from the violation, that the violation was due to a high degree of negligence, that the violation was S&S, and that the violation was caused by Dawes’s unwarrantable failure to comply with section 56.16009. Gov’t Ex. 1. In designating the citation as affecting two people, Vilona had Rahmlow and Eick in mind. Tr. 45. Vilona determined that an injury was reasonably likely to result because of the frequency with which this violation seemed to occur with this crew given Rahmlow’s statement that “sometimes you have to get underneath the load.” Tr. 45. Vilona testified that “[i]f that’s a practice; then left uncorrected, through the continued mining process, making picks over and over again in conditions where there is wind, where there [are]not enough tag lines, then it’s reasonably likely that something is going to happen to injure that person.”<sup>2</sup> Tr. 45-46. Vilona testified that the injury that would result from the hazardous condition would be a crushing injury, and that the crushing injury would likely result in death.<sup>3</sup> Tr. 46. Vilona determined that the company’s negligence was high because “there was a foreman involved [who] had reason to know or had knowledge of the violation and . . . [placed] . . . another employee at risk, along with himself.” Tr. 55.

Vilona listed all the possible hazards that could occur because of the violative condition: rigging failure, operator error, a load getting hooked on something and then suddenly releasing, a swinging boom, inadvertent lowering of the machine, and wind. Any of these listed hazards could result in the boom pinning, hitting, or crushing a person. Tr. 40. According to Vilona, relevant to this case in particular, is that there was wind that day, and wind can cause a boom to move while it is suspended. Tr. 40. In Vilona’s opinion, the tag line used was not sufficient

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<sup>2</sup> “Pick” is a commonly used word that describes the lifting of a load by a crane. The pick referred to in this case is the smaller crane lifting the boom of the larger crane.

<sup>3</sup> The Secretary presented multiple fatalgrams to illustrate the seriousness of injuries resulting from this type of violation. Tr. 46-48.

given the conditions and the load. Tr. 41. He believed that there should have been at least two tag lines on the boom, one on each side, and possibly two more on the “backside of the lattice, to hold it in position in that type of wind.”<sup>4</sup> Tr. 41. According to Vilona, if the crew did not have enough tag lines for the conditions, the crane operator should not have made the pick. It was too dangerous. Tr. 41. Vilona explained that the problem with having only one tag line hooked on only one side is that “if the wind blows one way, you can hold it. If it blows the other way, you can’t. There is nothing you can do.” Tr. 41.

In Vilona’s opinion, Dawes’s violation of section 56.16009 rose to the level of unwarrantable failure for a number of reasons. Vilona reasoned that Rahmlow was a foreman and that he went under the load in front of the men he was directing. Tr. 53. Vilona also believed that Rahmlow instructed Eick to go underneath the suspended load. Tr. 53. Vilona testified that the violation created an extreme hazard because “of the unpredictability of the suspended loads and the multiple things that can happen; there is anything from sling failures[,] to wind[,] to operator failure . . . the seriousness of the injury that were to occur [sic] would be significant, fatal or permanently disabling, or something very serious.” Tr. 53. As previously noted, based on Vilona’s conversation with Rahmlow, it seemed to Vilona that this was not a one-time occurrence. Tr. 54. Vilona also understood that there are no exceptions to section 56.16009. Tr. 51-52. He stated that there are no “exigent or emergent situations where it would be okay to be under a suspended load.”<sup>5</sup> Tr. 52, 86. Vilona noted that it is a widely recognized rule in the industry that traveling under a suspended load is prohibited. Tr. 52. In Vilona’s opinion, the company did not provide him with any information that would mitigate the violation. Tr. 55.

### COMPANY’S WITNESSES

John Schlieve

John Schlieve has been employed by Dawes for 15 years. Tr. 88. As of May 27, 2010, the day the citation was issued, Schlieve had 22 years of crane assembly experience. Tr. 88. Like Rahmlow, Schlieve is an Assembly/Disassembly (“AD”) Director for Dawes. Tr. 88. He has worked in that position for 14 years. Tr. 88. On the day of the citation, Schlieve was on the crew of the Tilden mine crane assembly operation, but Rahmlow, not Schlieve, was acting as AD Director. Tr. 88.

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<sup>4</sup> Witnesses used the word “lattice” to refer to the boom for the Manitowoc 21,000 crane. The boom was constructed of metal rods in a diagonal or triangular pattern with open spaces between each of the rods.

<sup>5</sup> This is also an OSHA standard, which is the body of regulations that Dawes most often works under. Tr. 52.

On May 27, Rahmlow held a safety meeting first thing in the morning at the Tilden job site. Tr. 97. At this meeting, the crew members discussed “the task of the day . . . , any hazards that . . . may have come about as far as pinch points [and] overhead suspended loads.” Tr. 97. Before beginning the project, Cliffs Natural Resources also conducted a site-specific orientation training session during which the group covered MSHA standards and regulations. Tr. 97.

Schlieve testified that on May 27, there were five Dawes employees working at the crane assembly site: Bill Rahmlow (the AD Director/foreman), John Schlieve (working on the crane body), Jeff Eick (part of the assembly crew), Randy Gilbertson (operating the Manitowoc 14,000 assist crane), and Cleve Mozley (operating the Manitowoc 21,000 crane). Tr. 95-96. Dawes had also hired two oilers through the local union to help with the assembly project. Tr. 96. At the time Vilona arrived, the crew was trying to connect the main boom to the body of the crane (also known as the “car body”), a process that is called the “boom-to-foot connection.” Tr. 98. Schlieve explained that to make the boom-to-foot connection: “You properly rig [the boom] to the assist crane and . . . [o]nce we have it connected, we attach our tag lines on each end, so we can control it. And then when everybody is all on the same page, we lift it and swing it into place and pin it.” Tr. 98. He explained that “[t]his particular pinning is done hydraulically. There is a remote control. You have to get the section close and hook up a few hydraulic lines and line up the holes and insert the pins.” Tr. 99. Schlieve was in charge of making the final connection with the pins. Tr. 99. He was standing on the superstructure catwalk on the Manitowoc 21,000 crane that they were assembling. He was positioned just above the car body. Tr. 101. During the pinning process, Mozley was in the cab of the Manitowoc 21,000 crane. Tr. 99. Rahmlow was located directly below Schlieve, to the left of the assist crane. Tr. 99. Jeff Eick was on the opposite side of the boom from Rahmlow, with a tag line. Tr. 100. One of the oilers was at the other end of the boom and opposite Eick with another tag line, “[t]o control both ends to keep it secure.” Tr. 100.

Explaining the events of the day, Schlieve testified that it was not a windy day. Tr. 106. However, a sudden gust of wind came, shifting the boom directly toward the cab of the Manitowoc 21,000 crane where Mozley was positioned. Tr. 106-07. To avert the danger to Mozley, Rahmlow told Eick to pull the tag line under the boom. Tr. 107-08. Eick did so by moving to the other side of the boom. This was the only time that Eick moved under the boom throughout the entire operation. Tr. 111. When Vilona arrived at the site, Eick had already completed his move under the boom, and the crew had succeeded in getting the boom squared off. Tr. 109. Schlieve, who was only 15 feet away from Rahmlow, confirmed that he never saw Rahmlow positioned under the boom. Tr. 110.

The boom-to-foot connection process can be difficult because “you only have inches to work with to make this connection.” Tr. 112. The lattice boom weighs 93,000 pounds. Tr. 112.

Schlieve thought that the rigging involved in hoisting and positioning the boom was sufficient.<sup>6</sup> Tr. 112. The crew followed the manufacturer's instruction manual for how to assemble the Manitowoc 21,000 crane. Tr. 111. In Schlieve's opinion, Eick needed to move under the boom in these circumstances, because "it would have been more of a hazard if that boom would have hit or bumped the cab where [Mozley] was." Tr. 113. By Schlieve's estimations, the car body was about 10 to 11 feet above the ground and the boom was about 12 to 15 feet above the ground at its lowest point. Tr. 112, 114. The boom was on a direct path to hit the cab. The oiler on the other tag line could not use his tag line to correct and control the lattice boom. Tr. 123. Eick had to come under the boom and to the other side for the crew to be able to direct the boom away from Mozley. Tr. 123. According to Schlieve, it takes two people on a tag line, if not more, to control the boom. Tr. 123. Rahmlow helped pull on the tag line with Eick once Eick came to his side. Tr. 123-24. There were no other tag lines other than Eick's and the oiler's. Tr. 124, 126. In Schlieve's opinion, Vilona's interruption of the operation in the middle of this critical phase, caused a dangerous situation. Tr. 115-16.

Jeffrey Eick

Jeff Eick has been employed by Dawes for 10 years. Tr. 129. His current job title is driver and crew member on crane jobs. Tr. 129. He has held these positions since he began at Dawes. Tr. 129.

On May 27, Eick was part of the crane assembly crew. Tr. 133. Eick's job was to use the tag line to "steady the boom." Tr. 137. Eick recounted what happened when the gust of wind came as follows: "[T]he [boom] started to [swing] a little bit. . . . And at that point, Bill said to me, get over here. And I was already on my way, because at the time the heel [of the boom] was going to . . . hit the cab [that Mozley was in]." Tr. 134. According to Eick, the decision to go under the boom was "a split decision." Tr. 139. There was no time to reflect on whether it was wise. Tr. 139. As to the danger posed to him because he moved under a suspended load, Eick was convinced that if the rigging had failed and the boom had fallen while he was underneath it, the boom would not have hit him. Tr. 139-40. He explained that the boom would have fallen on the car body instead, which was 10 feet off the ground; he is just over six feet tall, so he would have had plenty of clearance. Tr. 140. Eick acknowledged, however, that loads fall unpredictably, implying that it is hard to argue that he would have definitely been safe if the boom had fallen while he was passing under it. Tr. 150.

Eick testified that he never saw Rahmlow go under the boom, although Rahmlow was close to the side of the boom. Tr. 138, 150. Eick saw being under the boom and close to the boom as "two different things." Tr. 150.

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<sup>6</sup> Eick agreed with Schlieve that all the rigging was inspected before the crew began its task that morning. Tr. 151. He felt that the rigging was secure for the job. Tr. 151-52.

Eick was in close proximity to Rahmlow when Vilona came down to the crane assembly site. Tr. 142. Eick described the exchange between Vilona and Rahmlow. As he recalled, Vilona said:

You're working, standing under the boom. . . . And Bill said, no, I'm not. And [Vilona] said, well, your guy is. And Bill said, yes, he was; referring to myself because I had ran under the boom. And at that time [Vilona] wanted to kind of cease operation. And Bill became upset. And what [Bill's] exact words were, I don't recall. Something to the effect of: Just give me the ticket or whatever. I heard that part of it, because at that point, we had to make this [boom-to-foot] connection before we stopped.

