

February 2015

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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 6, 2015

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

v.

BIG RIDGE, INC.

Docket Nos. LAKE 2008-436
LAKE 2009-057
LAKE 2009-058
LAKE 2009-059
LAKE 2009-378

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

These civil penalty proceedings, which arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), involve, in part, a citation issued to Big Ridge, Inc., by the Secretary of Labor’s Mine Safety and Health Administration (“MSHA”) for an alleged violation of a notice of safeguard. The safeguard notice was previously issued to Big Ridge by MSHA pursuant to section 314(b) of the Mine Act.¹

On September 8, 2011, an Administrative Law Judge issued a decision vacating the citation at issue here. 33 FMSHRC 2238, 2250 (Sept. 2011) (ALJ). He concluded that the underlying safeguard was invalid because it did not provide the operator with sufficient notice of a hazard with respect to the transportation of men or materials. *Id.* The Secretary subsequently filed a petition for discretionary review, which the Commission granted.

For the reasons that follow, we reverse the Judge, find that the safeguard is valid, and remand the case to the Chief Administrative Law Judge for further proceedings consistent with this decision.²

¹ Section 314(b) provides that “[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.” 30 U.S.C. § 874(b).

² The Administrative Law Judge who authored the September 2011 decision has since retired from the Commission.

I.

Factual and Procedural Background

On August 11, 2008, an MSHA inspector visited Big Ridge's Willow Lake Portal, a large coal mine in southeastern Illinois. Tr. 30-33. As a result of his observations at the mine, the inspector issued Citation No. 6674618³ for an alleged violation of Safeguard No. 7583088. Gov. Exs. 16, 17.⁴

Safeguard No. 7583088, which had been issued by another MSHA inspector on July 12, 2006, states:

DT 15-160 [a mantrip] was observed coming out of the mine with a ram car bed jack adjacent the driver unsecured in the vehicle. This is a notice to provide safeguards requiring that supplies or tools, except small hand tools or instruments, should not be transported with men at this mine.

Gov. Ex. 17 (restating the criteria at 30 C.F.R. § 75.1403-7(k), which provides that “[s]upplies or tools, except small hand tools or instruments, should not be transported with men”).

Big Ridge contested the citation. At the hearing, Big Ridge contended that the underlying safeguard was invalid. 33 FMSHRC at 2250. Specifically, the operator argued that the safeguard failed to meet the Commission's requirement that a safeguard identify with

³ The citation states:

Two mantraps [sic] were observed transporting roof bolting materials in the mantrip with the miner. DT-18 had 12 bundles of 4 foot roof bolts (5 bolts to the bundle) standing up in the seat. DT-04 had 7 bundles of 4 foot roof bolts (5 bolts to the bundle) standing up in the seat, 28 chain hangers in the floor board under the passengers feet, a bucket of chain in the passenger seat behind the driver.

Gov. Ex. 16.

⁴ While other mandatory safety and health standards are adopted through notice and comment rulemaking, section 314(b) of the Mine Act provides the Secretary authority to create safeguards, which are in effect, mandatory safety standards issued on a mine-by-mine basis. *Southern Ohio Coal Co.*, 10 FMSHRC 963, 966 (Aug. 1988) (citation omitted). The broad language of the provision “manifests a legislative purpose to guard against all hazards attendant upon haulage and transport in coal mining. *Jim Walter Res., Inc.*, 7 FMSHRC 493, 496 (Apr. 1985). An MSHA inspector issues a written safeguard notice to an operator specifying the safeguard the operator must provide. If compliance does not occur, the inspector issues a citation pursuant to section 104 of the Mine Act. 30 C.F.R. § 75.1403-1(b).

specificity the nature of the hazard at which it is directed. The Secretary maintained that the safeguard was valid because it provided notice of a specific hazard and the remedy required.

The Judge concluded that the safeguard was invalid because it failed to “identify with specificity the nature of the hazard.” 33 FMSHRC at 2250 (citing *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) (“*SOCCO I*”). The Judge categorically rejected the Secretary’s argument that adequate notice of a hazard is provided when the safeguard specifically describes the hazardous condition observed by the inspector. *Id.* (citing MSHA’s Program Policy Manual (“PPM”), Vol. 5 Subpart O). The Judge vacated the citation.

II.

Disposition

We conclude that the Judge erred in his analysis. Section 314(b) of the Mine Act requires that the issuing inspector provide notice of a hazardous condition or practice in the safeguard. *The American Coal Co.*, 34 FMSHRC 1963, 1969 (Aug. 2012); *see also Oak Grove Res., LLC*, 35 FMSHRC 2009, 2014 (Jul. 2013). For the reasons that follow, the safeguard is valid.

In *American Coal*, the Commission stated that it has consistently held that “safeguards that *specify hazardous conditions and specify a remedy* [are] valid safeguards.” 34 FMSHRC at 1969, 1972-80 (emphasis in original). *See also SOCCO I*, 7 FMSHRC at 512 (“a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard”); *Southern Ohio Coal Co.*, 14 FMSHRC 1 (Jan. 1992); *Southern Ohio Coal Co.*, 14 FMSHRC 748 (May 1992); *Green River Coal Co.*, 14 FMSHRC 43 (Jan. 1992).

The Commission, however, has expressly rejected the argument that a safeguard must include a description of the types of risks or harms that may be associated with the cited hazardous condition. *American Coal*, 34 FMSHRC at 1969-1971. A valid safeguard must be drafted with the specificity required to provide an operator adequate notice of the condition covered and the conduct that is required, but it need not foreshadow the events that may occur in its absence. *Id.* at 1967; *see also Oak Grove Res.*, 35 FMSHRC at 2014.

For example, the valid safeguard at issue in *SOCCO I* stated:

A clear travelway at least 24 inches along the No. 1 conveyor belt was not provided at three (3) locations, in that there was fallen rock and cement blocks.

All conveyor belts in this mine shall have at least 24 inches of clearance on both sides of the conveyor belts.

This is a notice to provide safeguards.

7 FMSHRC at 510. Notably, the safeguard specified a hazardous condition, i.e., fallen rocks and cement blocks obstructing a travelway at three locations, and a remedy, i.e., all conveyor belts shall have at least 24 inches of clearance on both sides.

Similarly, the safeguard at issue in the case before us describes a hazardous condition, i.e., a mantrip traveling with an unsecured ram car bed jack adjacent to the driver, and a remedy, i.e., supplies or tools, except for small hand tools or instruments, should not be transported with men.⁵ Therefore, we conclude that the safeguard complies with the Commission's test for validity.⁶ See *American Coal*, 34 FMSHRC at 1969. The safeguard is valid, and a reasonably prudent person familiar with the mining industry would understand its requirements.

We also conclude that the Judge erred in suggesting that the Secretary's PPM establishes the test for safeguard validity. 33 FMSHRC at 2250. The PPM does not prescribe binding rules of law. *American Coal*, 34 FMSHRC at 1970-71; *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996); *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981). While the Secretary's PPM may encourage the issuing inspector to identify the types of injuries that the safeguard is intended to prevent, the Commission has never held that the Secretary is bound by the recommendations in a PPM.

⁵ Tellingly, Big Ridge does not contend that an unsecured ram car bed jack that is located adjacent to a driver in a mantrip is not a hazardous condition.

⁶ To the extent the Judge relied on the testimony of the inspector in determining the validity of the safeguard, he erred. At the hearing, the inspector testified that he did not believe that the safeguard described a "hazard." See 33 FMSHRC at 2250 (citing Tr. 401, 426-27). However, the legal conclusions of an inspector are neither binding nor dispositive. See *Penn Allegh Coal Co.*, 4 FMSHRC 1224, 1227 n.2 (July 1982).

III.

Conclusion

Accordingly, we reverse the Judge and hold that the safeguard is valid. The civil penalty contest of Citation No. 6674618 is hereby remanded to the Chief Administrative Law Judge for further proceedings consistent with this decision.⁷

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

⁷ In his opening brief, the Secretary requests that the Commission affirm a finding of a violation for Citation No. 6674618. However, this issue is not properly before the Commission; it was not raised in the Secretary's petition for review. *See* 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(d).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE NW, SUITE 520N
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February 12, 2015

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

Docket Nos. LAKE 2010-774
LAKE 2010-902

v.

SOLAR SOURCES, INC.

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”) and involve two citations issued to Solar Sources, Inc. (“Solar”) by the Department of Labor’s Mine Safety and Health Administration (“MSHA”).¹ Both citations allege a violation of 30 C.F.R. § 77.1109(c)(1), which requires “mobile equipment” to be equipped with at least one portable fire extinguisher.² In each instance, the inspector found a violation because a wheeled water pump was not equipped with a portable fire extinguisher.

The Administrative Law Judge affirmed both citations, finding that wheeled water pumps constitute “mobile equipment” under the clear meaning of section 77.1109(c)(1) and are thus required to be equipped with portable fire extinguishers. *Solar Sources, Inc.*, 34 FMSHRC 2826, 2834-37 (Oct. 2012) (ALJ). Solar filed a petition for discretionary review of the Judge’s decision, which we granted.

For the reasons that follow, we affirm in result the Judge’s decision regarding both citations. We conclude that the Judge erred in finding that the term “mobile equipment” had a clear meaning under section 77.1109(c)(1) and instead find the term “mobile equipment” to be ambiguous. However, we conclude that the Secretary’s interpretation, that wheeled water pumps

¹ The Judge had consolidated the two dockets at issue in these proceedings with a third docket, Docket No. LAKE 2009-373. However, the operator does not appeal the Judge’s decision in Docket No. LAKE 2009-373. PDR at 1 n.1.

² 30 C.F.R. § 77.1109(c)(1) provides: “Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers shall be equipped with at least one portable fire extinguisher.”

constitute “mobile equipment” under the standard, is reasonable and thus must be accorded deference.

I.

Factual and Procedural Background

On March 23, 2010, Inspector William Faulkner inspected the Solar Sources No. 2 mine, a coal surface mine in Pike County, Indiana. During his inspection, Faulkner observed a wheeled water pump that was not equipped with a fire extinguisher, and subsequently issued Citation No. 8425618 to the mine operator. The citation alleged a violation of 30 C.F.R. § 77.1109(c)(1). 34 FMSHRC at 2828-29. The inspector believed that the water pumps were “mobile equipment” due to the fact that they have wheels. Sec’y Mot. For Summ. Dec., Ex. D, Inspection Notes, at 9 of 15.

On June 7, 2010, Inspector Faulkner inspected another Solar Mine, the Craney mine, a coal surface mine in Daviess County, Indiana. During his inspection, Faulkner observed a wheeled water pump that was not equipped with a fire extinguisher and subsequently issued Citation No. 8425664 to Solar. This citation also alleged a violation of 30 C.F.R. § 77.1109(c)(1). 34 FMSHRC at 2828-30.

Solar contested both citations. Before the Administrative Law Judge, the parties agreed that no material facts regarding either citation were in dispute. The parties agreed that the water pumps were not self-propelled but that their wheels allowed them to be towed. The parties filed cross-motions for summary decision. 34 FMSHRC at 2826-27, 2830.

In his summary decision, the Judge concluded that the language of the regulation was clear and that the water pumps at issue constituted “mobile equipment.” 34 FMSHRC at 2835-36. The Judge noted that 30 C.F.R. § 56.2, a regulation that applies to metal and non-metal mines (as opposed to the coal mines at issue), defined “mobile equipment” in part as any wheeled equipment. On this basis, the Judge found that the two water pumps were clearly “mobile equipment” under section 77.1109(c)(1) since their wheels allowed them to be moved from place to place. 34 FMSHRC at 2834-35. Accordingly, the Judge affirmed both citations.

In reaching this result, the Judge rejected Solar’s argument that water pumps instead constitute “auxiliary equipment” under 30 C.F.R. § 77.1109(c)(3), and must be considered only under that section.³ The Judge “declin[ed] [the operator’s] invitation to second guess the Secretary’s choice of regulations to enforce.” 34 FMSHRC at 2836. Instead, the Judge upheld the Secretary’s decision to apply section 77.1109(c)(1) rather than section 77.1109(c)(3). *Id.* (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879 (June 1996), citing *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985)).

³ 30 C.F.R. § 77.1109(c)(3) states that “[a]uxiliary equipment such as portable drills, sweepers, and scrapers, when operated more than 600 feet from equipment required to have portable fire extinguishers, shall be equipped with at least one fire extinguisher.”

II.

Disposition

On review, Solar argues that section 77.1109(c)(1) is ambiguous because it fails to define “mobile equipment,” and that the Secretary’s interpretation of the regulation is unreasonable. In this regard, the operator claims that water pumps are “auxiliary equipment” subject to section 77.1109(c)(3) rather than “mobile equipment” subject to section 77.1109(c)(1). This contention is based upon the claim that water pumps are not directly involved in the extraction of coal. Rather, they are used to remove water that impedes mining and to fill water trucks which control dust on mine roads. However, as the operator concedes, this argument is undercut by the fact that portable welding units, which would fall under such a definition of “auxiliary,” are specifically listed as “mobile equipment” under section 77.1109(c)(1).

The Secretary argues that the clear meaning of the term “mobile equipment” includes wheeled water pumps as such pumps undoubtedly are mobile. Alternatively, even if the term is ambiguous, the Secretary claims that his interpretation that wheeled water pumps constitute “mobile equipment” is reasonable and thus should be accorded deference.

A. The standard is ambiguous with regard to the definition of “mobile equipment.”

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

We conclude that the Judge erred in finding that the term “mobile equipment,” as used in the standard, had a clear meaning. Section 77.1109(c)(1) does not define “mobile equipment” or include “water pumps” in the listed examples of “mobile equipment.”⁴ Likewise, section 77.1109(c)(3) does not define “auxiliary equipment,” and does not identify “water pumps” in listed examples of auxiliary equipment. Thus, neither standard defines the term “mobile equipment” or directly addresses whether water pumps are “mobile equipment” within the meaning of section 77.1109(c)(1) or “auxiliary equipment” under section 77.1109(c)(3).⁵

⁴ As mentioned above, section 77.1109(c)(1) states that “[m]obile equipment, *including* trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher” (emphasis added). The word “including” indicates that the subsequent list of “mobile equipment” is not exhaustive.

⁵ The Commission has previously found ambiguity regarding the scope of a standard under similar circumstances. *See Alcoa Alumina & Chemicals, LLC*, 23 FMSHRC 911, 914-15 (Sept. 2001) (in the context of 30 C.F.R. § 48.21, which applied to “surface mines,” the Commission found ambiguity as to whether “surface mines” included “mills” because the standard did not define “surface mines” or specifically include “mills” within its scope).

The Secretary argues that the term “mobile equipment” plainly encompasses a wheeled water pump because the water pump is capable of being moved from place to place. However, certain equipment categorized as “auxiliary equipment” pursuant to section 77.1109(c)(3), e.g. “scrapers,” are also capable of being moved from place to place. Scrapers are described by the *Dictionary of Mining, Minerals and Related Terms* 485 (2d ed. 1997) (“DMMRT”) as “rubber-tired device[s].”⁶ Therefore, the ability to move from one place to another does not plainly distinguish “mobile equipment” from “auxiliary equipment.”

We conclude, after reading section 77.1109(c) in its entirety, that the term “mobile equipment” in section 77.1109(c)(1) does not have a plain meaning. Instead, the term is ambiguous.

B. The Secretary’s proffered interpretation is reasonable.

Where a mandatory standard is ambiguous, courts and the Commission defer to the Secretary’s reasonable interpretation of the regulation. See *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec’y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (“agency’s interpretation . . . is ‘of controlling weight unless it is plainly erroneous or inconsistent with the regulation’”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Commission’s review similarly involves an examination of whether the Secretary’s interpretation is reasonable. See *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992); *Rochester & Pittsburgh Coal Corp.*, 12 FMSHRC 189, 193 (Feb. 1990); *Missouri Rock, Inc.*, 11 FMSHRC 136, 139 (Feb. 1989).

The Secretary’s interpretation, that wheeled water pumps constitute “mobile equipment” because they are capable of traversing roadways, is reasonable. Considering wheeled water pumps as “mobile equipment” is consistent with the examples contained in section 77.1109(c)(1), which include other wheeled equipment, such as portable welding units that can be towed along roadways. Such an interpretation of “mobile equipment” is not overly broad, as it does not include all types of equipment that can be picked up and carried.

Furthermore, the reasonableness of the Secretary’s interpretation is demonstrated by the definitions of “mobile equipment” in both the DMMRT and 30 C.F.R. § 56.2. The DMMRT defines “mobile equipment” as “equipment that is self-propelled or that can be towed on its own wheels, tracks, or skids.” DMMRT at 352. Section 56.2 defines “mobile equipment” as “wheeled, skid-mounted, track-mounted, or rail-mounted equipment capable of moving or being moved.” 30 C.F.R. § 56.2. While section 56.2 applies to metal and non-metal mines, and the mines at issue are coal mines, we have previously recognized that “[t]here is no logical reason why . . . coal mines would be subject to a regulation designed to be less protective . . . than the regulation governing other mines, and it would make little sense for MSHA or its predecessor agency to have intended such a result.” *Wolf Run*, 32 FMSHRC at 1681-82.

⁶ We have previously recognized that the definitions in the DMMRT, while not always dispositive, are a “recognized authority for [technical] usage.” *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1685 (Dec. 2010).

We are persuaded by these definitions that it is reasonable to interpret the term “mobile equipment” as any type of wheeled equipment that can traverse roadways.⁷ The Secretary’s interpretation, that wheeled water pumps are “mobile equipment” as they are capable of traversing roadways, is clearly consistent with these concepts. Consequently, we uphold the Secretary’s interpretation of the term “mobile equipment” as reasonable in this instance.⁸

Under the Secretary’s interpretation, both water pumps at issue constituted “mobile equipment” under section 77.1109(c)(1). As a result, the operator was required to equip both water pumps with fire extinguishers, and its failure to do so violated the standard.

⁷ The question as to whether auxiliary equipment listed in section 77.1109(c)(3) may also be considered mobile equipment under section 77.1109(c)(1) is not raised by the facts of this case. Consequently, we leave this issue for a future case.

⁸ We note that, as section 77.1109(c) is currently written, some types of equipment could fit both the definition of “mobile” within the Secretary’s interpretation and “auxiliary” within a reasonable interpretation of that term. When a regulation does not provide unambiguous notice of its coverage, the Commission’s test is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). Although the operator did not raise an issue of “fair notice” in this case, it may arise in other cases. For example, scrapers often have wheels, but they are explicitly included in section 77.1109(c)(3) as “auxiliary” equipment. Therefore, without in any way forecasting an outcome, we note that an operator might claim a lack of fair notice if it receives a citation under (c)(1) on a piece of demonstrably auxiliary equipment.

III.

Conclusion

For the foregoing reasons, we find that the Secretary proved violations of 30 C.F.R. § 77.1109(c)(1) with regard to Citation Nos. 8425618 and 8425664. Therefore, we affirm in result the Judge's decision with respect to both citations.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 4, 2015

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

v.

FREEPORT-MCMORAN TYRONE,
INC.

Docket No. CENT 2013-533-M
A.C. No. 29-00159-320274

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On December 11, 2013, the Commission received from Freeport-McMoRan Tyrone, Inc., (“Freeport”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On August 6, 2013, the Chief Administrative Law Judge had issued an Order to Show Cause in response to Freeport’s failure to answer the Secretary of Labor’s June 18, 2013 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause became a Default Order on September 6, 2013, when Freeport did not seem to file an answer within 30 days.

Freeport asserts that it failed to send a timely answer due to a miscommunication or misunderstanding of the Commission’s procedures. Freeport maintains that when the Order to Show Cause was issued it had been engaged in ongoing discussions with the Secretary, which have resulted in a proposed settlement agreement. The Secretary does not oppose the request, but notes that the Order to Show Cause clearly alerted the operator that it needed to respond to the order within 30 days.

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

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

Having reviewed Freeport’s request and the Secretary’s response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
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February 4, 2015

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

v.

BRIAN ENGLISH, employed by
BARNES PAVING COMPANY, INC.

Docket No. SE 2013-233-M
A.C. No. 31-02233-312147A

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On April 1, 2014, the Commission received from Brian English (“English”) a motion seeking to reopen a penalty assessment proceeding and relieve him from the Default Order entered against him.

On June 27, 2013, the Chief Administrative Law Judge issued an Order to Show Cause in response to English’s failure to answer the Secretary of Labor’s April 12, 2013 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause became a Default Order on July 29, 2013, when the operator did not file an answer within 30 days.

English asserts that he had sent his notice of contest on February 6, 2013, in response to the Secretary’s proposed assessment, and that he never received any more correspondence regarding the case until he was notified by the collection agency of the outstanding penalties. The Secretary does not oppose the request, and confirms that the Petition for Assessment of Civil Penalty was mailed to a different address than the one provided by English on the contest form.

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

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

Having reviewed English’s request and the Secretary’s response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 4, 2015

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

v.

PENINSULA TOPSOIL

Docket No. WEST 2012-1395-M
A.C. No. 45-03599-296395

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On January 8, 2014, the Commission received from Peninsula Topsoil ("Peninsula") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On February 5, 2013, the Chief Administrative Law Judge issued an Order to Show Cause in response to Peninsula's failure to answer the Secretary of Labor's October 10, 2012 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause became a Default Order on March 8, 2013, when the operator did not file an answer within 30 days.

Peninsula asserts that it failed to send a timely answer due to a miscommunication or misunderstanding of the Commission's procedures. The Secretary does not oppose the request, but notes that the Order to Show Cause clearly alerted the operator that it needed to respond to the order within 30 days. The Secretary cautions that he may oppose future motions to reopen penalty assessments.

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

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

Having reviewed Peninsula’s request and the Secretary’s response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 4, 2015

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

v.

DRUMLUMMON GOLD
CORPORATION

Docket No. WEST 2013-767-M
A.C. No. 24-01079-318628

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On April 9, 2014, the Commission received from Drumlummon Gold Corporation, ("Drumlummon") a revised motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On August 8, 2013, the Chief Administrative Law Judge issued an Order to Show Cause in response to Drumlummon's failure to answer the Secretary of Labor's June 17, 2013 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause became a Default Order on September 9, 2013, when the operator did not file an answer within 30 days.

Drumlummon asserts that it failed to send a timely answer because it had closed its mine facilities and had experienced confusion relating to an apparent settlement of the case. Drumlummon contends that it had accepted the Secretary's settlement offer but that the offer was subsequently rescinded on August 21, 2013. At that time, MSHA's Conference and Litigation Representative told Drumlummon, "I will be contacting you shortly to advise you how MSHA plans to proceed with this case."

The Secretary opposes the request to reopen and argues that, despite any confusion on the operator's part, it still had 17 days after being notified that the District Manager had disapproved the settlement in which it could have responded to the Judge's Order to Show Cause. The fact that the mine was closed did not relieve Drumlummon of its existing obligations under the Mine Act to maintain an adequate and reliable internal processing system.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its

issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision 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 the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Drumlummon's request and the Secretary's response, we conclude that good cause existed for Drumlummon's failure to respond to the Order to Show Cause by virtue of the settlement negotiations and the CLR's statement that MSHA would be contacting Drumlummon shortly about how the case would proceed. Hence, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

February 10, 2015

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

v.

MEDINA CRUSHED STONE, INC.

Docket No. CENT 2010-1205-M
A.C. No. 41-03594-228066

Docket No. CENT 2010-1206-M
A.C. No. 41-03594-228066

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 20, 2013, the Commission received from Medina Crushed Stone, Inc. (“Medina”) a motion seeking to reopen two penalty assessment proceedings and relieve it from the Default Orders entered against it.¹

In Docket No. CENT 2010-1205-M, the Chief Administrative Law Judge issued an Order to Show Cause on March 9, 2012, which by its terms became a final order on April 9, 2012 when the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Medina’s failure to answer the Secretary of Labor’s January 25, 2011 Petition for Assessment of Civil Penalty.

In Docket No. CENT 2010-1206-M, an Administrative Law Judge issued an Order to Show Cause on November 19, 2012 in response to the Secretary’s repeated unsuccessful attempts to contact Medina. On January 16, 2013, the Judge issued a Default Decision after Medina failed to respond to the show cause order.

Medina asserts that it did not receive much of the paperwork associated with both cases because it was sent to the addresses of a terminated employee and of Martin Marietta Materials Southwest, Inc. (“Martin”), the company that Medina sold the portable rock crushing plant to in 2011. Regarding Docket No. CENT 2010-1205-M, the record indicates that Show Cause Orders were issued on February 9, 2012 and March 9, 2012, to the terminated employee and Martin,

¹ A.C. No. 000228066 was divided into the two docket numbers captioned above. The Motion to Reopen and the enclosed documents referred to both docket numbers. Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2010-1205-M and CENT 2010-1206-M, both captioned *Medina Crushed Stone, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

respectively. The first Show Cause Order was returned as undeliverable, but the second order was delivered to Martin on March 15, 2012.

Medina further asserts that it paid \$3,300 in response to a properly addressed delinquency notice, dated July 23, 2012. Despite the payment, Medina notes that it received a collection notice, dated September 19, 2012, and promptly notified MSHA. Medina states in its response to the Secretary's opposition that, in its communications with MSHA, it was told that the payment of \$3,300 for Docket No. CENT 2010-1205-M would terminate all its debts. Therefore, Medina believed that it had satisfied all its responsibilities and was not notified otherwise.

The Secretary confirms that MSHA received a payment of \$3,300 by check, dated August 17, 2012, which was later applied to CENT 2010-1205-M after Medina contacted MSHA. The Secretary considers Docket No. CENT 2010-1205-M to be paid in full and thus ineligible for reopening.

Although payment of contested citations may be a grounds for finding a motion to reopen moot, we have made limited exceptions where there exists clear evidence that an operator made the payment by mistake or inadvertence. *See, e.g., McCoy Elkhorn Coal Corp.*, 33 FMSHRC 1, 2 (Jan. 2011). Based on the record, it is uncontradicted that Medina was under the mistaken belief that a payment of \$3,300 would satisfy all penalties relating to A.C. No. 000228066. Medina was never served with any document stating that the contested citations had been split into two dockets, and the delinquency and collection notices that prompted the payment only refer to the A.C. Number, not the docket with which the penalty is associated.

Regarding Docket No. CENT 2010-1206-M, in a letter dated January 30, 2012, Medina asserted that it did not receive any paperwork after contesting the proposed assessment. The Show Cause Order and the Default Decision were delivered to the new owner of the portable plant on November 26, 2012 and January 23, 2013, respectively. A copy of the Show Cause Order was also sent to the address of the terminated employee but was returned undelivered.

The Secretary opposes the request to reopen, asserting that the operator identifies no exceptional circumstances warranting reopening. The Secretary claims that, following Medina's sale of the plant, there was inadequate monitoring of MSHA citations, outstanding penalties, and active Commission cases. The Secretary does not explain why service was not attempted on the correct address, which was a part of the record and was known to both MSHA's Office of Assessments and a MSHA Conference Litigation Representative in Dallas, Texas.²

Medina responded to the Secretary's opposition, explaining that it did not part with Martin on good terms and never received the Show Cause Orders or Default Decisions.

² We note that the proposed penalties, motions requesting extension to file the petition for assessment of civil penalty, delinquency notices, and collection notice were sent to Medina's correct address. It is unclear why there was an abrupt change in service upon the filing of the Secretary's petition whereby documents were served to different addresses.

Moreover, Medina asserts that after it sold the portable rock crushing plant and notified MSHA of the sale, it was unreasonable to expect that the plant's former supervisor, whose employment had been terminated, would forward mail to Medina.

Pursuant to Commission Procedural Rule 66, an order to show cause shall be mailed to the party by registered or certified mail, return receipt requested, before the entry of any order of default or dismissal. 29 C.F.R. § 2700.66. Having reviewed Medina's request and the Secretary's response, we conclude that the operator did not receive the Show Cause Orders, and therefore the Default Orders have not been effectively entered. Accordingly, Docket Nos. CENT 2010-1205-M and CENT 2010-1206-M are remanded to the Chief Administrative Law Judge and Administrative Law Judge, respectively, for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 10, 2015

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

v.

PETE LIEN & SONS, INC.

Docket No. CENT 2013-472-M
A.C. No. 39-00020-318697

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On February 3, 2014, the Commission received from Pete Lien & Sons, Inc., (“Pete Lien”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On August 8, 2013, the Chief Administrative Law Judge issued an Order to Show Cause in response to Pete Lien’s failure to answer the Secretary of Labor’s June 24, 2013 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause became a Default Order on September 9, 2013, when the operator did not file an answer within 30 days.

Pete Lien asserts that on August 29, 2013, it submitted an answer to the Secretary’s Petition for Assessment of Civil Penalty, but that, due to a typographical error, the operator had incorrectly listed the docket number and case number in its answer, which is why the Commission never received it. The Secretary does not oppose the request, but notes that the safety coordinator at Pete Lien is a former MSHA inspector who is aware of MSHA’s contest procedures. The Secretary cautions that he may oppose future motions to reopen penalty assessments where proper procedures are not followed.

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

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

Having reviewed Pete Lien’s request and the Secretary’s response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 10, 2015

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

v.

KINGSTOWN CORPORATION

Docket No. YORK 2013-170-M
A.C. No. 19-01082-324542

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On February 20, 2014, the Commission received from the Secretary a motion seeking to reopen a penalty assessment proceeding to relieve Kingstown Corporation (“Kingstown”) from the Default Order entered against it.

On September 16, 2013, the Chief Administrative Law Judge issued an Order to Show Cause in response to Kingstown’s failure to answer the Secretary of Labor’s July 25, 2013 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause became a Default Order on October 17, 2013, when the operator did not file an answer within 30 days.

The Secretary asserts that Kingstown was engaged in ongoing negotiations with the Secretary for a global settlement for a number of consolidated cases. Because Judge Andrews, the presiding Judge, was aware of the negotiations, Kingstown apparently believed that it was not required to file an answer to the Judge’s Order to Show Cause and that this constitutes excusable neglect. The Secretary adds that the parties eventually entered into a settlement of all pending matters, except for the case in question. The Secretary requests that the Commission reopen this case and re-assign it to Judge Andrews so that he can assess the adequacy of the proposed settlement in this matter.

The Judge’s jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, relief from a judge’s decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision’s issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Chief Administrative Law Judge’s Order to Show Cause here has become a final decision 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 the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the Secretary’s request, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is 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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 11, 2015

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

v.

BOB BAK CONSTRUCTION

Docket No. CENT 2011-159-M
A.C. No. 39-01313-236458

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 5, 2013, the Commission received from Bob Bak Construction (“Bak”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On May 2, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms would become a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Bak’s failure to answer the Secretary’s December 20, 2010 Petition for Assessment of Civil Penalty.

Bak’s owner asserts that he did not answer the penalty petition because he misunderstood the procedures and thought he had fulfilled his responsibilities by timely contesting the proposed assessment. Bak further states that it had never received any other notification regarding this case. Bak’s recently-hired counsel discovered this delinquency while researching other matters. Bak recognizes that a significant amount of time had passed since it contested the proposed assessment, but maintains that in the interest of equity, this small operator should be permitted to defend the case on the merits, and present its inability to pay the \$86,400 assessed amount in addition to interest and penalty fees.

The Secretary of Labor opposes the request to reopen because it was filed two years after the Show Cause Order was issued. The Secretary states that MSHA mailed a delinquency notice on October 6, 2011, which was returned undelivered, and referred the case to the Department of Treasury for collection on January 2, 2012.

In reviewing Bak’s request, we are given pause by an apparent inconsistency in the record before us. Our internal records seem to indicate that the Show Cause Order may not have

been delivered to Bak, but was returned to the Commission as undelivered on May 12, 2011.¹ However, Bak's Motion to Reopen and supporting affidavit suggest that the Show Cause Order was received, but that Bak did not respond because it "did not understand the legal procedures and thought [it] did everything required when [it] contested the Proposed Assessment." Bak Aff. 2, ¶9; *see also* Bak Mot. to Reopen 2.

The issues raised by this inconsistency in the record require findings of fact that are the province of an administrative law judge in the first instance. *See, e.g., Pinnacle Mining Co.*, 29 FMSHRC 56, 57 (Jan. 2007). Thus, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Bak's failure to answer the Show Cause Order and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

¹ Internal Commission records include two receipts for certified mail which contain U.S. Postal Service tracking numbers. When the petition for reopening was received, Commission staff checked Postal Service records and discovered that one envelope was delivered to Denver, Colorado on May 6, 2011, and that the other envelope was returned to Washington, D.C. on May 12, 2011. Since Chief Judge Lesnick's Order to Show Cause was issued on May 2, 2011 and sent to the MSHA Solicitor's Office in Denver as well as to Bak, we surmise that the delivery on May 6 was the Show Cause Order to the Solicitor's Office. It appears that the envelope which was returned to Washington, D.C. on May 12 may have been an envelope containing the Show Cause Order which was intended for delivery to Bak, but returned undelivered.

In determining whether to reopen this case, the Chief Administrative Law Judge should consider if the operator actually received a copy of the Show Cause Order and whether the operator made a good faith attempt to receive mail at its address of record, particularly in light of the fact that mail appears to have been returned due to a lack of a mail receptacle.²

/s/ Patrick K. Nakamura

Patrick K. Nakamura, Acting Chairman

/s/ Robert F. Cohen, Jr.

Robert F. Cohen, Jr., Commissioner

/s/ William I. Althen

William I. Althen, Commissioner

² We note that it is the operator's responsibility to contact MSHA and the Commission to update its address of record. *Gudelsky Materials*, 35 FMSHRC 3258 (Oct. 2013).

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-3577 / FAX: 303-844-5268

February 4, 2015

UNITED STEELWORKERS LOCAL NO.
5114, ON BEHALF OF MINERS,
Applicant

v.

HECLA LIMITED,
Respondent

COMPENSATION PROCEEDING

Docket No. WEST 2012-466-CM

Lucky Friday Mine
Mine ID 10-00088

FINAL DECISION AND ORDER ON APPLICATION FOR COMPENSATION

Appearances: Susan J. Eckert, Esq., Santarella & Eckert, LLC, Littleton, Colorado, for Applicant;
Laura Beverage, Esq., and Karen Johnston, Esq., Jackson Kelly PLLC, Denver, Colorado, for Respondent.

Before: Judge Manning

This Compensation Proceeding is before me pursuant to section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Act”), upon an application for compensation filed by the United Steel Workers, Local 5114 on behalf of miners (“USW”) against Hecla Limited. On November 14, 2014, Hecla and USW filed simultaneous motions for partial summary decision in this matter. On December 23, 2014, I issued an order granting, in part, Hecla’s motion for partial summary decision.¹ *Steelworkers Local 5114 v. Hecla Limited*, 36 FMSHRC ____, No. WEST 2012-466-CM, 2014 WL 7464233 (Dec. 2014), *amended* at 37 FMSHRC ____, 2015 WL 226135 (Jan 5, 2015). That order, as amended, is incorporated herein by reference. In that order, I encouraged the parties to stipulate to the specific miners due compensation in accordance with my order and the amount of compensation due each miner.

On February 3, 2015, the parties filed a joint stipulation “Regarding Specific Miners Due Compensation and the Amount of Compensation” (the “Joint Stipulation”). The parties identified 19 miners who are entitled to compensation under section 111 of the Act based on my December 23, 2014 order. The name of each miner and the amount owed to each miner are identified in Joint Exhibit A, which is incorporated herein by reference. The amount of compensation was calculated by Hecla using “the miners’ regular rates of pay for

¹ My order was based upon the record developed at the hearing on two orders of withdrawal issued under section 103(k) of the Act that directly relate to this compensation proceeding. On October 29, 2014, I issued a decision in the contest cases for these withdrawal orders, *Hecla Limited*, 36 FMSHRC 2749 (Oct. 2014). With the parties’ agreement, the record from that hearing was incorporated by reference in this proceeding.

hours worked between December 6 and 14, 2011.” Joint Stipulation at 1. The total amount of compensation due excluding interest is \$13,150.48.

The parties stipulated that “[i]nterest on the total compensation amounts set forth in Joint Exhibit A will be calculated using the OPM guidelines for back pay annual interest rates by quarter based on IRS official rates pursuant to 5 U.S.C. § 5596 and 5 C.F.R. §§ 550.801-808. *See also Local 2274 v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1504-06 (Nov. 1988). The interest is to accrue up to the date of the Court’s entry of a decision and order in this matter.” Joint Stipulation at 2.

The parties further stipulated that “[u]pon entry of the Court’s decision and order, the operator will calculate the interest due as of that date and compensate the miners accordingly. Such compensation, which shall be subject to standard withholdings for taxes and shall be reported on a W2 Form, will be processed and paid to the miners in the first full pay period immediately following the date of the Court’s decision and order is entered and in a time period not to exceed fourteen days.” *Id.*

As stated above, the amount of compensation due under section 111 of the Act was calculated based on my order of December 23, 2014. Upon issuance of that order, I advised the parties not to file a petition for interlocutory review with the Commission if they disagreed with my order. I advised them that once I issued my final decision, the issues of fact and law discussed in my December 23, 2014, order would be ripe for review should either party wish to petition the Commission for review.