Tr. 142. Eick maintained that it was dangerous to stop operations right at the moment that Vilona arrived because the boom-to-foot connection is a critical pick. Eick continued:

But not only that, but then if we were to stop in the middle of it, now we have a suspended load that is, you know, really not secured until it is pinned. So, I mean, we would have been open to a wind gust. It could have damaged parts on the crane, the cab. I mean, there is – there is a lot of things that can probably happen.

Tr. 142-43. It was five to ten minutes between the time that Vilona showed up and the crew completed the connection process. Tr. 143. In Eick's opinion, stopping the operation immediately when Vilona arrived would have "been more of a hazard than finishing the job." Tr. 145-46.

Bill Rahmlow

Bill Rahmlow worked for Dawes for 21 years. Tr. 153. He was an AD Director at the time he retired,<sup>7</sup> and he held that position on May 27, 2010, when the citation was issued. Tr. 153. An AD Director oversees the assembly of a crane. Tr. 153. Rahmlow had 10 years of experience assembling cranes. Tr. 158. Prior to that, he spent 10 years operating a crane. Tr. 158. Rahmlow had never before set up a Manitowoc 21,000, but he had assembled a great many cranes during his career. Tr. 165. He testified that setting up any type of crane is essentially the same process. Tr. 165. As AD Director, he was responsible for making sure that the job was set up properly, that employees were not in danger, that people were not under the suspended load, that people were not in the way of pinch points, that he had an adequate number of people, and that the proper number of tag lines were being used. He also had to consider all variables that could affect the assembly, such as wind, weather, and rigging failure. Tr. 179-80.

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<sup>7</sup> Rahmlow retired from Dawes three weeks before the hearing. Tr. 153.

In assembling the crane on May 27, Rahmlow closely followed the manufacturer's crane assembly manual. Tr. 150. He began the Tilden Mine project in May, when he "set up the level pad for [the crane] . . . and [laid out] all [of its] pieces . . . in the proper order [to] make sure that everything [is] put together as the manual call[s] for." Tr. 160. For the boom-to-foot connection, Rahmlow positioned the two men with the tag lines on opposite sides and opposite ends of the boom from each other. Tr. 163. Eick and Rahmlow were close to the end of the boom by the crane body, standing across from each other. Rahmlow positioned the oiler with the tag line towards the other end of the 150-foot boom<sup>8</sup>, on the opposite side of the boom from Eick. Tr. 169-70. Rahmlow maintained that the reason for having the tag lines on opposite sides of the boom is:

To try to predict which way that boom is going to move. Remember, the boom is, like, taking a string. And whenever there is a reaction . . . – wind, gust of wind or movement of the other crane – that piece can swivel . . . . It's unpredictable . . . . And any reaction causes another reaction. The swing of the crane can cause it, today, to go to the left. Tomorrow it might go to the right.

Tr. 163.<sup>9</sup> Rahmlow reflected: "That day we should have had the tag line on the other two corners. Maybe we should have had four on. It didn't have enough people to have four on. It just – it's just the way it happened." Tr. 164. Rahmlow maintained that the day was not windy. Tr. 164. He could not have predicted that there would be a wind gust. Tr. 165. When the counsel for the Secretary asked why Rahmlow did not request Cliffs Natural Resources for more men to help with the crane assembly, Rahmlow replied that he could not because "they aren't familiar with it; and we never – we never ask for outside help . . . . It's a case of liability." Tr. 181.

When the gust of wind blew, Rahmlow instructed Eick to come under the boom to his side with the tag line because Rahmlow saw that the gust was causing the boom to head towards the cab. "And I did not want that boom section to hit that glass because, number one, [Mozley] was sitting there." Tr. 168-69. Rahmlow acknowledged that every manual, guidebook, and training session forbids going under a suspended load. Tr. 192-95. However, he chose to have Eick come under the boom instead of signaling to the oiler to try to adjust the boom's movement with his tag line because Rahmlow had never worked with the oiler before. Tr. 169. He did not know if the oiler would understand what needed to happen. Tr. 169. Also, Eick was 15 feet away from Rahmlow, whereas the oiler was almost 150 feet away. Tr. 169. Rahmlow was not

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<sup>8</sup> According to Rahmlow, the boom was 150 feet long and 13 feet wide. Tr. 161, 198.

<sup>9</sup> The problem with Rahmlow's set-up was that given the positioning of the tag lines, if a wind gust blew west to east, which is the direction it blew, neither the northeast tag line (that Eick was operating) nor the southwest tag line (that the oiler was operating) would be able to prevent the boom from swinging. Tr. 191.

sure he could communicate effectively to the oiler. Tr. 169. Rahmlow testified that Eick coming under the boom with the tag line averted the hazard to Mozley. Tr. 170. He also felt that the hazard to Mozley was greater than the hazard to Eick. Tr. 173.

Rahmlow described the boom-to-foot connection as being a tedious, time-consuming process. Tr. 166. The boom has to be lined up perfectly for the pins to go in. Tr. 166. The process takes a lot of concentration. Tr. 166. It is necessary to be in close proximity of the suspended boom. Tr. 166. Rahmlow testified that he was right next to the suspended boom, but not under it. Tr. 166-67, 199. It was never necessary to stand under the boom during the process. Tr. 167. However, he would not be able to perform the boom-to-foot connection operation from a distance further away from the boom. Tr. 199-200.<sup>10</sup>

Rahmlow estimated that the road from which Vilona first observed the crane assembly process was 150 yards from the site. Tr. 177. He also estimated that the hill the road was on was 80 feet high. Tr. 177. In his experience, Vilona's vantage point from the top of the hill was a bad one for observing what was actually going on at the assembly site, because Rahmlow was so close to the boom that anyone that far away could think he was actually under the boom. Tr. 177-78. According to Rahmlow, to see if he was under the boom or to the side of the boom, someone would have to be standing "[r]ight in line with the boom." Tr. 178. Rahmlow understood section 56.16009's command to "stay clear of suspended loads" to mean that if he was "alongside of it, [he was] not underneath it." Tr. 189. He did not understand the standard to mean anything more than not being directly underneath a suspended load. Tr. 189.

When Vilona came down to the assembly site and said Rahmlow was under the boom, Rahmlow replied that he was not under the boom. Tr. 170. However, he agreed with Vilona when Vilona said that Eick had been under the boom. Tr. 170. According to Rahmlow, Vilona wanted to talk immediately, and Rahmlow wanted to secure the boom, in case something went wrong while they were talking. Tr. 171. Rahmlow could neither confirm nor deny whether he told Vilona that sometimes he had to go under the suspended load to make sure everything was lining up correctly. Tr. 183-84. He explained that he could not remember what he said in the heat of the moment. Tr. 184. Rahmlow stated that when Vilona tried to discuss the violation with him, the crew was in the middle of a critical pick. Rahmlow was concentrating on the connection process to get everything lined up perfectly, to make sure the boom did not hit the cab that Mozley was in, and to make sure that Schlieve did not get pinched. Tr. 167-68. Rahmlow recalled telling Vilona, "write me the ticket out."<sup>11</sup> Tr. 184.

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<sup>10</sup> Schlieve agreed with Rahmlow. In his opinion, while it was possible to complete the boom-to-foot connection operation without working under the boom, it was not possible to complete the operation from a significant distance away. Tr. 113.

<sup>11</sup> Rahmlow also remembered Vilona suggesting that Rahmlow use mirrors so he would not have to work so close to the suspended load. Tr. 201-02. Rahmlow rejected that suggestion. He believed that mirrors would distort the image of the work zone, and he would not be able to

Richard Peters

Richard Peters has been employed by Dawes for 31 years. Tr. 204. He has held the position of engineer and safety manager for 25 years. As safety manager, his safety duties include: “keeping up with the guys’ training, supervising that they comply with regulations, safety policies and practices . . . , everything [of] that nature.” Tr. 204-05.

Peters described the safety training the company provides its employees:

We have various sort of meetings, gatherings. The other fellows have mentioned the annual safety meeting, which we cover very large topics, somewhat intensely. We have toolbox meetings where we cover small bits specifically. They’re every week. That’s where the guys get their check[s]. . . . We have safety memos that also attach to checks. We do a lot of one-on-one. [O]ne of the ways I prefer, is to take a guy and work with him on a specific problem or area he needs work on. Just work with him, teach him, train him. We have many others . . . long, experienced supervisors that do the same. We are very strong on taking new employees and putting them with somebody to give them a hands-on training.

Tr. 207.

Peters also explained how the company ensures compliance with safety rules.

You watch the people constantly. . . . [Another safety department worker] and I will drop in on job sites . . . [and] watch them. In my case, after [the employees] see me, it’s too late because I’ve seen everything. I don’t show up until I have watched . . . [their] job [performance], see how everybody is doing; but I never leave without making myself known. And we . . . discuss what has happened, and why they’re doing a great job, [or why they] need to catch up on something. I might need to talk to a customer because we also train customers as well as our own people. And we do have our other supervisors that get out in the field. Equipment managers [and] branch managers, also look over job sites, and [what] the guys are doing when they’re out on these jobs.

Tr. 208-09. Peters stated that the company takes these inspections, and the results of these inspections, very seriously, even going so far as to suspend or terminate an employee for violating safety rules.<sup>12</sup> Tr. 209.

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be certain that he was directing the crane correctly. Tr. 202.

<sup>12</sup> Schlieve’s, Eick’s, and Rahmlow’s testimony regarding safety and training at Dawes supports Peters’s description of the Dawes safety and training regimen. See Tr. 79-94, 119, 130, 154, 156, 159.

Peters testified that Dawes conducted an investigation of Rahmlow's behavior and work practices after the citation was issued on May 27. Tr. 211. Dawes removed Rahmlow from the job site, "in case he had made an infraction that was a real bad move. We didn't want to jeopardize safety on the job site. So Rahmlow was removed while the investigation proceeded, until we found out what the real story [was]." Tr. 211.

Peters maintained the company investigation revealed that:

[E]verything was proceeding normally, according to plan; but that as things got close – and we're talking about putting the main boom into the crane – that somewhere a gust of wind had come swirling around the building, and . . . the main boom started to swing toward the cab of the [Manitowoc] 21,000, which was occupied. And steps had to be taken to stop that motion and [bring] that section of boom back online where it belonged before any damage or injury could occur.

Tr. 213. "We determined that . . . was the safest course of action considering the possibilities for injury and damage that were occurring at that time." Tr. 213. The weather that day was good for working. Tr. 215. There was no high wind. Tr. 215. Peters agreed that staying clear of a suspended load is both an OSHA and an MSHA rule. Tr. 208. He believed that the rule is essentially the same under both agencies' standards. Tr. 208. The company determined that Rahmlow understood the suspended load rule. Tr. 213.

In response to the suggestion made by the Secretary that Rahmlow should have been using four tag lines instead of two, Peters noted that it is not normal industry practice to use four tag lines on this kind of operation. Tr. 214-15. Furthermore, there is no MSHA or OSHA regulation requiring that four workers each be holding a tag line during the crane assembly process. Tr. 230.