ORDER

I find that the terms of the Joint Stipulation comply with the requirements of section 111 of the Act. Hecla Limited is hereby **ORDERED** to pay \$13,150.48 plus interest to the miners listed in Joint Exhibit A in accordance with the parties’ Joint Stipulation. The parties **SHALL COMPLY** with all the terms and conditions set forth in the Joint Stipulation. Upon compliance with these terms, 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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February 5, 2015

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

v.

SALLY ANN COAL COMPANY, INC.,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. WEVA 2011-1028
A.C. No. 46-06843-244332

Docket No. WEVA 2012-481
A.C. No. 46-06843-272825-01

Docket No. WEVA 2012-559
A.C. No. 46-06843-275658-01

Mine: No. 2 Mine

DECISION

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

James F. Bowman, Litigation Representative, Midway, West Virginia, for
Respondent.

Before: Judge Harner

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Sally Ann Coal Company, Inc. (“Sally Ann” or “Respondent”) at its No. 2 Mine, 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”). These cases included three separate dockets containing twelve violations assessed at \$38,126.00. On December 9, 2013, I issued a Decision Approving Partial Settlement resolving seven of the eight violations in Docket No. WEVA 2011-1028. The parties presented testimony and documentary evidence for the remaining five violations at a hearing held in Charleston, West Virginia on November 14 and 15, 2013. Both parties filed post-hearing briefs which have been duly considered.

STIPULATIONS¹

1. Sally Ann Coal Company, Inc., (“Sally Ann”) at all times relevant to these proceedings, engaged in mining activities and operations at the No. 2 Mine in McDowell County, WV.
2. Sally Ann’s mining operations affect interstate commerce.
3. Sally Ann is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ *et. seq.* (the “Mine Act”).
4. Sally Ann is an “operator” as defined in §3(d) of the Mine Act, 30 U.S.C. §803(d), at the Mine where the contested citations in these proceedings were issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to §105 of the Act.
6. The individuals whose signatures appear in Block 22 of the contested citations at issue in these proceedings were at the times the citations were issued authorized representatives of the United States of America’s Secretary of Labor, assigned to MSHA, and were acting in their official capacities when issuing the citations at issue in these proceedings.
7. The citations at issue in these proceedings were properly served upon Sally Ann as required by the Mine Act.
8. The citations at issue in these proceedings may be admitted into evidence for the purpose of establishing their issuance but not for the truthfulness or relevancy of any statements asserted therein.
9. The certified copy of the MSHA Assessed Violations History reflects the history of the citation issuances at the Mine for 15 months prior to the date of the citations at issue and may be admitted into evidence without objection by Sally Ann.
10. Sally Ann demonstrated good faith in abating the violations.
11. Sally Ann may be considered a medium size mine operator for the purposes of 30 U.S.C. §820(i).

¹ Except for Stipulation 13, the Stipulations consist of the stipulations contained in the parties pre-hearing statements submitted prior to the hearing. Their substance is not at issue in this proceeding.

12. The assessed penalties will not affect the ability of Respondent to remain in business.

13. All of the miners in Order No. 8098519 were “experienced” miners. Tr. 96-97.²

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness’s testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his or her demeanor. Any failure to provide detail as to 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).

I. BASIC LEGAL PRINCIPLES

A. Significant and Substantial

The Orders in dispute and discussed below have been designated by the Secretary as significant and substantial and unwarrantable failures to comply with mandatory safety standards. A significant and substantial (“S&S”) violation is described in section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

² Hereinafter, the Secretary’s exhibits will be designated as GX followed by a number; and Respondent’s exhibits will be designated as RX followed by a number. Pages of the official hearing transcript are designated “Tr.” followed by the appropriate page reference(s). Respondent’s Post-Hearing Brief is designated as RPHB followed by the page number.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984). The Secretary “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

B. Negligence and Unwarrantable Failure

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.* Low negligence exists when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* High negligence exists when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* *See also Brody Mining, LLC*, 33 FMSHRC 1329 (2011) (ALJ). Finally, the operator is guilty of reckless disregard where it “displayed conduct which exhibits the absence of the slightest degree of care.” 30 C.F.R. § 100.3(d).

The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as “reckless disregard”, “intentional

misconduct”, “indifference”, or a “serious lack of reasonable care”. *Emery Mining Corp.*, 9 FMSHRC at 2003; see also *Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995).

The Commission has recognized that whether conduct is “aggravated” in the context of unwarrantable failure is determined by considering all the facts and circumstances of each case to determine if any aggravating factors exist, or if any mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *Windsor Coal Co.*, 21 FMSHRC at 1001; *San Juan Coal Co.*, 29 FMSHRC 125, 129-36 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law judge may determine, in his or her discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal Company*, 31 FMSHRC 1346, 1351 (Dec. 2009).

I rely on the state of the law as discussed herein in considering each issue addressed below and whether the Orders which are alleged to be S&S and unwarrantable failure to meet the above noted criteria.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. WEVA 2011-1028 – Order No. 8098519

On December 1, 2010, Inspector Bransom Williams (“Williams”) wrote Order No. 8098519 (Exhibit GX-2) citing a 104(g)(1) violation of 30 C.F.R. § 48.6(b) stating:

Eight miners³ working in the mine have not received experienced miner training prior to beginning work duties inside the mine. The operator is hereby ordered to withdraw the eight miners from the mine until they have received the required training. The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to himself and to others.

The Order was designated as S&S and highly likely to cause injuries that could reasonably be expected to be fatal for eight miners. *Id.* The inspector designated the operator’s negligence as

³ The eight miners were Carl Johnson, Rick Sizemore, Earl Click, Charles Allen Jr., James Rose, Jesse Milam, Garnie Estep and Mike Turner.

high, and a penalty of \$14,743.00 was assessed. *Id.* The Order was terminated the next day and the miners were allowed to return to work when they all received the required experienced miner training. *Id.*

The order was issued pursuant to section 104(g)(1) of the Mine Act, which states that an inspector who finds “a miner who has not received the requisite safety training ... shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from ... the mine, and be prohibited from entering such mine until ... such miner has received the training required by ... the Act.” 30 U.S.C. § 814.

30 C.F.R. §48.6 entitled “Experienced miner training” applies, in pertinent part, to experienced miners newly employed by the operator. Section (b) states: “Experienced miners **must complete the training prescribed in this section before beginning work duties....**” (emphasis supplied). The section continues by specifying in some detail all the areas that must be covered in this training. In brief, the training must include: (1) Introduction to work environment; (2) Mandatory health and safety standards; (3) Authority and responsibility of supervisors and miners’ representatives; (4) Entering and leaving the mine and communications; (5) Mine map, escapeways, emergency evacuation and barricading; (6) Roof or ground control and ventilation plans; (7) Hazard recognition; (8) Prevention of accidents; (9) Emergency medical problems; (10) Health; (11) Health and safety aspects of the tasks to which the experienced miner is assigned; (12) Self-rescue and respiratory devices, including hands-on training; and (13) Such other courses required by the District Manager based on circumstances and conditions at the mine.

At the time of the hearing, Inspector Williams has approximately sixteen years of experience in the mining industry, where he began as a mechanic in 1998. Tr. 15. He began working for MSHA as an underground inspector in 2007. Tr. 15-16. On December 1, 2010, Williams was at Respondent’s No. 2 Mine for a general inspection. Tr. 16. As part of this inspection, he regularly inspects training records. Tr. 18. The day prior, Williams had issued a citation after witnessing a miner exit the mine without a multi-gas detector. Tr. 34. This further prompted Williams to check the training records at the Mine. According to Respondent’s records, Mine Foreman Charley Allen (“Allen”) had conducted the training for the eight newly hired, but experienced miners. Tr. 17-18; Exhibit GX-2.

When he was inspecting the training records, Williams did not know that Allen was not a certified instructor; however, when he contacted Educational Field Services, he was informed of this fact. Tr. 18, 35. Williams wrote Order No. 8098519 for a violation of 30 C.F.R. § 48.6(b) because he knew from previous contact that the miners in question were experienced rather than new to the industry. Tr. 16, 20; Exhibit GX-2. However, given that the miners were newly hired at this mine, his concern was whether the miners had received training in all the various areas required by the standard, as the amount of information is quite broad in scope. According to Williams, the training covers, *inter alia*, methane issues, the location of self-contained self-rescuers (“SCSRs”),⁴ the location of escapeways, roof condition issues and information about ventilation controls. Tr. 21-23. In addition, he was concerned that the records reflected that the

⁴ SCSRs provide oxygen for miners in the event that escape is necessary. Tr. 22-23.

training that had been provided was conducted in a single day, which he asserted would be “impossible.” Tr. 19-20. Williams testified that, when Allen was questioned, he admitted that he did not follow the approved training plan; rather, he only “went over hazards...at the mine”. Tr. 21. Finally, Williams testified that if the required newly hired experienced training was conducted and the MSHA form completed correctly, only Section 2 of the form would be completed and there would be no writing in Section 5 of the form. Tr. 68.

Williams designated the Order as S&S and highly likely to result in fatal injuries to eight miners. Tr. 24-25. He testified that the Act states that an untrained miner is a hazard to himself as well as other miners. Tr. 24. If a fire were caused by methane gas, miners could suffer from smoke inhalation. Tr. 24. In the past, Williams testified that untrained miners have gotten lost because they did not know where the escapeways were located. Tr. 24, 59. Further, they have been injured because they did not know where SCSR caches were located or how to operate them. Tr. 24, 60. Williams found that the operator was highly negligent because it did not follow its required training plan even though certified trainers were available. Tr. 27. In fact, one such trainer, a mine foreman, worked at the mine adjacent to the No. 2 Mine. Tr. 27. Williams further stated that Allen’s belief that he was a certified instructor was not a mitigating factor because Allen should have known that he was not a certified trainer. Tr. 62.

At the time of the hearing, Charles Allen, Sr., has more than thirty-seven years in the mining industry, thirty-five years of which has been spent in underground coal mines. Tr. 88. During this time, he has held various jobs and has been a certified foreman since 1982. Tr. 88. At the time of the violation, he was the mine foreman; however, he resigned his position a few days before the hearing. Tr. 88-89. As mine foreman, his duties included examining the areas prior to the start of the shift and assisting in production. Tr. 89. Respondent operates another mine in very close proximity to the instant mine, and Mine Superintendent Ratliff oversaw both of these mines and had more authority than Allen. Tr. 90-91.

Allen testified that he realized that newly employed, experienced miner training had not been completed for the eight miners listed in the instant citation after the citation had been issued for the multi-gas detector on the previous day. Tr. 100. At that point, he made the decision to train the men “the best [he] could” by instructing the miners on rescuers, lifelines, rescue chambers, intakes, primary escapeways, secondary escapeways, returns and the general layout of the mine. Tr. 100-101. Compared to other mines in the area, he stated that the ventilation plan, roof control plan and rescue procedures were basically similar; and, they were adopted from the plans developed by the former owner of the Mine. Tr. 97-99. Allen did admit that although similar, the location of SCSR caches and escapeways would obviously vary depending upon the mine. Tr. 126-127. He also acknowledged that conditions in a mine can vary greatly depending upon the mining progression, the weather conditions, the particular miners working the shift, the materials being used and the equipment being used. Tr. 129. Although he testified that he did not know of any methane ever being found, there was a section of the mine that was sealed off and the air and gases could only be measured at the seals. Tr. 123, 136.

Allen also testified that because he had not yet been certified, he was confused as to the procedure for filling out the training forms. Tr. 101-102, 107. (Allen subsequently became certified in March 2011. Tr. 92.) Although Allen had only given task training, he also checked

the box for experienced miner training because the miners were experienced. Tr. 101. Allen maintained throughout his testimony that he believed that he was doing the right thing. Tr. 102. At the time, he testified that he did not know that the instructor had to be certified to conduct the eight hour refresher training. Tr. 103. James Rose (“Rose”) was the miner who was cited for not carrying a multi-gas detector. Tr. 79-80. He opined that Allen’s training was probably the best that he had ever received because of Allen’s strict adherence to safety standards. Tr. 87.

Although there were eight newly employed, experienced miners at the Mine, Allen testified that on November 30, he trained the four day shift miners and that the night shift mine foreman, Woodrow Williamson (“Williamson”), who was a certified instructor, trained the other four night shift miners. Tr. 38-39, 104-105. However, Allen confirmed that there were roughly ten miners working on each shift. Tr. 125-126. Allen stated that he had completed the 5000-23 form⁵ before, but it had only been for task and equipment training. Tr. 109.

Respondent submitted various training records for the eight employees into evidence. However, none of these records demonstrate that Respondent fulfilled its obligation to train newly hired experienced miners. It is evident from looking at most of these exhibits, namely Exhibit RX-1 (James Rose), Exhibit RX-3 (Charles Allen, Jr.) Exhibit RX-5 (Jesse Milam), Exhibit RX-6 (Earl Click), Exhibit RX-7 (Ricky Sizemore), Exhibit RX-9 (Carl Johnson) and Exhibit RX-10 (Garnie Estep), that the training all occurred on November 30, 2010, and that the training given on that date only concerned mine gases and the use of multi-gas detectors.⁶ This training was given as a result of the citation written on that date when miner Rose was observed exiting the mine without a multi-gas detector. Respondent also introduced into evidence three additional training forms for Rose (Exhibit RX-2), Allen Jr. (Exhibit RX-4) and Turner (Exhibit RX-8) to show that these miners received training. However these forms show that the miners received training in specific tasks on June 15, 2010 (Rose and Allen Jr) and on February 24, 2010 (Turner). And for two of the three miners this training was given by Allen Sr. who was not a certified instructor at the time and the record for Turner is training at another mine. Tr. 44. The record does not reflect any further training received by the eight named miners nor does it reflect when the eight miners were hired. Needless to say, Respondent has not demonstrated, either by documentation or by testimony, that the eight named miners ever received the newly employed, experienced miner training required by 30 C.F.R. §48.6(b).

I find that there has very clearly been a violation of 30 C.F.R. §48.6(b). To be in compliance, Respondent must be able to provide training forms showing that each of the newly employed, experienced miners received the required training. Not only could these not be provided, but the documentation provided totally fails to demonstrate the type of training required by 30 C.F.R. §48.6(b). The training that was given was either in response to a citation issued for a miner not having a multi-gas detector on November 30, 2010, or for specific tasks. Further, most training was undertaken by an individual who was not an MSHA certified trainer. Allen stated at hearing that while he knew that he was not certified, he believed that he was doing the right thing and since the incident has become certified.

⁵ This is the MSHA form filled out when training is complete.

⁶ Allen Sr. signed the MSHA training forms for Rose, Allen Jr., Milam and Click while Williamson signed the forms for Sizemore, Johnson and Estep.

I also find that this violation was S&S in nature. A violation of a mandatory standard has clearly been established. Having untrained miners in a particular mine, regardless of their experience in other mines, is a safety hazard to the untrained miners as well as those miners working with them. This significantly contributes to numerous hazardous situations that could be created by the untrained miners. None of these men had ever been previously employed at the Respondent's Mine. As no two mines are exactly alike, each must have its own emergency plans, roof and rib control plans and ventilation plans, among a variety of other things which each miner working within the mine must have knowledge of. Over the course of time, the absence of training could lead to injury or death to each of the miners working with the one or few who remains untrained. In light of this, I find that Order No. 8098519 is S&S. See e.g. *Boart Longyear Company*, 35 FMSHRC 3680, 3699-3700 (Oct. 2013) (ALJ Barbour); *Lehigh Southwest Cement*, 33 FMSHRC 3229, 3243 (Dec. 2011) (ALJ Paez); *Cannelton Industries, Incorporated*, 24 FMSHRC 840, 853 (Aug. 2002) (ALJ Barbour). Section 2(a) of the Mine Act states that "the first priority and concern of all in the coal...industry must be the health and safety of its most precious resource – the miner." To not properly train miners, whether new or experienced, clearly runs afoul of this basic principle.

Respondent contends that the gravity should be reduced to a non S & S violation. By requiring an untrained miner to be immediately withdrawn on grounds that the miner constitutes "a hazard to himself and to others," section 104(g) of the Act essentially defines the failure to properly train a miner as a significant and substantial violation; the untrained miner constitutes a hazard sufficiently likely to contribute to a serious injury to himself or others as to require his immediate removal. *Boart Longyear*, 35 FMSHRC at 3699-3700. I find that Respondent's argument that the involved miners were experienced in mining hazards from working at other similar mines in the same area to be ungrounded and fallacious since every mine has its own specific conditions of which miners must be aware. The best way to ensure that accidents resulting from insufficient training do not occur is to ensure that all new hires receive the MSHA-required training. Accordingly, the S&S designation for the Order is affirmed.

I further agree with the Secretary that this violation was the result of Respondent's high negligence. Allen admitted at hearing that he was not certified at the time of the violation, and in fact, was confused as to what was required. Instead of finding out what was required or calling in Williamson to ensure that the training was properly conducted, Allen had the men sign their forms and continue working. Further, there is absolutely no evidence that the eight affected miners ever received the required newly employed, experienced miner training contemplated by 30 C.F.R. §48.6(b). As such, I find that no mitigating circumstances exist and affirm the Secretary's high negligence designation. In light of the foregoing, Order No. 8098519 and the assessed penalty of \$14,743.00 are **AFFIRMED**.

B. WEVA 2012-481

1. Order No. 8136396

On October 12, 2011, Inspector Matilda Collins (“Collins”) wrote Order No. 8136396 (Exhibit GX-4) citing a Section 104(d)(2) violation of 30 C.F.R. §75.220(a) stating:

The operator is failing to follow the approved roof control plan. As specified on page 7 paragraph 4 the lengthwise spacing shall not exceed 4 feet. The following entries have not been support [*sic*] adequately: entry #4 – 1 cut; entry #5 – 2 cuts; entry #6 – 2 cuts; entry #7 – 2 cuts and entry #8 – 2 cuts, all exceeds the lengthwise bolt spacing of 4 feet in distance.

This is an unwarrantable failure to comply with a mandatory standard. The operator or his agent engaged in aggravating conduct constituting more than ordinary negligence by not recognizing the hazard of the roof supports not being installed according to the approved roof control plan.

This Order was designated as S&S and reasonably likely to result in fatal injuries to eight miners. *Id.* The inspector designated the operator’s negligence as high, and a penalty of \$7,774.00 was assessed. *Id.* The Order was terminated on October 14, 2011 when affected area was spot bolted. *Id.*

30 C.F.R. §75.220(a) entitled “Roof control plan” states, in pertinent part, “Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine.” 30 C.F.R. §75.220(a)(1).

Collins graduated from Virginia Polytechnic Institute and State University in 1980 with a degree in Mining Engineering. Tr. 143. She worked at a mine owned by her father where she roof bolted and assisted with plan submissions. Tr. 144-145. After twenty years out of the industry, she began working for MSHA in 2008 as a coal mine inspector. Tr. 146. She is currently the supervisor of Roof Control and Impalements. Tr. 147.

On October 12, 2011, Collins was at the Mine for an E01 regular inspection. Tr. 147. While conducting a danger run, she noticed that the roof bolts were irregularly spaced without a pattern. Tr. 149. According to Respondent’s roof control plan, roof bolts were to be inserted in a pattern of five feet wide and four feet deep. Tr. 149,151; Exhibit GX-12. While she and Section Boss Josh Collis did not measure every single bolt in the entries, they found several bolts that were not only inserted without a pattern but also exceeded the maximum spacing in the roof control plan. Tr. 189-191. Her notes taken at the time of the inspection, at Exhibit GX-5, indicate that the bolt spacing was five feet by five feet (instead of the plan required four feet by five feet) in entries 4 and 5. Her notes also reflect problems in entries 6, 7 and 8, where instead of the required four foot spacing, the spacing was 52-60 inches. This irregular pattern existed in Entries 4-8. Tr. 152-153. The pattern was so irregular that Collins could not determine the number of rows that existed. Tr. 205.

Inspector Collins explained that the purpose of roof bolting in a sandstone top⁷ was to form a beam that distributes the weight of the roof onto the pillars, preventing collapse. Tr. 157-158. Stress and water could cause the roof to collapse, and the irregular pattern could contribute to this by creating an insufficient beam. Tr. 158. If the roof collapsed on the miners working below, Collins testified that it would be fatal considering that a cubic foot of sandstone weighs approximately 165 pounds. Tr. 163. She believed that all eight miners working at the face would be affected because the crews often congregate to receive instructions. Tr. 159. She designated Order No. 8136396 as high negligence because she believed it was extensive and had lasted for about nine cuts, which constituted more than one shift. Tr. 159, 222. Collins testified that the obvious lack of pattern should have been noticed during a preshift or onshift examination. Tr. 159-160. The Order was terminated by spot bolting to bring the spacing into compliance. Tr. 164.

Respondent presented two witnesses to testify about this Order: Jeff Bennett and Charles Allen Sr. It did not call Josh Collis, the evening shift section foreman who accompanied the inspector, or offer any reason why he was not presented.

Jeff Bennett (“Bennett”) has been a miner for more than six years and testified for Respondent at the hearing. Tr. 265. After the issuance of the Order on the evening shift, Bennett was assigned on the following day shift to measure the bolts indicated. Tr. 272. He admitted that there were a few bolts beyond the required measurements, but not many according to the method he used for measuring. Tr. 273. He assumed a grid and measured distances according to this artificial line, rather than measuring on an angle. Tr. 273, 285. This is how he was trained to measure by Respondent. Tr. 286. He testified that the bolts along the rib line were “pretty straight” but “the ones that were wide – longwise was mainly in the middle.” Tr. 274. He further admitted that the first row of bolts in front of the face should be straight, and a pattern should be discernable even if misaligned. Tr. 291-292.

Allen testified that he conducted the preshift and onshift examinations after the bolting was complete. Tr. 304. While he did not measure every single bolt, the bolts that were measured were within the range of compliance. Tr. 306. He further explained that fully grouted resin bolts are used in the Mine. Tr. 307. The bolts bond layers of the strata together. Tr. 211. If cracks exist, the resin seeps in, fills them, and keeps everything bonded. Tr. 211, 307-308. If glue does not seep out of the bolt hole, it indicates that the resin has seeped into a crack. Tr. 309. In those situations, Allen testified that a test hole will be drilled adjacent to the original hole to investigate the top. Tr. 309.

As noted above Respondent did not call Josh Collis, the foreman who accompanied the inspector and helped her measure the distances between the irregularly spaced bolts. It is well established that if a witness has knowledge of a material issue and is within a party’s control, an inference may be drawn that the witness’ testimony would have been adverse to the party failing to call him. 75B Am Jur 2d § 1315; *Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149, 1150 (10th Cir. 1990). The Commission has long approved of its judges utilizing this rule. *Eagle Energy, Inc.*, 23 FMSHRC 1107, 1120 (2001). In the instant case, the Respondent failed to call the witness who made the measurements with the inspector and who therefore was in the

⁷ When compared to other forms of top, sandstone is considered to be good top. Tr. 211.

best position to support or contradict the inspector's testimony, despite that witness being in the Respondent's control. Consequently I draw the inference that if Collis had testified, his testimony would have been unfavorable to Respondent and would have supported inspector Collins' testimony that the roof bolts were not in the pattern or spacing required by the roof control plan.

I find that Respondent violated 30 C.F.R. § 75.220(a) when it failed to bolt within four feet of the last bolt as contemplated and approved in its roof control plan. Collins credibly testified that most of the bolts that she and Collis measured were beyond the requirement, some by as much as 12 inches. Respondent essentially argues that a violation did not exist according to its own measurements. The inherent flaw in its method, however, is that it measured to where the bolt should be, not to where it was. If this were an accepted method of measurement, it would create the absurd result of operators essentially bolting anywhere and measuring to where the bolt should be to maintain compliance. It is also significant that no witness testified that the bolting met the pattern established by the roof control plan.

I further conclude that the violation is S&S. Although Collins and Bennett did not see any adverse roof or rib conditions at that time, such conditions could reasonably occur over the course of continued mining as weight was insufficiently distributed over long distances. This is especially the case where the deficient spacing of the bolts -- leaving longer bolt spacing than required by the roof control plan -- is in the middle of the entry and not along the ribs, as testified to by Respondent witness Bennett. Tr. 274. At hearing, the testimony established that some areas of the mine do have roof problems. Tr. 260. The irregular bolting contributes to the hazard of a roof collapse. Given that this is a working section of the mine, it is reasonably likely that miners would be in the area. Collins testified that the miners also congregate in the entries to receive directions for the day. If a portion of the roof were to collapse, miners could suffer fatal injuries from being crushed or struck by falling rock. Based on the evidence and testimony at hearing, I affirm the Secretary's S&S designation.

I further find that the violation was the result of Respondent's high negligence. Based on Collins' testimony that she immediately noticed it, the violation was obvious. Further, it existed in five entries. Although Respondent offers evidence that a single-headed roof bolter makes it difficult to produce straight lines, its roof control plan was specifically created with the use of a single headed bolter in mind. Tr. 258. Moreover, the entries cited in the Order were the only entries affected by the unusual bolt pattern. Clearly, Respondent did not have trouble following the roof control plan in other areas of the mine. In light of the foregoing, Order No. 8136396 and its assessed penalty of \$7,774.00 are **AFFIRMED**.

2. Order No. 8136397

Also on October 12, 2011, Collins wrote Order No. 8136397 (Exhibit GX-6) citing a Section 104(d)(2) violation of 30 C.F.R. §75.211(c) stating:

The operator has created a hazardous condition when the boom hole was put in for the belt drive. The operator failed to recognize the hazardous roof condition and correct the condition before persons were assigned to work in this area. The

boom hole which is located in the adjacent intersection from spad #637 in #6 entry has a transition of up to 36 inches, consisting of fractured sandstone with open spaces of up to 2 inches between the layers. The operator used 42 inch resin bolts to hold the top. This left only 6 inches to be installed in the solid roof.

This is an unwarrantable failure to comply with a mandatory standard. The operator or this agent engaged in aggravating conduct constituting more than ordinary negligence by not recognizing the hazards of transition areas where persons work or travel.

The Order was designated as S&S and reasonably likely to result in fatal injuries to six miners. *Id.* The inspector designated the operator's negligence as high, and a penalty of \$5,645.00 was assessed. *Id.* The Order was terminated on October 14, 2012, when the area was rebolted with 72 inch super bolts. *Id.*

30 C.F.R. §75.211(c) entitled "Roof testing and scaling" provides:

When a hazardous roof, face, or rib condition is detected, the condition shall be corrected before there is any other work or travel in the affected area. If the affected area is left unattended, each entrance to the area shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel into the area.

A boom hole in a mine is a hole shot out with explosives to create a hole in the roof, which provides more room for an operator to install a new belt line. Tr. 166. It is dome shaped at the top where it has been blasted out and is square at the bottom where it intersects the roof. Tr. 172. When Collins arrived at the location of the boom hole in question, she testified that a crew of five men⁸ was working under it, and that one side of the hole had multiple fractures in the brow⁹, the largest of which was approximately two inches wide and at least two inches deep. Tr. 167-168, 178. She further testified that the brow was separating from the permanent roof in one approach. Tr. 167-168, 238. It was supported by 42 inch roof bolts, but Collins was concerned that the existence of the rock only allowed for about six inches of the bolt to be inserted into the permanent roof. Tr. 171; Exhibit GX-6. Although Respondent had scoped¹⁰ the area around the crack, it could not view the specific location and that was what concerned Collins. Tr. 246. In the end, Collins was not convinced that the roof was adequately supported. Tr. 248-249. In her

⁸ Collins admitted that although she listed six miners as being affected, all six of them could not fit in the boom hole at the same time. Tr. 257.

⁹ There is some dispute as to whether this was actually a brow. Allen testified that it was not; rather, it was simply a rock that could not be scaled down. Tr. 318. Therefore, the miners bolted it. Tr. 317-318. For the purpose of this decision, the distinction is not important.

¹⁰ A scope is entered into a hole so that any cracks or abnormalities in the layers of the roof can be viewed on a TV monitor. Tr. 247. The scope showed that there were two hairline cracks. Tr. 247-248.

opinion, she believed that the only effective way to secure the area was to install six to eight foot super bolts through the cracks or fractures in the rock so that the rock would be better attached to the roof. Tr. 176.

Collins' concern was that if the rock fell, miners could be crushed. Tr. 174, 255. Further, she feared that the loose rock would make equipment operators nervous, resulting in other accidents. Tr. 174, 257. In her opinion, any of these scenarios could result in a fatality. Tr. 174. The danger did not end with the belt installation either. Tr. 180. Belt men would have to maintain it, and miners would have to clean around it directly under the brow. Tr. 180, 238-239. Collins felt sure that the brow would eventually fall, and the water that existed in the mine would exacerbate the separation. Tr. 181. She believed that Respondent knew about the condition because additional roof bolts has been inserted and, in her opinion, loose top would be the only reason to do this. Tr. 173-174, 237.

Bennett testified for Respondent and stated that he helped bolt the boom hole about two weeks before the citation was written and at that time of the citation was being trained by Respondent as an underground mine foreman. Tr. 265, 267, 282. Bennett testified that timbers are set prior to blasting. Tr. 267-268. After blasting, the timbers are removed and the roof is bolted prior to cleaning. Tr. 267-268. After cleaning, extra bolts are set. Tr. 267. According to Bennett, a few sixty inch bolts were used, and he did notice at least one crack in the roof, but he could not judge how big the crack was.¹¹ Tr. 268-269, 281. Further, because some rock was hanging that could not be scaled, he inserted extra bolts in the area of the crack. Tr. 283. All of the bolts used in all four entrances around the boom hole were fully grouted, resin glue bolts. Tr. 269. The glue could be seen in the gaps of the brow. Tr. 270. Bennett testified that he believed the boom hole was in good condition when work was finished on it and at the time of the citation two weeks later. He stressed that eight foot super bolts were only inserted to abate the Order. Tr. 282, 287-288, 290, 325. He was assisted by scoop operator James Rose, who largely confirmed all of Bennett's observations. Tr. 297-299.

I find that the condition violated 30 C.F.R. § 75.211(c). After blasting the boom hole, a large rock was left hanging from the roof. Instead of finding a way to scale it, Respondent instead put up extra roof bolts. According to the regulation, Respondent either should have corrected the condition prior to allowing miners to work in the area or barricaded the area and posted warning signs to prevent access to the area. Because Respondent's attempt at putting up roof bolts did not fully correct the condition and allowed miners to work under the roof, I find that a violation existed.

Moreover, I find that the violation was S&S. As noted, Respondent did not fully comply with the cited regulation. Inspector Collins credibly testified that on one approach to the boom hole she observed that the brow was separating from the roof and she also observed multiple fractures in the brow, the largest of which was two inches wide and at least two inches deep. Respondent witness Bennett was uncertain as to large the crack was. These cracks or separations from the roof contributed to the hazard of a rock fall, which would be reasonably like to cause a

¹¹ Bennett testified that when a crack is hit, the roof bolt will "jump" when being pushed. Tr. 269. If, by contrast, the top is only soft, the roof bolt will move more quickly than it does in regular top. Tr. 269.

serious if not fatal injury to any employees working under the boom hole. This is an area where miners work for extended periods of time performing cleaning and maintenance tasks. There is also water in the mine which could exacerbate the possibility of a roof collapse. The boom hole area should have been bolted with the longer super bolts to assure that the brow or area around the boom hole was stable and did not show visible cracks or separations.

Although the Secretary asserts that the Respondent's negligence is high, I find that its negligence is low. Thus, the record reveals that Respondent inserted additional bolts immediately after blasting to ensure that the rock separating from the roof did occur. Bennett testified that a few sixty inch bolts were used, but most of the bolts were forty-two inches. He also testified that extra bolts were used because to insure that the area was safe. Respondent also "scoped" the area to see if it could determine the extent of the crack or separation. Collins also testified that Respondent would only have inserted extra bolts if loose top existed. Respondent realized that the rock could not be scaled down by the measures it took, so it took some additional steps in an effort to prevent injury. Therefore, I find that there are mitigating circumstances and reduce the negligence to low. I also find that the violation was not an unwarrantable failure under Section 104(d) of the Act as Respondent's conduct was not "aggravated" or reckless. Respondent did recognize the hazard and took steps to remedy the danger. Although the inspector believed that further steps (longer super bolts) were necessary to abate the violation, the record shows that Respondent did act.

Based on the above, Order No. 8136397 is **MODIFIED** from a 104(d) order to a 104(a) S&S, low negligence citation. I assess a penalty of \$1,500.00 for this violation.

3. WEVA 2012-559

1. Order No. 8143332

On September 26, 2012, Inspector John Stone ("Stone") wrote Order No. 8143332 (Exhibit GX-8) citing a Section 104(d)(2) violation of 30 C.F.R. §75.360(a)(1) stating:

A preshift exam was not performed in the intake airway where [sic] miners were working at the mine. Miners were found rock dusting and operating equipment from the section (life chamber location four breaks outby the LOCC) to the surface in this airway. These miners were not certified and the certified foreman at the mine had not traveled this area. The [sic] is an unwarrantable failure to comply with a mandatory standard.

Standard 75.36(a)(1) was cited 1 time in two years at mine 4606843 (1 to the operator, 0 to a contractor).

The Order was designated as S&S and reasonably likely to result in permanently disabling injuries to three miners. *Id.* The inspector designated the operator's negligence as high, and a penalty of \$4,000.00 was assessed. *Id.* The Order was terminated the next day when all members of management were instructed on the importance of conducting examinations where miners would be working. *Id.*

30 C.F.R. §75.360(a)(1) entitled “Preshift examination at fixed intervals” provides:

Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

Inspector Stone has worked in the mining industry for more than thirty years and has done various jobs in underground mines and cleaning plants throughout that time. Tr. 333. He began with MSHA in March 2007, and his current position is a CMI, or electrical specialist, as well as a collateral Conference Litigation Representative. Tr. 334. He was at the Mine on September 26, 2011, for a regular E01 inspection. Tr. 334-335. While entering the Mine with Foreman Mike Turner, Stone noticed a scoop operator exiting the intake. Tr. 335, 337. Stone did not recall seeing anything in the preshift examination book concerning the intake, so he asked foreman Allen about the situation and Allen admitted that a preshift examination had not been conducted in the intake. Tr. 335-336, 390, 492, Exhibit 9. Stone observed other miners rock dusting in the intake. Tr. 337. One of the miners from the intake explained to Stone that they were directed to continue doing what had been started either that day or a few days prior, and there was rock dust located in the intake, not at the belt line. Tr. 338, 379. Therefore, Stone concluded that management knew that the men would be in that location. Tr. 338.

Stone testified that the purpose of a preshift examination is to check an area of a mine for hazards, proper air quality and quantity, and proper air flow anywhere that miners travel or are scheduled to work. Tr. 339, 367, 371. If miners need to work outside of the initial area, a supplemental exam can be conducted. Tr. 369. In the absence of the examinations, miners could be exposed “to all sorts of different hazards.” Tr. 340. Therefore, Stone presumed that the three miners in the intake at the time of issuance would be exposed to permanently disabling injuries. Tr. 340, 342. He further designated the Order as a violation of Section 104(d) of the Act and high negligence because there were no mitigating circumstances. Tr. 343. Stone believed that management, specifically Allen, knew what work was being done in the intake and knew that the miners would continue rock dusting once they finished their work at the belt. Tr. 390-391.

Allen testified that one miner usually works on the belt, but three had been assigned on this particular day because Allen was concerned that Respondent would be cited for accumulations if one miner got behind on the work. Tr. 484-485. If the miners had been needed on a different section, Allen stated that he would have conducted a supplemental examination. Tr. 487. However, he testified that the miners proceeded to the intake without management’s knowledge, and he was not aware that there was rock dust in the intake. Tr. 489, 494, 515-516. Further, the scoop should have come out of the mine through the secondary escapeway rather than the intake. Tr. 489. Because a violation was issued, Allen talked to the men “harshly” concerning their behavior. Tr. 494-495.

I find that Respondent violated 30 C.F.R. § 75.360(a)(1) by allowing miners to work in an area of the mine where no preshift examination had been conducted. Stone found three miners working and the scoop operator exiting the intake, which Respondent admits had not been examined prior to the start of the shift. It argues that the men were not scheduled to work in the area and took it upon themselves to enter the intake to rock dust. However, Stone credibly testified that the miners' instructions were to continue the work that they had been doing in the prior days. This would have included rock dusting the intake. Further, it is telling that no rock dust was located at the belt. When the men were finished cleaning the belt, they would have logically progressed to an area of the Mine where they were previously working and contained the materials that were needed. If Respondent wanted the men to clean the belt and wait for further instruction, it should have made this clear. In light of this, I find that Respondent violated 30 C.F.R. § 75.360(a)(1) when it did not conduct a preshift examination in the intake.

I further find that the violation was S&S. The requirement of a preshift examination "is of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal*, 17 FMSHRC 8, 15 (Jan. 1995). Preshift examinations are intended to "prevent hazardous conditions from developing." *Enlow Fork Mining Company*, 19 FMSHRC 5, 15 (Jan. 1997). Failing to conduct the preshift examination contributes to an assortment of hazards ranging from the reasonable likelihood of minor injuries to death. In its brief, Respondent argues that the intake is not a normal working area and, therefore, is not required to be examined daily if work is not scheduled; rather, it is subject to a weekly examination. RPHB, page 14. This exacerbates the violation in that it increases the likelihood that the intake had not been examined for several shifts. The miners working on that day could have walked into any number of hazards. This could have reasonably led to the serious injury or death of any of the three miners working there.

Finally, I find that the violation was the result of Respondent's high negligence. Respondent argues that no miners were scheduled to work in the intake and, therefore, management had no knowledge that they would take matters into their own hands and work in an unexamined area of the mine. However, I find that Respondent did schedule miners to work in the intake. The miners' instructions were to "continue what work they had started either the day or couple shifts before in the intake airway." Tr. 338. The miners continued to tell Stone that they were to rock dust and clean the belt and finish rock dusting the intake. Tr. 338. Regardless of whether Respondent specifically meant for the workers to work in the intake, it gave them directions in such a way as to suggest that this was part of their tasks. Moreover, Respondent supplied the necessary materials in the intake, not on the belt. That rock dust was not to arrive until later in the day. Tr. 515-516. While Allen testified that he was unaware that there was rock dust in the intake, I find this unlikely because work was being conducted in the intake, at the very least, a few days prior. Given the evidence and testimony at hearing, I find that Respondent knew the miners would eventually progress to the intake and, nonetheless failed to conduct a preshift examination. I affirm the Secretary's high negligence designation. In light of all of the foregoing, Order No. 8143332 and its assessed penalty of \$4,000.00 are **AFFIRMED**.

2. Order No. 8143333¹²

Also on September 26, 2012, Inspector Stone wrote Order No. 8143333 (Exhibit GX-10) citing a Section 104(d)(2) violation of 30 C.F.R. §75.364(a) stating:

There was no weekly exam performed at the #1 and #2 seals located in the return airway at the mine. When these two seals were checked there were no dates, times or initials on the date board at these locations to indicate that an exam had been performed in the last 7 days. These two seals (out of nine in this set) were examined with the weekly examiner. Upon arriving at the seal locations the examiner was instructed by the authorized representative not to remove DTI's¹³ before inspection. The examiner removed DTI's on the date board placed at these two seals before it could be determined that a weekly examination had been performed. No other DTI's were found and evidence indicated than [*sic*] no weekly exam was performed. This is an unwarrantable failure to comply with a mandatory standard.

This Order was designated S&S and reasonably likely to result in permanently disabling injuries to one miner. *Id.* The inspector designated the operator's negligence as high, and a penalty of \$4,000.00 was assessed. *Id.* The Order was terminated the same day when an examination was performed and DTIs were placed on the date boards. *Id.* Management was further placed on notice that increased enforcement would result for future violations. *Id.*

30 C.F.R. §75.364(a) entitled "Weekly examination," and subtitled "Worked-out areas," states:

At least every 7 days, a certified person shall examine unsealed worked-out areas where no pillars have been recovered by traveling to the area of deepest penetration; measuring methane and oxygen concentrations and air quantities and making tests to determine if the area is moving in the proper direction in the area. The locations of measurement points where tests and measurements will be performed shall be included in the mine ventilation plan and shall be adequate in number and location to assure ventilation and air quality in the area. Air quantity measurements shall also be made where the air enters and leaves the worked-out area. An alternative method of evaluating the ventilation in the area may be approved in the ventilation plan.

¹² On November 12, 2013, I granted the Secretary's Motion to amend this Order and to plead in the alternative on the basis that the facts also support a violation of mandatory standard 30 C.F.R. §75.364(g), which provides that "The person making the weekly examination shall certify by initials, date, and the time that the examination was made."

¹³ DTI's refers to dates, time and initials. This information provides inspectors with a history of operator examinations.

During the same regular inspection, Stone and foreman Mike Turner traveled to two seals, which were remotely located from the others and were the most outby seals at the Mine.¹⁴ Tr. 343. The purpose of these two seals was to seal the newer section of the Mine from an older, worked-out section. Tr. 345. These two seals were accessed by crawling several hundred feet in muddy wet conditions to the seals; crawling was necessary as the top of the Mine at that point is only 26-28 inches with bad roof making access difficult. Tr. 347, Exhibit GX-11. As they approached the first seal, Turner, who was ahead of Stone, used his glove and hand to wipe the DTIs off the chalk board located near the seal before Stone could read it. Tr. 344, 355. At that point, Stone told Turner that the DTIs needed to be confirmed and when they got to the second seal, Turner should not remove the dates.¹⁵ Tr. 344, 358, Exhibit GX-11. However, when they arrived at the second seal, Turner again erased the DTIs. Tr. 344. In Stone's opinion, Turner's erasures were done to conceal evidence that the seals had not been examined in the last seven days as required by the regulation. Tr. 344, Exhibit GX-11.

Stone designated the Order as reasonably likely because the seals were constructed from Omega blocks, similar to foam insulation.¹⁶ Tr. 353. Although operators will often add strength to the seals using plaster, they can be penetrated by a pen or screwdriver. Tr. 353-354. Because dangerous gases accumulate behind the seals, Stone was concerned that these gases would migrate into the working section if the seal was damaged. Tr. 360. This could lead to an ignition or explosion, or it could expose miners to low oxygen levels. Tr. 360-361. Because the area is only subject to a weekly examination, the only miner affected would be the examiner. Tr. 361.

Stone designated Respondent's negligence as high because Turner erased the second DTI board after being instructed not to erase the DTIs as the dates needed to be confirmed. Tr. 344, 358. Turner never asked Stone to repeat or clarify what had been said. Tr. 359. He further testified that Turner was behaving in a nervous manner, and the area itself did not appear to be well traveled. Tr. 344, 350. Although the path was well worn, there was nothing to suggest that the requirement was actually being met, such as fresh boot or knee pad marks in the return. Tr. 350-351. Although the examinations were recorded in the books, Stone discounted them based on Turner's conduct and because there was no other evidence that the examination had, in fact, been conducted. Tr. 451-452, 456; Exhibits. RX-13-15.

To defend this Order, Respondent presented the testimony of foreman Allen and miner Bennett. Mr. Turner did not testify. Bennett testified that on September 14 and 21 he accompanied foreman Allen to examine the #1 and #2 seals as part of his training as a foreman. Tr. 477, 479, 481. Bennett stated that he observed Allen putting the date, time and his initials on

¹⁴ Stone testified that the other seals were inspected without issue. Tr. 346.

¹⁵ Stone testified that he believes he told Turner twice not to remove the DTIs. Tr. 344, 358.

¹⁶ The State of West Virginia considers these seals to be high risk and requires operators to inspect them daily. Tr. 350. Although Stone was unclear of the exact circumstances, he testified that this is required due to an explosion in a worked-out area in which the Omega seals did not hold. Tr. 354, 497, 501.

the date board and that Allen instructed him on how to examine seals. Tr. 478. He said further that Allen told him it was a felony to sign the examination forms if the examination had not been performed. Tr. 479, 482. Finally, he testified that he did not pay any attention to the DTIs that were on the date board. Tr. 480-481.

In his testimony, Allen confirmed that he and foreman trainee Bennett had gone to the #1 and #2 seals on September 14 and 21 to examine the seals and that he recorded the DTIs on those dates. Tr.499-504. Allen testified that after the Order was written, he asked Mike Turner why he erased the DTIs. Turner's only reply was "he couldn't hear good." Tr. 510-511. On cross-examination, Allen stated that during his deposition about the Order, when he questioned Turner, Turner admitted erasing the DTIs and that Stone had told him not to erase the date board. Allen also admitted that during the deposition he did not say anything about Turner's poor hearing. Tr. 523.

I find that Respondent violated 30 C.F.R. § 75.364(a) as set forth in the Order inasmuch as Respondent could not establish it examined Seals #1 and #2. This was because foreman Turner erased the DTIs on the date board before the inspector could verify their presence, despite being admonished by the inspector in a timely manner to not erase the DTIs at the second seal. I do not credit Allen's assertion that Turner told him he did not hear well or was hard of hearing.¹⁷ Further, Allen testified that Turner admitted to erasing the boards and had no further explanation for doing so. Tr. 511, 523. It is also significant that Respondent failed to call Turner as a witness since he was the person charged with erasing the DTIs. As with Josh Collis, noted about, I draw an adverse inference that had Turner been called to testify his testimony would have been unfavorable to Respondent. Since Turner was a certified examiner and foreman, he should have known that failing to keep records at the seals was a violation. Further, I agree with Stone's credible testimony that there would have been no reason to erase the boards unless Respondent was attempting to hide the fact that the examinations had not been conducted. Turner's unexplained conduct certainly supports this conclusion. Likewise, Turner's nervous behavior and failure to ask for clarification are telling and support Stone's testimony. Respondent argues that regardless of the erasure of the DTI boards, the examination books clearly show that the seals were examined daily and, therefore, weekly. Allen and Bennett testified that they had, in fact, examined the seals on September 14 and 21, 2011 and put the DTIs on the date board. Tr. 477-478, 480-481.¹⁸ If this were the case, it begs the question of why Turner would erase the boards. Further, the examination book records (Respondent Exhibits 13, 14 and 15) are only a record of the examination, and do not establish by themselves that the examination was in fact conducted. In light of all the facts and evidence, I find that Respondent violated 30 C.F.R. § 75.364(a).

I also find that this violation is S&S. Respondent's conduct here, through its agent Turner, prevented the inspector from determining if the required examinations of Seals #1 and #2

¹⁷ In this regard I note that the hard of hearing "defense" was not raised during the Secretary's deposition of Allen.

¹⁸ Respondent apparently argues that there was no violation here since foreman Allen had correctly examined the two seals on September 21, so that the next weekly examination was not due until September 28. This argument fails as the violation here is the concealment by erasure of all DTIs on the date of inspection (September 26).

had been completed. If there was not compliance with the regulation, this would have contributed to the likelihood of a serious injury. Because the seals are constructed of Omega blocks, they are more easily damaged or penetrated over time. Although MSHA does not so require, the State of West Virginia has labeled them high risk and requires them to be examined daily. This is particularly important because the worked-out areas behind the seals can contain dangerous gases, as well as low quality air. Any damage to the seals contributes to the hazard of noxious or flammable gases entering the working section. If this were to occur, at the very least, the examiner risks serious injury or death resulting from an ignition, an explosion or breathing poor quality air. As such, I conclude that the violation is S&S.

I further find that the violation was the result of Respondent's high negligence. Stone testified that the area was quiet, Turner was crawling in close proximity to him and Stone speaks loudly due to some loss of hearing. Tr. 357-358. Therefore, I conclude that Turner heard Stone and deleted the DTIs in direct defiance of the instructions that he had been given. In this regard, Stone's testimony that he instructed Turner not to erase the second date board is uncontradicted, and therefore fully supported by the record. Moreover, Turner was a certified foreman who should have known the examination requirements. Because Respondent cannot present any mitigating evidence, I affirm the Secretary's high negligence designation. Based on the foregoing, Order No. 8143333 is **AFFIRMED** and a \$4,000.00 penalty is assessed.¹⁹

III. THE APPROPRIATE CIVIL PENALTIES

It is well established that Section 110(i) of the Act grants to the Commission and its judges the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that:

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

30 U.S.C. § 820(i).

The Secretary submitted the operator's history of past violations with no objection from Respondent. Exhibit GX-1. There is no dispute concerning the appropriateness of the penalty to

¹⁹ As noted, the Secretary alleged an additional and/or alternative violation of 30 C.F.R. § 73.364(g) with respect to Turner's actions in erasing the DTIs on the date board. Although the argument is made in the Secretary's post-hearing brief that this was an additional violation, the Secretary does not urge any additional remedial relief. It would appear from the evidence adduced at the hearing would support a violation of § 73.364(g) apart from the violation of §73.364(a) found herein. However, inasmuch as no additional remedy is sought and the violation is essentially encompassed within the violation in the original Order, I decline to make a specific finding in this regard.

the size of the business. Further, the parties have stipulated to the fact that the penalties as assessed will not affect Respondent's ability to continue in business and Respondent's good faith in abating the violations. As stated above, the gravity for each violation except Order No. 8136397 was affirmed as issued. Therefore, a reduction in penalty was warranted for the reduction in gravity as to that Order. The same logic applies to the reduction in Respondent's negligence in Order No. 8136397. Based on the six civil penalty factors, I find that a total penalty of \$32,017.00 is warranted as follows:

Order No. 8098519 -- \$14,743.00
Order No. 8136396 -- \$7,774.00
Citation No. 8136397 -- \$1,500.00
Order No. 8143332 -- \$4,000.00
Order No. 8143333 --- \$4,000.00

IV. ORDER

It is **ORDERED** that Order Nos. 8098519, 8136396, 8143332 and 8143333 are **AFFIRMED**. It is further **ORDERED** that Order No. 8136397 is **MODIFIED** from a 104(d) order to a 104(a) citation, and that the operator's negligence be reduced from high to low. Respondent is **ORDERED** to pay the Secretary of Labor the sum of \$32,017.00 within 30 days of the date of this Decision.²⁰ Upon receipt of payment, this case is hereby **DISMISSED**.

/s/ Janet G. Harner
Janet G. Harner
Administrative Law Judge

Distribution:

Michele A. Horn, Esq., Office of the Solicitor, U.S. Department of Labor, Cesar E. Chavez Memorial Building, 1244 Speer Blvd., Denver, CO 80204

James F. Bowman, Litigation Representative, Sally Ann Coal Company, Inc., P.O. Box 99, Midway, WV 25878

²⁰ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

February 6, 2015

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

v.

TRI COUNTY COAL, LLC,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2011-0309
A.C. No. 11-02632-241358

Docket No. LAKE 2011-0377
A.C. No. 11-02632-243991

Docket No. LAKE 2011-0937
A.C. No. 11-02632-260765

Docket No. LAKE 2011-1051
A.C. No. 11-02632-263794

Mine: Crown III Mine

DECISION AND ORDER

Appearances: Emily L. B. Hays, Esq., Department of Labor, Office of the Solicitor,
Denver, CO, for Petitioner;

Wesley T. Campbell, Manager of Safety and Training, Farmersville, IL,
for Respondent.

Before: Judge L. Zane Gill

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”) involves seven section 104(a) citations, 30 U.S.C. § 814(a), issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Tri County Coal, LLC (“Tri County” or “Respondent”) at its Crown III Mine. The parties presented testimony on April 2, 2013, in St. Louis, MO.

During the hearing parties came to an agreement on one citation.¹ Additionally, the day before the hearing, Respondent withdrew its contest on Citation No. 8433712 for Docket LAKE 2011-0937. (Tr. 8:2-5) Citations No. 8429578, 8429598, 8429536, 8419112, 8419546, 8419577, 8419579 were litigated.

¹ I have approved the Secretary’s Motion in a Partial Settlement Decision dated December 23, 2014 for Citation No. 8419329, Docket No. LAKE 2011-0309, which was placed on stay in 2013, and Citation No. 8419572, Docket Lake 2011-1051, which was settled at the hearing.

Decision Summary

Citation No. 8429578 – Tri County violated § 75.630(b) of the Mine Act; its negligence was moderate; it was reasonably likely that an injury would occur and result in permanently disabling illness; and, the violation did not justify being designated as significant and substantial (“S&S”). I assess a penalty of \$300.00.

Citation No. 8429598 – Tri County violated § 75.630(b) of the Mine Act; its negligence was moderate; it was reasonably likely that an injury would occur and result in permanently disabling illness; and, the violation did not justify being designated as S&S. I assess a penalty of \$300.00.

Citation No. 8429536 – Tri County violated § 75.75.1505(b) of the Mine Act; its negligence was high; it was reasonably likely that an injury would occur and result in a fatality; and, the violation was properly designated as S&S. I assess a penalty of \$3,144.00.

Citation No. 8419112 – Tri County violated § 75.220(a)(1) of the Mine Act; its negligence was moderate; it was reasonably likely that an injury would occur and result in a fatality; and, the violation was properly designated as S&S. I assess a penalty of \$1,944.00.

Citation No. 8419546 – Tri County violated § 75.403 of the Mine Act; its negligence was moderate; and, it was reasonably likely that an injury would occur and result in a fatality. I assess a penalty of \$634.00.

Citation No. 8419577 – Tri County violated § 75.604(b) of the Mine Act; its negligence was moderate; and, it was reasonably likely that an injury would occur and result in a fatality. I assess a penalty of \$425.00.

Citation No. 8419579 – Tri County violated § 75.604(b) of the Mine Act; its negligence was moderate; it was reasonably likely that an injury would occur and result in a fatality; and, it was properly designated as S&S. I assess a penalty of \$2,106.00.

Stipulations:

The parties submitted the following stipulations at the hearing: (Tr. 452:10 – 453:1)

1. These dockets involve an underground coal mine known as Crown III Mine, which is owned by Springfield Coal Company and operated by Tri County Coal, LLC;
2. The mine, located in Macoupin County, Illinois, MSHA ID 11-02632, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, the Mine Act, 30 U.S.C. § 801 through 965;
3. The administrative law judge has jurisdiction over these proceedings pursuant to Section 105 of the Mine Act. 30 U.S.C. § 815;

4. Respondent is an operator as defined in 3(d) of the Mine Act, 30 U.S.C. § 803(d);
5. Respondent is engaged in mining operations in the United States and its mining operations affect interstate commerce;
6. Dennis Baum, Henry Trutter, Matthew Lemons, and Marsha Price are authorized representatives of the United States Secretary of Labor and were acting in an official capacity when the citations were issued;
7. Respondent demonstrated good faith in abating the violations at issue in these dockets;
8. The proposed penalties will not affect respondent's ability to remain in business;
9. The certified copies of the MSHA assessed violations history reflect the history of the mine for 15 months prior to the date of issuance of the citations at issue and may be admitted into evidence without objection by Tri County;
10. The Secretary modifies citation 8429536 in docket LAKE-2011-377 from unlikely to reasonably likely and from non-significant and substantial to significant and substantial.

Basic Legal Principals

Significant and Substantial

The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) (“The Secretary’s burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.”) Some of the citations in dispute and discussed below have been designated by the Secretary as S&S. A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999).

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation was S&S:

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

6 FMSHRC 1, 3-4 (Jan. 1984).

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984)). The Secretary, however, “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574.

There is additional case law regarding evacuation standards for S&S designations. The Commission found that “[e]vacuation standards are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs. When the citation for a violation of an evacuation standard is issued, presumably no emergency exists at that moment.” *Cumberland Coal Res.*, 33 FMSHRC at 2367. The Court also laid out the application of the second and third elements of the *Mathies* test to evacuation standards as follows:

Regarding the second *Mathies* element, the judge found that the hazard contributed to by the violations was “miners not escaping quickly in an emergency with attendant increased risk of injuries due to a delay in escape.” We conclude that this statement is an accurate description of the relevant hazard contributed to by the violations [...] [I]n addressing the third *Mathies* element, the next

question before the judge was whether there was a reasonable likelihood that this identified hazard would result in injury.

Id. at 2364-65. (internal citations omitted)

Negligence

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* “MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.” *Id.* Reckless negligence is present when “[t]he operator displayed conduct which exhibits the absence of the slightest degree of care.” *Id.* High negligence is when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Low negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* No negligence is when “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.*

The Commission has provided guidance for making the negligence determination in *A. H. Smith Stone Co.*, stating that:

Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to satisfy the appropriate duty can lead to a finding of negligence... In this type of case, we look to such considerations as the foreseeability of the miner’s conduct, the risks involved, and the operator’s supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

5 FMSHRC 13, 15 (Jan. 1983)(citations omitted).

Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions.

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), “is often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sep. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984) and *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987)). The seriousness of a violation can be examined by looking at

the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990)(ALJ Fauver). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28.

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."); *See American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ Zielinski).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, 293 *Sellersburg Stone Co.*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of

negligence and gravity more heavily than the other four statutory criteria). For example, violations involving “extreme gravity” and/or “gross negligence,” or, as stated in the former section of 105(a), “an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances,” may dictate higher penalty assessments. *See* 30 C.F.R. Part 100 Final Rule, 72 Fed. Reg. at 13,621.

In addition, Commission ALJs are obligated to explain any substantial divergence between a penalty imposed and that proposed by the Secretary. As explained in *Sellersburg Stone Co.*, 5 FMSHRC at 293:

When ... it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves that Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

Citation No. 8429578 (LAKE 2011-0937) and Citation No. 8429598 (LAKE 2011-0937)

On May 2, 2011, at 11:30am MSHA Inspector Marsha Price² (“Price”) issued Citation No. 8429578 to Tri County Coal’s Crown III Mine alleging a violation of 30 C.F.R. § 72.630(b) pursuant to Section 104(a)³ of the Mine Act. The relevant section of the regulation states that “[d]ust collectors shall be maintained in permissible and operating condition.” 30 C.F.R. § 72.630(b). Section 72.630(b) regulates a mandatory safety standard. The Citation alleges:

The dust collection system on the Fletcher Double Boom Bolter company number 30, serial number 91010/2005348, operating on the number 1 Unit (MMU 010-0) is not being maintained in permissible and operating condition. The following conditions were found: (1) The left drill pod has a bolt missing on the bottom of the pod. (2) Fine dust has accumulated on the clean side of the

² At the time of the trial, Marsha Price had been working at MSHA since 2005 as a health specialist, mine inspector, and had been a CLR since October, 2011. (Tr. 11:23 – 12:17) As a health specialist, Price reviewed ventilation plans, dust parameters, and ran respirable dust sampling at different mines. (Tr. 12:18-22) Price is a member of the “dust busters,” a team of health specialists that perform health analysis of respirable dust in mines. (Tr. 13:1-9) Price is a regular certified mine inspector as well. (Tr. 13:10-12) Prince has CMI training, health specialty training, training from the National Dust Lab in Pittsburgh, CLR training, special investigation training, and the annual refresher trainings. (Tr. 13:21 – 14:12) Price also worked for American Coal and Kerr-McGee for over 15 years before joining MSHA. (Tr. 14:21)

³ All citations are 104(a) citations, and therefore, no analysis is necessary to determine if unwarrantable failures existed.

filter media of the left side collection box. (3) The dust collection approval tag is not on the machine.

Ex. S-5.

On June 8, 2011, at 5:10pm Inspector Price issued Citation No. 8429598 to Tri County Coal's Crown III Mine also alleging a violation of 30 C.F.R. § 72.630(b) pursuant to Section 104(a) of the Mine Act. The Citation alleges:

The dust collection system on the Fletcher double boom bolter, company number 58, being used on MMU 013-0 active miner unit, is not being maintained in permissible and operating condition in that the following conditions were found: (1) The suction hose connector is leaking on the right side of the drill arm. (2) Three bolts are missing on the bottom of the left side drill pod. (3) The suction hose under the left side drill pod has a hole in it. (4) Fine dust has accumulated on the clean side of the filter media in the right side dust collection box.

Ex. S-9.

Violations

Respondent does not dispute that the conditions Inspector Price observed were violations. (Tr.73:17-19) Inspector Price determined that the dust collection systems for both citations were not being maintained in permissible or operating condition, in violation of the standard. "Permissible, as applied to a dust collector, means that it conforms to the requirements of this part, and that a certificate of approval to that effect has been issued." 30 C.F.R. § 33.2(a).

Manufacturers of dust collection systems for use on roof bolters in mines must submit them for testing by MSHA, which entails measuring the net concentration of airborne dust at each drill operator's position while a series of test holes are drilled. *See, gen. [sic.]* 30 C.F.R. Part 33. Additionally, dust concentrations may not exceed 10 million particles (5 microns or less in diameter) per cubic foot of air. 30 C.F.R. § 33.33(b). Systems that pass the test are issued a certificate of approval, which must be reproduced as an approval plate. The plate must be stamped or affixed to the unit, which identifies it as permissible. *Id.* § 33.11. Without an approval plate, no unit has the status of "permissible." *Id.* § 33.11(d). Use of the approval plate is not authorized except on units that conform strictly with the drawings and specifications upon which the certificate of approval was based. *Id.* § 33.11(e).

Tri County Coal, LLC, 34 FMSHRC 3255, 3274 (Dec. 2012) (ALJ Zielinski).

Citation No. 8429578 deals with the left side dust collection system. It alleges an injury was reasonably likely to occur, the injury could reasonably be expected to result in permanently disabling injury, the violation was S&S, two people could be affected, and the negligence level was moderate. (Ex. S-5) Citation No. 8429578 identifies three issues on a Fletcher roof bolter: (1) the left drill pod was missing a bolt underneath the pod; (2) there was dust behind the clean side of the filter media; and (3) the Respondent did not have a dust approval tag or plate on the machine. (Tr. 16:19-22)

Inspector Price testified that to check if bolts on the Fletcher roof bolter are secure, she one checked the vacuum pressure with a gauge and listened to hear if there were any leaks. (Tr. 25:3-20) Price testified that when she performed the vacuum test, she was alerted that there was a bolt missing by what she heard. *Id.* She asked the operator raise the drill so she could see if a bolt was missing. She visually confirmed that a bolt was missing on the left drill pod. (*Id.*; Tr. 23:16-17; Ex. S-5) Price testified that a missing bolt can cause the cap to loosen, which causes a leak in the vacuum system, and if left unfixed, causes the other bolts to loosen, resulting in a drop in vacuum below the 12 inches-of-mercury minimum. (Tr. 25:22-25)

Price also determined that an MSHA-issued approval tag or plate was missing. (Tr. 27:14-19) The MSHA tag assigns the machine an identification number and designates the approved suction level in inches-of-mercury. *Id.* Price concluded that the dust collection unit was not being maintained in a permissible and operating condition because of the missing bolt and the missing MSHA plate. (Tr. 26:8-22; Tr. 28:19-20)

Price asked the operator to remove the dust filter for inspection. (Tr. 21:10-14) She could see and feel dust behind the clean side of the filter on the left side dust box. *Id.* If functioning properly, the filter media prevents respirable dust from entering into the exhaust system and the mine atmosphere. (Tr. 19:11-19) Price considers dust on the clean side of the filter evidence that the dust collector is not in proper operating condition and thus not permissible. (Tr. 23:8-13)

Citation No. 8429598 deals with the right side dust collection system. It alleges that an injury was reasonably likely to occur, the injury could reasonably be expected to result in permanently disabling injury, the violation was significant and substantial, two people could be affected, and the negligence standard level was moderate. (Ex. S-9) Citation No. 8429598 identifies four violating conditions: (1) the suction hose connector on the right side of the drill arm was leaking; (2) three bolts were missing on the bottom of the left side drill pod; (3) the suction hose under the left side drill pod had a hole in it; and, (4) fine dust had accumulated on the clean side of the filter media in the right side dust collection box. *Id.*

First, Price observed and found that the right side drill arm's suction hose was leaking. (Tr. 47:13-25) The suction hose connects on the bottom side of the drill pod and runs to a collection box. *Id.* Price testified that she observed a hole and air leakage on the drill-arm connector. (Tr. 48:20-22) Price testified that she used a vacuum gauge on the drill pod and heard a leak. (Tr. 49:10-11) The leaking suction hose connector causes a bypass in the suction system. (Tr. 49:12-14) Price concluded that the suction hose was not being maintained in a

permissible condition per the MSHA approval plate and it was not in operating condition because it was not functioning correctly. (Tr. 50:9-17; Tr. 50:4-8)

Second, Price discovered a hole in the suction hose on the left side of the drill pod. (Tr. 51:4-6) She testified that she used the same method as before and could hear sound coming from the hole in the hose. (Tr. 52:6-8) She measured the vacuum level; on the left side it was 12 inches, and on the right it measured 18 inches. (Tr. 52:9-16) Price testified that because of the hole in the hose, the vacuum level on the left side was near the low end of the allowable vacuum range – 12 inches. (Tr. 53:3-7) Price concluded that the hole in the left side hose was not permissible. (Tr. 53:19-24)

Third, three bolts were missing on the left side drill pod. (Tr. 53:10-13; Tr.54:4-10) Price testified that, as above, she saw that three bolts were missing (Tr. 54:15-18) and concluded that the dust collector was not in permissible or operating condition because of the missing bolts. (Tr. 54:19-24)

Fourth, dust had accumulated on the clean side of the filter media in the right-side dust collection box. (Tr. 55:2-7) At Price's request, the operator opened the dust collection boxes and removed the filter for her to inspect. (Tr. 55:4-7) She concluded that the dust collection box was not being maintained in permissible condition and was not in operating condition because of the dust behind the filter. (Tr. 56:1-8)

Tri County argues that, under the Secretary's regulations, dust collection systems must be evaluated as a whole, and that without evidence of dust sampling showing non-compliance with applicable performance standards, the citation must be vacated. "It is well-settled, however, that section 72.630, upon which the citation was based, is a workplace standard designed to protect, not only drill operators, but other miners in the immediate area, and that enforcement of the standard does not require dust sampling." *Tri County Coal, LLC*, 34 FMSHRC at 3274-75; *Jim Walter Resources, Inc.*, 17 FMSHRC 1423, 1444-45 (Aug. 1995) (ALJ Barbour); *aff'd Jim Walter Resources, Inc. v. Sec'y of Labor*, 103 F.3d 1020, 1024 (D.C. Cir. 1997), cited in *Genwal Resources, Inc.*, 27 FMSHRC 580, 588 (Aug. 2005) (ALJ Manning); *White Buck Coal Co.*, 30 FMSHRC 535, 541-42 (June 2008) (ALJ Hodgdon).

Although it can be argued that a vacuum level of 12 inches of mercury did not render the system inoperable, MSHA would not have issued a certificate of approval for a system with a hole in the suction hose, a leak in the hose connector, or a component with missing bolts. Additionally, the presence of visible dust on the clean side of the filters is credible evidence that the dust collection systems were not maintained in a permissible or operating condition. If the systems were working properly, there should not have been any dust on the clean side of the filters. If visible dust can bypass the filters, invisible respirable dust can also bypass them and be exhausted into the mine atmosphere. I find that the left-side dust collection system for Citation No. 8429578 and the right-side dust collection system for Citation No. 8429598 were not maintained in permissible condition. Tri County violated Section 72.630(b) of the Mine Act for Citation Nos. 8429578 and 8429598.

Negligence

Inspector Price assessed both violations at the level of moderate negligence. As stated above, moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3(d). Price designated Citation No. 8429578 as moderate negligence because the mine requires a pre-shift examination of the roof bolters in its ventilation plan. (Tr. 44:18 – 45:5; Tr. 70:10-18) The section foremen and/or the roof bolters should have known of the condition because the section foreman approves the pre-shift examination. *Id.* Similarly, Price designated Citation No. 8429598 as moderate negligence, because the operator should have known of the condition due to the pre-shift examination requirement. (Tr. 57:1-4) Based on the above, I agree and find Respondent’s negligence to be moderate for both Citation Nos. 8429578 and 8429598.

Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. These Citations were marked as reasonably likely to result in permanently disabling illness or injury, namely black lung or lung disease, from miners breathing contaminated atmosphere. (Tr. 29:1-11; Tr. 44:4-12; Tr. 56:11-13) Price testified that when she designates something as reasonably likely, she looks to the condition at the time of the inspection and factors in what could be anticipated if the condition were allowed to continue. (Tr. 56:14-19)

Price testified that breathing even a small amount of respirable dust can cause an eventual deterioration of lung capacity and overall health, and further, the more exposure one has, the more potential there is for black lung to develop over time. (Tr. 30:16-19; Tr. 32:12-17) Price also testified that she is aware of studies showing that even a small amount of exposure to respirable dust over time can lead to lung disease. (Tr. 104:22 – 105:3)⁴ Price also testified that she marked the citations as permanently disabling because exposure to respirable dust can restrict lung capacity and breathing and can be fatal, if the illness is serious enough. (Tr. 31:3-12; 44:4-12)⁵ I agree that it is reasonably likely that breathing respirable dust could result in serious injury, i.e. permanently disabling lung disease. Therefore, I find that it is reasonably likely that the illness would be serious in nature.

⁴ Price testified that the studies she was referring to are publically available from NIOSH and MSHA. (Tr. 105:4-9)

⁵ In the Secretary’s Brief, he emphasized the fact that the mine had repeated violations of Section 72.630(b), which he claimed is evidence of multiple or repeated exposure to respirable dust. The fact that a citation was issued in and of itself is not proof that there is actual exposure to respirable dust, nor is it proof that an S&S designation should be upheld for the Citations at issue in this case.

Significant and Substantial

There was a violation of a mandatory safety standard for both citations. The improperly maintained dust collection systems contributed to a discrete safety hazard, i.e., respirable dust expelled into the mine's atmosphere subjected miners to the risk of developing lung disease. Any such illness would be serious. What is left to be determined is whether it was reasonably likely that the hazard identified here would contribute to an illness.

“There is no doubt that a violation of the respirable dust standards, sections 70.100⁶ or 70.101, 30 C.F.R. §§ 70.100 or 70.101, is presumed to be ‘significant and substantial.’” *White Buck Coal Co.*, 30 FMSHRC at 541-42; *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274, 1281 (Sept. 1986); *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986). However, the dust collector violations in this case do not arise from respirable dust standards. They involve a workplace practice standard which does not require a showing of dust sampling results above a minimum concentration (as the respirable dust standards do) and the related presumption of disease causation built into the sampling criteria. Every element of an S&S allegation must be proved by a preponderance of evidence unless there is an applicable presumption that can substitute for actual provable facts. The Secretary asks the court to graft the same presumption of causation from the respirable dust standards onto the workplace standards involved in these citations, and therein lies the rub.

Commission judges have been divided about how to apply Section 72.630(b). Some appear to have interpreted the legislative history to support an S&S designation based on a presumption of disease causation. *See, e.g., White Buck Coal Co.*, 30 FMSHRC 535, 541-42; *Genwal Resources, Inc.*, 27 FMSHRC 580, 588-89.⁷ Specifically, the legislative introduction to

⁶ Respirable dust standards: “(a) Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed, as measured with an approved sampling device and expressed in terms of an equivalent concentration, at or below: (1) 2.0 milligrams of respirable dust per cubic meter of air (mg/m^3). (2) 1.5 mg/m^3 as of August 1, 2016. (b) Each operator shall continuously maintain the average concentration of respirable dust within 200 feet outby the working faces of each section in the intake airways as measured with an approved sampling device and expressed in terms of an equivalent concentration at or below: (1) 1.0 mg/m^3 . (2) 0.5 mg/m^3 as of August 1, 2016.” 30 C.F.R. § 70.100.

⁷ In both *White Buck and Genwal* there is considerable evidence of visible dust in the mine atmosphere, significant duration of the dust in the atmosphere, and miners being immediately exposed to the dust escaping the filtration system. These conditions can legitimately be presumed to persist as part of continuing normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. As such the reference to the language about the dangers of dust in the mine environment in the legislative history is *dicta*. On their facts, these cases align themselves with *Tri-County Coal* and *Banner Blue Coal*, which reject the notion that disease causation can be presumed merely from the legislative history. All four decisions can be harmonized with the idea that disease causation must be proved by preponderant evidence when
(continued...)

Section 72.630(b) notes that during drilling, “there is the potential for extremely high exposures in short periods of time to both miners doing the [...] drilling and to other miners in the immediate areas.” Air Quality Standards for Abrasive Blasting and Drill Dust Control, 59 Fed. Reg. 8318 (February 18, 1994). Further, “[t]he development of silicosis and pneumoconiosis among underground coal miners has been well documented, particularly among roof bolters and transportation workers”⁸ *Id.* at 8322, and that “§ 72.630 is a work practice standard that does not require sampling.” *Id.*

Others have resisted applying a presumption of disease causation derived from the legislative language. Within this camp, the Secretary still bears the burden of proving disease causation despite the concern for lung disease mentioned in the legislative history. Thus, the finding that a violation deserves an S&S designation must be based on preponderant facts rather than a presumption of causation. *See, e.g., Tri County Coal*, 34 FMSHRC at 3274-75; *Banner Blue Coal Co.*, 34 FMSHRC 1321, 1342 (June 2012)(ALJ Koutras). My decision follows this line of cases. I cannot find a rationale from the cited legislative language to dispense with the requirement that disease causation must be proved directly by preponderant evidence.

Without a presumption that the mere presence of respirable dust in the mine atmosphere (the hazard) causes lung disease, irrespective of its concentration, its constituent makeup, its duration, and without the benefits of actual dust sampling data, I must limit my review to the evidence in the record to determine whether the S&S requirement -- that the hazard contributes to a serious disease or injury -- is satisfied.

As always, the Secretary carries the burden to prove, based on a preponderance of evidence, that there was respirable dust in the mine atmosphere, that the amount of dust in the atmosphere, its makeup, duration, and presence near the miners, if any, created a reasonable likelihood that a serious illness would result.