### **THE ISSUES**

The issues are: (1) whether there was a violation, (2) if there was a violation, whether the violation was S&S, (3) if there was a violation, whether the violation was the result of an unwarrantable failure to comply with a mandatory safety standard, and (4) if there was a violation, the amount of the civil penalty that must be assessed for the violation, taking into consideration the civil penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i).

### **THE VIOLATION**

As has been frequently noted, section 56.16009 requires that persons "stay clear of suspended loads." 30 C.F.R. §56.16009. "The standard's goal is to prevent persons from being hit by such loads through barring persons from locating within a hanging load's possible arc or radius." *Haines and Kibblehouse*, 30 FMSHRC 504, 517 (June 2008) (ALJ). Remaining "clear of suspended loads" has been widely understood to mean among other things remaining clear of

the area under a load and the “area which the load would strike in falling, or after impact, in toppling over.” *Anaconda Co.*, 3 FMSHRC 859, 861 (Apr. 1981) (ALJ). In short, “in order to comply with the cited standard and be ‘clear’ of the suspended loads, miners must not only be outside the limit of the point of suspension, i.e., the limit of the arc or swing of the load, should the load move/spin, but also must not be underneath the load or in the area that would be affected should the load fall.” *CCC Group, Inc.*, 2012 WL 2175816, at \*6 (F.M.S.H.R.C.) (May 2012) (ALJ).

In this case, there was a violation. Most obviously, Eick walked under a suspended load, a blatant violation of the standard. The record also supports finding that Eick, Rahmlow, and Mozley were in violation of the standard when standing (Eick and Rahmlow) and sitting (Mozley) in their positions before and after Eick walked under the suspended load. Eick stood about 15 to 20 feet across from Rahmlow, Tr. 126, who stood just barely on the other side of the boom from him. Tr. 150, 166-67, 199. Thus, Eick stood only a couple feet from the boom, which was 13 feet wide. Tr. 198. This was undoubtedly within the swing/arc/fall path of the 150-foot boom. While it is true that the boom was 12-15 feet above the ground, Tr. 114, 169, and therefore would not have bumped into Eick or Rahmlow if the boom swung, if the rigging failed and the boom fell while swinging slightly, it could have fallen on Eick, given his position in relation to the boom. Tr. 142, 170.

Rahmlow also failed to remain clear of a suspended load. Rahmlow stood right beside the boom. Tr. 150, 166-67, 199. He stood so close to the boom that only someone within several feet of him and aligned properly with him and the boom could tell that he was not under the boom. Tr. 177-78. While the company’s argument that Vilona was too far away to be able to be sure that Rahmlow was under the boom is persuasive,<sup>13</sup> and while I credit the company’s witnesses that Rahmlow was standing right next to the boom, not under it, standing immediately adjacent to the boom still put Rahmlow within the suspended load’s possible arc or swing, and therefore in danger, and in violation of the standard. Eick, once he moved to stand by Rahmlow, remained in violation of the standard. Eick also stood directly adjacent to the boom at that point, Tr. 141, when both Rahmlow and Eick were pulling on the tag line to steady the boom. Tr. 123-24.

Mozley also failed to remain clear of a suspended load, although his positioning was not discussed by the inspector or the Secretary. Mozley’s position was the reason why Eick and Rahmlow felt they needed to violate the standard – given the way the tag lines were arranged, Mozley was in the direct swing path of the boom as the boom adjusted to the gust of wind. Tr. 106-07. Both Eick and Rahmlow testified that had they not acted, the cab where Mozley was sitting would have been hit by the swinging boom. Tr. 134-35, 168-69.

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<sup>13</sup> Vilona watched the operation from the top of an 80-foot hill, about 150 yards away from the assembly site, Tr. 170, with his bare eyes (no binoculars or camera), Tr. 60-61, and from inside the company vehicle, Tr. 60-61. Also, Vilona is not familiar with crane assembly, having only watched a crane being assembled a few times. Tr. 68-69, 70, 85.

The company contends that Rahmlow, Mozley, Eick, and the oiler were complying with industry practice where they were standing, and Rahmlow testified that he could not have completed the boom-to-foot connection from further away from the boom, and therefore there was no violation. The company suggests that industry custom holds enough weight that the boom-to-foot connection should be an exception to the rule of staying clear of the swing and fall path of a suspended load. Given the intent of the regulation, to “prevent persons from being hit” by suspended loads, *Haines*, 30 FMSHRC at 517, Respondent’s argument fails. If the company could not complete the connection without violating the standard, it could have petitioned the Secretary for a modification to the standard under Section 101(c), which provides that MSHA may grant a modification so long as there is an alternative method for achieving the goal of the standard (i.e., protecting miners from suspended loads) that will guarantee no less than the same measure of protection to the miners as the existing standard.<sup>14</sup> 30 C.F.R. § 811(c). Without an authorized modification, there is no exception to the standard, and non-compliance is a violation. Rahmlow should have had more tag lines. He should have set up the tag lines such that the team would be able to control the boom no matter which direction the wind came from. Eick’s and the oiler’s tag lines should have been longer so that they could stand completely out of the swing path of the boom. Where Rahmlow and Mozley should have been positioned so that they still could have performed their jobs effectively while in compliance with the safety standard is a question that the crane assembly industry may have to address, perhaps with the Secretary.

### **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). 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; (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

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<sup>14</sup> Section 101(c) states in relevant part:

Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine.

30 U.S.C. §811(c)

be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (Jan. 1984) accord *Buck Creek Coal Co., Inc.*, 52 F.3d 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.*, 19 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Furthermore, 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).

I have found a violation of the cited safety standard. I further find that the employees' positioning with respect to the suspended boom constituted a discrete safety hazard. As already discussed, there were a number of ways in which Dawes's employees were endangered. The rigging could have failed and the boom fallen on Eick, or if it swung before it fell, on Rahmlow. The boom could have swung and hit Mozley in the cab. Eick claimed that if the boom fell as he was walking under it, the boom would have hit the cab and been propped up such that Eick, who is over six feet tall, would not have been hit. However, as Eick admitted, the boom could have fallen unpredictably. Tr. 150. It could have missed the cab, particularly given that there had just been a gust of wind, in which case the boom could have swung and fallen on Eick.

As discussed earlier and as evident by the instant discussion, Eick, Rahmlow, and Mozley were all in violation of the safety standard, and that violation put each of them in discrete danger. Vilona found that two persons (Eick and Rahmlow) were endangered by the violation. Citation No. 6502467. Generally, deference is given to the inspector's findings. See *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995) (ALJ did not abuse discretion in crediting expert opinion of experienced inspector); and *Mathies Coal Co.*, 6 FMSHRC 1, 5 (Jan. 1984). However, in this case, I find that three, not two, persons were affected by the violation, thus making the discrete safety hazard more serious.

I also find that there was a reasonable likelihood that the hazard contributed to would result in an injury. I credit Inspector Vilona's testimony that any time a suspended load is involved, there is a reasonable likelihood that the rigging could fail, causing the suspended load to swing or fall, pinning, hitting, or crushing anyone who has failed to remain clear of the suspended load. Tr. 40. Likewise, when working outdoors with a suspended load, the possibility of wind is always a factor that could reasonably result in a swinging load, as it did

here, which could result in a hitting or pinning injury, or a crushing injury. *See* Tr. 40. Further, there was a reasonable likelihood that Mozley could have been hit by the swinging boom because of the onset of wind and his position in the cab of the Manitowoc 21,000 crane. In fact, as everyone agreed, in the instant situation, the boom was headed Mozley's way, and Eick had to move, putting himself in danger and in direct violation of the safety standard, in order to prevent the boom from hitting the cab that Mozley was in. Tr. 139-40.

Dawes maintains that the rigging was secure and unlikely to fail. Rahmlow examined the rigging before the crew began assembling the crane that morning. Tr. 151. He put together the rigging as the assembly manual instructed. Tr. 150, 160. Eick felt that the rigging was sufficient. He believed that it was completely secure given the load and the demands on it, Tr. 151-52, as did Schlieve, Tr. 112. Therefore, in the minds of Rahmlow and the crew, there was very little chance that the rigging would fail. However, rigging does fail. *See* Tr. 40. One reason for the safety standard to stay clear of suspended loads is because suspended loads are apt to fall. As the Secretary pointed out, under the company's work policy, its AD Director is responsible for setting up the work site to be a safe environment. As AD Director, Rahmlow had to consider all circumstances that could affect work site safety, such as wind or failed rigging. Tr. 179-80. The day was beautiful and was not windy. Tr. 164. Nevertheless, a gust of wind blew up that Rahmlow had not predicted, putting Mozley, Eick, and himself in danger. Tr. 106-07, 134, 165. As the events of the day showed, injuries reasonably could have occurred.

Finally, I find that there was a reasonable likelihood that the injuries would be of a reasonably serious nature. If the boom, which was 93,000 pounds, had fallen or swung and hit one or more of Dawes's employees, the resulting injury or injuries would have been extremely serious, if not fatal. Therefore, the violation was S&S in nature.

I also find that given the likely injuries if the feared hazard occurred, the violation was very serious.

### **UNWARRANTABLE FAILURE AND NEGLIGENCE**

A citation is issued under section 104(d)(1) of the Mine Act if a violation is both S&S and caused by the unwarrantable failure of the operator. 30 U.S.C. § 814(d)(1). I have found that the violation of section 56.16009 was S&S. I also find the violation was the result of the company's unwarrantable failure.

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Emery*, 9 FMSHRC at 2203-04. Whether conduct is "aggravated" is determined by analyzing the facts and circumstances of the case and identifying whether any aggravating factors exist. Such factors include the length of time the violation existed, the extent of the violative condition, whether the operator was placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the

violative condition, whether the violation was obvious and posed a high degree of danger, and the operator's knowledge of the existence of the violation. *Jim Walter Resources, Inc.*, 28 FMSHRC 579 (Aug. 2006).

The length of time the violation existed can be analyzed in two respects in this case. In both respects, I find that the length of time was excessive. One measurement of the length of time that the condition existed is the amount of time the men were in violation of the standard during the crane assembly operation that morning. Eick crossing beneath the 13-foot-wide boom probably amounted to several seconds. However, it is so dangerous to cross beneath a suspended load that any amount of time of being directly beneath a suspended load is excessive. Further, Eick and Rahmlow presumably stood alongside the boom all morning. Mozley also was probably in the cab much of the morning. At any time that morning, a gust of wind could have come, swinging the boom out of control. Or, at any time the rigging could have failed. Therefore, at any time the boom could have hit, pinned, or crushed the men who were in its swing and fall path.