The Secretary suggests two reasons for the S&S designation: (1) a suction disruption due to the holes and missing bolts will cause respirable dust to enter the mine atmosphere, which causes serious illness; and (2) it can be inferred that dust on the clean side of the filter means that respirable dust is entering the mine atmosphere, which causes serious illness. Indeed, Price testified that the only time MSHA issues an S&S citation for a violation of this standard is when dust is on the clean side of the filter or the vacuum level is less than 12 inches of mercury. (Tr. 57:22-58:7) She testified that both or either of these scenarios apply in this case. (Tr. 58:18-21)

⁷ (...continued)

the violation is for a workplace practice standard rather than a respirable dust standard. Violation of the latter follows from proof of extant atmospheric dust determined by dust sampling. As such, the causation element needed for an S&S determination is subsumed in an empirical maximum allowable dust measurement, which is another way of saying that disease causation is presumed for the respirable dust standards, but not for general workplace standards.

⁸ At the hearing I stated that: “I’m more interested in having this causation tied to this citation, not just general. I can take judicial notice that exposure - some exposure to respirable dust can cause black lung, that’s not really a question.” (Tr. 105:16-17)

The evidence is clear that there was a hole in the right side suction hose, a leak in the hose connectors, missing bolts, and dust on the clean side of the filters.

The filter element is designed to prevent respirable dust from entering the miner's atmosphere after passing through the dust control system. (Tr. 19:11-19) Price testified that dust on the clean side of the filter shows that dust has entered the mine atmosphere (Tr. 55:20-25), and that it takes a significant amount of dust to become visible on the filter. (Tr. 89:10-13) Further, Price testified that the visible dust on the clean side of the filter represents large dust particles that have escaped the filter unit. She inferred from this that invisible and respirable dust particles also bypassed the filter and went into the mine atmosphere. (Tr. 90:1-5) Price testified that dust behind the filter contributes to lung disease. (Tr. 76:5-6)

Price testified that she could not take air samples on the days she wrote these citations because on both of the days, the mine was operating below the minimum production threshold necessary to make dust samples relevant under MSHA's respirable dust sampling regimen. (Tr. 66:3-7)⁹ Additionally and importantly, she did not observe airborne dust coming out of the exhaust system at any time. (Tr. 88:22-23)

According to Price, when the bolter is being moved, one operator is in back of the machine handling the cables, behind the exhaust system. (Tr. 33:23 – 34:5)¹⁰ Anyone downwind of the roof bolter could be exposed to respirable dust, including the roof bolter operators. (Tr. 33:15-20) The exhaust systems of the roof bolters in question are powered when the roof bolter is being moved. (Tr. 36:7-9) When the machine moves from place to place, the vacuum system is not operating but the exhaust system is. (Tr. 86:8-15) On the day of the inspection, the roof bolter operators were not wearing respirators. (Tr. 40:15-17)

The fact remains that despite Price's testimony regarding a bypass in the vacuum system, both roof bolters were measured for suction and were within the 12 inches-of-mercury requirement. (Tr. 68:14-17) Although the suction might not have been functioning optimally due to bypasses in the system, it was still within the parameters set by MSHA. While the roof bolter noted in Citation No. 8429578 did not have an MSHA approval tag outlining the appropriate inches-of-mercury parameters, Price testified that as a general rule, the allowable range of vacuum is 12 to 22 inches. (Tr. 53:1-2)

In summary, the weight of evidence does not support a conclusion that these violations were S&S. The only evidence tending to show that respirable dust could have entered the mine atmosphere is the presence of dust behind the filter elements. The evidence showing permissibility problems and lack of operational condition must be balanced against the fact that the vacuum levels for both systems were within MSHA guidelines. Although it could be inferred from this that some respirable dust might have entered the mine atmosphere, there is

⁹ Prince testified that she was at Crow III to work on EOIs and to run respirable dust sampling for the quarter. (Tr. 16:1-3)

¹⁰ Prince testified that it takes anywhere from five to thirty minutes to move a roof bolter and it is moved approximately two to six times a shift. (Tr. 36:10-14)

nothing to show duration, concentration, makeup, or anything else relevant to establish that the violating conditions were reasonably likely to contribute to the development of lung disease. I conclude that the Secretary has failed to carry his burden to prove that the violations warrant an S&S designation.

Price designated both citations as potentially affecting two people. However, in light of my findings above and of the testimony that only one roof bolter would be downstream from the exhaust at the time the roof bolter was being moved, it is necessary to modify both citations from two persons affected to one person affected.

Penalty

For Citations No. 8429578 and 8429598, the Secretary suggests a penalty of \$1,026.00 each. Tri County's mine produces 1,310,941 tons annually. Tri County was moderately negligent. Tri County's business will not be significantly affected by the penalty sought by the Secretary. The violations are not S&S. According to the parties' stipulations, Tri County demonstrated good faith in abatement of the violating conditions. Considering the factors itemized in section 110(i), and guided by the Secretary's penalty assessment regulations, I impose a penalty of \$300.00 for each violation – a total of \$600.00.

Citation No. 8429536 (LAKE 2011-0377)

On December 7, 2010, at 8:35am MSHA Inspector Price issued Citation No. 8429536 to Tri County Coal's Crown III Mine alleging a violation of 30 C.F.R. § 75.1505(b) pursuant to Section 104(a) of the Mine Act. The regulation states that "[a]ll maps shall be kept up-to-date and any change in route of travel, location of doors, location of refuge alternatives, or direction of airflow shall be shown on the maps by the end of the shift on which the change is made." 30 C.F.R. § 75.1505(b). Section 75.1505(b) is a mandatory safety standard. The Citation alleges:

All maps shall be kept up-to-date and any change in route of travel, location of doors, location of refuge alternatives, or direction of airflow shall be shown on the maps by the end of the shift on which the change is made. The Refuge Chamber located at crosscut 10 between entry 7 and entry 8, the Refuge Chamber located at crosscut 10 and the lifelines in the primary and secondary escapeways are not noted on the active Number One Unit, the Third West, MMU 011-0.

Ex. S-2.

Violation

The Citation alleges that an injury is unlikely; an injury could reasonably be expected to be fatal; the violation was not S&S; one person could be affected; and high negligence. *Id.* However, the parties stipulated to modify Citation No. 8429536 from unlikely to reasonably

likely and from non-S&S to S&S.¹¹ (Tr. 9:23 – 10:1; Tr. 144:16 – 145:24) Respondent presented no evidence at trial to contradict Price’s testimony, and did not dispute the fact of the violation in its brief. (Resp. Br. at 13)

Price testified that the regulation generally requires that all mine maps be kept up to date, and any changes in the mine must be added to the maps. (Tr. 112:22 – 113:3) Price testified that the correct locations of two refuge chambers were not shown on three different mine maps. (Tr. 114:7-20; Tr. 113:19-21)¹² Price also testified that the lifelines for the alternate and primary escapeways were not marked on the three escapeway maps. (Tr. 113:7-13; Tr. 116:6-20) The three incorrect maps were located at the two refuge chambers and at the end of the primary escapeway, or the first point at which a miner would access a lifeline to exit the mine in case of an emergency. (Tr. 116:15-20)

I find that Tri County failed to show the correct locations of the refuge chambers and escapeway lifelines on the three maps mentioned above. This violated Section 75.1505(b) of the Mine Act.

Negligence

Inspector Price assessed both violations as arising from high negligence. As stated above, high negligence is when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. § 100.3(d). Price testified that the mine conducts a pre-shift examination of the alternative escapeway and the refuge chambers for each shift. Therefore, an examiner had been at the chamber several times and never noticed that the map was inaccurate. (Tr. 125:8-16) Additionally, miners are required to perform periodic escapeway drills. Generally, there is one person in charge of maps during such drills. (Tr. 126:11-20; Tr. 130:14-16) The inaccurate maps existed long enough for miners to make 14 crosscuts, which Price testified could be anywhere from several days to weeks. (Tr. 125:17-22) Additionally, the examination records on the outside of the refuge chambers did not reflect that the maps were inaccurate. (Tr. 141:21-22)

Price designated the citation as high negligence because mine management knew or should have known about the defective maps, and there were no mitigating circumstances. (Tr. 124:23 – 125:5) I agree and conclude that Respondent’s negligence for Citation No. 8429536 was high.

Gravity

The citation’s gravity was classified as unlikely to cause injury or illness, but Price

¹¹ The Secretary made a formal motion at the hearing to amend the pleading to mark the Citation as reasonably likely and S&S (Tr.144:17-19), however, since the Respondent stipulated and agreed to the change, a formal ruling on the record was not necessary. (Tr. 145:8-23)

¹² The refuge chambers were actually located at crosscut 10 between entry seven and eight, and at crosscut 10 between entry six and seven. (Tr. 114:7-20; Tr. 113:19-21)

testified that in hindsight she should have raised the gravity designation to reasonably likely and S&S. (Tr. 122:10-25) Price stated that she should have evaluated the condition in the context of an emergency, stating that it would be reasonably likely in an emergency that this condition would result in a fatal injury if a miner couldn't find a refuge chamber or if he followed the wrong escapeway out of the mine. (Tr. 122:10-16)

Price designated this citation as fatal because in an emergency situation the confusion caused by inaccurate map information could cause a miner to panic, thus increasing the likelihood he would die from lack of oxygen or not be able to find his way out of the mine. (Tr. 123:123:4-7) One of the inaccurate maps was located at the first point a miner would access if he were trying to escape. Panic and confusion could cause a miner to travel in the wrong direction, and the resulting delay could cost the miner valuable breathing time on his self-rescuer. (Tr. 118:2 – 119:13) An inaccurate map increases the likelihood of panic, particularly if a miner is running out of oxygen and cannot find a refuge chamber or escapeway lifeline. (Tr. 121:7-13; Tr. 118:13-23)

Price added that when a miner enters a refuge chamber, he takes the mine map in with him so he can give the rescue team at the surface his location. (Tr. 121:4-6; Tr. 123:17 – 124:4) If the miner gives rescuers the wrong location because the map is not accurate, he might not be rescued. (Tr. 123:17 – 124:4)

Price designated the citation as affecting one person, but she testified she should have marked it for the whole crew, perhaps 10 to 14 persons. (Tr. 124:7-20) I find it reasonably likely that in an emergency a crew would be affected, but the Secretary did not prove by a preponderance of evidence how many persons would be in the crew. Therefore, I assess the number of persons affected as three – the continuous miner operator, his helper, and the foreman.

Based on these facts and inferences, I conclude that the injury possible from the scenario of miners not being able to escape the mine quickly because of inaccurate maps could be serious and potentially fatal.

Significant and Substantial

I have determined that there was a violation of a mandatory safety standard and there was a reasonable likelihood that a reasonably serious injury would ensue. The three inaccurate maps gave incorrect locations for two refuge chambers, the lifeline for the alternate escapeway, and the lifeline for the primary escapeway. This contributed to a discrete safety hazard which had the potential of resulting in injuries to miners who might not be able to quickly escape the mine. I must yet determine whether there was a reasonable likelihood that the hazard was reasonably likely to result in an injury. *Mathies*, 6 FMSHRC at 3-4.

A miner must know where to go in an emergency. (Tr. 118:2-4) Updated and current escapeway maps are crucial in an emergency. (Tr. 128:20-22) Price testified that the impact of not showing refuge chambers on the mine map depends on the timing of events. (Tr. 119:7-13) Self-rescuers only have a certain amount of oxygen which must last until a refuge chamber is

found. *Id.* If a miner runs out of oxygen, he might not make it out of the mine. (Tr. 118:13-23) If a miner actually makes it to a refuge chamber, he is trained to take the map into the chamber with him so he can communicate his location. (Tr. 120:24 – 121:3) However, as explained above, if a miner gives rescuers the wrong location, the chances increase that rescuers will not reach him in time.

Lifelines are a backup escape measure. A miner could follow a lifeline out of the mine without a map, however the potential for confusion increases in the dark and panic without an accurate map. (Tr. 117:16-20) Indeed, a miner might follow a lifeline to the place on an out-of-date map where a refuge is supposed to be only to realize it is not there. The inverse is also possible. A miner might follow a lifeline and be close to a refuge not shown on the map but not know it. (Tr. 119:14-19)

Respondent argued that the hazard was not reasonably likely to result in an injury because its miners participated in previous escapeway drills. (Tr. 130:1-131:24) However, previous training is not a substitute for accurate maps. Training cannot guarantee that in a real-time emergency situation where miners are more likely to be panicked and relying on escapeway maps to guide them safely out of the mine or to refuge chambers that their drill experience will lead them to safety. Furthermore, “[e]scapeway maps are the primary source of information needed by miners as they are evacuating the mine. Locations of refuge alternatives are critical to decisions made during evacuation efforts and must be kept current on the escapeway map.” Refuge Alternatives for Underground Coal Mines, 73 Fed. Reg. 80656, 80681 (Dec. 31, 2008).

Respondent also argued that the presence of lifelines should mitigate the likelihood of injury. This argument is unavailing, however, because the Mine Act requires both lifelines and accurate maps. 30 C.F.R §§ 75.1505(b); 75.380(d)(7). Additionally, there is well established Commission and D.C. Circuit case law holding that the presence of redundant safety systems is irrelevant to the designation of a violation as S&S. *Cumberland Coal Res., LP, v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013). Something that is required to be on hand is not properly considered a mitigating factor in this context.

In an emergency, the out-of-date maps would show an incorrect location for the lifelines in the primary and secondary escapeways and the two refuge chambers. Importantly, it is incorrect to assume a lifeline would always be present during an emergency. The emergency itself could obliterate it, increasing a miner’s need for and reliance on the mine map to exit the mine or find a refuge chamber. Even assuming a miner did find a refuge chamber; incorrect information on the map located at the refuge chamber itself would still be reasonably likely to result in an injury because the miner might not be able to give an accurate location to a rescue team. In this case, both refuge chambers had inaccurate maps. In an emergency two separate rescue crews could have been misled by the inaccurate maps.

I conclude there was a reasonable likelihood that the inaccurate maps would result in injury, i.e. the inability of a miner or miners to escape quickly, or at all, in an emergency. Thus, the Secretary proved by a preponderance of the evidence that an S&S designation was warranted for Citation No. 8429536.

Penalty

The Secretary proposed a penalty of \$2,107.00 for this violation. Tri County's mine produces 1,310,941 tons annually. Tri County's negligence was high. Its business will not be significantly affected by the penalty sought by the Secretary. The violation is S&S. According to the parties' stipulations, Tri County demonstrated good faith in abatement of the violating conditions. Considering the factors itemized in section 110(i), and guided by the Secretary's penalty assessment regulations, I impose a penalty of \$3,144.00.

Citation No. 8419112 (LAKE 2011-0309)

On October 30, 2010, at 1:50am MSHA Inspector Dennis Baum¹³ ("Baum") issued Citation No. 8419112 to Tri County Coal's Crown III Mine alleging a violation of 30 C.F.R. § 75.220(a)(1) pursuant to Section 104(a) of the Mine Act. The regulation states that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered." 30 C.F.R. § 75.220(a)(1). Section 75.220(a)(1) regulates a mandatory safety standard. The citation alleges:

A violation of the operator's approved roof control plan is present in the unit 1, 3W/2S panel. Two areas have been mined in excess of the 18' wide maximum that is allowed by the plan. Location 1 is in the number 3 entry from the inby rib line of the intersection at survey station 490 inby toward the face. This wide place measured approximately 18'6" to 20" wide for a distance of approximately 27'. Location 2 is in the last open crosscut between entries 2 and 3 at survey station 420. This place was mined 19'1" to 20' wide for a distance of approximately 37'. Standard 75.220(a)(1) was cited 41 times in two years at mine 1102632 (41 to the operator, 0 to a contractor).

Ex. S-14.

¹³ At the time of the hearing, Dennis Baum had worked for MSHA since 2007. (Tr. 147:14-15) From March, 2012 until June, 2012, Baum was a Certified Mine Inspector for MSHA (Tr. 147:11-15), and he was a roof control specialist since June, 2012. (Tr. 147:3-10) Inspector Baum completed the mine academy training and had refresher training. (Tr. 148:7-14) He worked in mines for over 25 years and for part of that he worked at Crown III. (Tr. 149:21-24) He was also a UMWA safety committee chairman for about 15 years. *Id.* When he worked at Crown III it was operated by Freeman United Coal Mining Company (Tr. 150:3-6)

Violation

The Citation alleges that the violating condition is reasonably likely to result in an injury, the injury could reasonably be expected to be fatal, the violation was significant and substantial, two persons could be affected, and the negligence level was moderate. *Id.*

Inspector Baum was at the mine as part of an EO1 inspection. (Tr. 151:2-6) He testified that he found a violation of the roof control plan, viz. two locations had been mined in excess of the maximum width allowed by the plan. (Tr. 152:16-23) Respondent does not dispute the fact that the area was mined in excess of the approved roof control plan. (Resp. Br. at 17)

The maximum entry width at the Crown II mine is 18 feet per the roof control plan. (Tr. 153:20-23; Tr. 154:17-18; Ex. S-16, pg. 2) Page 11 of the roof control plan provides that if miners inadvertently mine the entries too wide, or if the ribs weather and slough off, the mine must take additional measures to install supplemental support. (Tr.154:19 – 155:6; Ex. S-16, pg. 11) According to the roof control plan, in those instances: “a bolt, no less than 2 foot long, will be installed between the rows of bolts and the rib to compensate for the wider entry.” (Ex. S-16, pg. 2) Respondent had not installed supplemental support at the two cited locations as required by the roof control plan. (Tr. 155:7-16)

The first location was in entry number three at the last open crosscut toward the face; it extended approximately 27 feet and was approximately 20 feet wide. (Tr. 153:2-12) Baum measured the roof with a tape measure. (Tr. 153:12-13) There was no additional support installed at this location. (Tr. 155:7-10)

The second location was in crosscut entries two and three, where examiners and the foreman take air readings. (Tr. 156:3-9) The width at this location ranged from 19 feet 1 inch to 20 feet for approximately 37 feet, which is almost the entire length of the coal pillar. (Tr. 156:13-15) Baum measured the width with a tape measure. (Tr. 156:16-17)

Baum testified that Respondent abated the violation by installing 19 fully grouted bolts between the two locations and putting a bolt at least two feet long between the existing rows of bolts in the wide area. (Tr. 164:17-22) He also testified that the violating conditions were not the result of sloughage; they had been mined too wide. (Tr. 165:24-25) The roof control plan specified a maximum width of 18 feet. However, in two locations, the width was more – as much as 20 feet. There was also no additional support, as required under the roof control plan.

I find that the width of the entries at the two locations just discussed exceeded the maximum set by the roof control plan. I conclude that the Respondent violated Section 75.220(a)(1) of the Act.

Negligence

Inspector Baum assessed the violation at moderate negligence. Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but

there are mitigating circumstances.” 30 C.F.R. § 100.3(d). Respondent did not object to Baum’s negligence designation. (Tr. 171:25 – 172:3)

Baum chose moderate negligence because the pre-shift mine examiner and the foreman knew or should have known about the roof condition from being in the area while taking air readings. (Tr. 162:8-16) Additionally, Baum testified that the mine has a policy that the roof must be measured after it is cut and bolted. *Id.* Inspector Baum testified that he could have issued the citation as high negligence. (Tr. 162:22-24) Baum further testified that in the entry itself, the excess cut width was obvious enough that somebody should have seen it, especially since there were people in that area regularly. (Tr. 162:17-19)

I conclude that Respondent was moderately negligent for Citation No. 8419112.

Gravity

Inspector Baum testified that the violating conditions must have existed for a shift or more based on when the areas would have been mined. (Tr. 164:2-5) The first location extended approximately 27 feet with a width of approximately 20 feet. The second location was approximately 37 feet long – almost the entire length of the coal pillar – and was approximately 19 feet 1 inch to 20 feet wide. The danger to miners was proportionately greater because the excess cutting occurred in two locations.

It is clear that a miner could be injured by a roof fall. (Tr. 158:2-4) It is obvious that if a roof slab fell on a miner, the injury could be fatal. Baum testified that such a roof slab could be more than 18 feet wide and 6 feet thick. (Tr. 159:18-24) I conclude that if a roof fall were to occur under these circumstances, it could result in a fatality. Two persons could be affected – the continuous miner operator and his helper. (Tr. 160:10-16)

This failure to comply with the roof control plan posed a discrete safety hazard. Miners were subjected to the danger of falling rock from an unstable and inadequately supported roof. “[P]ractices that compromise the integrity of the mine roof or are permitted to exist in an area of compromised integrity are *per se* of a ‘reasonably serious nature.’” *Excel Mining, LLC*, 34 FMSHRC 99, 116 (ALJ Gill). I conclude that there was a reasonable likelihood of serious injury to two persons.

Significant and Substantial

Roof control plans are tailored for the specific conditions in each mine. MSHA set the maximum cut width for this mine at 18 feet. (Tr. 158:13-17) Inspector Baum designated this citation as S&S because, consistent with *Mathies*, there was a violation of a mandatory safety standard giving rise to a reasonable likelihood of serious injury and involving at least moderate negligence. (Tr. 160:19 – 161:2) Baum designated the citation as reasonably likely to cause an injury because of poor roof conditions and the mine’s history of roof falls. (Tr. 157:10-23)

In the last open crosscut, the roof had “potted out,” (part of the roof had fallen out) prior to being bolted, indicating to Baum that the roof was susceptible of falling. *Id.* Baum testified

that he observed a visible slip running toward the face, parallel with the entry. (Tr. 159:5-8) A slip is an anomaly in the roof caused by a change in rock strata, which according to Baum, increases the chance of a roof fall. (Tr. 159:9-13) Additionally, the fact that there were roof falls despite changes made to the roof control plan to deal with them, indicates that the quality of the mine roof in general was poor. (Tr. 176:17-22)

Miners were regularly exposed to the poor roof conditions. In the first location, the over cut was found at the last open crosscut in by the face, which meant that people were regularly going to and coming from the face throughout the shift. (Tr. 155:20 – 156:1) Baum also testified that the second location was used for haulage and ventilation, and mine examiners and foreman did their examinations regularly throughout the shift at that location. (Tr. 156:22 – 157:5)

Respondent argued that there had been no fatalities from previous roof falls at the mine. (Tr. 169:18-24) But, it conceded in its brief that if the roof were to fail as Inspector Baum opined, and if miners were under it, “a fatal injury would likely result.” (Resp. Br. at 18) Respondent also argued that it was not reasonably likely that an injury would occur because there was no evidence in the record that roof failure was imminent. *Id.* However, this is not the correct standard to apply. The Court evaluates the citation in the context of continued mining operations. Miners would be exposed to the hazards of a roof fall in the two cited unsupported roof areas if a roof fall occurred.

Respondent also argued that the unit was idle. (Resp. Br. at 18; Tr. 173:5-6) The unit may have been idle at the time of the citation, but there were still people working in that section, namely, the section foreman and a couple of miners who were bolting and cleaning the face. (Tr. 175:10-21) Additionally, the condition had lasted for more than one shift, and in the context of continued mining operations, would have continued to exist unabated. Finally, exposure to the hazard was particularly high at the first location because of the greater width of the cut and the fact that miners worked there on a regular basis.

The Secretary has proved by preponderance of evidence that the excess cut width contributed to the hazard of a roof fall which was reasonably likely to result in serious injury. Therefore, I find that the S&S designation was warranted for Citation No. 8419112.

Penalty

The Secretary proposed a penalty of \$1,944.00 for this violation. Tri County’s mine produces 1,310,941 tons annually. Tri County’s negligence was moderate. Its business will not be significantly affected by the penalty sought by the Secretary. The violation is S&S. According to the parties’ stipulations, Tri County demonstrated good faith in abatement of the violating conditions. Considering the factors itemized in section 110(i), and guided by the Secretary's penalty assessment regulations, I impose a penalty of \$1,944.00.

Citation No. 8419546 (LAKE 2011-0937)

On May 23, 2011, at 9:45am, MSHA Inspector Baum issued Citation No. 8419546 to Tri County Coal’s Crown III Mine alleging a violation of 30 C.F.R. § 75.403 pursuant to

Section 104(a) of the Mine Act. The regulation states that “[w]here rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 80 percent. Where methane is present in any ventilating current, the percent of incombustible content of such combined dust shall be increased 0.4 percent for each 0.1 percent of methane.” 30 C.F.R. § 75.403. Section 75.403 regulates a mandatory safety standard. The citation alleges:

No dry rock dust has been applied over previously wet dusted surfaces of the roof, ribs and floor in the 9 Right/2 West Sub-Mains, 002/013 MMU. This condition is present in the following locations. 1. Entry number 1 from survey station 680 to survey station 890. 2. Entry number 2 from survey station 590 to survey station 890. 3. Entry number 3 from survey station 680 to survey station 890. 4. Entry number 4 from survey station 680 to survey station 890. 5. Entry number 5 from survey station 750 to survey station 890. 6. Entry number 6 from survey station 680 to survey station 960. 7. Entries number 7-10 from survey station 820 to survey station 960. These areas also include the adjoining crosscuts.

Ex. S-18.

Violation

The Citation alleges that injury is unlikely; the injury could reasonably be expected to be fatal; the violation was not S&S; four persons could be affected; and, the negligence level was moderate. *Id.* Inspector Baum testified that under Section 75.403, rock dust must be applied to roof, ribs, and the floor of the coal mine and be maintained at least at 80 percent incombustible content. (Tr. 183:3-10) Rock dust is used to neutralize the danger of an explosion. (Tr. 196:7-9) Baum testified that the areas in question were in the working section, and there were a number of locations where he observed that no dry dust had been applied to the ribs and roof. (Tr. 183:11-15)

The areas in question were dry. (Tr. 189:22-24) Baum used his fingers to test areas to determine if they were wet and needed dusting. (Tr. 190:10-13) Dry rock dust had not been applied in seven places across the whole section from entries 1 through 20, ranging from 200 to 300 feet in length, including the adjoining crosscuts between entries. (Tr. 190:18-25) In total, approximately 1,900 linear feet were not properly dry or wet dusted. (Sec’y Br. at 29)

Baum testified that the area in question had been wet dusted. (Tr. 183:18-19) Respondent may wet dust initially, but when the wet dust dries, it must go back and apply dry dust. (Tr. 184:16-23) The Program Policy Manual dated February, 2003 states: “After the wet rock dust dries, additional dry rock dust shall be applied to all surfaces to meet applicable standards.” (Tr. 188:4-11; Ex. S-36) Inspector Baum testified that even the wet dusting in the violating areas was rather poor. (Tr. 184:25) He testified that the wet dust covered about 50

percent of the area and looked speckled (Tr. 185:8-08; 194:1-3). He could determine visually that there was not 80 percent coverage. (Tr. 204:19-21) Baum also testified that at the time he issued the citation, the Respondent's representative voiced no objection. (Tr. 205:5-7)

Respondent argued that they were not in violation of Section 75.403 because they had wet dusted and because the area was not dry but was in fact damp. Inspector Baum did testify that the roof and rib were damp, but he testified that they were not wet. (Tr. 201:1-3) The dampness of the rock dusting relates to likelihood of an accident or injury occurring (Tr. 222:16-17), not whether the Respondent violated Section 75.403. And as Inspector Baum noted, there is moisture everywhere underground in a coal mine. (Tr. 221:19-22)

Respondent's "damp" argument is unconvincing because irrespective of whether the area was damp and not dry, the Respondent's dust application was insufficient to meet the standard.

I find that Respondent did not adequately dry dust the areas in question. I also find that in the areas that were wet dusted, the surfaces had dried sufficiently to require dry dusting. The combined coverage was insufficient to satisfy the standard. Therefore, for the reasons stated above, I conclude that Respondent violated Section 75.403.

Negligence

Inspector Baum determined that the violation resulted from moderate negligence. Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). Baum testified that he chose moderate negligence because the working section is examined before and during each shift by a foreman. (Tr. 198:14-25) Additionally, Baum had conversations with management before the Citation was issued regarding the requirement that dry dust be applied after wet dusting. (Tr. 186:12-20)

Baum testified that the areas were dry dusted after the citation was issued. (Tr. 200:4) Baum cited this as the reason he listed moderate negligence; management was aware of this requirement and had made some effort to comply. (Tr. 191:1-5)

I find moderate negligence for Citation No. 8419546.

Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Baum designated the Citation as unlikely because ignition conditions were not present at the time. (Tr. 198:9-10; Ex. S-18)

Baum testified that the areas in question were not dry dusted for more than one shift based on the location relative to the face. (Tr. 192:22 – 193:8) He also testified an ignition is more likely to occur at the face because that is where the methane is liberated during the mining

cycle. (Tr. 193:9-13) Here, however, he did not detect methane at the face nor did the mine have a history of face ignitions. Baum marked the Citation as unlikely to result in an injury. (Tr. 195:6-18)

Baum testified that if there were an injury, it would involve at least lost work days or restricted duty. However, he designated the gravity as fatal because if an ignition occurred at the face it would likely result in severe burns. (Tr. 196:10-25; 197:12-21) Baum determined that four people would be affected, namely the four ram car operators that were in the area. (Tr. 197:2-4)

I find that the injury was serious in nature, was unlikely to occur, but if it did occur could reasonably be expected to be fatal.

Penalty

The Secretary proposed a penalty of \$634.00. Tri County's mine produces 1,310,941 tons annually. Tri County's negligence was moderate. Its business will not be significantly affected by the penalty sought by the Secretary. The citation was not designated as S&S. According to the parties' stipulations, Tri County demonstrated good faith in abatement of the violating conditions. Considering the factors itemized in section 110(i), and guided by the Secretary's penalty assessment regulations, I impose a penalty of \$634.00.

Citation No. 8419577 (LAKE 2011-1051) and Citation No. 8419579 (LAKE 2011-1051)

On July 6, 2011, at 11:10 am, MSHA Inspector Baum issued Citation No. 8419577 to Tri County Coal's Crown III Mine alleging a violation of 30 C.F.R. § 75.604(b) pursuant to Section 104(a) of the Mine Act. The regulation states "[w]hen permanent splices in trailing cables are made, they shall be: [...] (b) Effectively insulated and sealed so as to exclude moisture [...]" 30 C.F.R. § 75.604(b). Citation No. 8419577 alleges:

The number 2, 3 conductor trailing cable supplying 480 VAC power to the number 57 roof bolter, contains two defective permanent type splices that are no longer effectively insulated and sealed so as to exclude moisture. The outer jacket of both of these splices is split open around the splice nearly to the inner insulated conductors.

Ex. S-24.

On July 7, 2011, at 10:05 am, Inspector Baum issued Citation No. 8419579 to Tri County Coal's Crown III Mine alleging a violation of 30 C.F.R. § 75.604(b) pursuant to Section 104(a) of the Mine Act. Citation No. 8419579 alleges:

The number 2, 3 conductor trailing cable, supplying 480 VAC power to the number 58 roof bolter, contains one defective permanent type splice that is no longer effectively insulated and sealed so as to exclude moisture.

The outer jacket material is split open exposing the insulated inner conductors. This bolter is in service in the 9 North/2 West Sub-Mains, 002/013 MMU.

Ex. S-27.

Violations

Respondent does not contest the violations, but disputes the “fatal” designation for both citations and the S&S designation for Citation No. 8419579. (Resp. Br. at 22) Baum described the process he used to inspect the cables: He started at the power center, required the mine to turn off the power, and performed a hand-over-hand evaluation of the entire cable, except for areas he could not reach because they were hung too high. (Tr. 238:10-19) To inspect the splices, Baum flexed the cable to see if it was sealed. (Tr. 239:3-6) For the hanging cables, Baum observed the splices with his naked eye. (Tr. 239:21-23) A hand-to-hand examination was not needed for the splices that were cited because they were visible. (Tr. 240:12-16)

Citation No. 8419577 alleges that an injury was unlikely; the injury could reasonably be expected to be fatal; the violation was not S&S; one person could be affected; and, negligence was cited as moderate. (Ex. S-24) Inspector Baum found two defective permanent splices on roof bolter cable No. 57. (Tr. 226:10-13) He testified that the outer jacket material was split and the only thing that was left underneath was some tape. (Tr. 226:15-19)

The tough rubber outer jacket on these cables is there to protect the inner conductors and to keep moisture out. (Tr. 226:22-25) The opening Baum found would have allowed dirt, debris, and moisture to reach the inner conductors. (Tr. 227:3-6) Baum stated that if moisture gets in and a person makes contact, he could be electrocuted. (Tr. 227:8-18)

Citation No. 8419579 alleges that injury is reasonably likely; the injury could reasonably be expected to be fatal; the violation was S&S; one person could be affected; and, negligence was listed as moderate. (Ex. S-27) On roof bolter No. 58, Baum found one splice. The inner insulated conductors were exposed. (Tr. 231:11-18) Baum testified that the cable was not adequately insulated and sealed to exclude moisture. (Tr. 245:19-20)

I conclude that Respondent violated Section 75.604(b) for Citation Nos. 8419577 and 8419579.

Negligence

Inspector Baum assessed moderate negligence for both violations. Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3(d).

For Citation No. 8419577, Baum chose moderate negligence because this condition should have been found during a weekly electrical examination. (Tr. 229:13-21) Baum testified that the operator had told MSHA on numerous occasions that they had a policy requiring miners

to walk their machine cables to look for violating conditions. *Id.* Baum stated that this condition would have been obvious to anybody checking the cable. *Id.*

Baum designated Citation No. 8419579 as arising from moderate negligence because if miners had checked their cables as the operator indicated was their practice, someone should have seen the violation and fixed the problem. (Tr. 234:13-20) Additionally, this condition should have been found during the weekly bolter examination. (Tr. 234:1-20) Baum testified that the condition was obvious. (Tr. 234:6-7)

I conclude that Respondent was moderately negligent for both Citation Nos. 8419577 and 9419579.

Gravity

Citation No. 8419577 was designated as unlikely because the tear did not extend all the way through to the inner conductors, the cable was hanging up on the rib and somewhat out of the way, and the tear was in an area that would not generally be handled by anybody during the shift. (Tr. 227:19-228:3) Baum testified that if someone were to come into contact with defective cable splice, the 480-volt load could cause a fatal electrical shock. (Tr. 228:4-9) The condition existed for at least a shift. (Tr. 229:22-24) Baum designated the citation as affecting one person because generally only one person handles the cable at a time. (Tr. 229:7-12)

In contrast, Citation No. 8419579 was designated as reasonably likely. (Ex. S-27) The splice was in an area near the bolter where it would have been handled throughout the shift on a regular basis. (Tr. 232:7-9) Additionally, the cable would be energized when in use. (Tr. 231:22-24) When the roof bolter is moved, miners have to hang the cable, take the cable down, reel it up, deploy it along the ribs, and keep it out of the way. (Tr. 232:14-19) Baum testified that a fatal electric shock could happen. (Tr. 233:10-12) He determined that one person would be affected because only one person handles the cable at a time. (Tr. 233:15-19) Baum testified that the condition lasted at least one shift. (Tr. 234:23-25)

Respondent argued that the citations should be limited to “lost workdays” because a NIOSH study shows that only 3.3% of all reportable coal mine electrical injuries were fatal, whereas 90% of the injuries resulted in lost workdays or restricted duty. (Resp. Br. at 21) Respondent also stated that according to the MSHA website, there were only three electrical fatalities between 2001 and 2007. *Id.* Respondent used a risk management analysis to determine that the likelihood of injury would not be fatal. *Id.* at 22. This is not the proper analysis when the court makes a determination of gravity.

The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator’s conduct with respect to that standard, in the context of the Mine Act’s purpose of limiting violations and protecting the safety and health of miners. *Harlan Cumberland Coal Co.*, 12 FMSHRC at 140. Additionally, the Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130. Citing statistics of fatalities at other mines over a period of time does not adequately account for

the presumption of continued mining operations at the mine in question and under the circumstances at the mine when the citation was issued. Thus, I find Respondent's argument to be less convincing than the Secretary's.

I find that for Citation No. 8419577 an injury was unlikely and for Citation No. 8419579 was reasonably likely to occur, but for both citations, the injury would be reasonably serious in nature, i.e., electrocution.

Significant and Substantial

Citation No. 8419579 described a violation of a mandatory safety standard. There was a reasonable likelihood that the injury in question will be reasonably serious. The defective cable splice created an electrocution hazard. The S&S allegation requires that I determine whether there was a reasonable likelihood that the hazard would result in an injury.¹⁴

Baum testified that the splice was in an area near the bolter where it would have been handled throughout the shift on a regular basis. He also testified that the cable was on the ground, and it would only take a pinhole in the insulation on the conductor for the electricity to get out if the conditions were right. (Tr. 233:1-6) Additionally, in this case the tear extended through to the inner conductors, creating a greater chance of shock. (Tr. 233:20-234:6) In addition, because the splice had opened all the way to the inner conductor, the cable was more likely to sustain additional damage during continued mining operations. (Tr. 232:2-9) Respondent's witness Randy Aymer ("Aymer")¹⁵ testified that, as the cable is being moved along the mine floor, rocks and debris could get inside the outer jacket and cause further damage to the inner conductor. (Tr. 252:22 – 253:16)

Respondent argued that Citation No. 8419579 should not be designated as S&S because the bolter was not in use at the time of inspection, no work was scheduled for the machine for the remainder of the vacation period, and the roof bolter cable would have been checked as part of the required electrical permissibility prior to the roof bolter being placed back into service. (Resp. Br. at 22) Baum testified that even though the mine was idle for a vacation break, maintenance and repair crews were still working in the mine. (Tr. 241:18-20) Baum also testified that if the damaged cable was not found, it would have existed when mining resumed after the vacation. (Tr. 242:4-10) Respondent presented no evidence, other than conclusory statements in its brief, that no work was scheduled for the roof bolter during the vacation period and that the machine had been tagged out, which would require a permissibility inspection if returned into service. As such, Respondent's argument is unconvincing.