Another measurement of the length of time the condition existed is gained through viewing the positioning of the men as a continuing practice. Tr. 45-46. Rahmlow had been assembling cranes for 10 years. Tr. 158. Schlieve had been assembling cranes for at least 14 years. Tr. 88. Eick had been working with cranes for 10 years. Tr. 129. Peters had been safety manager at Dawes for 25 years. The record reveals that none of these men thought "stay clear of a suspended load" meant anything more than not to position oneself beneath a suspended load. Tr. 113, 150, 189, 208. No one at Dawes understood that Rahmlow standing immediately adjacent to the inadequately tethered boom was a violation of the standard. It is clear that Dawes's widely held and flawed belief as to what constituted compliance with section 56.16009 existed for some time, making it an extensive violation.

The company has a good safety record. In the previous 15 months, the company had never been cited by MSHA for violating the suspended load standard. Gov't Ex. 14. Therefore, the company was not directly put on notice. However, the standard and its intent are clear and straightforward. The Secretary did not change her definition or her interpretation of the standard. A fundamental misunderstanding of the law is not an excuse for a violation.

The violation was open and obvious and posed a high degree of danger. That Eick violated the standard in crossing beneath the suspended boom was obvious. Further, had the men properly understood the safety precautions they were supposed to take under the standard, the fact that they were positioned in violation of the standard would also have been obvious. Further, as concluded in the S&S discussion above, the violation posed a high degree of danger. Should the boom have swung into or fallen on one or more of the men, a fatal injury was reasonably likely to result. (The boom weighed 93,000 pounds. Tr. 112.)

Finally, the violation occurred under the immediate and direct supervision of Rahmlow, a company supervisor. Given all of these factors, I find that the violation was the result of the company's unwarrantable failure.

This violation was also the result of the company's high negligence. The potentially grave danger to its employees meant that Dawes's management was called to a commensurately high standard of care. It is clearly a standard the company did not meet.

In making unwarrantable failure and high negligence findings, I recognize that Dawes provided some mitigating information. Rahmlow quickly had Eick cross under the boom to prevent Mozley from being hit. Rahmlow tried to avert a greater danger by encouraging a lesser one. Tr. 113, 173. Rahmlow and the crew also made sure to abide by the standard as best they understood it. They did not, except for Eick, position themselves directly below the suspended load. Tr. 189, 208. The record also confirms that Dawes went to great lengths to train its employees and have refresher training sessions. The company reinforced the importance of safety and compliance with safety regulations, going so far as to conduct its own internal safety inspections. *See* Tr. 89-94, 97, 130, 154, 156, 159, 207-09. While the mitigating factors do not negate the violation or its S&S and unwarrantable natures, they will to some extent impact the penalty that must be assessed.

### **REMAINING CIVIL PENALTY CRITERIA**

#### **HISTORY OF PREVIOUS VIOLATIONS**

The Secretary conceded that Dawes has a small history of previous violations. Tr. 15.

#### **SIZE**

The parties agreed that the operator is of a medium size. Tr. 15.

#### **ABILITY TO CONTINUE IN BUSINESS**

The parties stipulated that the proposed penalty will not adversely affect the company's ability to continue in business. Jt. Ex. 1; Tr. 13-14

#### **GOOD FAITH ABATEMENT**

No abatement requirements were made because by the time the inspector arrived at the assembly site, no one was positioned beneath the boom anymore. Tr. 31-33. The crew took five to ten minutes to complete the critical boom-to-foot connection before quitting activity and talking with Inspector Vilona. Tr. 143, 167-68, 171. It was necessary to complete the connection because if the crew had left the job half done, a 93,000-pound, 150-foot-long boom would have remained suspended in the air at the mercy of the wind and possible rigging failure, creating an even greater hazard. Tr. 115-16, 142-46.

**CIVIL PENALTY ASSESSMENT**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
6502467	5/27/10	56.16009	\$3,000

I have found that the violation existed, that it was serious, and that the negligence of the company was high. Given these findings and the other civil penalty criteria, I would normally assess the penalty as proposed. However, the company's small history of previous violations, which reflect its admirable internal procedures to enhance compliance and work-site safety warrant a lesser assessment.

**ORDER**

Within 40 days of the date of this decision, Dawes Rigging & Crane Rental **IS ORDERED** to pay a civil penalty totaling \$2,500 for the violation of section 56.16009 set forth in citation 6502467. Upon payment of the penalty, this proceeding **IS DISMISSED**.

/s/ David F. Barbour  
David F. Barbour  
Administrative Law Judge

Distribution: (Certified Mail)

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# **ADMINISTRATIVE LAW JUDGE ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

**Office of Administrative Law Judges**

721 19<sup>th</sup> Street, Suite 443

Denver, CO 80202-2500

Office: (303)844-5266/ Fax (303) 844-5268

July 2, 2012

PARAMONT COAL COMPANY	:	CONTEST PROCEEDING
VIRGINIA,LLC,	:	
	:	
Petitioner,	:	Docket No. VA 2012-375-R
	:	Citation No. 8190034; 03/22/2012
	:	
v.	:	
	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine I.D. 44-07129
Respondent.	:	Deep Mine # 25

**ORDER DENYING PARAMONT’S MOTION FOR SUMMARY DECISION**

This case is before me on a notice of contest and request for expedited hearing filed by Paramont Coal Company Virginia, LLC (“Paramont”) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the “Act”). 30 U.S.C. § 801 et seq. The case involves one 104(a) citation issued to Paramont on March 22, 2012 for an alleged violation of 30 C.F.R. § 75.512.

On May 25, 2012, Paramont filed a Motion for Summary Decision (“Motion”) pursuant to Commission Procedural Rule 67, 29 C.F.R. § 2700.67. Also on May 25, 2012, the Secretary filed a Response to Contestant’s Motion for Summary Decision (“Response”) arguing that the matter was not appropriate for summary decision because facts remain in dispute. Subsequently, Paramont filed a Reply to the Secretary’s Response (“Reply”) and the Secretary filed further documentation on June 15, 2012. Following a conference call held on June 11, 2012, Paramont and the Secretary stipulated to facts that primarily address the allegations made by the inspector in his citation and the Secretary submitted further documents in support of her case..

**I. BACKGROUND**

On March 22, 2012, Inspector Dennis Shortt with the Department of Labor’s Mine Safety and Health Administration, (“MSHA”) issued Citation No. 8190034 under Section 104 (a) of the Act, alleging a violation of 30 C.F.R. § 75.512. The citation arose from a nonfatal electrical accident that occurred when a miner was moving a trailing cable for a shuttle car and he received an electrical shock. The miner was knocked unconscious and was taken to the hospital where he was treated for burns to his hand. The miner missed one full day of work. The Condition or Practice section of the citation states the following:

The section electrical equipment is not being properly maintained. During an electrical accident investigation conducted on March 22, 2012, six citations were issued for trailing cables that were inadequately protected and insulated. One of the inadequately

protected and insulated cables (#43 Shuttle Car, 600 volts) caused a miner to receive an electrical shock and an arc burn to the palm of his hand. The miner lost [consciousness] because of the shock and was transported to the hospital to receive treatment.

This citation provides notice that once-a-week electrical examination is not adequate to ensure the section electrical equipment is properly maintained. This mine cuts rock that seems to fracture and break creating thin, sharp and pointy edges that damages the cable. Additional examinations have to be conducted to minimize the reoccurrence of this type of accident.

Per the authorization of the District Manager, this mine is now required to do two electrical examinations each calendar week on all section equipment with trailing cables. These examinations shall be recorded in an electrical examination book required by 75.512.

Inspector Shortt determined that an injury or illness was reasonably likely to occur and that such injury could result in death, that the violation was significant and substantial (“S&S”), that one person was affected, and that the violation was a result of moderate negligence on the part of the operator.

Paramont filed a motion for summary decision asserting that the language found near the end of the Condition or Practice section of the citation that puts the mine on notice that it must inspect all trailing cables twice each week is invalid. Paramont seeks to have the citation vacated. The Secretary responded to Paramont by asserting that summary judgment is not appropriate in this circumstance because the Secretary expects that further evidence will be needed as to the fact of the violation, the meaning of “at least weekly,” and on the S&S finding. A penalty has not yet been assessed. For the reasons that follow, I deny the motion for summary decision.

## **II. APPROPRIATENESS OF SUMMARY DECISION**

The Commission’s Procedural Rule 67 sets forth the grounds for granting summary decision as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answer 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

The purpose of summary judgment is not to resolve disputed issues of fact, but to assess whether there are any factual issues to be tried. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Though the burden of establishing the absence of genuine issues of material fact rests initially on the moving party, when a motion for summary judgment is made and supported, the nonmoving party must “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250.

The issues raised by Paramount extend only to the language in the citation that refers to the requirement to conduct an electrical examination of the trailing cables twice each week. Paramount suggests, as a part of its argument, that if the mine conducts one inspection each week, it is in compliance with the regulation. Since the Mine Act requires “frequent” examination, which is interpreted to mean, “at least once per week,” the mine argues that the District Manager has no authority to require a twice weekly exam.

The parties filed a number of documents and pleadings, including a stipulation of facts not in dispute. This analysis is limited to the issue raised by Paramount, i.e., that the language provided at the end of the body of the citation purports to put the mine on notice that it must conduct two weekly examinations and that such language is invalid, thereby requiring the citation to be vacated.

### **III. BRIEF SUMMARY OF THE ARGUMENTS**

#### *A. Paramount’s Motion for Summary Decision*

Paramount asserts that there is no dispute of fact and that it is entitled to summary decision. Paramount contends that the Secretary exceeded her authority by demanding that Paramount conduct a second electrical examination per week, in addition to the one required by 30 C.F.R. § 75.512. Paramount Mot. 1. Paramount argues that summary decision as a matter of law is appropriate pursuant to 29 C.F.R. § 2700.67(b), because there is no genuine issue of material fact. *Id.*

Paramount submits that the inspector, per the authorization of the District Manager, acted outside the scope of his authority when he ordered Paramount to conduct two electrical examinations each week. *Id.* at 2. Section 305(g) of the Act states that “[a]ll electrical equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions.” *Id.* at 1. The term “frequently” has been interpreted to mean “at least weekly.” *Id.* at 2. Consequently, Paramount argues that a District Manager does not have the authority to effectively amend the Act and require two inspections.

#### *B. Secretary of Labor’s Response*

The Secretary argues that there are factual issues that must be resolved, so Paramount is not entitled to summary decision. Sec’y Resp. 4. The Secretary takes the position that the issue of requiring more than a once a week inspection must be done on a case-by-case basis and is

heavily dependent on the facts of each case. *Id.* The Secretary argues that the frequency of inspections should be read in light of whether or not the mine is effectively maintaining safe operating conditions. *Id.*

### *C. Paramount's Reply*

Although the Secretary alleges that there are factual issues that need to be resolved, the Secretary offers nothing to support this assertion. Paramount Rep. 1. Paramount contends that the issue is not whether the facts in the case justify the action taken, but rather whether the Secretary can legally take such action. *Id.* Consequently, Paramount argues that because the Secretary has no discretion to require a second examination under any circumstance, regardless of the facts, there is no need for a hearing and summary decision is appropriate. *Id.* at 2.

### *D. Secretary's Supplemental Response*

Following a conference call with the parties, the Secretary agreed and stipulated to the facts surrounding the violation as described in the inspector's citation, *supra*. The submission of the Secretary includes a declaration by Jason Lane, the electrical supervisor for MSHA coal district 5. The stipulations, together with Lane's declaration, explain the basis for the violation described in the citation, as well as the designation of the violation as S&S. Lane's declaration explains that the mine was put on notice to conduct more than one weekly inspection but Lane does not address the precise language requiring two weekly examinations. The Secretary argues that, given the circumstances surrounding this violation, the mine must conduct more than one weekly examination in order to comply with 30 C.F.R. § 75.512.

### *E. Stipulations*

The parties submitted the following stipulations:

1. This proceeding involves one 104(a) citation, No. 8190034, that was issued by the Federal Mine Safety and Health Administration ("MSHA") at Paramount Coal Company's Deep Mine #25.
2. Paramount Coal Company was an "operator" as defined in §3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. §803(d), at the Deep Mine #25 on the date that the citation involved in this proceeding was issued.
3. Operations of Paramount Coal Company at the Deep Mine #25 are subject to the Mine Act.
4. The Federal Mine Safety and Health Review Commission and the Administrative Law Judge assigned to this matter have jurisdiction to hear and decide this proceeding pursuant to Sections 105 and 113 of the Act.
5. MSHA Inspector Dennis Short was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation at issue in this proceeding was issued.
6. A true copy of Citation No. 8190034 at issue in this proceeding was served on Paramount Coal Company or its agent as required by the Mine Act.

7. Government Exhibit 1 is an authentic copy of Citation No. 8190034, with all modifications, and may be admitted into the record for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
8. The Deep Mine #25 operates two continuous miner super sections, the 001/002 and 003/004 sections.
9. Both sections operate two continuous miners.
10. The 001/002 section operates various pieces of mobile electrical equipment, including; continuous mining machines, roof bolters and shuttle cars.
11. The electrical equipment being operated on the 001/002 section receives power from a section power center via trailing cables.
12. On March 22, 2012, a nonfatal electrical shock accident occurred at the Deep mine #25 when David Mondrage, who was working as a Section Foreman, handled the trailing cable for a shuttle car and received an electrical shock.
13. Mr. Mondrage suffered burn injuries to his hand.
14. Mr. Mondrage was taken to the hospital for treatment and was released.
15. The accident occurred on a Thursday. Mr. Mondrage missed work on Friday, March 23, due to the accident and returned to work on Monday, March 26, 2012.
16. Government Exhibit 2 is a photograph of a section of the type of trailing cable being utilized on the 001/002 section and may be admitted into the record.
17. Government Exhibit 3 is a photograph showing the damaged section of the trailing cable believed to be the source of the electrical current that resulted in the electrical shock received by Mr. Mondrage and may be admitted into the record.
18. Following the above accident, MSHA conducted an investigation that included examination of all trailing cables on the 001/002 section.
19. MSHA's investigation found that the shock was caused by a pin hole opening in the insulation of the cable that the victim handled.
20. The cable was carrying 600 volts.
21. Six of the eight trailing cables being used on the 001/002 section has damaged places to the cable insulation.
22. Government Exhibit Nos. 4 through 9 are accurate copies of citations that were issued by MSHA citing each of the inadequately maintained trailing cables and may be admitted into the record.
23. Following its investigation of the accident and examination of all trailing cables on the section, MSHA issued Citation No. 8190034 alleging a violation of 30 CFR §75.512.
24. Government Exhibit 10, 19 pages, is an accurate copy of reports of weekly examinations of electric equipment for the 001/002 section for the period from March 22 through May 31, 2012.
25. Government Exhibit 11, 19 pages, is an accurate copy of reports of weekly examinations of electric equipment for the 003/004 section for the period from March 22 through May 31, 2012.

#### IV. DISCUSSION

Inspector Shortt issued a citation to Paramont for a violation of Section 75.512 which requires that “[a]ll electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions.” Section 75.512-2 defines the term “frequently” to mean that the examinations and tests required by Section 75.512 “shall be made at least weekly.”

The citation was issued as a result of an electrical accident in which a miner was handling a 600 volt cable with a pin hole opening in the insulation and outer jacket. Stip.19, Lane Decl. ¶¶ 11 and 12. The miner was knocked unconscious, suffered burns to the hand and was hospitalized as a result. The mine had been conducting weekly examinations of the trailing cables, as well as other electrical equipment, but when the cables were examined by MSHA following the accident, six of the eight cables were damaged. Stip. 21, Lane Decl.¶ 20. As a result, MSHA determined that it would put the mine on notice that, in the future, more than one weekly examination was necessary. Lane Decl. ¶ 24.

The fact of the violation is confirmed by the stipulations submitted by the parties but Paramont argues that the facts surrounding the violation are not important. Specifically, it argues that the Secretary, as a matter of law, is not authorized to require the mine to examine electrical equipment twice per week. I first note that the language Paramont objects to is not a part of the description of the actual violation. Rather, it is framed as a notice to the operator, based on the actual violation, that a “once-a-week electrical examination is not adequate to ensure that the section electrical equipment is properly maintained.” The final paragraph in the body of the citation sets the frequency of future examinations at twice per week. I agree with the operator that the District Manager cannot unilaterally dictate the precise number of examinations to be conducted by Paramont and that, if Paramont were cited in this particular case for failing to conduct two inspections, the citation would fail. However, again, with respect to this particular citation, Paramont was not cited for failing to conduct *two* examinations of equipment and was instead cited for not conducting a sufficient number of examinations to assure safe operating condition of the trailing cables. There is no question that the cable that resulted in the injury, and six out of the eight cables used on the section, were not in safe operating condition. The trailing cables contained “one or more damaged places” thereby exposing miners to a shock hazard. Lane Decl. ¶ 20. Evidently the damage to the cables is caused when the mine cuts into sandstone rock that breaks into sharp pieces. Lane Decl. ¶ 22.

The Secretary argues that Section 75.512-2 must be read to mean that the frequency of examinations must be sufficient to establish “safe operating condition.” I agree with the Secretary that the standard has a two-fold requirement and that it may be necessary in some instances for the mine operator to conduct more than one examination. The standard requires “frequent” examinations, which translates into “at least once weekly.” The term is not ambiguous. It is clear that the mine must, *at a minimum*, conduct an examination once each week. If the standard had been intended to require *only* one examination per week, common sense dictates that it would have been clearly constructed to indicate such. Instead the standard, 75.512-2, uses the qualifying language “at least,” which is has the same meaning as “at a

minimum” Therefore, if the minimum is not enough to assure safe operating conditions, it is up to the mine operator to conduct further examinations of electrical equipment.

Paramont argues that, under the plain terms of the standard, the mine is required to conduct one electrical exam every week. The Secretary agrees that, a minimum of one exam is required, but further argues that, in some instances, more than one is required. Paramont reasons that one exam alone always meets the requirements of the standard and argues that “under the plain terms of the relevant standards, an operator complies with § 75.512 . . . as long as it conducts at least one electrical exam every week.” Paramont Mot. 7. The mine’s reasoning fails to consider the obvious intention of the standard, as well as the meaning of “at least” once per week. An operator does not necessarily comply with the standard by conducting an examination once a week, as is evidenced by the facts in this case. Clearly, given the accident that occurred in this instance, *at least more than one examination* was needed to assure safe operating conditions. Accordingly, in this case, the one examination alone did not meet the requirements of the standard.

Certainly the stipulation of fact, taken with the inspector’s declaration, supports the fact of the violation and the significant and substantial nature of the violation. However, the Secretary did not seek summary decision on that issue but limited the case to the issues raised by Paramont. The issue presented by Paramont, is whether the language near the bottom of the citation, requiring two examinations in the future, is unacceptable, thereby requiring that the citation be vacated. While I find that the Secretary may not cite the operator for its failure to conduct specifically two examinations, she may cite the operator for failing to conduct enough examinations if the examinations that were conducted did not assure safe operating conditions. The language following the violation in the citation is not a part of the alleged violation and its inclusion is not a basis to vacate the citation.

I find that the violation of section 75.512 is accurately cited as set forth in the citation. The mine is required by the standard to conduct a minimum of one inspection per week, but if that is not sufficient to maintain the equipment safely, more examinations are required. The mine may need to make two electrical examinations each week or it may require two each day. Each citation or order issued under this standard must be evaluated based on the conditions present at the time. In any event, it is up to the mine operator to conduct sufficient inspections to insure that the equipment is maintained in the proper condition. A failure to assure safe operating conditions can be, and in this case was, cited by the Secretary.

## V. ORDER

Having considered all of the documents, briefs, exhibits and stipulations, I find that the citation was properly issued and that the language near the end of the violation relating to requiring two inspections per week does not merit vacating the citation. Therefore, Paramount's motion for summary decision is **DENIED**. While the Secretary has not moved for summary decision, it seems that, given the documents submitted, the only matter that remains is the issue of the appropriate penalty for the violation. The parties are **ORDERED** to contact the court within ten days to schedule a conference call to discuss how the case will proceed from this point.

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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July 6, 2012

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2011-940
Petitioner,	:	A.C. No. 46-01968-000243606-01
	:	
	:	Mine: Blacksville No. 2
v.	:	
	:	
CONSOLIDATION COAL CO.,	:	
Respondent.	:	

**ORDER REQUESTING INFORMATION**  
**AND**  
**RULINGS ON MOTIONS TO COMPEL**

This civil penalty proceeding arises under section 105 of the Mine Act. 30 U.S.C. §815. The case is scheduled to be heard in Morgantown, West Virginia beginning on Tuesday, August 7, 2012 at 8:30 a.m. At issue are one section 104(d)(2) (30 U.S.C. §814(d)(2)) order of withdrawal and four section 104(a) citations. 30 U.S.C. §814(a). The order and one of the citations allege that Consolidation Coal Company (“Consol”) violated mandatory safety standard 30 C.F.R. §75.202(a) at its Blacksville No. 2 Mine [1], while three of the citations allege that Consol violated §75.220(a)(1) at the mine.<sup>2</sup> In addition to alleging a violation of section 75.202(a), the order and one of the citations charge that the alleged violations were a significant and substantial contribution to a mine safety hazard (“S&S”). The order also charges that the violation was caused by Consol’s unwarrantable failure to comply with the standard. In addition to alleging a violation of section 75.220(a)(1), one of the other citations alleges that the violation was S&S. The Secretary seeks a total civil penalty of \$67,200.00 for the alleged violations. Pending before the Court are several matters relating to the proposed penalties and to discovery disputes.

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<sup>1</sup> Section 75.202(a) requires an operator to support or otherwise control the roof, face and ribs of areas where persons work or travel so as to protect the persons from falls of the roof face or ribs and from coal and rock bursts.