¹⁴ Citation No. 8419577 was not designated as S&S, and therefore, no analysis is necessary.

¹⁵ At the time of the hearing, Randy Aymer was the chief underground maintenance person for Tri County Coal. (Tr. 247:25 – 248:1) He has worked in the mine since 1973 and been chief electrician for a majority of the time. (Tr. 248:4-10)

Aymer testified that if a fault occurs in the system, a ground check device would prevent electrocution, unless the inner insulation was damaged. (Tr. 250:9-23) For Citation No. 8419579, the inner insulation was damaged. (Tr. 250:9-23). Aymer confirmed that 480 volts could kill a person. (Tr. 257:1-2) On rebuttal, Inspector Baum testified that a defect in the cable covering does not always trip the ground fault protector as Aymer suggested. Baum has witnessed machines running with cuts in the cable. (Tr. 259:2-7) He testified that minor damage to the inner conductors does not necessarily cause the power to turn off. (Tr. 259:9-10)

I conclude that it was reasonably likely that the defective cable splice could contribute to an injury because of its location and the fact that the tear went all the way to the inner conductors. The Secretary proved by a preponderance of the evidence that the S&S designation was warranted for Citation No. 8419579.

Penalty

For Citation No. 8419577, the Secretary proposed a penalty of \$425.00. Tri County's mine produces 1,310,941 tons annually. Tri County's negligence was moderate. Its business will not be significantly affected by the penalty sought by the Secretary. The citation was not designated as S&S. According to the parties' stipulations, Tri County demonstrated good faith in abatement of the violating conditions. Considering the factors itemized in section 110(i), and guided by the Secretary's penalty assessment regulations, I impose a penalty of \$425.00.

For Citation No. 8419579, the Secretary proposed a penalty of \$2,106.00. Tri County's mine produces 1,310,941 tons annually. Tri County's negligence was moderate. Its business will not be significantly affected by the penalty sought by the Secretary. The citation is S&S. According to the stipulations agreed to by the parties, Tri County demonstrated good faith in abatement of the violative condition. Considering the factors itemized in section 110(i), and guided by the Secretary's penalty assessment regulations, I impose a penalty of \$2,106.00.

WHEREFORE, it is **ORDERED** that Tri County pay a penalty of **\$8,853.00** within thirty (30) days of the filing of this decision.

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

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February 9, 2015

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

v.

JANNEY PAINTING,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. VA 2014-28-M
A.C. No. 44-00022-333864-UXY

Docket No. VA 2014-50-M
A.C. No. 44-00022-337048-UXY

Mine: Burkesville Plant

DECISION REJECTING SETTLEMENT MOTION

Before: Judge Moran

This case is before the Court upon a petition for assessment of civil penalties in these consolidated cases under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlement. The original, proposed, assessment for the citations at issue in these consolidated cases was \$600.00, representing six section 104(a) citations, each with a proposed assessment of \$100.00. The \$100.00 per citation figure represents a 10% lopping off of the \$112.00 penalty amount, derived upon application of the Part 100 penalty point computation, per 30 C.F.R. § 100.3(f), which provides a 10% discount in the penalty “where the operator abates the violation within the time set by the inspector.”

Concerning the four remaining (i.e. non-vacated) citations that are the subject of the settlement motion, only one presents a problem. Three of the four are proposed to be settled for the full proposed penalty of \$100.00 each, with no changes, that is to say, as the Secretary describes it, with “no modifications” to the citations. However, for one of the citations, while proposed to be settled for the same \$100.00 proposed amount, the motion seeks to modify the negligence from “moderate” to “low.”

While the Commission evaluates the degree of negligence associated with a given violation independent of Part 100’s provisions, it is noted that, per section 100.3(d), “*Negligence*,” moderate negligence is distinguished from low negligence. Both categories of negligence refer to a mine operator who knew or should have known of the violative condition or practice, but whereas moderate negligence allows that mitigating circumstances were present, “low negligence” involves “*considerable* mitigating circumstances.” 30 C.F.R. § 100.3(d) (emphasis added).

Although, in the broader scheme, the Court recognizes that, *monetarily*, these dockets are small affairs, the Commission’s responsibilities under section 110(k) operate irrespective of the dollar value involved. The problem with the Secretary’s motion is language that it inserted which

is plainly yet another gambit in its effort to erode the Commission's statutory review authority under that section. *See, Sec'y of Labor v. Am. Coal Co.*, 35 FMSHRC 515 (Feb. 2013) (ALJ) (on interlocutory review before the Commission, as granted in the Order dated July 11, 2014). To that end, the Secretary asserts that "[i]n light of the fact that there are no reductions in penalty and in light of the fact that the Secretary has unreviewable authority to modify or to vacate citations or orders, [the Commission has] no discretion to reject the proposed disposition of these cases." Secretary's Draft Order Approving Settlement at 1 (emphasis added).

The Court does not agree, as the Secretary contends here, that the Commission's authority under section 110(k) is limited to passing on the proposed dollar amount. Consequently, while for now¹ the Mine Act does not prevent the Secretary from vacating citations and orders, the *modification* of those enforcement tools is subject to the Commission's review.

The applicable Mine Act language provides that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). The reduction of the category of negligence from moderate to low negligence falls within the Commission's approval of contested penalties. Here, the Secretary's Motion fails to provide essential and required information to explain the basis for its diminished characterization of the negligence.

The motion therefore needs to identify both the mitigating circumstances originally listed and then identify the "*considerable* mitigating circumstances" that brought about the proposed change. The Joint Motion also misleads, in its summary portion, the true state of affairs for Citation No. 8725394, in that it speaks only in terms of the basis of compromise of the penalty, which it describes as "none," and merely notes that the proposed amount of the penalty from the Office of Assessments and the settled amount are the same.² Joint Motion at 3.

Although the requirement to present sufficient information for the Commission to appreciate the basis for compromising a citation applies in each instance, it is also noted that in this instance the violation was not merely a relatively harmless paperwork oversight. Involved was a 105 gallon diesel fuel tank in the back of flatbed truck which tank lacked "the required haz-com label to display the appropriate hazard warnings." The citation went on to allege that the absent label "exposes miners to a hazard of contacting a chemical and not knowing the physical hazards of that chemical. Permanently disabling injuries would be expected if miner[s] were to get the chemical in their eyes and not know the appropriate medical treatment. [The] Diesel fuel tank is available for use on a daily basis." Citation No. 8725394.

¹ Whether the Secretary should continue to have unreviewable authority to vacate citations is not presently in issue. Perhaps the time for reconsideration of that unfettered authority has arrived.

² A table, at page 2 of the Joint Motion, does note for Citation No. 8725394 under "other modifications to citations," the change from "Moderate to Low Negligence." The table, as with the entirety of the Motion, offers no explanation of the basis for this reduction in the negligence level.

Regrettably, this Motion evidences that the Secretary continues to miss the larger point. Recall that in the Secretary's April 30, 2014 Motion for Reconsideration of this Court's denial of the Secretary's settlement motion in *American Coal*, it had to be pointed out that its Motion for Reconsideration contained *not a single word about the safety and health of miners*, the Secretary apparently forgetting that its client is the Mine Safety and Health Administration and that its ultimate clients are the men and woman who work in the Nation's Coal and other mines.³ Order Denying Motion for Reconsideration of Settlement, May 13, 2014. Here, the Secretary, again unwilling to comply with the Commission's mandate under section 110(k) of the Mine Act, apparently continues to think that it is only about money, not miner safety.

As evidenced by the stock language it now inserts in nearly every settlement motion, the Secretary deigns to only tell the Commission that it "has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt." *See, e.g.*, the motion in this case, Janney Painting Settlement Motion at 2.

By this incantation, empty of any useful information, the Secretary believes that is all that the Commission, the public, and miners are entitled to know. But if this were accepted, the Commission's role in reviewing proposed penalties, which have been contested before it, would become a perfunctory and hollow process. As this Court has previously noted, the words of section 110(k) of the Mine Act, 30 U.S.C. § 820(k), the legislative history for that provision, and the decisions of the Federal Mine Safety and Health Review Commission each refute such a construction.

ACCORDINGLY, on the basis of the foregoing, the Joint Motion to Approve Settlement is **DENIED**. The Secretary is directed to resubmit its motion with the appropriate information included, justifying its proposed reduction in the negligence attendant to this citation, or to prepare for hearing.

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

³ It was not until *after* the Court pointed out that Secretary said not a word about the Nation's miners in its Motion for Reconsideration that subsequent filings remembered to mention it.

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February 12, 2015

LAWRENCE PENDLEY,

Complainant,

v.

HIGHLAND MINING CO. AND JAMES
CREIGHTON,

Respondent.

DISCRIMINATION PROCEEDING

Docket No. KENT 2013-606-D
MSHA Case No.: MADI-CD 2010-07 & 11

Mine: Highland 9 Mine
Mine ID: 15-02709

DECISION

Appearances: Tony Opegard, Esq., Lexington, KY, Representing the Complainant
Wes Addington, Esq., Appalachian Citizens Law Center, Representing the Complainant
Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True PLLC, Lexington, KY, Representing the Respondent

Before: Judge Andrews

This case is before me upon a complaint of discrimination brought by Lawrence Pendley (“Complainant”), a miner, against Highland Mining Co. and James Creighton, (“Respondents”), pursuant to § 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(3).

Pendley filed his original discrimination complaints with the Mine Safety and Health Administration (MSHA) on February 25, 2010 and March 25, 2010. RX-2; RX-3.¹ Pendley alleged that he was being interfered with in performing his duties as a miners’ representative by Jack Creighton. CX-1; CX-2. After conducting an investigation, MSHA filed a §105(c)(2)

¹ Complainant’s exhibits will hereinafter be designated CX followed by a number. The Respondent’s exhibits will be designated as RX followed by a number. Dep-CX or Dep-RX followed by a number refers to the Complainant’s or Respondent’s exhibits that were attached to the deposition submitted into the record.

complaint on Pendley's behalf on December 2, 2010.² On February 3, 2011, the case was stayed pending the outcome of remand ordered by the Sixth Circuit Court of Appeals and the Commission in Docket No. KENT 2007-383. On December 27, 2012, Judge Barbour's Decision on Remand dismissed all claims of discrimination pending in Docket No. KENT 2007-383. Based on Judge Barbour's decision, the Secretary filed a Motion to Dismiss Docket No. KENT 2011-337-DM on February 21, 2013, stating that the "pattern of discrimination that served as a basis for the Complaint filed in this matter no longer exists." An Order dismissing KENT 2011-337-DM was issued on February 26, 2013.

Pendley, through counsel, filed the instant complaint of discrimination under §105(c)(3) of the Act on March 22, 2013. A hearing was held in Henderson, Kentucky, on April 17, 2014, at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs, which have been fully considered.

STIPULATIONS

The Complainant stipulated to the following: At the time that Lawrence Pendley filed his complaint to MSHA in this matter, February 25, 2010 and March 25, 2010, he was designated as a miners' representative at Highland's No. 9 Mine. *Complainant Pre-Hearing Report, 2.*

The Respondent stipulated to the following:

1. Highland is subject to the Federal Mine Safety & Health Act of 1977.
2. Highland mines and produces coal at the Highland No. 9 Mine that enters into and has an effect upon interstate commerce within the meaning of the Federal Mine Safety & Health Act of 1977.
3. Highland is subject to the jurisdiction of the Federal Mine Safety & Health Review Commission and the Administrative Law Judge has the authority to hear this case and issue a decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to 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.*

² This Complaint was docketed as KENT 2011-337-D, with MSHA Case No. MADI CD 2010-11.

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).

Lawrence Pendley had been a coal miner for 31 years at the time of hearing. Tr. 14.³ He worked at Highland No. 9 as a parts runner, until he was suspended and discharged in 2007 after an altercation with Jack Creighton. Tr. 14, 55-57; RX-7. Pendley filed several discrimination complaints associated with the discharge and predicate suspension, and Judge Barbour found that the suspension was discriminatory, but the discharge was not.⁴ Tr. 15.

Pendley became a miners' representative in 2009 after several miners requested that he serve in that role. Tr. 15-16. He remained a miners' representative at the time of hearing. Tr. 52. As a miners' representative, Pendley was entitled to review examination books; however, on two occasions, people interfered with him doing so. Tr. 17. In the first instance, a Highland manager named Jack Willingham took the books from Pendley in the recording office because he did not think that Pendley had a right to view them. Tr. 17; Dep. 56. In the second instance, Scott Maynard, who worked in safety for Highland, took materials from Pendley as he was viewing them. Tr. 17-18, 28. Pendley complained to MSHA about these incidents in August 2009. Tr. 18. MSHA subsequently had a meeting with Highland and sent letters stating that if any more interference took place, action would be taken. Tr. 18. The August 18, 2009 letter from MSHA informed Highland that neither Highland nor any of its agents may interfere with Pendley's viewing of examination books. Dep. 56; CX-4. Larry Millburg, the superintendent of operations at Highland No. 9 mine, testified in deposition that he agreed that not allowing a miners' representative to view examination books would constitute interference.⁵ Dep. 57.

³ Pages of the official hearing transcript are designated "Tr." followed by the appropriate page reference(s).

⁴ 34 FMSHRC 3406 (December 27, 2012) (ALJ Barbour); 30 FMSHRC 459 (May 19, 2008) (ALJ Barbour).

⁵ Millburg's deposition of April 8, 2014, was submitted as testimony at hearing. At the time of deposition, Millburg was employed as the General Manager by Cliff's Natural Resources in Hueytown, Alabama. Dep. 8-9. Millburg had a high school degree, a hoist engineer's certificate, a mine examiner's certificate, a mine manager's certificate, Kentucky mining papers, and Illinois and Kentucky mine manager and examiner certificates. Dep. 9. He had worked in the mines since 1973, as a utility man, maintenance foreman, assistant mine manager, shift manager, general manager, operations manager, superintendent, and vice president of operations. Dep. 9-11. When Millburg became vice president of operations in February 2011, he had jurisdiction over Highland 9, the surface mine, Freedom underground mine outside Henderson, and the underground mine at Dodge Hill. Millburg began at Highland in April, 2006. Dep. 44. Therefore, Millburg's jurisdiction included Highland 9 mine from 2006 through August 2012. Dep. 12-13. During the 2009-2010 timeframe, Millburg's duties included him being in charge of operations at Highland 9 mine, including production, safety, maintenance, and employee discipline. Dep. 13-14.

Furthermore, Pendley testified that Creighton interfered with his duties on several occasions, often by standing close to him and trying to intimidate him. Tr. 16-17. Pendley felt that mine management was permitting Creighton to behave in this way. Tr. 17. Millburg testified that neither he nor anyone else encouraged interference with Pendley's rights. Dep. 26-27.

The first incident with Creighton occurred in February, 2010, when Pendley and MSHA inspector Jeff Winter came out of the records book room and into the common area. Tr. 19. At the time, Creighton was working as a supply man, and part of his duties was to clean the common area.⁶ Tr. 21. Creighton was in an area in the back of the room when he yelled out, "hey there," which Pendley believed was directed at him. Tr. 19, 36. Pendley believed Creighton's statement was a provocation, rather than a greeting. Tr. 19-20.

According to Creighton, he was sitting in the last table in the commons area when the phone rang. Tr. 76. Creighton answered the phone and someone told him that there were parts for him to pick up. Tr. 76. Creighton admitted that he may have yelled out "hey there," but testified that it would have been part of him yelling, "hey I got me a nibble," in reference to getting a call from the supply house. Tr. 79. He testified that the comment was not directed at anyone. Tr. 79.

After this incident, Pendley and Winter walked over to the edge of the room and stopped for a moment. Tr. 20. Creighton walked over and stood in close proximity to them for approximately 15-40 seconds before moving on.⁷ Tr. 20, 25, 77. Creighton grew up with Winter and had been friends with him for a long time. Dep. 27-29. Creighton said to Winter, "How's it going Jeff? Where did you go today?" Winter told Creighton where he went and Creighton asked how it looked in that area. Tr. 77. Creighton testified that he was three to four feet from Winter when he stopped to talk to him. Tr. 86. He also said that he was facing Winter. Tr. 86. Creighton described the conversation he had with Winter as "chit chat." Tr. 116-118. Pendley testified that he did not believe that Creighton had a reason to stand where he was. Tr. 20.

Creighton testified that he did not say anything to Pendley when he spoke with Winter. Tr. 79. Pendley did not say anything to Creighton because he had been advised by mine management and Carolyn James at MSHA not to be around Creighton. Tr. 21. Creighton testified that he did nothing to harass Pendley or interfere with his activities as a miners'

⁶ Jack Creighton was employed at Highland No. 9 mine in February and March 2010. Tr. 72. Creighton began in the mining industry at Highland No. 9 mine since 1972, and retired on September 21, 2013. Tr. 72-74. He had worked as an underground supply man, a timber man, a ventilation man, a hoist man, a scoop man, and a bathhouse/supply/surface utility man. Tr. 73. Creighton's duties at the time of hearing included running the hoist, cleaning up the bathhouse, loading and unloading supplies, and working in utilities. Tr. 74. Most of his duties were on the mine surface. Tr. 74-75.

⁷ Creighton testified that he ran into Winter and Pendley right outside the commons area. Tr. 77.

representative. Tr. 87. Creighton had been shown a letter from the District Manager that articulated Pendley's walk-around rights, and was told to avoid Pendley when possible. Tr. 120-124; CX-4.

Pendley brought this incident to Winter's attention, and Winter told Pendley to ignore Creighton. Tr. 22. Pendley proceeded to file a complaint with MSHA over this incident. Tr. 22. After hearing that Pendley filed a complaint against him, Creighton asked Inspector Winter what he did wrong. Tr. 88. According to Creighton, Winter replied, "Jack I didn't say you did anything wrong." Tr. 90.

Creighton also talked about the complaint with Larry Millburg, Highland's superintendent of operations at the mine at the time. Tr. 90. Millburg had been aware of the conflict between Creighton and Pendley. Dep. 44. Millburg testified that he received the May 5, 2009 letter from MSHA making him aware that Pendley was a miners' representative. Dep. 16-17; RX-1. At that time, a notice that Pendley was a miners' representative was posted on a bulletin board in the hallway. Dep. 24. Millburg had previously talked to Creighton about Pendley being a miners' representative. Dep. 25. Millburg testified that prior to receiving the August 18, 2009 letter from MSHA, he was not aware that anyone from Highland was interfering with Pendley's rights as a miners' representative. Dep. 26; RX-4.

After talking with Creighton, Millburg did not believe that Creighton had interfered with Pendley's rights as a miners' representative. Dep. 29. Millburg discussed the events with Creighton and Winter to see if Creighton's account was accurate. Dep. 27. Millburg did not believe that the letters to Pendley and Creighton prohibited contact. Dep. 36-37; RX-6, 7. Millburg never told Creighton or Pendley that they could not be in the same room or have any contact. Dep. 37. Millburg testified that he told Creighton that if it was at all possible he should stay away from Pendley while Pendley was on the mine property. Dep. 37-38.

Creighton asked Millburg if he could retrieve the security camera footage from the time of the incident on February 22, 2010. Tr. 90-91; RX-8. There had been cameras set up in the hallways, so Millburg had Ronnie Weiss find the video.⁸ Dep. 30-31. After viewing the video, Millburg determined that it corroborated Creighton's account. Dep. 32. He stated that Creighton was beside Pendley, standing approximately three feet away. Dep. 32-33. Creighton testified that after reviewing the video, Millburg told him that "I saw nothing going on. I saw no harassment, no cause for a case to be filed." Tr. 96.

Millburg testified that he could not have prevented Creighton from speaking to Winter because it was Creighton's right as a miner to speak to an MSHA inspector. Dep. 33-34. Millburg did not see any problem with Creighton's conduct. Dep. 34.

In Creighton's deposition, which took place 21 days before hearing, he stated that after the February complaint, no one from Highland management talked to him about the incident. Tr.

⁸ Weiss did all the mine maps and computer work at the mine at the time. Dep. 31. He passed away prior to the hearing. Dep. 31-32.

110, 113. At hearing, Creighton stated that the reason he said this, despite the fact that he testified that he spoke with Millburg after the February incident, is because *he went to talk with* Millburg, rather than Millburg coming and talking with him. Tr. 110-111. Creighton then stated that during the deposition, he could not recall talking with Millburg or watching the video with him. Tr. 113.

The second incident with Creighton occurred in March, 2010, in approximately the same location as the February 2010 incident. Tr. 22, 102. It occurred when Pendley was traveling with MSHA Inspector Archie Coburn during a quarterly closeout.⁹ Tr. 22. When Pendley and Coburn entered the common room, Creighton yelled across the room to Pendley, “I’m going to file a harassment case against you.” Tr. 23. At hearing, Creighton testified that he was approximately 20-25 feet from Pendley when he yelled to Fenwick. Tr. 129. However, in the deposition, Creighton stated that he was approximately 5-10 feet from Pendley. Tr. 131.

Then, a little later, Creighton walked over to within a foot of Pendley and stood there for approximately 30 seconds to one minute. Tr. 23-25. Pendley testified that there was no reason for Creighton to walk up to him, and that he understood the move to be a form of intimidation and harassment. Tr. 24-25. Pendley mentioned his concern to Coburn and Coburn told him not to pay any attention to it. Tr. 25. Pendley subsequently filed a discrimination complaint with MSHA over the incident. Tr. 26.

Creighton testified that he arrived at the mine at 6:30 or 7:00 am on the day of the second incident, and soon after a miner named Chad Fenwick became upset with him because Creighton had not yet made any sweet tea. Tr. 102. Creighton told Fenwick “to get the hell out of there before I filed a case on him.”¹⁰ Tr. 102. Then Creighton proceeded to make Fenwick the sweet tea, and Fenwick left. Tr. 102-103. Creighton never filed a harassment charge against Fenwick. Tr. 127-128, 133. Creighton denied that he said anything to Pendley, stared at Pendley, touched Pendley, or made any gestures at Pendley on March 25. Tr. 106-107.

On April 14, 2010, Creighton filed a harassment charge against Pendley. Tr. 26, 127-128, 133. In his statement to MSHA, Creighton said he felt that he was being harassed, threatened, and discriminated against. Tr. 136. Creighton accused Pendley of positioning himself so that he would have contact with Creighton, and said that he felt threatened and feared for his safety while Pendley was on mine property. Tr. 137-139. Further, he demanded that Pendley be removed as a miners’ representative. Tr. 136.

After Creighton received Pendley’s March complaint, he discussed it with superintendent Millburg. Tr. 107-108. Millburg did not witness the events that Pendley described in his March 2014 complaint, but Millburg did not believe that Creighton’s conduct constituted harassment or

⁹ In quarterly closeouts, there is a review of the mine violations during the quarter, and miners’ representatives have an opportunity to be present. Tr. 22-23.

¹⁰ Creighton alternately described his comment as, “I’m going to file a harassment case against you.” Tr. 126-127.

interference. Dep. 38-39. Millburg talked to Creighton after the March incident. Dep. 40. Creighton told Millburg that he was doing his job and then walking past Pendley. Dep. 40-41. Millburg told Creighton to stay away from Pendley if possible. Dep. 40-41.

In addition to the encounters with Creighton, Pendley also alleged discrimination by Highland management concerning a belief that he was making complaints to MSHA and in regards to sharing information with him. On September 9, 2009, Safety Manager James Allen sent an email to a group of Highland management stating that Pendley was making §103(g) complaints. Dep. 62. The recipients to the email included Frank Foster (corporate safety), Scott Maynard (superintendent of Highland 9), Randy Duncan (Safety Supervisor at Highland 9), Travis Little (Safety Supervisor), Jack Willingham (Safety Supervisor), and J.R. Wolfe (Training Supervisor). Dep. 59-61.

In another email, David West asked James Allen how changes in the Emergency Response Plan (ERP) were being communicated to the miners' representatives at Highland. Dep. 64. At deposition, Millburg agreed that changes to the ERP must be communicated to the miners' representatives. Dep. 65. Allen responded that they would not post a complete ERP plan for Pendley to review, and followed up the statement with three exclamation points. Dep. 66; Dep-CX-6.

CONTENTIONS OF THE PARTIES

Following the hearing, the Complainant and Respondent submitted briefs and reply briefs in support of their respective positions. The Respondent argued that no Commission case has addressed the issue of co-worker harassment, rather than harassment by management, and that the Commission should use other federal anti-discrimination laws as guides. Accordingly, Respondent suggested that this Court follow a five-step analysis to determine if such discrimination is actionable: (1) that the individual engaged in protected activity; (2) that he was subject to harassment; (3) that the harassment was based on the protected activity; (4) that the harassment unreasonably interfered with his performance as a miners' representative and objectively created a hostile environment; and (5) that the operator knew or should have known of the alleged harassment and failed to implement prompt and appropriate corrective action. Respondent argued that Complainant should prevail only if he can meet each of these elements. *Resp. Post-Hearing Br. 4.*

The Respondent conceded that Pendley engaged in protected activity in the past, but argued that Pendley's claim fails on all other elements of the *prima facie* test that it suggested the Commission adopt. *Resp. Post-Hearing Br. 5.* The Respondent argued that Pendley failed to establish that the harassment rose to a level that was both subjectively and objectively hostile and abusive. Respondent next argued that Pendley failed to prove that Creighton's harassment was based on activity protected under the Act, specifically Pendley's rights as a miners' representative. *Resp. Post-Hearing Br. 7.* Respondent contended that it was more likely that Creighton's actions towards Pendley were based on their history of mutual animosity rather than on Pendley's protected activity. *Resp. Post-Hearing Br. 8-9.*

Respondent further argued that even if Creighton harassed Pendley, there was no actionable discrimination because Highland responded appropriately and reasonably to Pendley's complaints. *Resp. Post-Hearing Br.* 9-11. Millburg told Creighton not to interfere with Pendley's duties as a miners' representative and to avoid him when possible. Millburg determined that Creighton had not violated company rules in his interactions with Pendley, so it was proper not to discipline Creighton. Furthermore, the Respondent argued that Highland was not permitted to limit Creighton's abilities to speak to an MSHA inspector, so it could not instruct him against approaching the inspector while Pendley was around. *Resp. Post-Hearing Br.* 13-14.

Furthermore, the Respondent argued that §103(f) provides that a miners' representative has the right to accompany an inspector only during the physical inspection of the mine or participate in a pre- or post-inspection conference. To the extent that Pendley was not accompanying the inspector at the time of the alleged harassment, the Respondent argued that he was not engaged in protected activity. *Resp. Post-Hearing Br.* 3.

In its Post-Hearing Brief, the Complainant argued that the Commission has established a different framework from the standard *Pasula-Robinette* analysis for determining whether conduct constitutes interference under §105(c). *Sec'y of Labor on behalf of Mark Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005). Rather than having to find protected activity, adverse action, and a nexus between the two using various indicia, the interference analysis is based on §8(a)(1) of the National Labor Relations Act. The Complainant argued that under this analysis, the judge must only find that the Complainant engaged in protected activity and that the operator engaged in conduct that would tend to interfere with such protected rights. *Comp. Post-Hearing Br.* 14-16.

The Complainant argued that the following actions performed by Pendley constituted protected activities under §105(c): Pendley performing his duties as a miners' representative from June 2009 through April 2010; Pendley's complaints to MSHA regarding Creighton's and the Highland's alleged harassment that led to the August 18, 2009 letter; Pendley's review of mine examination books; and Pendley's §105(c) complaints in February and March 2010, which led to the instant proceeding. Furthermore, Highland's belief that Pendley was making §103(g) complaints to MSHA after reviewing the mine examination books was protected activity that was imputed to Pendley, regardless of whether he actually made the complaints. The Complainant further argued that Creighton's harassment of Pendley, and the company's tacit approval of Creighton's conduct, tended to interfere with Pendley's rights as a representative of miners. *Comp. Post-Hearing Br.* 16-19.

In response to this position, the Respondent contended that the cases cited by Complainant involved a supervisor's conduct, rather than a coworker's, and that there was nothing in the instant case to impute Creighton's actions to management. *Resp. Response Brief* at 5-7. Furthermore, as opposed to the cases cited by Complainant, Pendley was neither fired nor threatened with economic repercussions. *Id.* The Respondent also argued that the Commission's concerns over chilling speech are inapplicable here because Pendley did not receive any remuneration for his position as a miners' representative. *Id.* at 8. Finally, the Respondent

argued that insofar as Creighton's conduct was based on personal animosity or on any other response to non-protected activity, Pendley's interference claim must fail.

The Complainant responded that Pendley's argument is not as atypical or unique as Respondent asserted. Numerous cases have considered complaints by non-employee miners' representatives, which are specifically protected under 105(c), and numerous cases have been directed toward an individual respondent. *Pendley Reply Brief*, 4-6. Furthermore, Complainant argues that the Respondent's argument that Pendley and the investigator were not engaged in an inspection or in a pre- or post-inspection conference at the precise moment of the alleged conduct is an absurd and unsupported reading of the Mine Act. *Id.* At 6-7.

ANALYSIS

This case is before me on allegations that the Respondent interfered with Pendley's rights as a miners' representative in violation of §105(c). The provision states:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. 815(c)(1).

The Act prohibits both discrimination because of protected activity and interference with the exercise of statutory rights. Most cases before the Commission are of the former, and follow the *Pasula-Robinette* framework, wherein the Claimant presents a *prima facie* case by showing that he or she engaged in protected activity, that there was an adverse action, and that the adverse action was motivated in any part by that activity. *See Turner v. Nat 7 Cement Co. of California*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consol Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 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 (Apr. 1981).

The five-step analysis proposed by Respondent is unnecessary, as the Commission has already developed various tests to determine whether unlawful discrimination or interference has taken place, noting that “in addition to the broad protections offered against adverse actions, the scope of miner rights protected by the Act is equally broad.” *Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 7 (Jan. 2005). The Act’s legislative history makes clear that it protects miners against “not only the common forms of discrimination, such as discharge, suspension, demotion..., but also against the more subtle forms of interference, such as promises of benefits or threats of reprisals.” S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978). In *Moses v. Whitley Development Corp.*, the Commission found that “more subtle forms of interference” includes “coercive interrogation and harassment over the exercise of protected rights.” 4 FMSHRC 1475, 1478 (Aug. 1982). The Commission explained,

A natural result of such practices may be to instill in the minds of employees fear of reprisal or discrimination. Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights. This result is at odds with the goal of encouraging miner participation in enforcement of the Mine Act. We therefore conclude that coercive interrogation and harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act.

Id. at 1479.

The Commission developed the test for interference by looking to Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), “which makes it unlawful for an employer to ‘interfere with, restrain, or coerce’ an employee’s protected rights. *Gray*, 27 FMSHRC at 9. The Commission quoted approvingly from NLRB caselaw, which holds that the issue “does not turn on the employer’s motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the [NLRA].” *Id.*, quoting *American Freightways Co.*, 124 NLRB 146, 147 (1959). The Commission made clear that the judge should take into consideration the totality of the circumstances in determining whether there was unlawful interference. *Id.* at 10-12. In *Gray*, the Commission considered such factors as “the persistence with which the subject of the miner’s protected activity was raised and “the accusatory manner in which it was done.” *Id.* at 11 (quoting trial court judge). Furthermore, it stated that other factors must be taken into account, such as “where the statements were made,” “the nature of [the] relationship,” and the manner in which statements were made. *Id.*

Building upon its prior precedent in *Gray* and *Moses*, the Commission recently provided a helpful clarification of the elements of an interference violation. According to this test, an interference violation occurs if:

- 1) A person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and
- 2) The person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

United Mine Workers of America obo Mark A. Franks and Ronald M. Hoy v. Emerald Coal Resources, LP, 36 FMSHRC 2088, 2108 (Aug. 2014). The Commission stated in no uncertain terms that “for the miners to prevail on their interference claim, proof of the operator’s intent to interfere with the miner’s statutory rights is not required.” *Id.* at 2112-2113. Viewing the totality of the circumstances in the instant case, I find that Pendley’s rights as a miners’ representative were interfered with in violation of Section 105(c).

Section 103(f) of the Mine Act provides miners’ representatives the “opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine.”¹¹ 30 U.S.C.A. § 813(f). In addition to these walk-around rights and pre- and post-inspection conference rights, miners’ representatives are also provided notice rights and the right to make safety complaints. The legislative history of the Mine Act viewed the miners’ representative as serving an important function in ensuring the safety and accountability at mines.¹²

In the instant case, Pendley faced interference with his walk-around rights, his right to examine books, and his right to make safety complaints. Each of these will be examined

¹¹ The regulations define “representative of miners” as:

- (1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and
- (2) Representatives authorized by the miners, miners or their representative, authorized miner representative, and other similar terms as they appear in the Act.

30 C.F.R. § 40.1.

¹² The Senate Report accompanying the Mine Act states, “Presence of a representative of miners at opening conference helps miners to know what the concerns and focus of the inspector will be, and attendance at closing conference will enable miners to be fully apprised of the results of the inspection. It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness.” S. Rep. 95-191.

separately. However, taken together, these actions constituted interference of Pendley's rights as a miners' representative in violation of the Mine Act.

The Respondent Creighton interfered with Pendley's walk-around rights when he repeatedly conducted himself in a manner that Pendley understood as intimidation. The Commission's test requires that the action be "reasonably viewed...under the totality of the circumstances." In this instance, Pendley and Creighton's multi-year feud, which resulted in numerous judicial decisions and Pendley's termination, is important to contextualizing the conduct.

In his December 27, 2012 Decision, Judge Barbour began by noting that "this discrimination proceeding has a long and tortured history."¹³ *Sec'y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 3406 (Dec. 27, 2012) (ALJ).¹⁴ Allegations of discrimination and conflicts with Creighton go as far back as 2005. *Sec'y on behalf of Pendley v. Highland Mining Co.*, 30 FMSHRC 459 (May 19, 2008) (ALJ).¹⁵ In May 2005, Pendley complained to his supervisor after Creighton used "foul language" in response to Pendley's request for a delivery of food. *Id.* at 462. During that same month, Pendley accused Creighton of opening his bathroom locker and pouring bleach on his clothing. *Id.* at 463. Creighton denied the charge, but according to Pendley, he told fellow miners that Pendley was "crying," and "I'll give you something to cry about." *Id.* Subsequently, dirt was swept intentionally in front of Pendley's locker, and Pendley similarly suspected Creighton of being the culprit. *Id.* 463-464.

¹³ Judge Barbour recounted this history in his decision:

It is before me on remand from the Commission (*Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC ___, KENT 2007-383-D (August 30, 2012) (hereinafter *Pendley*, slip op.), which in turn received the case from the United States Court of Appeals for the Sixth Circuit. *Pendley v. FMSHRC*, 601 F. 3d 417 (6th Cir. 2010). The Sixth Circuit reversed the prior decision of the Commission (*Sec'y on behalf of Pendley v. Highland Mining Co., LLC*, 31 FMSHRC 61 (Jan. 2009)), a decision affirming my underlying decision on the merits. *Sec'y on behalf of Pendley v. Highland Mining Co, LLC*, 30 FMSHRC 459 (May 2008) (ALJ). Pursuant to its reading of the Sixth Circuit's opinion, the Commission returned the case to me to determine whether Highland Mining Co. ("Highland") discriminated against Lawrence Pendley ("Pendley") in violation of the Mine Act when it: (1) fired him in March 2007, and (2) changed his work assignments and conditions when he returned to work upon an order of reinstatement.¹ *Pendley*, slip op. at 15.

34 FMSHRC at 3406.

¹⁴ This decision is also in the Record as RX-7.

¹⁵ This decision is also in the Record as RX-6.

Next, as Judge Barbour found, came the “gun” incident. Creighton testified he knew Pendley had gone to Creighton's supervisor and complained. “So” said Creighton, one day in the bathhouse “after I heard [about] him complaining, I walked halfway back [to Pendley's locker] ... thr[ew] a piece of paper towel on the floor and told him there is something to cry about ... [and] that's when he reached up in his locker in his hard hat and pulled out what I perceived to be a weapon.” Creighton continued, “I told him ... I [will] shove it down ... [your] throat or make ... [you] eat it, something on that order.” Creighton maintained Pendley “started mouthing” at him, but Creighton walked away. *Id.* at 464 (citations omitted). Throughout 2005, matters continued to deteriorate between Pendley and Creighton, with accusations that Creighton was inspiring harassment against him. In one instance, Pendley accused Creighton of suddenly stopping the cars while he was traveling into the mine, which resulted in Pendley going to the hospital. *Id.* at 468-471.