<sup>2</sup> Section 75.220(a)(1) requires an operator to adopt and to follow a roof control plan approved by MSHA.

## **I. THE PROPOSED PENALTIES**

It is not clear to the Court how the Secretary arrived at the proposed penalties. Although paragraph 5 of her petition purports to explain the Secretary's calculations, the Court finds it difficult, if not impossible, to comprehend what the Secretary has done. For example, although the petition asks its reader to "See MSHA Form 1000-179 in Exhibit A for a detailed summary of point computations," there is no form that is identified as Form 1000-179 in the copy of Exhibit A the Secretary filed with the Commission. Further, although paragraph 5 refers to "[C]itations/orders assessed pursuant to 30 C.F.R. §100.5, which are indicated as 'Special Assessment' in Exhibit A," there is no indication in the exhibit that any assessment is a "special assessment."

Before the case can be tried the Court needs to understand how the Secretary determined the penalties she proposed. Accordingly, within 15 days of the date of this order, the Court requests the Secretary file a narrative explanation of how each proposed penalty was calculated, including the part each of the statutory civil penalty criteria played in the calculation. The Court is especially interested to know why the Secretary determined the alleged violation of section 75.202(a) set forth in the order warrants a proposed penalty of \$50,700. In short, the Court needs to be "walked through" the Secretary's proposed assessment process.

## **II. DISCOVERY MATTERS**

The Court is in receipt of Consol's Motion to Compel Discovery. In the motion Consol states that although the Secretary requests that "specially assessed penalties be levied against Consol with respect to each alleged violation" – something that as noted is not apparent to the Court from the present record – the Secretary's petition "offers no substantive basis for its decision to propose a specially assessed penalty with respect to each citation in the docket." Consol Mot. at 2, 3. The motion goes on to state that on April 20, 2012 Consol through a discovery request sought certain information related to the specially assessed penalties, including but not limited to the Special Assessment Review Forms ("SAR Forms" or MSHA Forms 7000-32) and that the Secretary responded by withholding the information because she claims it is protected by the deliberative process privilege.

Consol also states that while the Secretary produced some documents regarding her special assessment procedures, these documents "offered no substantive basis with respect to each specially assessed penalty." *Id.* Consol Mot. at 4. Consol further states that the Secretary "declined to identify and provide data regarding how many citations and orders alleging

violations of Sections 75.202 and 75.202(a)(1) have been specially assessed, both nationwide and in [MSHA] District 3, since the inception of the “Rules to Live By [I]nitiative” (the “Initiative”).<sup>3</sup> *Id.*

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<sup>3</sup> In pertinent part the Initiative states:

**“Rules to Live By”** is an initiative to improve the prevention of fatalities in mining. Through a first phase of industry outreach and education followed by enhanced enforcement, the focus will be on 24 frequently cited standards (11 in coal mining and 13 in metal/nonmetal mining) that cause or contribute to fatal accidents in the mining industry in 9 accident categories.

In 2009, mining fatalities fell to an all-time low for the second straight year. While the mining community achieved a record-setting low of 34 mining deaths in the United States and has seen a significant decline in fatal mining accidents during the past 10 years, too many miners still lose their lives in preventable accidents. The loss of even one miner causes devastation and pain to the victim's family and friends. From CY 2000 - 2008, 589 miners lost their lives, mostly in single and double fatality accidents. MSHA analyzed these fatal accidents to identify conditions and practices that contributed to the 589 deaths, safety standards violated, root causes, and abatement practices. MSHA's analysis identified 24 standards - 13 in metal and nonmetal mining and 11 in coal mining - frequently cited in fatal accident investigations. These violations fell into 9 different categories:

\* \* \*

**PRIORITY STANDARDS: COAL**

§75.202\* Roof, face, and ribs shall be supported and no person shall work or travel under unsupported roof

§75.220(a)(1) Develop and follow approved roof control plan

\* \* \*

(continued...)

Consol argues that documents related to the specially assessed penalties are relevant in that the Secretary has requested the court to impose such penalties. Because the SAR Forms contain facts that MSHA relied upon to support its specially assessed penalties, Consol asserts it is entitled to the forms.<sup>4</sup> Consol Mot. at 5. Moreover, according to Consol, even if the forms were once protected by the deliberative process privilege, they lost the protection once the recommendations they contain were adopted by the Secretary as the agency's position. Consol Mot. at 6-7.

Consol also argues that it is entitled to data concerning all of the citations and orders alleging violations of sections 75.202 and 75.220(a)(1) that have been specially assessed in order to determine whether the Initiative is a binding norm and therefore a substantive rule requiring notice-and-comment rulemaking to be valid. Although the Secretary objects that this request is irrelevant and burdensome, Consol maintains that it is correctly attempting to prove that the Initiative is a substantive rule and therefore was improperly implemented. Consol Mot. at 9-10.

The Secretary responded to Consol's motion by filing her own motion to compel. She wants Consol to answer supplemental interrogatories and to supply documents requested by her on May 11, 2012. She asserts that Consol's responses were due on June 8, but that Consol's counsel stated that he "[was] not inclined to answer any supplemental discovery responses until [Consol's] Motion to Compel has been ruled on." Sec's Mot. at 2. The Secretary asserts that there is no relation between the two motions and seeks a ruling that Consol be compelled to answer as required by the Commission's rules. *Id.*

The Court has little patience with this kind of tit for tat. It agrees with the Secretary that the matters are not related and orders Consol to respond to the Secretary's Supplemental Interrogatories/Documents Requests within 15 days of the date of this Order.

As for the SAR forms, if the alleged violations are proven, the Court must assess civil penalties *de novo* based on its consideration of the six penalty criteria set forth in section 110(I) of the Act. *Sellersburg Stone Co.*, 5 FMSHRC 287. 292 ) (March 1982). Therefore, the Court would view the SAR forms as irrelevant to the issues at hand except for the fact that if the Court

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<sup>3</sup>(...continued)

\*Includes All Subparts

*Rules to Live By* (last visited June 14,2012), <http://www.msha.gov/focuson/RulestoLiveBy/RulestoLiveByI.asp>

<sup>4</sup> As Commission Administrative Law Judge Michael Zielinski explained, "Under the [Rules To Live By Initiative] all violations of [the specified] standards are forwarded for consideration of special assessment. [A SAR] form typically consists of an initial recommendation by the issuing inspector, with a short, typically factual, narrative, and concurrences or oppositions of supervisors indicated by a check in a box, which may be accompanied by comments." *Big Ridge Inc.*, (Order Granting In Part and Denying In Part Respondent's Motion to Compel), slip op. at 1, Docket No. LAKE 2011-716 (March 16, 2012).

assesses a penalty that “substantially diverges” from that which is proposed by the Secretary, the Commission requires the Court to explain the variance. *Hubb Corporation*, 22 FMSHRC 606, 612 (May 2000) (quoting *Sellersburg*, 5 FMSRHC at 293). The Court can hardly do so if it does not understand the basis for the Secretary’s proposal. Likewise, Consol can hardly show a variance is warranted without knowing the basis. The Court recognizes, however, that there may indeed be valid deliberative process concerns that arise when viewing the forms. For example, they may contain comments by MSHA personnel concerning the pros and cons of issuing a special assessment. Like other judges who have considered the matter (*see e.g., Big Ridge Inc.* at 2), the Court orders the Secretary to submit the SAR forms sought by Consol to the Court for its *in camera* review. The forms must be submitted within 15 days of the date of this order. The Court will rule as to those parts of the forms which are protected by privilege. The Secretary will then be directed to redact such parts and to send the redacted copies to Consol.

The Court is not disposed to entertain any issues pertaining to whether the Initiative is a substantive rule requiring notice and comment rulemaking. The Court views such questions as far outside the bounds of what is essentially a garden variety civil penalty proceeding, albeit with at least one unusually high proposed penalty. Therefore, the Court denies Consol’s motion to compel production by the Secretary of data respecting the number of alleged violations of section 75.202 and 75.202(a)(1) that were specially assessed both nationally and in MSHA District 3 since implementation of the Initiative.

/s/ David F. Barbour  
David Barbour  
Administrative Law Judge

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July 16, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Docket No. WEST 2010-450-M
Petitioner,	:	A.C. No. 02-03243-203823 (NWB)
	:	
v.	:	Mine: Drake Quarry
	:	
RECON REFRACTORY &	:	
CONSTRUCTION, INC.	:	
Respondent.	:	

**ORDER GRANTING SECRETARY’S MOTION FOR PARTIAL  
SUMMARY DECISION ON THE ISSUE OF JURISDICTION**

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) against RECON Refractory & Construction, Inc. (“RECON,” “the company,” or “Respondent”) on February 18, 2010, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“the Mine Act” or “the Act”), 30 U.S.C. § 815. RECON timely filed an answer after which this case assigned to me. The parties thereafter complied with my prehearing order. This case is now set for hearing on July 17–18, 2012, in Riverside, California. On June 22, 2012, the Secretary filed her motion for partial summary decision, given RECON’s challenge to her claims of jurisdiction. RECON filed its opposition on June 29, 2012.

**I. STATEMENT OF THE CASE AND ISSUES**

The Secretary issued RECON six citations under section 104(a) of the Mine Act alleging violations of health and safety standards pursuant to regulations applicable to surface metal and nonmetal mines. *See* 30 C.F.R pt. 56. In its answer to the petition, RECON, a contractor performing construction work, denied that the subject facility was a mine as defined in the Act. The Secretary filed her motion for partial summary decision on the jurisdictional issue, arguing that the cement facilities under construction at the Drake Quarry site fall within the jurisdiction of the Mine Act. RECON opposes the motion, arguing that during the period when the citation was issued, the Mine Safety and Health Administration (“MSHA”) did not have jurisdiction over the site.

Commission Rule 67 provides the standard for granting any motion for summary decision:

A motion for summary decision shall be granted only if the entire record, including 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 decision, Commission Judges 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)).

The issues before me are whether the Secretary has met the elements for summary decision by establishing that a new cement processing site still under construction falls under the Mine Act’s jurisdiction. For the reasons that follow, the Secretary’s motion is GRANTED.

## II. FINDINGS OF FACT

On April 6, 2009, MSHA assigned a mine identification number to Drake Quarry, a surface metal/nonmetal mine owned by Drake Cement Company (“Drake”) and located near Paulden, Arizona.<sup>1</sup> (Statement of Material Facts in Support of Secretary of Labor’s Motion for Partial Summary Decision (“Sec’y Statement of Material Facts”) at ¶ 3; Respondent’s Opposition to Secretary of Labor’s Motion for Partial Summary Decision (“Resp’t Opp’n”) at 2; Respondent’s Response to Secretary of Labor’s Statement of Material Facts in Support of its Motion for Partial Summary Judgment (“Resp’t Resp.”) at 1.) On October 6 and 7, 2009, MSHA Inspector Enrique Vidal conducted a routine health and safety inspection of the Drake Quarry site. (Sec’y Statement of Material Facts at ¶ 1; Resp’t Opp’n at 1; Resp’t Resp. at 1.) On October 8, 2009, MSHA Inspector Kyle Griffith continued the inspection of the Drake Quarry site. (Sec’y Statement of Material Facts at ¶ 2; Resp’t Resp. at 1.)