The final incident occurred in 2007, when a physical altercation occurred between Pendley and his “long-time nemesis, Jack Creighton.” 34 FMSHRC at 3407. As a result of this altercation, as well as a loud argument that Pendley had concerning his overtime pay, Millburg made the decision to suspend and then terminate Pendley’s employment. *Id.* Judge Barbour found that the suspension was discriminatory, but that Respondent had a legitimate nondiscriminatory reason for firing Pendley. *Id.*

Pendley became a non-employee representative of miners in 2009, and it was in this capacity that he experienced the instant discrimination. Tr. 15-16.

With regards to the February and March 2010 incidents where Creighton stood beside Pendley or yelled out threats to bring discrimination claims against him, I found much of Creighton’s testimony to be incredible. Creighton’s testimony was filled with ad hoc explanations that sounded more clever than true. A prime example of such incredible testimony was Creighton’s attempt to reconcile his hearing testimony with his deposition testimony, which took place three weeks prior, concerning whether he talked with anyone in mine management about the February encounter with Pendley. Tr. 110-113. At deposition, Creighton answered in the negative when asked if anyone in mine management had talked to him about the incident, however at hearing he testified that he spoke with Millburg. *Id.* Creighton’s explanation for this contradictory testimony was that in deposition he understood the question to be whether anyone from mine management talked to him about the incident, not whether he talked to anyone from mine management about the incident. *Id.* This tortured parsing of the parts of a conversation to explain contradictory testimony defies credibility, and constitutes but one instance of Creighton providing seemingly made up and self-serving excuses to explain away his actions.

Pendley and Creighton had been told to stay away from each other when possible. Tr. 120-124; CX-4. There may have been instances where run-ins between Pendley and Creighton were necessary or unavoidable, but what occurred in February and March 2010 were not such instances. According to Pendley’s credible testimony, Pendley was exercising his walk-around rights by accompanying inspectors before, during, and after an inspection. Tr. 19-20, 22-25.

During the February inspection, Creighton yelled out “hey there” to Pendley as a provocation. Tr. 19-20, 36. Creighton’s testimony that he was not yelling at Pendley, but was instead yelling “hey there I got me a nibble” to no one in particular in response to a phone call, defies belief and was not credible. Tr. 79. Following this outburst at Pendley, Creighton walked over to the edge of the room where Pendley and the inspector were standing and stood in close proximity to them for a period of 15-40 seconds in order to “chit chat” with the inspector. Tr. 20, 25, 77, 116-118. Based on their long history of conflict, it was reasonable for Pendley to see these actions as a provocation and an attempt to interfere with his rights as a miners’ representative. Pendley proceeded to complain to the inspector and filed a complaint with MSHA over the incident; however, mine management did nothing. Tr. 22.

Approximately one month later, a similar encounter occurred. Pendley was accompanying an inspector, and Creighton yelled at him from across the room, “I’m going to file a harassment case against you.” Tr. 22-23. Creighton’s testimony that he was not yelling at Pendley, but rather was yelling at another miner who was upset with Creighton for not making sweet tea was not credible, especially in light of the fact that Creighton filed a discrimination complaint against Pendley a few weeks after the incident. Tr. 102, 26, 127-128. Creighton then proceeded to walk over to within a foot of Pendley and stand there for approximately 30 seconds to one minute. Tr. 23-25. Pendley viewed Creighton’s conduct to be a form of harassment meant to intimidate him. Tr. 24-25. Based on the history of conflict that existed between Creighton and Pendley, along with the fact that Pendley had just filed a complaint based on similar conduct, this view was indeed reasonable.

Creighton has a right under the Act to bring a discrimination complaint for actions that he believes constitute discrimination. However, his yelling across the room that he would be filing a complaint against Pendley appears more like a threat than an exercise of his rights. This is further bolstered by the fact that in his complaint Creighton demanded the removal of Pendley as a miners’ representative, which is a remedy beyond MSHA’s authority. Tr. 136. Despite the long history of actual conflicts between these miners, it is quite telling that at the time pertinent to this proceeding there is no credible evidence that Pendley acted in any aggressive manner. He was not alone, but in the company of an MSHA inspector while on mine property.

Despite Millburg, who was a member of mine management, knowing about the problematic history between Pendley and Creighton, he chose to do nothing. Tr. 110-111, Dep. 40-41. Millburg testified at deposition that after talking with Creighton, he did not believe that any interference had taken place. Dep. 29. Millburg only viewed the videotape footage of the incident because Creighton asked him to retrieve it. Tr. 90-91. Millburg testified that the footage corroborated Creighton’s account, so there was no need for an investigation. Dep. 32-33. Upon viewing the video footage submitted, I find that the footage has little evidentiary value in proving or disproving interference on Creighton’s part. The video, which has no sound and is shot from a high vantage point in the hallway, merely shows Creighton walking up to two obscured figures who are largely beyond view and talking at them for a period close to a minute. RX-8, at minute 11:33-11:34. One cannot hear what was said, or see how Pendley reacted. The video simply corroborates that the event happened—a fact not in dispute—but does not help in determining

the nature of the event. *Id.* Millburg's lack of action based on a conversation with Creighton and a viewing of this video served as an allowance for Creighton to repeat his conduct.

Indeed, that the event occurred reveals mine management's failure to restrain Creighton's aggressive verbal and non-verbal behaviors. Creighton was only advised that he "should" stay away from Pendley "if at all possible." Considering Millburg's knowledge of the history of conflicts, this advice was a woefully inadequate exercise of supervisory responsibility. Millburg did not tell Creighton and Pendley they *could not* have contact. Hence, Creighton's actions can be imputed to Highland.

Respondent cites *Thurman v. Queen Anne Coal Co.*, 9 FMSHRC 526 (March 9, 1987) (ALJ) for the proposition that the employer is not liable for acts of co-worker harassment. However, *Thurman* is inapposite to the instant case. *Thurman* was not an interference case, but rather a discrimination case. The judge employed the *Pasula-Robinette* framework for analyzing the case, and found that it failed on the adverse action prong. *Id.* at 529-531. Furthermore, the judge found that the instances of harassment by Thurman's coworker, were not in any way related to the miner's protected activity.

In the instant case, Creighton's conduct tended to interfere directly with Pendley's walk-around rights, which, as discussed *supra*, is a protected activity. Respondent's argument that the Act only protects miners' representatives during the actual inspection and during the exact moments of pre- or post-inspection conferences is an unnecessarily narrow reading of the Act, which the Commission has rejected previously. See *Secretary of Labor, on behalf of Truex v. Consolidation Coal Co.*, 8 FMSHRC 1293, 1299 (Sept. 25, 1986) ("Consol's argument that the miners' section 103(f) rights, if any, arose when the inspector arrived on mine property is not well taken on this record."). Pendley was accompanying the inspector during the general period of an inspection, and as such was exercising his walk-around rights. If the Act permitted interference immediately before or after an inspection, then the purpose of §§103(f) and 105(c) would be nullified by providing legally sanctioned windows when interference was allowable.

I need not find that Creighton's conduct alone constituted interference in this case, because there were other acts or omissions by mine management, which combined with Creighton's conduct, constituted interference.

In addition to Creighton's conduct, mine management illustrated a pattern of attempting to hide information from Pendley that, as a miners' representative, he was permitted to access. Pendley complained to MSHA in August, 2009 about two incidents where materials he was viewing were taken from him. Tr. 18. In the first incident, a manager named Jack Willingham took examination books from Pendley while he was reading them in the recording office, an act which Millburg admitted constituted interference with Pendley's rights. Tr. 17; Dep. 57. In the second incident, an individual from safety named Scott Maynard took materials from Pendley as he was viewing them. Tr. 17-18, 28.

Furthermore, Highland was required to inform miners' representatives of any changes to the emergency response plan (ERP); however, safety manager James Allen refused to provide a

copy of the ERP to Pendley. Dep. 83-84. Evidence submitted at hearing shows that Carl Boone emailed Allen informing him that Pendley was a miners' representative and should receive a copy of the ERP. Dep-CX-6. Following this email, Frank Foster of Magnum Coal emailed Allen that "there should be a copy [of the ERP] posted for Pendley to review if he wishes, correct?" Dep. 65-66; Dep-CX-6. Allen responded, "We will not post a complete ERP plan!!!" Such refusal to share required materials with Pendley constituted interference with Pendley's rights as a miners' representative.

Additionally, there are indications beyond these events that Highland's actions were conducted with animus towards Pendley's rights. For instance, emails introduced into evidence indicate that Allen was trying to determine who was making confidential 103(g) complaints to MSHA. Dep. 62. "Section 103(g) of the Mine Act provides for an immediate inspection of a mine upon the complaint of a miner or representative of miners. 30 U.S.C. § 813(g). The section further provides that the name of the complaining miner should not be disclosed." *Highland Mining Co.*, 31 FMSHRC 61, n. 8 (Jan. 2009). On September 9, 2009, Allen sent an email to Foster detailing a few recent 103(g) inspections. Dep-CX-5. In response, Allen asked Foster, "Are we still getting a lot of 103 G's (sic) there?" *Id.* Foster responds to this email, by blind copying a group of Highland managers, and indicating that he believed Pendley was responsible for the 103(g) complaints to MSHA. *Id.*

As you know, Lawrence Pendley (X-employee) is on the "Miner's Rep" listing for this group of miners. He shows up at different times to travel with the inspectors. When he is on the property, he will review our belt books, then at a later date call in a 103 G on specific belts that he seen "Corrections needed" entered in the belt books. MSHA comes out to the mine and inspects these areas. The no. 3 and 4 belts have been inspected during this regular as a result of 103 G call In's.

Id. (grammatical mistakes in original). This email sent among Highland management shows that they suspected him of making 103(g) complaints and labeled him as a troublemaker.

CONCLUSION ON LIABILITY

Based on the above, I find that Highland Mining Company and James Creighton violated Section 105(c) of the Act by interfering with Lawrence Pendley's rights as a Miner's Representative.

DAMAGES

When a discrimination complainant's claim is granted, Section 105 (c)(3) of the Act provides that the Administrative Law Judge may grant "such relief as it deems appropriate." The Complainant has requested no specific relief in these proceedings. The record, therefore, must be further developed for consideration of any affirmative relief, including but not limited to, for example, costs and expenses, posting notice and/or training.

Accordingly, the parties are **ORDERED TO CONFER** within **21 days** of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that will constitute the complete relief to be ordered in this case. If an agreement is reached, it shall be submitted within **30 days** of the date of this decision.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within **30 days** of the date of this decision. For those areas involving monetary damages and relief on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. In the rare event of factual disputes requiring an evidentiary hearing, the parties should submit a joint request.

The undersigned judge retains jurisdiction of this matter until the specific remedies to which Lawrence Pendley is entitled are resolved and finalized. Accordingly, **this decision will not become final** until an order granting any specific relief and awarding any monetary damages has been entered.

Pursuant to Commission Rule 44(b), 29 C.F.R. §2700.44(b), a copy of this decision will be sent to the office of the Regional Solicitor having responsibility for the area in which the Highland 9 Mine is located so that the Secretary may take the actions required by the rule.

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, DC 20004

February 23, 2015

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

v.

MANALAPAN MINING CO., INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. KENT 2008-737
A.C. No. 15-18267-144079

Mine: RB No. 10 Mine

DECISION ON REMAND

Before: Judge Feldman

I. Procedural History¹

This proceeding initially concerned four alleged violations of 30 C.F.R. § 75.400, which prohibits the accumulation of combustible coal dust materials, three of which have been resolved. The remaining alleged violation, which was previously remanded by the Commission for further consideration in *Manalapan I*, 35 FMSHRC 289 (Feb. 2013), has once again been remanded for resolution of whether the cited violation of section 75.400 in Order No. 7511478 (Belt No. 2) was attributable to an unwarrantable failure. *Manalapan II*, 36 FMSHRC 849 (Apr. 2014).

¹ There have been several decisions issued in this matter:

- My initial decision, 32 FMSHRC 690 (June 2010) (ALJ), will be referred to as the “*initial decision*.”
- The Commission’s initial remand, 35 FMSHRC 289 (Feb. 2013), will be referred to as “*Manalapan I*.”
- My first decision on remand, 35 FMSHRC 1377 (May 2013) (ALJ), will be referred to as the “*previous remand decision*.”
- The Commission’s second remand, 36 FMSHRC 849 (Apr. 2014), will be referred to as “*Manalapan II*.”

The Commission succinctly summarized the material facts in this case in its current remand in *Manalapan II*:

Manalapan operated an underground coal mine in Pathfork, Kentucky. Coal was extracted from the working face by a continuous miner and transported out of the mine by a series of conveyor belts that were approximately 2,300 feet in total length. The extracted material was transferred in turn from the No. 4 belt at the face to the No. 3 and No. 2 belts and ultimately to the No. 1 belt nearest the surface. The conditions in the mine were constantly wet because of percolation of water through old works and the mine floor and ribs, and by the use of water for dust control at the face. Despite the presence of water pumps, water was never completely removed, and the mine floor remained muddy at all times.

36 FMSHRC at 850-51.

As noted in my initial decision in this matter:

The [Secretary] initially sought to impose a total civil penalty of \$833,600.00 for four alleged “flagrant” violations of the mandatory safety standard contained in section 75.400, 30 C.F.R. § 75.400, of the Secretary’s regulations. . . .

On November 3, 2009, the Secretary filed . . . an amendment to the May 15, 2008, civil penalty petition removing the “flagrant or reckless disregard” charge for the 104(d) citation and three 104(d) orders that are the subject of this proceeding. In addition, the Secretary reduced the total proposed penalty from \$833,600.00 to \$240,000.00 to conform with the maximum civil penalty of \$60,000.00 [in effect at that time] for each of the four alleged combustible accumulation violations that the Secretary asserts is attributable to Manalapan’s unwarrantable failure.

Initial Decision, 32 FMSHRC 690, 690-91 (June 2010) (ALJ).

My initial decision affirmed 104(d)(1) Citation No. 7511467 (Belt No. 4) as a significant and substantial (S&S) violation attributable to an unwarrantable failure, and imposed a civil penalty of \$20,000.00. *Id.* at 697-99. With respect to 104(d)(1) Order No. 7511472 (Belt No. 3), my initial decision also affirmed the cited violation and its S&S nature, but modified the order to a section 104(a) citation, thus reflecting that the cited condition was not attributable to an unwarrantable failure. A \$12,000.00 civil penalty was imposed for 104(a) Citation No. 7511472 (Belt No. 3). *Id.* at 700-02. With regard to 104(d)(1) Order No. 7511478 (Belt No. 2), the subject of this Remand Decision, my initial decision affirmed the violation, deleted the S&S designation, and modified the order to a 104(a) citation, thus deleting the unwarrantable failure designation. A \$4,000.00 civil penalty was imposed for 104(a) Citation No. 7511478 (Belt No. 2). *Id.* at 702-04. Finally, my initial decision vacated 104(d)(1) Order No. 7511479 (Belt No. 1) as the facts surrounding the cited condition did not support the alleged section 75.400 violation. *Id.* at 704-05.

The Secretary appealed the removal of the unwarrantable failure designations with respect to the cited conditions in 104(a) Citation Nos. 7511478 (Belt No. 2) and 7511472 (Belt No. 3).² In response to the Secretary's appeal, in *Manalapan I*, the Commission remanded this matter for reconsideration of these unwarrantable failure deletions. 35 FMSHRC at 298. My previous remand decision reinstated Order No. 7511472 (Belt No. 3), reflecting that the cited condition was attributable to an unwarrantable failure, and raised the civil penalty from \$12,000.00 to \$16,000.00. *Previous Remand Decision*, 35 FMSHRC 1377, 1381 (May 2013) (ALJ). Upon revisiting the circumstances surrounding the unwarrantable designation in Order No. 7511478 (Belt No. 2), I concluded, in essence, that the issuing inspector's testimony characterizing the cited condition as a "borderline" violation failed, as a matter of law, to satisfy the Secretary's preponderance of evidence burden of demonstrating that a violation occurred. *Id.* at 1383-85. Thus, my previous remand decision vacated Order No. 7511478 (Belt No. 2).

This brings us to the Commission's current remand, in *Manalapan II*, in which the Commission vacated and reversed my previous remand decision that vacated Order No. 7511478 (Belt No. 2) because the Secretary had not proven that the cited violation had in fact occurred. In so doing, the Commission credited the Secretary's assertion that my initial unappealed finding that the accumulations along the Belt No. 2 constituted a violation of section 75.400 became the law of the case and could not be revisited on remand.³ 36 FMSHRC at 852. Thus, the Commission has concluded that I am precluded from vacating Order No. 7511478 (Belt No. 2) based on the law of the case doctrine. *Id.*

As stated by the Commission, the law of the case "doctrine provides that when a decision is made at one stage of litigation and not challenged on appeal, it continues to govern." *Id.* (citations omitted). However, the Commission further noted that this doctrine allows for a "modicum of residual flexibility in exceptional circumstances." *Id.* at 853 (citations and quotations omitted). These exceptions include "a showing that the prior decision was clearly erroneous and would work a manifest injustice." *Id.* (citations and quotations omitted).

² A flagrant violation reflects that a violative condition is extremely dangerous in that it has been, or can reasonably be expected to be, the proximate cause of death or serious bodily injury. 30 U.S.C. § 820(b)(2). Despite initially designating the cited accumulations at Belt Nos. 1 and 2 as flagrant, the Secretary did not contest my initial decision that the alleged accumulation violation at Belt No. 1 did not occur, and that the cited accumulation at Belt No. 2 was not reasonably likely to contribute to a serious injury.

³ At trial, the Secretary's sole witness, the issuing inspector, agreed that the accumulations at Belt No. 1 were "too wet to propagate an explosion." 35 FMSHRC at 1382 (citing trial transcript, at 150-52 (incorporating Resp. Ex. 13 deposition testimony, at 110-12)). Although the inspector testified that the accumulations at Belt No. 3 constituted a violation, he opined that the accumulation at "[Belt] Number 2 was on the borderline." *Id.* It is regrettable that the Secretary's appeal is based on the law of the case doctrine, rather than on his assertion that the alleged accumulation violation at Belt No. 2 in fact occurred. Consequently, the Secretary seeks to impose a civil penalty regardless of whether the cited accumulations constituted a violation of section 75.400. Our Government should be held to a higher standard.

II. Discussion

In addressing the Commission's remand in *Manalapan II*, it is particularly essential that this matter be viewed in context.⁴ The Secretary has retreated from his original desire to impose a total civil penalty of \$833,600.00 for the four subject cited conditions. In this regard, the Secretary has failed to contest not only the fact that the accumulation conditions cited in Order No. 7511479 (Belt No.1) were neither S&S nor unwarrantable, but also the fact that the evidence does not support that the violation in fact occurred. On this point, the issuing inspector testified that the cited coal dust accumulations at Belt No. 1 were not combustible as they were so liquefied that they were "incapable of being handled because the material ran through the fingers." 32 FMSHRC at 704. With respect to Order No. 7511478 (Belt No. 2), as previously noted, the Secretary has not appealed the initial decision deleting the S&S designation, thus reflecting that the cited condition was not reasonably likely to contribute to injuries of a reasonably serious nature. It is obvious that, despite his best intentions, even the Secretary's proposed reduced total \$240,000.00 civil penalty grossly overstates the monetary sanction that should be imposed in this matter.

It is in this context that I turn to consideration of Order No. 7511478 (Belt No. 2), the only order subject to this Remand Decision. It is true that my previous remand decision did not explicitly characterize my affirmance of Order No. 7511478 in my initial decision as "a mistake" despite the Secretary's "borderline situation" characterization. 32 FMSHRC at 702 (citing Tr. 150-52). I readily admit that I did not consider the law of the case doctrine in vacating Order No. 7511478. Nevertheless, my decision to vacate Order No. 7511478 in my previous remand decision was based on my belief that the characterization of the alleged violation as "borderline," consistent with the undisputed extremely wet conditions along Belt No. 2, failed to satisfy the Secretary's preponderance of the evidence burden.⁵ *Rag Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (quoting *Concrete Pipe and Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993)) (holding that satisfying the preponderance of the evidence standard requires the proponent to demonstrate "that the existence of a fact is more probable than its nonexistence"). As such, I continue to believe that my affirmance of the violation in my initial decision was, implicitly, and as a matter of law, an unjust mistake that should not be perpetuated to the benefit of the Secretary through application of the law of the case doctrine.⁶ In the final analysis, a "borderline" violation is a non-event unworthy of recognition.

⁴ I believe it is appropriate to clarify the record with respect to my decision vacating Order No. 7511478 (Belt No. 2), which has been reversed by the Commission, in the event this matter is appealed.

⁵ As noted in my previous remand decision, synonyms for the term "borderline" include "dubious," "questionable," "ambiguous," "doubtful," and "inconclusive." 35 FMSHRC at 1383 (citing *Webster's Third New Int'l Dictionary* 255 (1993); *Roget's II: The New Thesaurus*, 52, 17 (3rd ed. 1996)).

⁶ I am cognizant of the Commission's decision in *Douglas R. Rushford Trucking*, 23 FMSHRC 790 (Aug. 2001). In *Rushford*, the judge affirmed an unwarrantable violation that

(continued...)

However, the Commission does not share my view that a “borderline” characterization is inadequate, as a matter of law, to establish a violation. Rather, in *Manalapan II*, the Commission concluded, in essence, that the inspector’s testimony that the Belt No. 2 violation was a “borderline situation” is “susceptible to different interpretations.” 36 FMHSRC at 853; *see* Tr. 150-52. Thus, the Commission concluded that affirming the violation in Order No. 7511478 in my initial decision was not so “clearly erroneous” as to justify an exception to the law of the case doctrine. *Id.* Consequently, the Commission has reinstated the violation in Order No. 7511478 and directed me to consider whether the violation was properly attributable to an unwarrantable failure. *Id.* at 855.

Accordingly, I will now turn to an evaluation of whether the cited accumulation conditions in Order No. 7511478 were attributable to an unwarrantable failure. The criteria for an unwarrantable failure finding are addressed in my initial decision:

The elements of unwarrantable conduct are well settled. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining*, 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991); *see also* *Buck Creek Coal*, 52 F.3d 133, 135-36 (7th Cir. 1995) (approving the Commission’s unwarrantable failure test).

The Commission examines various factors in determining whether a violation is unwarrantable, including the magnitude of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the violation poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC at 11-12, 17; *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). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator

⁶(...continued)

contributed to a fatality. However, the judge reduced the proposed \$25,000.00 civil penalty to \$3,000.00. The case was remanded for an explanation of the penalty reduction in light of the judge’s unwarrantable failure findings. On remand, the judge reevaluated the evidence with respect to his initial finding of gross negligence and imposed a \$4,000.00 civil penalty. On appeal, the Commission concluded that “the law of the case with respect to negligence is controlled by the judge’s finding from his original decision that the violation was a result of ‘high and gross negligence.’” 32 FMSHRC at 791. However, in the present case, I have not reevaluated the factual evidence. Rather, I simply concluded that, assuming everything the Secretary alleges is true, his characterization of the violation as “borderline” fails, as a matter of law, to establish that the violation in fact occurred.

on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1263-64.

32 FMSHRC at 694-95.

Significantly, it is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that a violation is unwarrantable. *IO Coal*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Eastern Associated Coal Corp.*, 32 FMSHRC 1189 (Oct. 2010). Although the cited accumulations were extensive, obvious, and apparently existed for a significant period of time, there are significant mitigating circumstances that markedly reduced the degree of hazard posed by the violation. Namely, as noted in *Manalapan II*, the mine floor remained muddy at all times because of water percolation through old works, the mine floor, and ribs. 36 FMSHRC at 850-51. It is undisputed that the conveyer belt conditions became progressively wetter as water used for dust suppression at the face accumulated as the coal was transported on the conveyer system from Belt No. 4 nearest the face to Belt No. 1 nearest the surface. *Id.*; 32 FMSHRC at 691. To wax poetically, suffice it to say, there was “water, water, every where.”⁷

Thus, indicia of an unwarrantable failure, such as extensiveness, obviousness, and duration, which are normally significant factors in an unwarrantable failure finding, are entitled to less weight given the circumstances in this case. With respect to the degree of danger posed by the cited violation, it is significant that my initial decision to delete the S&S designation has not been appealed by the Secretary. Consequently, as previously noted, the Secretary has, in effect, conceded that the cited accumulations are not reasonably likely to contribute to a fire or explosion. Thus, Manalapan’s failure to timely remove the accumulations, given the violation’s lack of serious gravity, may not be viewed as a significant aggravating factor. Hence, the circumstances surrounding the violation are indicative of no more than moderate negligence and do not support the Secretary’s assertion that the violation was attributable to inexcusable conduct. The remaining unwarrantable failure indicia are not aggravating factors. Accordingly, the 104(d)(1) Order No. 7511478 (Belt No. 2), designated as non-S&S in nature, **shall be modified to a 104(a) citation to reflect that the cited violation was attributable to moderate negligence, rather than an unwarrantable failure.**

The Secretary initially proposed a penalty of \$60,000.00 for Order No. 7511478. The civil penalty analysis in my initial decision is incorporated by reference. *See* 32 FMSHRC at 695, 704. Given the modification of the 104(d)(1) order to reflect that the conditions along Belt No. 2 were neither S&S in nature nor attributable to Manalapan’s unwarrantable failure, **a civil penalty of \$4,000.00 shall be assessed for 104(a) Citation No. 7511478.**

⁷ Samuel Taylor Coleridge, *The Rime of the Ancient Mariner*, in *Lyrical Ballads* (1st ed. 1798).

ORDER

The fact of the violation and its non-S&S nature having been reinstated by the Commission in *Manalapan II*, **IT IS ORDERED** that Order No. 7511478 be modified to a section 104(a) citation to reflect that the cited violative accumulations were not attributable to Manalapan's unwarrantable failure. **IT IS FURTHER ORDERED** that Manalapan Mining Company, Inc., pay, within 40 days of the date of this Remand Decision, **a total civil penalty of \$4,000.00** in satisfaction of 104(a) Citation No. 7511478 (Belt No. 2).^{8 9}

IT IS FURTHER ORDERED that upon timely receipt of the total \$40,000.00 payment, the civil penalty proceeding in KENT 2008-737 **IS DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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⁸ Payment should be addressed 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.

⁹ Thus, **Manalapan's total liability in Docket No. KENT 2008-737 is \$40,000.00:** \$20,000.00 for 104(d)(1) Citation No. 7511467 (Belt No. 4), \$16,000.00 for 104(d)(1) Order No. 7511472 (Belt No. 3), and \$4,000.00 for 104(a) Citation No. 7511478 (Belt No. 2).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 23, 2015

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

v.

NATIONAL CEMENT CO. OF
ALABAMA
Respondent

CIVIL PENALTY PROCEEDING:

Docket No. SE 2014-71-M
A.C. No. 01-00027-335066

Mine: National Cement Co.

DECISION

Appearances: Daniel Brechhuhl, Esq., U.S. Department of Labor, Office of the Solicitor,
Denver, Colorado for Petitioner

Jay St. Clair, Littler Mendelson, Birmingham, Alabama for Respondent

Before: Judge Barbour

In this civil penalty case, arising under sections 105(d) and 110(i) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), as amended (30 U.S.C. §§ 815(d), 820(i)), the Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”) seeks the assessment of civil penalties for 24 alleged violations of various mandatory safety standards for the nation’s metal and non-metal mines. The standards are set forth at 30 C.F.R. Part 56. In citing the alleged violations MSHA’s inspectors made findings as to whether the violations were significant and substantial contributions to mine safety hazards (“S&S” violations). They also made findings regarding the violations’ gravity and the negligence of National Cement Company of Alabama, Inc. (“National Cement”). The violations purportedly occurred at a cement plant owned and operated by National Cement. The plant is located in Ragland, Alabama.

Following issuance of the citations, the Secretary proposed civil penalties. When the company contested the Secretary’s assessments, the Secretary filed the subject petition requesting the Commission assess the penalties as proposed. The company answered, admitting it was subject to the Mine Act, but denying the violations occurred, or, if they did, that the proposed penalties were appropriate. The Commission’s Chief Judge assigned the case to the court, which directed the parties to engage in discussions to determine if any of the alleged violations could be settled. The court advised the parties that it would receive evidence and arguments concerning all of the allegations the parties could not settle. The parties ultimately agreed to settle 20 of the violations. The rest were tried on December 2, 2014, in Birmingham, Alabama.

THE MINE and THE INSPECTIONS

At its Ragland facility the company mines, crushes, grinds, and processes limestone to make powdered cement. Tr. 184. The cement is stored at the facility and is then shipped by truck and rail to customers throughout the southeastern United States. *Id.* Jeffery Golden, the company's human resources manager, testified that of the five similar cement plants in Alabama, National Cement's plant is fourth in size. Tr. 186-187. One hundred and twenty workers are employed at the plant, which operates three shifts around-the-clock. Tr. 47, 185, 187. Although Golden described National Cement as "one of the very small companies in the cement industry" (Tr. 186), when calculating proposed penalties, the Secretary regarded the plant as a medium sized operation, and given the number of miners who work at the facility and the annual hours worked, the court concludes the Secretary is correct. *See* Petition for the Assessment of Civil Penalty, Exhibit A.

On September 3, 2013, MSHA Inspector Rayford Stan Fendley, who at the time had been an inspector for seven plus years, traveled to the plant to conduct a four day inspection. Tr. 45-47. Fendley was accompanied by MSHA Inspector Michael S. Cohen and another inspector, both of whom participated in the inspection. The inspection resulted in the alleged violations, each of which was set forth in a citation issued pursuant to section 104(a) of the Mine Act. 30 U.S.C. §814(a).

THE ALLEGED VIOLATIONS

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
8723970	9/3/13	56.14100(c)	\$1795

The citation states:

No safety chains or wire ropes were installed on the portable pressure washer trailer. The trailer was not tagged or placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items used to prohibit further use until the defects are corrected [*sic.*]. Serious injury could result should the trailer become disengaged from the tow vehicle. Standard 56.14100(c) was cited 4 times in two years at [the] mine . . . (2 to the operator, 2 to a contractor).

Gov't Exh. 3 at 1.

Section 56.14100(c) states,

When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment, shall be taken out of service and placed in a designated area posted for that purpose,

or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

Fendley testified that on September 3 he inspected the trailer used to transport the mine's pressure washer. The trailer was not in service. Tr. 54. Rather, it was parked in the plant's shop area, but not in an area specially designated for equipment in need of repair. Tr. 54-55; Gov't Exh. 3 at 2. The inspector noticed that although the tongue on the trailer's hitch was stable and in excellent condition (Tr. 50), there were no safety chains or wire ropes in the area of the hitch.¹ Tr. 49. *See* Gov't Exh. 3 at 3. He further testified that safety chains or wire ropes are almost always provided by the trailer manufacturer and are standard safety equipment on a trailer. Tr. 51-52. In fact, Fendley never had seen a trailer without safety chains. Tr. 72.

The purpose of the chains or wire ropes is to secure the trailer to the equipment pulling it in case the trailer "accidentally disengage[s] from its towing apparatus." Tr. 49. A moving, uncontrolled, and unhitched trailer poses a danger to miners working or traveling near it. In the inspector's opinion, the lack of the chains or ropes made the trailer a "defective item" within the meaning of section 56.14100(c). Despite this, there was nothing to alert miners that the trailer was defective and could not be used until the chains or ropes were provided.² Tr. 55. In Fendley's view, the trailer should have been removed to a designated area that was specifically set aside for defective equipment, or it should have been tagged and thus have been prevented from being used until the chains or ropes were installed. *Id.* The Inspector believed that the failure to take the trailer out of service or mark the trailer as defective violated section 56.14100(c).³

Fendley saw no other defects on the trailer, and he thought it unlikely that the missing chains or ropes would result in an accident. Tr. 58. Still, an accident was possible. Even properly

¹ The hitch mechanism is comprised of a triangular shaped tow bar that is attached to the trailer. A metal tongue projects from the tow bar and couples onto a ball that is mounted to the vehicle towing the trailer. Safety chains or wire ropes are usually attached to the hitch mechanism at the tow bar or on the tongue. *See* Gov't Exh. 3 at 4.

² Section 56.14209(b) states, "Unless steering and braking are under the control of the equipment operator on the towed equipment, a safety chain or wire rope capable of withstanding the loads to which it could be subjected shall be used[.]"

³ Fendley testified that the company could have simply taken the trailer out of service by removing a tire or wheel or by letting air out of one of the tires. Tr. 57, 74-75. If a tire or wheel had been removed or if the tires had been flat, Fendley would not have regarded the lack of safety chains or wire ropes as a violation because further use of the trailer would have been prohibited by the missing wheel or flat tire(s). *Id.* However, the tires were inflated and on the trailer. Tr. 75. In contrast to Fendley, Scott White, the company's mobile equipment supervisor, testified of the trailer's four tires, the two on the left were flat and that he and Fendley walked around the trailer and looked at all of the tires. Tr. 83.

hitched trailers can disengage and move in an out-of-control manner. A person who is struck by an unhitched, moving trailer can be injured fatally. Tr. 58-59. However, because the trailer's hitch mechanism was in good condition and because when it was used at the plant the trailer was towed at low speeds, Fendley found that an accident due to the violations was "unlikely." Gov't Exh. 3 at 1.

The fact that the missing safety equipment was obvious indicated to Fendley that someone from mine management should have been aware of the condition. More to the point, he maintained that Tom Hayes, the production manager, told him that mobile equipment supervisor, White, whose job it was to maintain and repair all equipment at the mine, knew of the cited condition. Tr. 59, 67-69.⁴

The alleged violation was terminated by placing a lock and a tag reading, "danger equipment locked out," on the tongue of the hitch. Gov't Exh. 3 at 5; Tr. 59.

Scott White testified that the trailer was not in service because the pressure washer's generator and one of its control valves were defective. Tr. 80. He stated that the washer had been out of service for three or four weeks. According to White, the two left tires on the trailer "went flat from sitting there." *Id.* White, who was with Fendley during the inspection (Tr. 82), maintained that the inspector asked if the trailer had chains. Tr. 81. Because "you could clearly see that it didn't," White told Fendley that the trailer was out of service and why. *Id.* White did not recall if the trailer came from the manufacturer with safety chains or wire ropes. *Id.* Because he knew that a contractor was coming to do the necessary repairs on the washer, White stated that he had not "inspected . . . and [gone] over" the trailer. Tr. 84.

THE VIOLATION

The violation occurred as charged. The court finds that as testified to by Fendley and as admitted by White, the trailer, which is "equipment" within the meaning of the standard and whose steering and braking is not controlled by the equipment operator or by the trailer itself, was not provided with safety chains or wire ropes as is required by section 56.14209(b) and therefore was "defective" within the meaning of section 56.14100(c). The court agrees with Fendley's common sense testimony that even though the hitch was in excellent condition, it could fail when it was in use and endanger miners working or traveling in the vicinity. Tr. 50-51, 58-59. Therefore, the court finds that the lack of safety chains or wire ropes made "continued operation [of the trailer] hazardous to persons." 30 C.F.R. §56.14100(c). The trailer should have been taken out of service and kept in a designated area, or it should have been tagged or otherwise removed from service. Because it was not, the company violated section 56.14100(c).⁵

⁴ When Fendley was cross examined, it became clear that Fendley may have been told by Hayes that Scott White knew the trailer was "in for repairs" not because White knew that the chairs or ropes were missing but because the pressure washer needed to be fixed. Tr. 69-70.

⁵ The court does not credit White's testimony that the trailer's two left tires were flat. It is clear to the court that if they had been flat, Fendley would not have issued the citation. Tr. 57. Fendley specifically stated that he looked at the tires and they were not flat. Tr. 74-75. The court believes him.

GRAVITY and NEGLIGENCE

The court finds Fendley’s analysis of the gravity of the violation persuasive. His testimony confirmed that while it was unlikely the trailer would unhitch and move unrestrained and out of control (Tr. 58), it could have happened, and if it happened the result could have been fatal to a miner traveling or working in the vicinity of the uncontrolled and uncontrollable trailer. The company did not dispute that it was possible, and the court finds that the violation was serious.

Fendley also found that the company was highly negligent in allowing the violation. Gov. Exh. 1 at 1. The court concludes that the company was moderately negligent. While it is true, as Fendley noted, that the lack of chains or ropes was obvious and thus compliance with section 56.14100(c) was required, the record also supports finding, as White testified, that use of the trailer, while not impossible, was unlikely because of the broken pressure washer and the fact that the contractor had not yet come to repair it. Thus, White understandably lacked a sense of urgency to observe the defect and either take the trailer out of service or tag it. Tr. 84. This was ordinary negligence.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
8723974	9/4/13	56.11001	\$807

The citation states:

Safe access was not being maintained to the bed of the . . . service truck. Cable slings, pipes, scrap iron and plastic buckets located on the bed of the truck created a slip, trip, and/or fall hazard and prevented safe access to the equipment located in the back of the truck. Serious injury could result from a slip, trip, and/or fall. Standard 56.11001 was cited 2 times in two years at [the]mine . . . (2 to the operator, 0 to a contractor.)

Gov’t Exh. 5 at 1.

Section 56.1101 states, “Safe means of access shall be provided and maintained to all working places.”

On September 4 Fendley inspected a flatbed pickup truck that was used at the mine by repairmen. The truck’s bed was littered with various pieces of equipment, among which were cable slings, scrap iron, plastic buckets, drop cords, a welder and a ladder. Tr. 98, 103; *see* Gov’t Exh. 5 at 4. Based on his experience working at other mines, Fendley believed miners regularly accessed the truck’s bed during the course of their work day. Tr. 98. He testified that trucks such as the one he cited were routinely used at the plant to transport people, tools, equipment, and materials. *Id.* The bed of the cited truck was typical in size, approximately 4 feet wide by 8 feet long. Tr. 100. The tailgate had been removed (Tr. 113), and Fendley believed miners usually

accessed the bed from its open tailgate end. Tr. 101. Because of the height of the bed and of the bed's side panels, Fendley doubted miners always accessed the truck's bed by climbing over its sides, nor did he believe they often reached over the sides to load and unload equipment. *Id.* He thought that in most instances they climbed onto the bed from the tailgate end and then moved around the bed as they loaded or retrieved items. Tr. 102. In Fendley's opinion, when miners climbed onto the bed and moved around, they subjected themselves to the hazard of tripping or slipping on the equipment and being injured. Fendley stated, "If they need something . . . they're going to go across this material without clearing it out of the way." Tr. 104.

Fendley testified that because miners needed to go up and onto the truck bed to load and retrieve equipment and materials, the bed was a "working place" within the meaning of section 56.11001⁶. The inspector believed a slip or fall accident was reasonably likely because of the truck bed's littered state and because miners had to "go through [the] stuff" to do their jobs. *Id.* He also testified that he believed a fall would likely result in a sprain or a strain and/or cuts, "nothing that would be permanently disabling, but it would cause [a] person to not be able to fully perform [his] job." Tr. 107-108. Finally, he thought that one person would be affected because normally one person at a time would be on the truck bed. Tr. 108.

Fendley found the condition to be S&S. The discrete safety hazard about which he was concerned was a tripping hazard. Tr. 111. There was, he stated, a "good likelihood" someone "could get their feet tangled up" and fall. *Id.* Adding to the likelihood of a fall was the fact that a metal bar was positioned approximately four feet over the truck bed toward the cab end of the bed. Gov't Exh. 5 at 4; Tr. 111-112. A miner trying to retrieve something from the back of the bed would have to bend over to pass under the bar, and this added to the chance the miner would lose his balance. Tr. 111. Fendley testified that the only way to avoid the hazard was to keep the bed clean and orderly. Tr. 112. If miners had left "a clean path up the middle of [the] bed to access . . . equipment," Fendley would not have issued the citation. Tr. 118.

Fendley could not say that a management person had "direct knowledge" of the condition, but in his opinion someone from management should have known about it. The conditions was obvious. Tr. 108. It was, he stated, "readily visible to the casual observer." Tr. 109.

Company welder and repairman, Ray Silvey, testified that he used to truck for welding and repairs. Tr. 120. Silvey was on the job when the citation was issued, but he did not recall what he was doing. Silvey maintained that when things were loaded onto the truck bed he stood on the ground at the rear of the truck and hand loaded the equipment and materials. He did not get up on the bed. Tr. 122. He could not "recall a time" when he got on the truck bed to load materials. *Id.* According to Silvey, the only time he was on the bed was when he fueled the welding machine, which was once a week, at most. *Id.* Usually, when he or another miner was on the bed, loose items were not present. He stated, "We clean [the bed] regularly [W]e don't

⁶ 30 C.F.R. §56.2 defines a working place as, "any place in or about a mine where work is being performed." When asked why the bed of the truck met the definition, Fendley stated, "Because miners have to go [on the bed] in performance of their job. That's part of the areas [(sic.)] they have to access to do their job." Tr. 107.

get to it every single day, but I'm not going to climb over anything to fuel the welder." Tr. 123. Silvey stated that he never had to climb over anything "substantial" when he was on the bed of the truck. *Id.* Otherwise, he stayed on the ground and dragged equipment off the bed as he needed it. Large items like the acetylene tanks were loaded and unloaded from a loading dock, where access to the bed was not required. Tr. 123. Further, the ladder and all of the welding tools could be retrieved from the side of the truck. Tr. 124-125.

THE VIOLATION

The court finds that the violation occurred as charged. There is no doubt that the truck bed was cluttered with equipment. A photograph taken of the bed when the violation was issued confirms, as Fendley testified, that numerous items were scattered about the bed. Gov't Exh. 5 at 3; *Id.* at 4. There was no path, clear or otherwise, to travel from the tailgate area of the bed to the area closest to the cab. Gov't Exh. 5 at 3.

The court also finds that the bed was in fact a "working place," that is, a "place in or about the mine where work is being performed," the work being loading and unloading equipment. 30 C.F.R. §56.2. The court does not credit Silvey's testimony that he only got on the bed of the truck when it was necessary to refuel the welding machine. Clearly, it was much easier to access the truck bed from its open end than from over its sides, and human nature, being what it is, the court concludes that in most instances, most miners, including Silvey, accessed and left the truck bed the easiest way possible. In so doing, miners, including Silvey, subjected themselves to possible slips and falls and resulting injuries due to the equipment cluttering the bed. The court fully agrees with the inspector that the lack of a clear path on the truck bed means that safe access was not provided on the bed and that this violated section 56.11001.

S&S and GRAVITY

The court does not agree with the inspector's S&S and gravity findings.⁷ *See* Tr. 127-126. Rather, the court finds that it was unlikely the violation would result in an injury. Given the fact

⁷ A violation is S&S, "if, based upon the particular facts surrounding the violations there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission explained:

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

Mathies Coal Co. 1, 3-4 (Jan. 1984).

that the obstacles on the bed were obvious, the possibility of a miner stumbling or tripping on the disorderly equipment was significantly reduced. The obvious clutter means that a miner was more likely to watch where he was stepping. Moreover, the crossbar under which a miner had to bend to reach the cab end of the bed was just as likely to serve as a brace to steady the miner as a cause for the miner to lose his footing. Further, given the confined space of the bed and the short distance a miner would fall, the court finds that should a slip or stumble occur, it was unlikely the force generated by the mishap would be enough to result in a broken bone or a cut. Rather, in the court's opinion, the most likely result would be a bruise and/or a sore spot, if that. It might make a miner uncomfortable but no more than that, and it would be a stretch to find a slip or fall would be likely to result in an injury of a reasonably serious nature. For these reasons, the court also finds that in addition to the violation not being S&S, it was not serious.

NEGLIGENCE

As Inspector Fendley noted, the condition of the flat bed was open and obvious. The violation should have been observed and corrected. It was not, and the court finds that the violation was due to National Cement's moderate negligence.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
8725985	9/4/13	56.12032	\$1,304

The citation states:

The appx. 9"x 9" junction box cover, for the East and West Hydrophobe Pumps, was not secured in place. Primary voltage inside the electrical box is 120 volts which exposed miners to a shock. Standard 56.12032 was cited 10 times in two years at [the] mine . . . (10 to the operator, 0 to a contractor).

Gov't Exh. 7

Section 56.12032 states, "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing and repairs."

On September 3 MSHA Inspector Michael S. Cohen conducted an inspection at the plant. Tr. 131. Cohen testified that during the course of the inspection he saw "at least 100" junction boxes. *Id.* One of those was located next to the chemical storage facility. Tr. 132. The box formed a metal (steel) enclosure in which 120 volt electrical wires were connected⁸. Tr. 134-

⁸ The company offered the actual box as an exhibit. Co. Exh. A. Examination of the exhibit allows the court to provide a more complete description of the box than that offered by Inspector Cohen. The box measures approximately 8 1/4 inches wide by 10 1/4 inches long by 4 inches deep. The cover of the box is hinged at the top. Half inch flanges on the sides and bottom of the cover overlap the sides and bottom of the box, effectively preventing access to the inside of the box unless the cover is raised. At the bottom of the box is a draw latch. The latch part of the mechanism is soldered to the bottom of the box and the keep part of the mechanism is

(continued...)

135, 139. Cohen noticed that the steel cover of the junction box was down but that the cover was not latched. Tr. 137, 145. Cohen believed the unlatched cover was a violation of section 56.12032, which requires cover plates on junction boxes to be “kept in place.” 30 CFR § 56.12032. Although Cohen agreed that gravity helped keep the cover in place (Tr. 145) and that once closed, there was some resistance or friction that made the cover harder to open (Tr. 146), Cohen explained that the manufacturer of the particular box included a latch at the bottom of the box, and if the latch was not closed an explosion or arc inside the box could “blow the door open and . . . somebody could get burned or seriously injured.”⁹ Tr. 138, *see also* Tr. 139. On the other hand, if the latch was closed and there was an explosion or an arc he believed the resulting fireball or blast would be contained inside the box. *Id.*; *see also* Tr. 140. There was nothing that Cohen noticed that indicated repairs or testing were underway and therefore the exception in the standard that allows the cover plate to be open, did not apply. *Id.* According to Cohen, there are many “different kind[s] of junction boxes on the market [and e]very one of them has a similar type of either latch or mechanical fastener that holds the cover plate in place.” *Id.* During his training as an inspector, Cohen was taught that if the latch or fastener is not employed on a junction box, section 56.12032 is violated. Tr. 152.

Cohen did not try to lift the cover. Rather, the company had its electrician come to the box, lift the cover, and verify the voltage. Tr. 150. Cohen assumed everything inside the box was as it should be because “all [the electrician] did was verify the voltage and latch the cover and . . . [the inspection party] moved on from there.” Tr. 150. Latching the cover abated the alleged violation. *Id.*

Cohen also noted that the standard had been cited 10 times between September 3, 2011, and September 3, 2013. He termed this a “significant history.” Tr. 141. Based on the 10 prior citations, the inspector believed the company was highly negligent. Tr. 144.

⁸ (...continued)

soldered to the flange at the bottom of the cover. *See* Co. Exh. A. All that is necessary to close the cover is for a person or for gravity to pull down on the cover. When this is done, the flanges of the cover easily fall over the sides and the bottom of the box preventing all but purposeful or accidental access to the inside of the box. To latch the cover, the bail of the latch mechanism must be intentionally slipped over the keep of the latch and the tongue of the latch must be pushed toward the back of the box. Once latched, the cover can only be opened by the deliberate action of a person pulling the tongue toward the front of the mechanism which loosens the bail, and which then falls from the hook. After this happens, the cover can be lifted. Cohen agreed that even if the box cover is not latched, gravity helps keep the cover in place and that the effort to open the latched cover is only minimally different from the effort to raise the unlatched cover. Tr. 147-148.

⁹ When asked how there could be an explosion inside the box, Cohen stated it would require, “somebody taking a wire, a loose wire, [and] ground[ing] it out internally” or “it could just be a broken wire.” Tr. 148-149.

THE VIOLATION

The court concludes that the Secretary did not prove the violation. The standard requires that the cover be “kept in place at all times except during testing and repairs.” There is no dispute that testing and repair of the pump starters or of the electrical connections inside the box were not underway when the violation was cited. Tr. 135. There also is no dispute that when the violation was cited only gravity held the cover in place and only friction offered some resistance to opening the cover. Tr. 145-146. Finally, there is no dispute that the latch at the bottom of the box was open, not closed. Tr. 137, 145.

The court has struggled with whether the failure to close the latch is essentially a *per se* violation of the standard. As counsel for the operator pointed out, there is no specific regulatory requirement that the cover be latched or locked. Tr. 180. On the other hand, as counsel for the Secretary pointed out, the box was manufactured with a latch presumably to “protect people that would be subject to [the] area [where the box is located.]” Tr. 176. (The court interprets counsel for Secretary’s argument as being that the court should above all effectuate what counsel deems the purpose of the standard by finding that an unlatched or unpinned box is in and of itself a violation of section 56.12032.) However, the court has concluded that rather than read into the standard something that is facially missing in order to effectuate what the Secretary presumes to be the standard’s purpose, the court should resolve the issue of the existence of the violation in a more elementary and prosaic manner – by applying the words of the standard to the facts.

“In place” refers to the position of the cover, and here all agree that the cover was properly positioned. “Kept” is the past tense of “to keep,” a transitive verb connoting “restraint.” Mirriam-Webster, Inc., *Webster’s New International Dictionary* (1993) at 1236. The force of gravity restrained the cover plate from moving from its closed position and friction offered some resistance to it opening. Tr. 145-146. If analysis of the words of the standard ended here, the court might find that the conditions cited by the inspector did not violate section 56.12032.¹⁰ However, the standard contains other words that require further analysis. The words, “at all times,” form an inclusive phrase encompassing both when the alleged violation is cited and the coming time as mining continues. The court accepts Inspector Cohen’s testimony that as mining continued if wires inside the box became loose or broken and touched one another, an electrical explosion or arc could occur. Tr. 139. There is no testimony to the contrary, and the inspector’s opinion is entitled to considerable weight. The critical question, therefore, is whether the Secretary established that such an explosion or arc would produce forces sufficient to lift the cover and allow flames to escape the box and enter the mine atmosphere, and it is here that the Secretary’s case comes a cropper.

The Inspector’s testimony is conflicted and inconsistent. Early in his testimony, Inspector Cohen stated, “If you have an electrical arc, flash or explosion inside this box, the fireball or

¹⁰ The court recognizes circumstances can arise in which a cover is technically “kept in place,” that is, it is in a closed position, but defects in the plate (e.g. holes due to corrosion or other causes) render the cover functionally equivalent to an open cover and hence result in a violation of the standard. *See e.g.*, (*TM Incorporated – Knife River Materials*, 33 FMSHRC 1210, 1238-1240 (ALJ Zielinski)). However, such circumstances are not before the court.

pressure can blow the door open, and therefore, somebody could get burned or seriously injured.” Tr. 137-139. However, on cross examination he admitted that he did not know if this was so. The admission is contained in a colloquy between counsel for the company and the inspector in which counsel pursued a line of questions probing the basis for the inspector’s belief that an electrical malfunction inside the box could result in the cover being raised. Tr. 149.

Counsel: So how could there be and explosion inside [the box?]

Inspector: Have somebody taking a wire, a loose wire, ground it out internally.

Counsel: You mean, if they were working inside?

Inspector: It could be just a broken wire.

Counsel: Oh, so you’re talking about just a short?

Inspector: Yes, sir. Yes.

Counsel: Of 120 volts?

Inspector: Yes, sir.

Counsel: You think that’d blow the cover off?

Inspector: I don’t know.

The court concludes that to prevail, the Secretary had to offer other testimony or documentary evidence as to the force produced by an electrical malfunction inside the cited box and the effect of the force on the box’s unlatched cover. He did not.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
8725995	9/4/13	56.12032	\$1,304

The citation states:

The Kiln Shell Fan disconnect box cover, located next to the auxiliary fans, was not secured in place. The primary voltage inside the box was 480 volts which exposed miners to a shock or electrocution. Standard 56.12032 was cited 14 times in two years at [the] . . . mine (14 to the operator, 0 to a contractor).

Gov. Exh. 9 at 1.

As previously noted, Section 56.12032 states “Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing and repairs.”

Inspector Cohen testified that on September 4 he observed another junction box whose cover was not kept in place. Wires carrying 480 volts of electricity passed through the box. Tr. 154. The electricity was “on” and flowing into and out of the box. Tr. 155, 158, 164. Although the inspector testified that the box was partly opened, the evidence is in conflict.¹¹ However, it is clear that the box was not fastened shut. Tr. 155. The box was manufactured with a hasp, but there was no pin or lock through the hasp, securing the cover against opening. According to Inspector Cohen, if the cover had been pinned or locked, there would have been no safety issue and no violation. Tr. 156; *See also* Tr. 168. Cohen agreed that the force of gravity closed the cover. He stated, “If you flipped [the cover] open and let it go, it would close down[.]” Tr. 158. Although he could not recall for certain, the inspector acknowledged that there also might have been a “dimple” on the lower edge of the cover and if the dimple lodged in a corresponding depression in the lower body of the box, the two would have helped to keep the cover closed. 163. Cohen thought it improbable that the condition would injure a miner. *Id.* However, if an injury occurred, it would likely be fatal to the miner involved. Tr. 155. Because of the previous violations of section 56.12032 cited at the mine in the two years between June 4, 2011, and June 4, 2013, Cohen found that the condition was due to the company’s “high” negligence.¹² Tr. 157; Gov’t Exh. 8.

To abate the violation the company took a piece of wire or welding rod and inserted it through the hasp preventing the cover from opening without removing the fastener. Tr. 160, 167; *See similarly configured* Co. Exh. B. In Cohen’s opinion, the wire served the same purpose as a lock in preventing the cover from opening accidentally. Tr. 161.

THE VIOLATION

The court concludes that the Secretary did not prove the violation. Had the Secretary established the cover of the box was partly open, the violation would have been established because a partly open cover is clearly one that is not kept in place at all times and testing or repairs were not underway. But the evidence is in conflict on this point. On one hand, the

¹¹ Cohen stated, “The door was partially open. That’s why I issued the citation.” Tr. 158. However, in his contemporaneous notes he stated that the “front cover [was] down and not secured or locked in place.” Tr. 165; Gov’t Exh. 9 at 2. Earlier in his testimony when asked why he thought it was unlikely the condition he cited would result in a fatal accident, he stated, “[T]he cover was down, but it was not fastened or latched.” Tr. 154. Cohen acknowledged that nowhere in his notes did he mention that the door was partially open, but he excused himself by stating that, “Nobody’s perfect.” Tr. 166. However, shortly thereafter, he again stated, “The cover was found down.” *Id.* Moreover, Cohen’s supervisor understood that the cover was not partially opened. Cohen agreed that the supervisor subsequently modified Cohen’s negligence finding from “high” to “moderate” to reflect that “the box was closed.” Tr. 157.

¹² As previously mentioned, the finding was modified to “moderate” negligence by Inspector Cohen’s supervisor “to reflect that the box was closed.” Tr. 157.

inspector described the cover as “partially open.” Tr. 158; 166. On the other, in his written notes and in other testimony he described the cover as “down” and as being “found down. Gov’t Exh 9 at 3; Tr. 166. Moreover, in a photograph of the junction box that purports to show the box as cited, the cover appears to in fact be down. Gov’t Exh 9 at 4. Further, Inspector Cohen agreed that his supervisor modified the inspector’s negligence finding because the cover was closed. Tr. 157. Given the conflicts in the evidence and the lack of corroboration that the cover was partly open, the court cannot find that the cover was in fact partly open and hence that the standard was violated.

None-the-less, it is undisputed that the cover was not locked or pinned and the Secretary still could have proven the violation if he offered testimony that an internal explosion or arc would have been forceful enough to blow open the cover. He did not present any oral or written evidence on the effect on the cover of the forces produced by an internal explosion, arc, or other electrical malfunction of conductors carrying 440 volts of electricity. Despite this deficiency, had the Secretary established that forces produced by a malfunction of the 120 volt conductors in the junction box for the Hydrophobe Pumps produced forces sufficient to blow open that box’s unlatched cover, the court might have been able to conclude that the presumably greater forces produced by a malfunction of the 440 volt conductors would have blown open the cover of the smaller Kiln Shell Fan disconnect box, but the record does not allow the court to find the premise necessary to reach the conclusion. Therefore, based on the record before it, the court holds that the Secretary failed to establish that the cover of the Kiln Shell Fan disconnect box was not “kept in place at all times.”

OTHER CIVIL PENALTY CRITERIA

The parties stipulated that the company exhibited good faith in abating the violations. Tr. 25. They further agreed that the amount of any civil penalties assessed will not affect the company’s ability to continue in business. Tr. 25-26. The Secretary maintains that the company has a “very large” history of prior violations. Tr. 27. The Secretary submitted a computer printout purporting to show all violations cited and assessed at the mine that became final between June 3, 2012 and September 2, 2103. Gov’t Exh. 2. There are 84 such final violations. The court finds that the company has a large history of prior violations. *See* Tr. 26-34 (discussion between the court and counsels). Finally, the parties did not stipulate as to the size of the company. However, given the points assigned by the Secretary for the size of the mine and the mine’s controlling entity, points the company did not dispute, the court finds the company is of a medium size. *See* Petition for Assessment of Civil Penalty, Exh. A; “The Mine and The Inspection” discussion *supra*.

ASSESSMENT OF CIVIL PENALTIES

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8723970	9/3/13	56.14100(c)	\$1,795	\$1,000

The court finds that the violation was serious and the company’s negligence was moderate. Given these findings and the other civil penalty criteria, the court assesses a penalty of \$1,000 for the violation.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8723974	9/4/13	56.11001	\$807	\$500

The court finds that the violation was not serious and the company's negligence was moderate. Given these findings and the other civil penalty criteria, the court assesses a penalty of \$500 for the violation.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
8725985	9/4/13	56.12032	\$1,304

The court finds that the Secretary did not prove the violation. The citation will be vacated.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
8725995	9/4/13	56.12032	\$1,304

The court finds that the Secretary did not prove the violation. The citation will be vacated.

SETTLED VIOLATIONS

The parties agreed to settle 20 alleged violations. At the close of the hearing counsel for the Secretary read the details of the settlements into the record. Tr. 188-194. The settlements are as follows:

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8723972	9/4/13	56.141323(a)	\$1,795	\$1,795

There are no modifications to the citation and the penalty assessed is the penalty proposed. Tr. 188.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8725990	9/4/13	56.12032	\$1,304	\$1,304

There are no modifications to the citation. The penalty assessed is the penalty proposed. Tr. 188.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8725991	9/4/13	56.12004	\$1,304	\$1,000

The inspector's negligence finding will be modified from "high" to "moderate." Tr. 188.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.§</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8723973	9/4/13	56.4104(a)	\$807	\$807

There are no modifications to the citation. The penalty assessed is the penalty proposed.
Tr. 188.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.§</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8725992	9/4/13	56.20003(b)	\$807	\$100

The inspector's gravity finding will be modified from an injury being "reasonably likely" due to the violation, to an injury being "unlikely." The inspector's S&S finding will be deleted.
Tr. 189-190.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.§</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8730407	9/4/13	56.14107(a)	\$3,143	\$2,000

The inspector's negligence finding will be modified from "high" to "moderate," Tr. 190.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.§</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8723976	9/4/13	56.14100(c)	\$807	\$807

The inspector's negligence finding will be modified from "high" to "moderate," but the penalty assessed will remain as proposed Tr. 190-191.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.§</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8725994	9/4/13	56.12032	\$392	\$392

There are no modifications to the citation. The penalty assessed is the penalty proposed
Tr. 191.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.§</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8725996	9/4/13	56.14132(b)(1)	\$2,678	\$2,678

There are no modifications to the citation. The penalty assessed is the penalty proposed
Tr. 191.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.§</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8725998	9/4/13	56.12032	\$1,304	\$1,304

There are no modifications to the citation. The penalty assessed is the penalty proposed
Tr. 191.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.§</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8723979	9/5/13	56.12032	\$3,143	\$3,143

The inspector’s negligence finding will be modified from “high” to “moderate.” The penalty assessed will remain as proposed. Tr. 191.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.§</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8723981	9/5/13	56.12034	\$425	\$100

The inspector’s negligence finding will be modified from “high” to “moderate.” Tr. 191.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.§</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8730415	9/5/13	56.12032	\$946	\$946

The inspector’s negligence finding will be modified from “high” to “moderate.” The penalty assessed will remain as proposed. Tr. 192.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.§</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8730416	9/5/13	56.12019	\$425	\$100

The inspector’s gravity finding will be modified from the violation being unlikely to result in a “fatality” to the violation being unlikely to result in “lost workdays or restricted duty.” Tr. 192.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.§</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8726005	9/6/13	56.20003(b)	\$362	\$362

There are no modifications to the citation. The penalty assessed is the penalty proposed Tr. 192.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.§</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8726006	9/6/13	56.20003(b)	\$362	\$362

There are no modifications to the citation. The penalty assessed is the penalty proposed Tr. 192.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.§</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8730418	9/6/13	56.12004	\$745	\$100

The inspector’s negligence finding will be modified from “high” to “moderate.” Tr. 192.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R.§</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8730420	9/7/13	56.12004	\$634	\$634

There are no modifications to the citation. The penalty assessed is the penalty proposed Tr. 192.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8726007	9/7/13	56.14107(a)	\$7,578	\$4,735

The inspector’s negligence finding will be modified from “high” to “moderate.” Tr. 192.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8726008	9/7/13	56.16012	\$138	\$138

There are no modifications to the citation. The penalty assessed is the penalty proposed. Tr. 192.

After the settlements were explained by counsel, they were approved on the record by the court. Tr. 194.

ORDER

In view of the conclusions, findings, and approval set forth above, within 30 days of the date of this decision the Secretary **IS ORDERED** to:

Modify Citation No. 8723970 by changing the inspector’s negligence finding from “high” to “moderate;” and modify Citation No. 8723974 by changing the inspector’s gravity finding from “reasonably likely” to “unlikely” and from “lost workdays or restricted duty” to “no lost workdays” and by deleting the inspector’s S&S finding.

Further, if he has not already done so, within 30 days of the date of this decision, the Secretary **SHALL** modify Citation No. 8725991 by modifying the inspector’s negligence finding from “high” to “moderate;” modify Citation No. 8725992 by changing the inspector’s gravity finding from “reasonably likely” to “unlikely” and by deleting the inspector’s “S&S” finding; modify Citation No. 8730407 by changing the inspector’s negligence finding from “high” to “moderate;” modify Citation No. 8723976 by modifying the inspector’s negligence finding from “high” to “moderate;” modify Citation No. 8723979 by changing the inspector’s negligence finding from “high” to “moderate;” modify Citation No. 8723981 by changing the inspector’s negligence finding from “high” to “moderate;” modify Citation No. 8730415 by changing the inspector’s negligence finding from “high” to “moderate;” modify Citation No. 8730416 by changing the inspector’s gravity finding from “unlikely” to result in a “fatality” to “unlikely” to result in “lost workdays or restricted duty;” modify Citation No. 8730418 by changing the inspector’s negligence finding from “high” to “moderate;” and modify Citation No. 8726007 by changing the inspector’s negligence finding from “high” to “moderate.”

Citations No. 8725985 and No. 8725995 **ARE VACATED**.

Finally, within 30 days of the date of this decision, the company **SHALL PAY** civil penalties in the amount of \$24,307 (\$1,500 for the contested violations and \$22,807 for the settled violations).¹³ Upon **MODIFICATION** of the citations and **PAYMENT** of the penalties, this proceeding **IS DISMISSED**.

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

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35203

/db

¹³ Payment shall be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, BOX 790390, ST. LOUIS, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

February 25, 2015

SECRETARY OF LABOR, MSHA on
behalf of RALPH KEELE,
Complainants,

v.

ENERGY WEST MINING COMPANY,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2013-0877-D
DENV-CD 2013-13

Mine: Deer Creek Mine
Mine ID: 42-00121

DECISION AND ORDER

Appearances: Tyler P. McLeod, Esq., U.S. Department of Labor, Office of the Solicitor,
Denver, CO, for Complainants;

Willa B. Perlmutter, Esq., Crowell & Moring, Washington, D.C., for
Respondent.

Before: Judge L. Zane Gill

This proceeding arises under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. § 815(c) (1994). The parties presented testimony and documentary evidence at the hearing held in Price, Utah on April 8, 9, and 10, 2014.

By agreement, Ralph Keele (“Keele”) was temporarily economically reinstated from March 7, 2013, the date he was suspended without pay with intent to terminate, under the same terms as if he had not been suspended. (Tr.1 at 127:18-20)¹ This agreement was approved by the Court on June 26, 2013. The temporary reinstatement will expire when Keele is no longer entitled to temporary reinstatement under Section 105(c) of the Act. 30 U.S.C. § 815(c).

Keele argues here that Energy West terminated his employment because he engaged in protected activity. The Respondent admits that Keele engaged in many instances of protected activity, but claims as an affirmative defense that Keele was terminated because he made a false statement against the mine manager which violated Respondent’s Business Code and justified termination. Keele also claims that the Respondent failed to make full payment under the terms of the economic reinstatement agreement. The parties agreed that if the Respondent is found

¹ Tr.1 refers to the transcript for the first day of the hearing, Tr.2 for the second day, and Tr.3 for the third day.

liable for violating Section 105(c), they would submit additional evidence regarding Keele's economic reinstatement claim.

For the reasons that follow, I find that Keele engaged in protected activity and conclude that Energy West violated Section 105(c) of the Act by terminating him. I also conclude that Energy West's stated reasons for terminating Keele are pretextual. Therefore, Keele is entitled to reinstatement at the Deer Creek Mine, and in addition to any amount determined later to be due to Keele under the terms of the economic reinstatement, the Respondent shall pay a civil money penalty in the amount of \$20,000.00.

I. Stipulations

The Parties' Pre-Hearing Report dated April 1, 2014, included fourteen stipulations:

1. The Administrative Law Judge has jurisdiction over this action pursuant to § 113 of the Mine Act, 30 U.S.C. § 823;
2. This action is brought by the Secretary pursuant to the authority granted by § 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2);
3. Energy West is the operator of Deer Creek Mine, Mine ID No. 42-00121, an underground coal mine located in Emery County, Utah;
4. At all relevant times, Energy West was an operator as the term is defined by § 3(d) of the Mine Act, 30 U.S.C. § 802(d);
5. Energy West produces products that enter commerce or has operations or products that affect commerce, all within the meaning of §§ 3(b), 3(h), and 4 of the Mine Act, 30 U.S.C. §§ 802(b), 802(h), 803;
6. At all relevant times, Energy West employed Complainant, Ralph Keele, as a diesel mechanic at the Deer Creek Mine;
7. At all relevant times, Mr. Keele was a miner within the meaning of § 3(g) of the Mine Act, 30 U.S.C. § 802(g);
8. Energy West is an operating division of Interwest Mining, which is a wholly owned subsidiary of PacifiCorp;
9. PacifiCorp is a wholly owned subsidiary of MidAmerican Energy Holdings Company;
10. Energy West employees are subject to the MidAmerican Energy Holdings Company's Code of Business Conduct;

11. On March 7, 2013, Mr. Keele was suspended from his employment at the Deer Creek Mine with intent to discharge. The reasons for Mr. Keele's suspension were included in a letter to Mr. Keele from Human Resources Manager, Don Childs, dated March 7, 2013;
12. As of March 7, 2013, Mr. Keele was rotating between day and afternoon shifts every two weeks. On the day shift he earned \$25.65 per hour and on the afternoon shift he earned \$26.05 per hour;
13. The proposed penalty will not affect Energy West's ability to remain in business;
14. The parties stipulate to the authenticity of those documentary exhibits that have been exchanged by the parties in discovery up to the date of the Pre-Hearing Report, but not to the relevance or truth of the matters asserted therein. The parties do not stipulate to the authenticity of any video footage that may be presented at hearing, but reserve the right to review such video footage prior to stipulating to authenticity.

II. Legal Principles

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint notifying the operator [...] of an alleged danger or safety or health violation." 30 U.S.C. § 815(c).

In order to establish a *prima facie* case of discrimination under Section 105 (c)(1), Keele must show: (1) that he engaged in protected activity; and (2) that the adverse action he complains of was motivated, at least in part, by that activity. *Drissen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Robinette v. United Castle Coal, Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom.*; *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d. Cir. 1981).

The Commission recently sharpened the focus on the appropriate quantum of proof needed to establish the *prima facie* case. *Turner v. National Cement Co. of California* reiterated the clear difference in the quantum of proof a claimant must provide to ultimately prevail in a discrimination case as opposed to the minimal showing required to establish the *prima facie* case. 33 FMSHRC 1059 (May 2011). "[T]o make out a *prima facie* case of discrimination, the [discriminatee] need only submit enough evidence so that the record *could* support an inference" that the termination resulted, at least in part, from protected safety complaints. *Id.* at 1066 (internal citations omitted) (emphasis in original).

The Commission has noted that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor ex rel. Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Circumstantial evidence may include: 1) coincidence in time between the protected activity and the adverse action; 2) knowledge of the protected activity; 3) hostility or animus toward the protected activity; and 4) disparate treatment. *Id.* The more that hostility or animus is

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

Under Section 105(c), 30 U.S.C. § 815(c), the operator may rebut the miner’s *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case, it may nevertheless defend affirmatively by proving that it was motivated by the miner’s unprotected activity. It is not enough under Section 105 (c) for the operator to show that the miner deserved to be fired for engaging in the unprotected activity. The operator must show that it did, in fact, consider the miner deserving of discipline for engaging in the unprotected activity alone and that it would have disciplined him in any event. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

In analyzing a mine operator’s asserted justification for taking adverse action under the *Pasula-Robinette* framework, the inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator’s actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. The ALJ may not impose his own business judgment as to an operator’s actions, *Chacon*, 3 FMSHRC at 2516-517, and he may not substitute his own justification for disciplining a miner over that offered by the operator. *Sec’y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 989 (Sep. 2001).

The Commission has explained, however, that “pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator’s normal business practices.” *Sec’y of Labor ex rel. Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). Further, “[a] plaintiff may establish that an employer’s explanation is not credible by demonstrating ‘either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.’” *Turner* 33 FMSHRC at 1073 (emphasis in original) (citations omitted). Additionally, “[a] company’s failure to follow its own policies can be evidence of pretext.” *Garza v. Hanson Aggregates, LLC*, 36 FMSHRC 974, 992 (Apr. 2014) (ALJ Gilbert); *See Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 727 (7th Cir. 2005) (failure to follow company’s own procedures may be evidence of pretext); *see Giacoletto v. Amax Zinc Co.*, 954 F.2d 424, 427 (7th Cir. 1992) (determining that employer’s proffered justification was pretextual when company failed to follow its own procedures.)

III. *Prima Facie* Discrimination

As part of his burden to make a *prima facie* showing of discriminatory intent, Keele must show that his termination was motivated, at least partially, by his making safety complaints. I

must determine whether the evidence in total, including the inferential evidence, has sufficient circumstantial weight to satisfy his *prima facie* burden to show discrimination.

A. Keele Engaged In Protected Activity

To satisfy the first prong of the *Pasula-Robinette* test for a *prima facie* case of discrimination, Keele must show that he engaged in protected activity. *Drissen*, 20 FMSHRC at 328; *Robinette* 3 FMSHRC at 803; *Pasula*, 2 FMSHRC at 2786. Counsel for the Respondent conceded this point, by stating in her opening statement: “There is no doubt that Mr. Keele engaged in protected activity and lots of it [...]” (Tr.1 at 22:12-14) Thus, the primary issue is the “motivational nexus” between Keele’s protected activity and the adverse actions. *See Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000).

Protected activity under the Act has been found to include tagging out equipment because it may be unsafe, *see Consolidation Coal Co.*, 8 FMSHRC 1568 (Oct. 1986) (ALJ Lasher), making a complaint to an operator or its agent of “an alleged danger or safety or health violation,” *see Sec’y of Labor ex rel. Davis v. Smasal Aggregates, LLC*, 28 FMSHRC 172, 175 (Mar.2006)(ALJ Lietinski), and reporting potential safety or health hazards to MSHA or an MSHA inspector, *see Sec’y of Labor ex rel. Chaparro v. Comunidad Agricola Bianchi, Inc.*, 2010 WL 1145197 at *4 (Feb. 2010)(ALJ Barbour). The language of the statute prohibits discrimination against a miner for filing complaints under §§ 105(c) or 103(g), which in and of itself qualifies as protected activity. 30 U.S.C. § 815(c)(1).

I find that between December 17, 2012, and March 6, 2013, the day he was terminated, Keele engaged in protected activity of which company management was aware at least ten times.