At the time of the inspection, what is currently the Drake Quarry mine site was still under construction and was over 60% completed. (Sec’y Statement of Material Facts at ¶ 4; Resp’t Resp. at 1; Resp’t Opp’n at 2.) The Drake Quarry mine site and adjoining facilities were brand

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<sup>1</sup> Respondent notes that MSHA issued the mine identification number in the middle of construction and only after a couple of accidents had occurred at the site. (Resp’t Opp’n at 2.)

new and had never before been in production. (Resp't Opp'n at 1.) About 300 workers were working at the construction site.<sup>2</sup> (Sec'y Statement of Material Facts at ¶ 4.) The mine was to be a large cement processing facility that produced Portland cement once it opened. (Sec'y Statement of Material Facts at ¶ 5; Resp't Resp. at 2; Decl. of Lawrence R. Nelson, Attach. A.) The adjacent quarry itself had not yet been constructed. (Resp't Opp'n at 2.) No miner hours had been recorded at the Drake Quarry site at the time of the October 2009 inspection. (*Id.*) While the Secretary alleges the projected date to begin operations was May 2010 (Sec'y Statement of Material Facts at ¶ 12), the plant did not in fact record any miner hours until the first quarter of 2011. (Resp't Opp'n at 3.)

RECON was hired by CCC Group as a subcontractor to build a facility on the construction site. (Sec'y Statement of Material Facts at ¶ 6; Resp't Opp'n at 2; Resp't Resp. at 2.) During the October 2009 inspections, the Secretary's inspectors issued RECON seven citations, five of which are still contested.<sup>3</sup> (Sec'y Statement of Material Facts at ¶¶ 7, 8; Resp't Resp. at 2.) Throughout the settlement negotiation process, RECON has continuously denied that MSHA had jurisdiction over the mine site at the time of the inspection. (Sec'y Statement of Material Facts at ¶ 9; Resp't Resp. at 2; *see, e.g.*, Answer at ¶¶ 1, 2; Respondent's Response to Secretary of Labor's Interrogatories, Set Number One, Interrogatory No. 5, dated November 15, 2011; Response to Secretary of Labor's Motion to Compel Discovery, dated November 16, 2011

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<sup>2</sup> The Secretary refers to the workers at the mine site as "miners"; Respondent disputes that they are miners based on its argument for no jurisdiction. I note that the Act's legislative history defines miners as including construction workers at a mine site, stating:

The definition of mine "operator" is expanded to include "any independent contractor performing services of construction at such mine." It is the Committee's intent to thereby include individuals or firms who are engaged in construction at such mine, . . . , under contract or otherwise, . . . and to make clear that the employees of such individuals or firms are miners within the definition of the Federal Mine Safety and Health Act of 1977.

S. Rep. No. 95-181, 95th Cong., 1st Sess., at 14 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3414, *and in Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978). Nonetheless, I need not reach this issue because it is neither before me, nor is it relevant to a determination on the jurisdictional question at hand.

<sup>3</sup> Of the seven original citations the company chose to contest six of them, choosing to accept Citation No. 6453942. (Secretary's Motion for Partial Summary Decision and Memorandum of Points and Authorities ("Sec'y Motion") at 6; Sec'y Statement of Material Facts at ¶¶ 7, 8; Resp't Resp. at 2.) Later, the company withdrew its contest of Citation No. 6453944, one of the remaining six contested citations, leaving five citations before me. (*Id.*) RECON's acceptance/payment of these citations has no bearing on my ruling regarding jurisdiction.

at ¶ 5.)<sup>4</sup> However, RECON acknowledges that MSHA would have jurisdiction over the mine once the facility went into operation. (Sec’y Statement of Material Facts at ¶ 10; Resp’t Resp. at 2; *see, e.g.*, Answer at ¶ 2; Respondent’s Response to Secretary of Labor’s Interrogatories, Set Number One, Interrogatory No. 5, dated November 15, 2011.)

I determine that the parties agree on all the relevant facts on the question of jurisdiction. Therefore, there is no genuine issue of material fact as to the question of jurisdiction.

### III. GENERAL PRINCIPLES OF LAW

The Mine Act defines a “coal or other mine” in section 3(h)(1) 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 if in liquid form, with workers underground, 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. In making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 802(h)(1) (emphasis added).

The Act defines an “operator” as “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).

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<sup>4</sup> I note that in the body of Respondent’s Opposition to Secretary of Labor’s Motion for Partial Summary Decision it “move[d] the Review Commission to disregard all mention of [the e-mail communications between it and the Secretary].” (Resp’t Opp’n at 5.) I agree that substantively the communications are irrelevant to this decision. However, I disregard this request in Respondent’s Opposition because Commission Procedural Rule 10 requires that “[a]n application for an order shall be by motion which, unless made during a hearing or a conference, shall be made in writing and shall set forth the relief or order sought.” 29 C.F.R. § 2700.10(a). Burying the request in its Opposition to the Secretary’s motion does not meet these requirements.

## IV. DISCUSSION AND ANALYSIS

### A. Summary of the parties arguments.

The Secretary contends that the Drake Quarry construction site meets the definition of a mine as defined in section 3(h)(1) of the Act. (Sec’y Motion at 1.) The Secretary argues (1) that the legislative history of the Act gives guidance to interpret jurisdiction broadly, giving preference to there being jurisdiction under the Act should there be any doubts as to jurisdiction (*id.* at 7); (2) that Respondent acknowledges when construction is completed Drake Quarry will be a mine under the definition of section 3(h)(1) and subject to MSHA jurisdiction (*id.* at 13); (3) that courts have widely held that cement facilities fall under the jurisdiction of the Mine Act and not the Occupational Safety and Health Act (“OSH Act”) in keeping with the Interagency Agreement between MSHA and the Occupational Safety and Health Administration (“OSHA”) (“Interagency Agreement”), *see* Mine Safety and Health Administration and the Occupational Safety and Health Administration Interagency Agreement, 44 Fed. Reg. 22,827-22,830 (Apr. 17, 1979) (“Interagency Agreement”); (Sec’y Motion at 9, 11); and (4) that RECON is subject to MSHA jurisdiction as an “operator” (Sec’y Motion at 8).

RECON claims, on the other hand, that MSHA lacked jurisdiction to conduct an inspection of the Drake Quarry facility and had no authority to issue citations to the company. RECON primarily argues that no Mine Act jurisdiction existed at the time the citations were issued because (1) the Drake Quarry cement processing facility was not yet in operation, (2) the adjoining quarry was not yet constructed, and (3) the State of Arizona should have jurisdiction as a “State Plan” state under the OSH Act. As discussed below, Respondent’s arguments are inapposite and therefore fail.

### B. Mine Act definitions and analysis of the relevant case law.

Under the Mine Act, to be a “mine” that MSHA has the authority to inspect, where MSHA may identify violations, and to which MSHA may issue citations, a site must be a “structure,” “facility,” or “other property” that is “used in, or to be used in, the milling of . . . minerals.” 30 U.S.C. § 802(h)(1). To be a mine, a site must satisfy each of the location (“structure,” “facility,” or “other property”), functional (“used in . . . the milling of . . . minerals”), and temporal (“used in, or to be used in”) components.

#### 1. The Commission and courts have held that the definition of a “mine” under the Mine Act should be interpreted broadly.

Here, the question at issue is whether a brand new cement processing site – a site that was still under construction and that had never logged any miner hours nor produced any cement at the time MSHA issued its citations – falls within MSHA’s jurisdiction. Both the courts and the Commission have interpreted the definition of “mine” broadly. “Mine” is to mean more than the ordinary sense of the word. *Marshall v. Stoudt’s Ferry Preparation Co.*, 602 F.2d 589, 591-

92 (3d Cir. 1979) (“Although it may seem incongruous to apply the label ‘mine’ to the kind of plant operated [here], the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it”). The goal of the Mine Act is to protect miners from the hazards of working to produce mine products and “the hazards to which miners are exposed are not limited to the hazards of underground mines, but include improperly maintained equipment and supplies that are used in mining.” *Jim Walters Res., Inc.*, 22 FMSHRC 21, 29 (Jan. 2000).<sup>5</sup> Congress leaves no doubt that the intent of the Act is to establish a “single mine safety and health law, applicable to *all mining activity*.” S. Rep. No. 461, 95th Cong., 1st Sess. 37 (1977) (emphasis added). Hence, the definition not only includes the area of land from which minerals are extracted, but also encompasses structures, facilities, equipment, machines, tools, or other pieces of property that are used in extraction or milling of minerals. *Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683, 688 (Apr. 1994).

Moreover, the Secretary, in interpreting the limits of her jurisdiction under the Mine Act and the OSH Act, promulgated the Interagency Agreement to help remove any confusion as to the respective authority of those agencies. In the Interagency Agreement, the Secretary determined that cement plants are covered by the Mine Act rather than the OSH Act. In section B.6.a. of that agreement, the Secretary specifically provided that MSHA has jurisdiction over “alumina and cement plants.” 44 Fed. Reg. at 22,827 (April 17, 1979). Appendix A of the Interagency Agreement also lists cement under the “Subgroups of Nonmetals” over which MSHA has sole jurisdiction. *Id.* at 22,829. See also *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984) (finding Mine Act jurisdiction to include any “‘structures’ and ‘facilities’ used in ‘milling’ or ‘the work of preparing . . . minerals.’ ”); *Magma Copper Co. v. Sec’y of Labor*, 645 F.2d 694 (9th Cir. 1981) (holding that a milling facility itself is a “mine” under the Mine Act); *Watkins Eng’rs & Constructors*, 24 FMSHRC 669 (July 2002) (holding that cement plants are “milling” operations and fall within the Mine Act’s definition of “mine”). In fact, RECON concedes Mine Act jurisdiction over the Drake Quarry site, including its cement preparation plant, at the very least once it became operational. (Answer at ¶ 2; Respondent’s Response to Secretary of Labor’s Interrogatories, Set Number One, interrogatory No. 5, dated November 15, 2011.)

RECON makes two temporal arguments to counter the claims of Mine Act jurisdiction. First, RECON focuses on the fact that the Drake Quarry cement processing facility was not yet operational when RECON performed construction work at the Drake Quarry site, pointing to the lack of miner hours reported on quarterly reports. (Resp’t Opp’n at 4, 5.) Second, RECON argues that MSHA jurisdiction must be predicated on a quarry (*id.* at 5) but that the site for the quarry to be built had not yet been constructed (*id.* at 2). RECON would thus have me limit MSHA’s jurisdiction until a point in time when the cement facility’s production begins and the

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<sup>5</sup> Inspector Nelson investigated an accident at the Drake Quarry on September 22, 2009 (Decl. of Lawrence R. Nelson at ¶ 6), which argues in favor of the broad interpretation of “mine” espoused by Congress and the courts in view of the remedial nature of the Act.

adjacent quarry is active. Unable to cite case law to support its position, RECON first attempts to distinguish the cases cited by the Secretary on their facts, noting they involve mines already in existence. (*Id.* at 4, 5.) RECON attempts to distinguish between repairs and expansions, and new construction. (*Id.*) RECON then plays the “Doubting Thomas” because no case cited by the Secretary conforms to the exact facts of this case, i.e., a mine being newly constructed that has never before produced or logged mining hours. (*Id.*) However, I determine that the facts of those cases cited by the Secretary, while different, do not make the cases distinguishable in principle, and the reasoning behind those cases support the result I reach here.

The Mine Act’s language that any “workings, structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, the milling of such minerals” indicates that a “mine” includes not just facilities presently being used to mill minerals, but also facilities where mineral milling will be taking place in the future. 30 U.S.C. § 802(h)(1). Considering Congress’s intent that the Act be interpreted broadly in favor of MSHA jurisdiction, courts have held that the “used in, or to be used in” language in the Act would include facilities that are not yet producing mine products but are preparing to begin production. Thus, in *Cyprus Indus. Minerals Co. v. FMSHRC*, the Ninth Circuit, in which this case arises, held that activities conducted at a site in preparation for future mining may bring the site within the Mine Act’s definition of “mine” because the company was engaging in these activities in contemplation of mining, even though the activities did not occur on a producing mine site. 664 F.2d 1116, 1117-18 (9th Cir. 1981). Similarly, the Third Circuit in *Lancashire Coal Co. v. Secretary of Labor*, recognized that the Act refers to three time frames in section 3(h)(1): “(1) the term ‘used in’ meaning current use, i.e. ‘being used in’; (2) the term ‘to be used in’ meaning contemplated use; and (3) the term ‘resulting from’ meaning former use.” 968 F.2d 388, 390 (3d Cir. 1992). Consequently, facilities falling under MSHA jurisdiction would include those that a company contemplates using for mining activities.

The Commission’s ALJs have relied on this “contemplated mining activity” articulated in the Mine Act and noted by the courts. As ALJ Amchan commented, “it logically follows from the general scheme of Federal regulation of occupational safety and health, that the installation and adjustment of equipment at a mine site is subject to the Act prior to the commencement of production.” *The Pit*, 16 FMSHRC 2008, 2010 (Sept. 1994) (ALJ). Likewise, ALJ Moran stated “it is undeniable that the hazards associated with [mining] activities are present whether they occur during the mine’s set-up for operations to commence or during the actual process of mineral removal for its sale.” *Khani Co., Inc.*, 32 FMSHRC 1339, 1342 (Sept. 2010) (ALJ). Therefore, so long as the activities are in preparation of future mining activities, those activities fall within MSHA jurisdiction. *See, e.g., Khani Co.*, 32 FMSHRC at 1342-43 (ALJ) (holding that because the mine was in the process of making repairs to resume production, even though the facility was not producing at the time of the inspection, the MSHA inspector had jurisdiction over the mine site); *Royal Cement*, 31 FMSHRC at 1462 (ALJ) (holding that although the plant at which the miners were making repairs had been closed for three years, because the miners were making repairs on it in preparation for it to begin production again, the plant fell under MSHA jurisdiction); *The Pit*, 16 FMSHRC at 2009-10 (ALJ) (holding that “equipment that is located at a site where mining will take place, and will be used in the extraction of minerals, or

the milling of minerals, is subject to MSHA jurisdiction – even if mining has not commenced.”).

At the Drake Quarry site, Drake Cement Company had hired a number of construction companies to build the structures and facilities necessary for its new cement processing operation. Cement processing is a mining activity as defined by the Mine Act, and thus any facility that is used or will be used for cement processing is subject to MSHA jurisdiction. That the Drake Quarry site had never before been in operation or that the actual construction of the quarry had not occurred is inapposite.<sup>6</sup> See *Donovan v. Carolina Stalite Co.*, 734 F.2d at 1552 (holding section 3(h) “does not require that those structures or facilities be owned by a firm that also engages in the extraction of minerals from the ground or that they be located on property where such extraction occurs.”) What is important is that Drake Cement Company intended the Drake Quarry site to be used in mining activities and that the construction of the facilities was being done in contemplation of those mining activities. Because RECON was hired by CCC Group as a subcontractor to build a facility on the Drake Quarry site (Sec’y Statement of Material Facts at ¶ 6; Resp’t Opp’n at 2; Resp’t Resp. at 2), RECON was using “equipment” and “tools” to construct a “facility” being constructed in contemplation of “milling” at the Drake Cement Company operation at Drake Quarry, placing it within the Mine Act’s definition of a “mine.” 30 U.S.C. § 802(h)(1).<sup>7</sup>

## **2. Jurisdictional doubts should be resolved in favor of Mine Act coverage.**

When resolving jurisdictional questions, the benefit of the doubt goes to the Secretary. As the Commission stated in *Watkins Engineers & Constructors*, “Congress clearly intended that

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<sup>6</sup> Respondent argues that focusing on how close the cement facility was to completion is irrelevant when considering MSHA’s jurisdiction over the site. (Resp’t Opp’n at 6.) Rather, Respondent posits that MSHA’s jurisdiction turns on the extent to which the quarry was under construction, completed, and prepared for production at the time of the citation. (*Id.*) I agree with Respondent that the state of completion of the construction at the cement facility is irrelevant in determining whether MSHA had jurisdiction over the site. Moreover, Respondent’s attempts to distinguish between work on the quarry and work on the cement facility are empty distinctions, because a cement processing facility need not be in any way connected to a mineral extraction site (quarry) and could, due to its own characteristics, be a mine site itself under the Act. See *Donovan v. Carolina Stalite Co.*, 734 F.2d at 1552.

<sup>7</sup> The Act specifies that an “operator” includes “any independent contractor performing services or construction at such mine.” 30 U.S.C. § 802(d). An “independent contractor” under the Mine Act is “a party . . . [that] performs significant services, under contract or otherwise, on mine property.” *Joy Technologies, Inc.–Coal Field Operator v. Sec’y of Labor*, 99 F.3d 991 (10th Cir. 1996). RECON was a contractor that was part of the Drake Quarry construction project. Because I have determined that Drake Quarry was a mine, RECON was a contractor at a mine subject to Mine Act jurisdiction and is an operator so long as it operated at Drake Quarry.

jurisdictional doubts be resolved in favor of coverage by the Mine Act.” *Watkins Eng’rs*, 24 FMSHRC at 675–676 (citing S. Rep. No. 95-181, 95th Cong., 1st Sess., at 14 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3414, *and in Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978)). Indeed, MSHA issued the Drake Quarry a mine identification number in April 2009, six months before the citations in this case were issued during October 2009.<sup>8</sup> As ALJ Miller stated, the Secretary “is the one whose duty it is to administer the [Act], and when, in the course of her administration, she makes informed and reasoned jurisdictional determinations, judicial decision makers have been wary of overruling her.” *Beylund Constr.*, 31 FMSHRC 1410, 1415 (Nov. 2010) (ALJ) (citing *Watkins Eng’rs*, 24 FMSHRC at 672–673, 676). Based on the case law discussed above and the Secretary’s issuance of a mine identification number to Drake Quarry six months prior to issuing the citations in this case, I determine that the Secretary made a reasoned jurisdictional determination that supports Mine Act coverage of the Drake Quarry.

### **3. Respondent’s arguments regarding the MSHA/OSHA Interagency Agreement are immaterial.**

Finally, Respondent contends that because Arizona is a State Plan state under the OSH Act’s enforcement scheme, Arizona retains jurisdiction over the cement manufacturing facility at Drake Quarry that was the venue of the citations being contested. (Resp’t Opp’n at 7.) Respondent believes this is relevant given the weight the courts have put on the MSHA/OSHA Interagency Agreement and its designation of cement facilities as falling under MSHA’s jurisdiction. Respondent argues that the MSHA/OSHA Interagency Agreement is not applicable in Arizona because Federal OSHA does not have the authority to make agreements that will control Arizona’s State OSHA.

Respondent’s argument that the MSHA/OSHA Interagency Agreement is not binding in Arizona, and therefore Arizona retains jurisdiction over cement facilities, is flawed. Under the State Plan program, Federal OSHA transfers jurisdiction to State OSHA once State OSHA receives final approval under section 18(e) of the OSH Act. 29 C.F.R. § 1952.355. However, MSHA jurisdiction over a mine will preempt the coverage of an OSHA-approved state plan. *Troy Gold Indus., Ltd. v. Occupational Safety & Health Appeals Bd.*, 187 Cal. App. 3d 379, 231

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<sup>8</sup> Respondent complains that MSHA only issued Drake Quarry a mine identification number partway through the construction project, and therefore none of the contractors or subcontractors were aware that they might be operating under MSHA’s jurisdiction. (Resp’t Opp’n at 2.) However, a six month gap existed between April 6, 2009, when MSHA issued the mine identification number to Drake Quarry and when MSHA inspectors inspected the site on October 6 and 7, 2009. (Sec’y Statement of Material Facts at ¶¶ 1, 3; Resp’t Opp’n at 1, 2; Resp’t Resp. at 1.) RECON had sufficient time to learn that it was operating on a mine site and that its activities were subject to MSHA jurisdiction. Respondent did not raise this issue directly in its Opposition or Response. I see no issue of notice here and it is of no import to the question of Mine Act jurisdiction.

Cal Rpt. 861 (1986). Likewise, where overlapping jurisdiction exists, MSHA's ceding authority over a mine facility to OSHA (and thereby to state plan enforcement) has been held to be a lawful discretionary function. *United States v. Agronics, Inc.*, 164 F.3d 1343 (10th Cir. 1999). Given that the MSHA/OSHA Interagency Agreement recognizes that MSHA has sole jurisdiction over cement facilities, it follows that the Interagency Agreement controls in jurisdictional questions between Arizona's State OSHA and MSHA. Accordingly, Arizona's State OSHA must cede jurisdiction to MSHA under the Interagency Agreement whenever MSHA asserts jurisdiction over cement facilities as it has in this case.

## V. CONCLUSIONS OF LAW

Because I find that there is no genuine issue of material fact, I have examined the applicable law and conclude that the Drake Quarry site was a "mine" under the Mine Act and subject to MSHA jurisdiction, and thus the MSHA inspectors had the authority to issue RECON the citations at issue in this case. Accordingly I conclude the Secretary is entitled to summary decision on the issue of jurisdiction as a matter of law.

## VI. ORDER

In light of the foregoing, **IT IS ORDERED** that the Secretary's motion for partial summary decision on the issue of jurisdiction is **GRANTED**. This case is still scheduled on July 17-18, 2012, for a hearing on the merits of the citations issued.

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

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