1. Background Facts²

At the time of trial, Keele had been employed at the Deer Creek Mine since 1981, approximately 33 years. (Tr.1 at 33:3) During that time, Keele had been the Vice President of the local union, Chairman of the Mine Committee, and was serving as the union’s Safety Committee

² These findings of fact here and below are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into account the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies in each witness’s testimony and between the testimonies of other witnesses. In evaluating the testimony of each witness, I have also taken into account his or her demeanor. Any perceived failure to provide detail about any witness’s testimony is not a failure on my part to consider it. The fact that some evidence is not discussed does not mean that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered). I have also fully considered the contents of the official file, including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

Chairman when he was terminated. (Tr.1 at 36:17-23) Keele was on the Safety Committee from approximately 1983 until 1994, and then again in 2013. (Tr.1 at 37:10-16)³

During his mining career at Deer Creek, Keele worked mostly as a mechanic electrician until January, 2012, when he bid for and won a surface diesel mechanic position. (Tr.1 at 33:3-11; Tr.1 at 34:7-8) The new position required that Keele master new skills. (Tr.1 at 34:11-21)

Keele's predominant duty as a diesel mechanic was to perform permissibility inspections – weekly inspections that must be completed for every piece of diesel equipment at the mine. (Tr.1 at 35:16-23) Ordinarily, the mechanic shop superintendent would give the diesel mechanics work orders at the beginning of every shift. (Tr.1 at 39:5-7) Two mechanics would then inspect each piece of equipment for permissibility. (Tr.1 at 48:12-21) The mechanics were expected to complete a form describing any problems with equipment they inspected. (Tr.1 at 50:14-23) Diesel mechanics also performed repairs on mantrips, small trucks, and haulage equipment. *Id.* As a practice, if a problem with a piece of diesel equipment was easy to fix, the mechanics fixed it right away, if not, they tagged the equipment out of service. (Tr.1 at 50:3-7) There were two lifts or hoists in the shop where mechanics did routine equipment maintenance. (Tr.1 at 93:5-8)

2. Events Related to The Tagging Out Incident on December 17, 2012

Keele and Brian Lea⁴ (“Lea”) testified that Rudy Madrigal⁵ instructed them to do permissibility inspections of the diesel mantrips on December 17, 2012. (Tr.1 at 47:7-14; Tr.1 at 46:8-12; Tr.2 at 34:21 – 35:2; Tr.2 at 36:6-12) Keele and Lea went to the diesel garage where all of the mantrips were parked along the wall. They went down the line, and did their permissibility inspections. (Tr.1 at 47:14-20) They ultimately found problems with and tagged out of service seven of the mantrips and one duster. (Tr.1 at 49:10-25; Tr.2 at 40:5-8; Ex. S-21)⁶

Keele and Lea began their inspection between 9:00-9:30am. (Tr.1 at 49:1-9) They tagged out four mantrips before their lunch break, which began around 11:00am and lasted about one hour. (Tr.1 at 165:10-16) After returning to work, they inspected the rest of the mantrips and tagged out an additional three, plus the duster. (Tr.1 at 166:1-3) Around 1:30-2:00pm, while

³ The Safety Committee is an elected position. The committee consists of 12-13 people who conduct monthly or bimonthly inspections of the mine to address safety issues. (Tr.11 at 36:25 – 37:3)

⁴ At the time of the hearing, Brian Lea had been working at the Deer Creek Mine for approximately 17 years and had been a diesel mechanic for nine months. (Tr.2 at 33:11-22)

⁵ Rudy Madrigal was the diesel mechanic supervisor at the time of the incident. (Tr.1 at 46:8-12)

⁶ Ex. S-21 contains Keele's handwritten notes on the mantrips they inspected, which were submitted to management. (Tr.1 at 52:4-9)

Keele and Lea were finishing the duster examination, Darrel Bagley⁷ came into the garage and told them to fix the mantrips that did not require a lot of work first so that they could be placed back into service. (Tr.1 at 53:4-16) Keele and Lea took two mantrips into the shop to start working on them. (Tr.1 at 54:3-7) Within minutes, Clayton Cox (“Cox”), the assistant mine manager, a position directly under mine manager, Rick Poulson (“Poulson”),⁸ came into the shop to find out what was going on with the mantrips. (Tr.1 at 55:7-15) Keele told Cox that there were problems with some of the mantrips, and because of that, they tagged them out. (Tr.1 at 55:20-25) Keele testified that Cox was “quite upset” that the mantrips were tagged out. (Tr.1 at 56:5) Lea also testified that Cox was irritated and upset. (Tr.2 at 41:19)

Both Keele and Lea testified that after Cox asked what was going on, he said he was going to conduct an investigation, that he was going to get to the bottom of what happened, and that he was going to make sure something was done about it. (Tr.1 at 56:8-13; Tr.2 41:8-17) Cox left the garage and called Don Childs⁹ to inquire whether any disciplinary action could be taken against Keele and Lea for tagging out the mantrips. (Tr.2 at 225:4-7) Because of Cox’s comments, both Keele and Lea believed they were going to get fired for tagging out the mantrips. (Tr.1 at 57:21-25; Tr.1 at 58:2-6; Tr.2 at 41:22 – 42:2) Lea felt the working environment was hostile after speaking with Cox. (Tr.2 at 43:2-7)¹⁰

Approximately ten minutes after Cox left, mine manager Rick Poulson came into the shop. (Tr.1 at 59:1-8) He came up to Keele while he was standing on a stool on one side of a mantrip and asked him what the issue was with the mantrip he was working on. *Id.* Keele told Poulson that he was working to try to figure it out and fix the problem. (Tr.1 at 59:8-11) Keele testified that Poulson then approached Lea and asked him the same question. (Tr.1 at 59:15-19) As Poulson was talking to Lea, Keele walked around to the other side of the mantrip to spray degreaser on the engine so that he could find leaks. *Id.* At this point, Keele was facing the

⁷ At the time of the hearing, Darrel Bagley was Keele’s immediate supervisor during the afternoon shifts. (Tr.1 at 38:17-19)

⁸ Rick Poulson is the general manager at Energy West and Bridger Coal. (Tr.2 at 163:10-12) Rick Poulson worked for Energy West for 23 years, then went to work at three other coal companies for eight years, and then went back to Energy West in 2007 to the present and was promoted to general manager over Energy West’s two operations two months before trial. (Tr.2 at 163:14-20) Before that, he was the general manager at Deer Creek only. (Tr.2 at 163:21-23) Prior to being the general manager at Deer Creek for three years, he was maintenance superintendent for about four years. (Tr.2 at 164:7-11)

⁹ At the time of the hearing, Don Childs was the Director of Human Resources with Energy West Mining Company. (Tr.2 at 206:18-25)

¹⁰ There was, in fact, an investigation performed two days later, on December 19, 2012. This is discussed further below.

surveillance camera and was partially blocked from the camera's view by the mantrip. (Ex. S-22; Ex. S-23)¹¹

A short time later, Poulson came back to where Keele was working on the mantrip. *Id.* According to Keele, Poulson came up to him from behind, inserted his finger or an object into his buttocks, and said, "Good job, buddy. Way to go. Good Job." (Tr.1 at 59:20 – 60:3)¹² Keele testified that he told Poulson that he was just trying to do his job, and Poulson said, "Yeah, I bet you are." *Id.* Poulson then walked out of the garage. *Id.* Keele testified that Poulson's statements towards him were sarcastic. (Tr.1 at 60:10) Lea corroborated Keele's testimony by stating that as Poulson was walking away, he said, "Good job," sarcastically. (Tr.2 at 42:16-19) Poulson testified, however, that his "Good job" statements were not sarcastic, but in fact were intended to praise Keele for a job well done. (Tr.2 at 194:7-12) I find Poulson's testimony not credible and inconsistent with the evidence before me on this point.

It became apparent at trial that Cox and Poulson (management) were upset that Keele and Lea did not notify them earlier that so many mantrips had been tagged out because someone could have begun to work on the mantrips, and thus, returned them to service more quickly. (See Tr.1 at 165: 17-20; Tr. at 166:4-6; Tr.2 197:18 – 198:7) As a result of the way the equipment was tagged out of service, the mine was left with fewer mantrips than was needed to perform the shift change at 3:00pm. (Tr.2 at 198:1-3) This caused a disruption in production. (Tr.2 at 195:1-12) However, Keele testified that the standard practice when performing permissibility inspections was that at the end of the shift, mechanics submitted their paperwork outlining work performed to their supervisor. (Tr.1 at 58:10-15) Lea testified that as a rule they did not notify the supervisors about tagging out mantrips until the end of the shift when they turned the paperwork in. (Tr.1 at 45:17-20) Keele also testified that he was never told that he had to notify his supervisor when something was tagged out. (Tr.1 at 58:18-21) Poulson admitted at the hearing that there was no written policy requiring mechanics to inform management when equipment was tagged out during the shift. (Tr.2 at 104:22-24) Poulson also stated that Keele and Lea did not break any rules by failing to notify management about the tagged out equipment prior to their shift change. (Tr.2 at 105:16-18)

The surveillance video footage and the snapshot excerpts from it (Ex. S-22; Ex. S-23) show Poulson approaching Keele from behind, Poulson's left arm (away from the camera) extending from his side towards Keele as he approached, Poulson stepping forward toward Keele, Poulson's body is blocked from camera view by Keele and the mantrip, and Keele's head turning to the side in apparent recognition of something happening, before Keele turned back to the task he was performing. *Id.* The video and the snapshots were taken from an angle that does

¹¹ Everyone who worked in the shop and all of the relevant management people knew there were cameras capturing everything that happened there. (Tr.1 at 60:13-20)

¹² Normally, a claim of sexual assault would not be central to a discrimination claim under 105(c), however, Respondent claims as an affirmative defense that Keele lied about the sexual assault, and because of his false statement, he was in violation of Respondent's Business Code, which justified his termination.

not explicitly confirm that Poulson pushed anything into Keele's buttocks, but I find it reasonable to conclude by a preponderance of the video and testimonial evidence that Rick Poulson made physical contact with Keele by physically prodding him from behind. This determination is based upon the context in which these events took place, the credibility of Keele's and Poulson's testimony, the video footage and the snapshots from the footage, and Keele's actions in response to the contact, which are discussed below.¹³

Within minutes of the contact, Keele told Lea about the incident, and that he was going to file a complaint about it and the mantrip issue. (Tr.1 at 75:1-9; Tr.2 at 43:11-14)¹⁴ Lea agreed with Keele and thought they should both make a complaint based on Cox's and Poulson's actions before they were fired. (Tr.2 at 46:6-11) Keele also told several people around the shop that Poulson assaulted him, namely, Kevin Wilson, Gordon Manchester, Kip Allred, Forest Addison, Kenny Rhodes, Monte Fillmore, Merrill Fillmore, Merrill Jukes, Don Larson, and Steve McNee. (*Id.*; Ex. S-30, at 27:9-17) Keele also told two union representatives, Lou Shelly and Sheldon Oviatt. (Ex. S-30, at 28:1-5)

Keele testified that when he got home from work, he immediately called the Emery County Sheriff's office to initiate a complaint against Poulson for sexual assault. The Sheriff's office informed him that he would have to come in in person to file a complaint. (Tr.1 at 75:18-22)¹⁵ Keele testified that he knew the shop had around-the-clock surveillance cameras in the garage, and that this did not dissuade him from filing a complaint with the Sheriff's office. (Tr.1 at 78:6-13)

The next day, December 18, 2012, Keele filed a complaint via the company's ethics hotline alleging that his job had been threatened by Cox, and that Poulson had assaulted him for tagging out the mantrips. (Tr. Tr.1 at 44:22 – 45:2) Later that day, Keele also filed a complaint with MSHA. (*Id.*; Tr.1 at 75:25 – 76:1) Paul Priest¹⁶ received Keele's hotline complaint on

¹³ Respondent made the argument that because Keele did not react more obviously to the contact, the contact did not occur. I find this argument unconvincing. It takes a split second to make a decision and to react to an action of another. It is reasonable to infer that Keele did not react more obviously because he was already apprehensive that he might lose his job and he was able to hold back any further reaction.

¹⁴ Lea did not observe the physical contact. (Tr.2 at 44:1)

¹⁵ Lea knew Keele was going to call the Sheriff's office. (Tr.2 at 46:15-17)

¹⁶ At the time of the trial, Paul Priest was Vice President of Safety and Labor Relations at MidAmerican Energy Holdings Company. (Tr.2 at 246:13-14)

December 18, 2012, and Rick Poulson, Don Childs, and Cindy Crane¹⁷ were informed of it the same day. (Tr.2 at 213:17-25; Tr.2 at 252:12-17; Tr. At 256:1-6; Tr.3 at 16:22-25)¹⁸

On December 19, 2012, Keele spoke with two Sheriff's officers at the Deer Creek Mine and filled out the paperwork to initiate a criminal sexual assault complaint. (Tr.1 at 78:24 – 79:9) Keele provided a written sworn statement to the Sheriff, under penalty of perjury, that among other things, Rick Poulson had sexually assaulted him. (Tr.1 at 77:1-9; Ex. S-25)

That same day, as Keele was working in the shop, Carl Beckstead¹⁹ told him that he needed to go to the mine office for a meeting because Keele had called the "1-800-squeal-pig number." (Tr.1 at 80:1-4) Keele challenged Beckstead about his knowledge that Keele had phoned in a complaint, since by company policy, all such matters were to be kept confidential. (Tr.1 at 79:24 – 80:10) Beckstead deflected this inquiry and told Keele that this statement was made by management. *Id.*

Keele and his union representative, Sheldon Oviatt, went to the mine office. (Tr.1 at 80:12-21) Debra Stone ("Stone"),²⁰ Don Childs, and another union representative, Lou Shelley, also attended the meeting. (Tr.1 at 80:12-21) Stone had been hired by Paul Priest to investigate Keele's hotline complaint, and Priest had directed Stone to determine whether Keele's complaint was accurate. (Tr.1 at 79:15-18; Tr. 2 at 255:16-22; Tr. 2 at 274:20-23; Tr.2 at 257:2-6)

During this meeting, Keele told Stone about tagging out the mantrips and the assault that occurred on December 17, 2012. (Tr.1 at 81:1-15) Keele also informed Stone that there were at least three other miners he knew of who had been physically assaulted by Rick Poulson in the past: Gary Olson, Kenny Rhodes,²¹ and Kelly Duke.²² (Tr.1 at 81:1-15; Tr.1 at 86:19 – 90:8)

¹⁷ At the time of the hearing, Cindy Crane was Vice President of PacifiCorp for nine years. (Tr.3 at 6:14-15)

¹⁸ Lea also filed a complaint which stated that his job was threatened for engaging in a protected activity. (Tr.2 at 46:13-14) Lea also called the Berkshire Hathaway toll-free number and the MSHA hotline on December 17, 2012. (Tr.2 at 46:1-4)

¹⁹ At the time of the hearing, Carl Beckstead was the foreman over the in-service shop. (Tr.1 at 105:9-25) Beckstead's nickname is "Bummer." (Tr.2 at 86:16-19) He had been the surface foreman over all of the surface and the diesel for about six years. (Tr.2 at 87:15-15) He did not have hiring or firing authority at the mine. (Tr.2 at 89:15-17)

²⁰ At the time of the hearing, Debra Stone worked for Evolutionary HR and was hired to conduct an investigation into Keele's hotline complaint. (Tr.2 at 255:9-10; Tr.2 at 274:20-23)

²¹ Kenny Rhodes testified at the hearing and confirmed that Poulson threatened him and stated: "Get out of here before I shove that windshield wiper up your ass." (Tr.2 at 78:1-25) Rhodes testified that Beckstead and two other miners were present during this exchange. *Id.*

Stone noted these incidents in her investigation report, but did not contact any of the miners to determine the accuracy of the allegations or whether Poulson had committed multiple prior assaults on miners. (Ex. S-31, p. 2) Don Childs and Paul Priest both testified that they did not follow up on these allegations, nor was Cindy Crane told of them. (Tr.2 at 225:14-21; Tr.2 at 275:11-18) Cindy Crane was responsible for making the ultimate decision to terminate Keele. (Tr.2 at 178:18 – 179:1)

On December 28, 2012, Keele prepared a narrative to be used with the §105(c) complaint he filed with MSHA on January 8, 2013. In it he alleged discrimination by Cox and Poulson related to tagging out the mantrips. (Tr.2 at 279:1-6; Tr.3 at 45:3-7; Ex. S-42, p. 3) He also stated that Poulson “belly bumped” and pushed him from behind against the mantrip he was working on, and “shoved something in my butt a couple of times and kept saying over and over ‘Good job, Ralph. Way to go.’” (Ex. S-42, p. 3)

On January 8, 2013, Keele filed a §105(c) complaint with MSHA alleging discrimination by Cox and Rick Poulson for tagging out the mantrips. MSHA conducted an investigation, interviewing mine management and miners. Priest and Cindy Crane knew of the §105(c) complaint and the MSHA investigation. (Ex. S-42, p. 1-2; Tr.2 at 279:4-6; Tr.3 at 45:3-7)

On February 25, 2013, around 5:30pm, Keele’s supervisor Darrel Bagely told him to go to the mine office for a meeting. (Tr.1 at 106:17-25) When Keele arrived at the mine office, Don Childs told him that he needed to speak with an attorney who was following up on the complaint that Stone had investigated. (Tr.1 at 106:17-25) Russ Archibald, Keele’s union representative, Steve Ortiz (“Ortiz”), an attorney hired by the Respondent, and a court reporter were also in the room. (Tr.1 at 107:3-6) Keele declined to take an oath because he did not have his notes with him and he had not been given notice of an interrogation. (Ex. S-30, pgs. 4–5)²³

Attorney Ortiz told Keele he was following up on Stone’s investigation and asked Keele questions about the incident on December 17, 2012. (Tr.1 at 107:19-25; Tr.2 at 11:14-21; Tr.2 at 12:7-13) Ortiz and Keele watched the surveillance video. *Id.* During the course of the interrogation, Keele gave Ortiz the same list of names of the other miners who allegedly had been physically assaulted by Poulson in the past.²⁴ (Tr.1 at 108:1-3) Again, management did not follow up on the allegations against Poulson. At the hearing, Russ Archibald testified that while viewing the surveillance video, one could see Rick Poulson’s hand open up as he pressed into Keele from behind. (Tr.2 at 29:23-24)

²² These past and arguably similar incidents are listed as examples of the inadequacy of Stone’s investigation, which will be discussed further below.

²³ At the hearing, Keele confirmed under oath that he did not make any false statements during this interrogation. (Tr.1 at 45:6-16)

²⁴ These incidents are not used as evidence that Rick Poulson engaged in bullying behavior with other miners. They are, however, evidence of the inadequacy of Ortiz’s investigation.

The decision to terminate Keele was made on March 5, 2013. (Tr.3 at 39:20-22) Poulson testified that he participated in the discussion to fire Keele, but the ultimate decision was made by the Vice President of Operations, Cindy Crane. (Tr.2 at 178:18 – 179:1)

On March 7, 2013, Keele worked the day shift. As he was walking to the bathhouse, he noticed people standing at Kelly Mann's office window and in the hallway office window looking down at him. (Tr.1 at 40:5-19) When Keele walked into the bathhouse, Cox and Kevin Poulson asked him to come upstairs with them. (Tr.1 at 40:20- 24) When Keele went upstairs to Rick Poulson's office, Don Childs, Kelly Mann, and Sheldon Oviatt, Keele's union representative, were there. (Tr.1 at 41:4-8) Keele asked for a second union rep, Tom Kay. *Id.*

Don Childs read Keele the letter of suspension with the intent to discharge. (Tr.1 at 41:24-25; Ex. S-20) Keele received no other reason for his suspension than Don Childs reading the letter. (Tr.1 at 42:17-20) The letter states, in pertinent part:

- On or about December 18, 2012, you called the company's ethics hotline and the Emery County Sheriff's office and reported you have been physically assaulted by the mine manager.
- You stated the mine manager pushed you against the man trip equipment and inserted something in your buttocks.
- On February 25, 2013, you were interviewed and asked to explain the above described incident. At this time you were shown a video of the event you described; however, this video shows your statements were false. When questioned, you offered no reasonable explanation for why the video is inconsistent with your statement.
- Making false statements to the company, and making false accusations that an employee committed a sexual assault is a very serious violation of company rules of conduct and will not be tolerated.

Ex. S-20

On March 11, 2013, Keele refiled his §105(c) complaint with MSHA, adding information about his termination. (Tr.1 at 123:13; Ex. S-42, p. 4-5)

3. Other Protected Activity

Keele was terminated because he accused mine manager Rick Poulson of assaulting him on December 17, 2012. Energy West does not contest that Keele engaged in protected activity on that date and on several other occasions. The following facts pertain to the events of December 17, 2012, summarized above, and other incidents of protected activity for which evidence was admitted at the hearing.

On February 6, 2013, Jason Marietti²⁵ asked Keele to examine a piece of Sandvik equipment. (Tr.1 at 100:5-6) Keele asked for the manufacturer's recommendations on how to fix the equipment. (Tr.1 at 100:3-6) As Keele read through the manufacturer's document, he found that in order to check the flame arrester, he needed a pin gauge. (Tr.1 at 100:22-25) Neither Keele nor anyone else at the mine had a pin gauge. (Tr. 1 at 101:1-18) Keele asked foreman Marietti what he should do. *Id.* Marietti spoke to management, and as a result, all five of the Sandviks were put out of service until the right pin gauges arrived. (Tr.1 at 101; Tr.2 at 108:22-109:15; Tr.2 at 151:19-25; Ex. S-40, pgs. 7, 25-26) The pin gauges took a week to arrive. (Tr.1 at 102:12-21) Marietti and Beckstead were aware of this report. (Tr.1 at 100:22-23; Tr.2 at 151:19-23).

On, February 6, 2013, some of the other mechanics told Keele, in his capacity as a member of the union's Safety Committee, of another problem on the Eimco 922 underground forklifts. (Tr.1. at 103:3-19) They reported that none of the swan piping on the Eimco 922s had been checked. Keele asked Beckstead about this and Beckstead told Keele that all of the Eimcos would be tagged out until they were inspected. Keele asked for the paperwork regarding the Eimcos, and Beckstead refused to give it to him. (Tr.1 at 102:22-25; Tr.1 at 103:33-25; Tr.1 at 104:1-7; Tr.2 at 111:20-22; Tr.2 at 153:2-23; Tr.3 at 67:6-8; Ex. S-40, pgs. 8, 27) Marietti and Beckstead were aware of this report as well. (Tr.1 at 103:16-19; Tr.2 at 111:20-22; Tr.2 at 153:15-18)

On February 6, 2013, Keele submitted a §103(g) complaint to MSHA alleging that the mine failed to maintain records of required quarterly examination of the swan piping on the 922 Eimco scoops. Keele's complaint resulted in an MSHA investigation and the issuance of two citations. (Tr. 1 at 104:11-19; Tr.2 at 113:16-20; Tr.2 at 154:6-12; Ex. S-40; Ex. S-29) Marietti and Beckstead were aware of this report and the MSHA investigation. (Tr.1 at 103:16-19; Tr.2 at 113:17-18; Tr.2 at 153:10-23; Tr.3 at 67:4-5; Ex. S-40, p.8). Beckstead later approached Keele and said, "What the company ought to do is fire you for making safety complaints and other complaints and that way everybody else would be scared to file complaints." (Tr.1 at 105:9-25)

On March 5, 2013, Keele was scheduled to do an escapeway walk (similar to a fire drill) intended to impress on everyone how to escape in the event of an emergency. (Tr.1 at 115:3-24) Keele and the group he was with did not complete the escapeway walk because one of the miners got sick. (Tr.1 at 117:4-9) If the escapeway walk is completed, the workers are expected to sign a log book confirming completion of the walk. Keele refused to sign the log book despite insistence by Marietti. (Tr.1 at 117:12-25) Keele also told Marietti that he should not turn in the sheet of paper confirming that the escapeway walk was completed when it was not. (Tr.1 at 116:11 – 118:4; Tr.2 at 157:5-25; Ex. S-40, p. 8) Keele reported to Marietti that the secondary escapeway was less than six feet in width and needed to be corrected. *Id.* Marietti reported this to Kevin Poulson, who ordered that the area be brought into compliance. *Id.*

On March 6, 2013, Keele reported a safety concern regarding the proper grooving of some eight inch pipes to Gary Christensen, a safety engineer at the Deer Creek Mine. (Tr.

²⁵ At the time of the hearing, Jason Marietti was Keele's immediate supervisor on the day shift. (Tr.1 at 38:15-16)

118:13-20) Keele believed the pipe had not been properly grooved on the ends. (Tr.1 at 114:5-12) Gordon Manchester brought this safety concern to Keele's attention on the morning of March 5, 2013. (Tr.1 at 113:24 – 114:14) Gary Christensen did not know the proper grooving needed for the eight-inch pipes, so Keele and Christensen went across the hall to speak to Lou Tonc, an engineer. (Tr.1 at 119:1-8) Lou Tonc agreed that the pipe needed to be grooved, as Keele pointed out. *Id.* At some point Kevin Poulson²⁶ came into Lou Tonc's office and they all talked about the issue. (Tr.1 at 119:9-22) As they all went out into the hall, Keele testified that Rick Poulson came out of his office and started yelling at Keele. (Tr.1 at 120:1-16) Keele felt that Poulson's demeanor and tone were very abrasive and created a hostile working environment. (Tr.1 at 120:15-18) A couple of hours after the confrontation with Rick Poulson, Keele went to his boss, Marietti, and told him that he wanted to file a hostile work environment complaint with Don Childs. (Tr.1 at 120:20-25) Keele told Childs he wanted to complain that Rick Poulson had chastised him for raising a safety concern. (Tr.1 at 121:21-25) Later that day, Keele submitted a complaint over the company hotline that Rick Poulson had harassed him for raising a safety complaint about the eight-inch pipe. (Tr.1 at 121:21-24; Ex. S-35) Priest received the hotline complaint. He later drafted Keele's termination letter. (Tr. 2 at 254:4-5) Keele was terminated the next day, March 7, 2013. (Tr.1 at 123:8)

I find that beginning on December 17, 2012, and continuing until March 7, 2013, the day Keele was terminated, Keele repeatedly engaged in protected activity. As summarized below, and described in detail above, Keele engaged in ten instances of protected activity:

1. December 17, 2012 - Keele tagged out seven mantrips and one duster for safety reasons;
2. December 18, 2012 - Keele filed a complaint over the company's hotline alleging that his job had been threatened by Cox, and that Poulson had physically assaulted him for tagging out the mantrips;
3. January 8, 2013 - Keele filed a §105(c) complaint with MSHA alleging discrimination by Cox and Poulson for tagging out the mantrips. MSHA conducted an investigation, interviewing mine management and miners;
4. February 6, 2013 - Keele reported to his superiors that the mine was not using the proper pin gauge to check the flame path on the Sandvik equipment, which resulted in the equipment being tagged out;
5. February 6, 2013 - Keele reported to his superiors that the swan piping on the Eimco 922 scoops was not checked;
6. February 6, 2013 - Keele submitted a §103(g) complaint to MSHA alleging that the mine failed to maintain records of required quarterly examination of the swan piping on the 922 Eimco scoops, which resulted in an MSHA investigation and the issuance of two citations (Tr. 1 at 104:11-19);

²⁶ At the time of the hearing, Kevin Poulson had been the general mine foreman for approximately three years. (Tr.3 at 51:4-9)

7. March 5, 2013 - Keele reported to Marietti that the secondary escapeway was less than six feet in width and needed to be corrected;
8. March 5, 2013 - Keele refused to sign a log book indicating that he had completed the quarterly escapeway walk and told Marietti he should not turn in the log book with signatures of those who did not complete the walk;
9. March 6, 2013 - Keele reported a safety concern regarding the proper grooving of eight inch pipes to Christensen. The discussion ultimately included Christensen, Rick Poulson, Kevin Poulson, Lou Tonc, and Marietti; and
10. March 6, 2013 - Keele submitted a complaint to the company hotline that Rick Poulson had harassed him because he raised the eight inch pipe safety concern.

B. Keele's Employment Was Terminated Because He Engaged In Protected Activity

The Commission has noted that “direct evidence of motivation [for termination] is rarely encountered; more typically, the only available evidence is indirect.” *Chancon*, 3 FMSHRC at 2510. Circumstantial evidence may include: 1) coincidence in time between the protected activity and the adverse action; 2) knowledge of the protected activity; 3) hostility or animus toward the protected activity; and 4) disparate treatment. *Id.* The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.*

1. Hostility or Animus – Prima Facie Case

The Commission has held that “[h]ostility towards protected activity – sometimes referred to as ‘animus’ – is another circumstantial factor pointing to discriminatory motivation. The more that the animus is specifically directed towards the alleged discriminatee’s protected activity, the more probative weight it carries.” *Chacon*, 3 FMSHRC at 2511. The Respondent argues that management at the Deer Creek mine welcomed safety complaints. (Tr.2 at 174:13 – 176:22; Tr.2 at 273:4-20; Tr.2 at 135:1-24; Tr.2 at 158:8-12; Tr.2 at 90:2) However, the events in this case occurred against a contentious labor/management backdrop. The Respondent’s witnesses’ testimony evidenced a perceptible animus towards the Union and its members, including Keele. As discussed in more detail below, I have taken the Respondent’s animus and hostility towards Keele into consideration when evaluating pretext.

2. Adverse Employment Action

The Commission has defined “adverse action” as:

“[A]n action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship.” 601 F.3d at 428 (quoting *Sec’y on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug.

1984)). [...] [T]he Commission has recognized that, while “discrimination may manifest itself in subtle or indirect forms of adverse action,” at the same time “an adverse action ‘does not mean any action which an employee does not like.’” *Hecla-Day Mines Corp.*, 6 FMSHRC at 1848 n.2 (quoting *Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981)). Consequently, where the action alleged to be adverse against the miner is not self-evidently so -- such as a discharge or suspension would be -- the Commission will closely examine the surrounding circumstances to determine the nature of the action. *Id.* at 1848. “Determinations as to whether an adverse action was taken must be made on a case-by-case basis.” *Id.* at 1848 n.2.

Sec’y of Labor ex rel. Pendley v. Highland Mining Co., 34 FMSHRC 1919, 1930 (Aug. 2012)

The Commission has found that a discharge, demotion, or termination is an adverse employment action. *Pretty Good Sand Co., Inc.*, 36 FMSHRC 1177, 1186 (May 2014)(citing 30 USC § 815(c)(1); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), *aff’d*, 770 F.2d 168 (6th Cir. 1985). Additionally, the United States Supreme Court has held such action must be “material[ly] adverse action” and broadened the scope of the “adverse action” to include Title VII retaliation provisions such as actions by an employer that “could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Burlington Northern & Santa Fe Railway Co. v. White*, 584 U.S. 53, 68 (2006).²⁷ Here, the correct analysis would be whether the alleged adverse action would have a chilling effect on a miner’s desire to raise safety complaints.

In *Pendley*, the Commission discussed the fact that reassignment of job duties, even within the same job classification, can constitute an adverse employment action when such change is less desirable, arduous, or otherwise detrimental to the miner. 34 FMSHRC at 1931. Keele’s job duties changed after December 17, 2012, when he was assigned to the lift and worked on changing oil, changing starters, and changing bearings on the diesel equipment. (Tr.1 at 91:23-25; Tr.1 at 92:9-11; Tr.1 at 93:5-8) Keele was not allowed to go underground or learn to work on more difficult equipment. (Tr.1 at 196:1 – 198:23)²⁸

The weekly equipment examination master list shows Keele’s initials in connection with approximately 400 examinations of equipment from May 27, 2012, to January 26, 2013. (Ex. S-27; Tr.1 at 94:6 –96:25; Tr.1 at 99:19-22) The number of exams performed by Keele diminished significantly after December 17, 2013, when his permissibility examination duties were curtailed. (Tr.1 at 196:9-25) From January 20, 2013, until his termination on March 7, 2013, Keele only performed examinations on two pieces of equipment. (Ex. S-28; Tr.1 at 95:18-19;

²⁷ The Commission acknowledged the *Burlington Northern* concept of adverse action is applicable in § 105(c) cases in *Pendley*, 34 FMSHRC at 1932.

²⁸ After December 17, 2012, Lea was also assigned to the lifts and went underground only one more time. (Tr.2 at 50:6-7; Tr.2 at 48:11-16)

Tr.1 at 96:1-3)²⁹ Compared to the documented incidents when Keele performed equipment examinations prior to his demotion, this shows a dramatic curtailment of an essential component of Keele's job duties after December 17, 2012.

Not being allowed to go underground meant that Keele was no longer able to learn new skills while he was working on the lifts in the shop. (Tr.1 at 93:15) This also prevented him from working on the heavy underground equipment or learning finer points of the trade from more experienced mechanics. (Tr.1 at 194:1-25; Tr.2 at 160:10-14) The change of duties occurred despite the fact that Beckstead, Marietti, and Poulson all agreed that the reasons for tagging out the mantrips on December, 17, 2012, were legitimate. (Tr.1 at 195:20-21; Tr.2 at 105:16-18; Tr.2 at 140:4-5; Tr.2 at 144:20-21; Tr.2 at 195:7-9) Further, there is no written policy that states when a mechanic is supposed to inform management that a piece of equipment is tagged out. (Tr.2 at 141:3-6)

Don Larson, a fellow diesel mechanic, testified that when he complained about the change in job assignments, the foreman stated that his hands were tied and apologized that the job assignments were not fair. (Tr.1 at 197:5-24) Marietti told Larson that he could not assign Keele underground work because management did not want Keele causing problems underground, and assigning Keele to underground duty would put Marietti's job in jeopardy. *Id.* Marietti agreed that new mechanics such as Keele would not gain job-related knowledge unless they were assigned to tasks they had not completed before. (Tr.2 at 160:10-14).

The foregoing convinces me that management bore animus against Keele which extended beyond the tagging out incident on December 17, 2012. I conclude that the reassignment of job duties was an adverse act. Management took steps to minimize Keele's opportunities to make safety complaints, which adversely impacted his chances to improve his job skills. Even though Keele continued to work as a diesel mechanic, the restriction in his job duties interfered with and disrupted his ability to develop skills in his position as a diesel mechanic.

It also appears that management was willing to put pressure on lower-level foremen and supervisors (Marietti) to keep Keele in a position where he could not make more safety complaints. It is a matter of reasonable inference to conclude that the company took adverse action against Keele due, at least in part, to the frequency, number, and significance of Keele's safety complaints and due to his union status. As discussed further below, these adverse actions were animated by management's desire to punish Keele for engaging in protected activity and to dissuade him from engaging in further protected activity.

3. Coincidence In Time Between The Protected Activity And The Adverse Action

The Commission has accepted substantial gaps between the last protected activity and adverse employment action. *Pretty Good Sand Co., Inc.*, 36 FMSHRC at 1186 (citing *Cam*

²⁹ Lea filed a discrimination case with MSHA when he felt his job was threatened. (Tr.2 at 56:16-17) Lea was not fired after December 17, 2012, and was not disciplined (other than being demoted). (Tr.2 at 63:7-11)

Mining, LLC, 31 FMSHRC at 1090 (three weeks); *Sec’y of Labor ex rel. Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999). Indeed, the Commission has stated “We ‘appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.’” *All American Asphalt*, 21 FMSHRC at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)). Here, there is a close proximity between Keele’s protected activities and the adverse action taken against him, namely the change in job duties and his ultimate termination. As discussed above, the first relevant instance of protected activity began on December 17, 2012, and continued until March 6, 2013, the day before Keele was terminated. The series of events meets the time requirements to establish a temporal nexus.

For the foregoing reasons, I find that Keele presented a *prima facie* case of discrimination in that he proved by a preponderance of evidence that he engaged in protected activity and the record supports a reasonable inference that Keele was terminated for engaging in such activity. Indeed, there is a logical and rational connection between the evidentiary facts here and the inference that Keele was terminated for engaging in protected activity.

IV. Energy West’s Affirmative Defense

The operator may rebut a *prima facie* case of discrimination by showing that the adverse action for which the miner seeks relief was not at all motivated by the miner’s protected activity. *Pasula*, 2 FMSHRC at 2799-800. In analyzing a mine operator's asserted justification for taking adverse action under the *Pasula-Robinette* framework, the inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. The ALJ may not impose his own business judgment as to an operator's actions, *Chacon*, 3 FMSHRC at 2516-517, and he may not substitute his own justification for disciplining a miner over that offered by the operator. *McGill*, 23 FMSHRC at 989. Respondent claims as an affirmative defense that Keele made a false statement that Rick Poulson sexually assaulted him, and because of his false statement, Keele violated Respondent’s Business Code, which justified his termination.

Respondent offers two grounds for Keele’s termination in the March 7, 2013 letter: (1) Keele made false statements to the hotline and the Sheriff that Poulson sexually assaulted him; and, (2) On February 25, 2013, Keele offered no reasonable explanation to attorney Ortiz as to why the surveillance video footage was inconsistent with Keele’s statement. (Ex. S-20) Respondent argues that Keele was terminated because he violated its Code of Business Conduct. The company’s EEOC Policy states that “[i]f the company determines an individual has misused the process by intentionally filing a false charge of discrimination or harassment, he or she may be subject to discipline, up to and including termination of employment.” (Ex. S-33, pg. 508)

Don Childs testified that Keele violated the company’s rules of conduct because he felt Keele made a false accusation against Poulson pertaining to sexual assault. (Tr.2 at 217:13-19) Paul Priest testified that he also believed Keele intentionally fabricated his accusation that Rick Poulson sexually assaulted him based on the Ortiz transcript and the video. (Tr.2 at 265:8-13)

Priest felt that Keele's accusations against Poulson amounted to a violation of Mid American's Business Code. (Tr.2 at 271:5-12) Cindy Crane testified that she believed Keele filed a false complaint with the intent of harming Rick Poulson. (Tr. 47:11-12)

V. Pretext

The Commission has explained that "pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Price*, 12 FMSHRC at 1534. Further, "[a] plaintiff may establish that an employer's explanation is not credible by demonstrating 'either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.'" *Turner*, 33 FMSHRC at 1073 (emphasis in original). Additionally, "[a] company's failure to follow its own policies can be evidence of pretext." *Garza*, 36 FMSHRC at 992. Another useful test to determine whether an employer's proffered justification for taking adverse action is pretext is to determine whether it is plainly credible and plausible. *Quakenbush v. Kentucky-Tennessee Clay*, 26 FMSHRC 913, 922-23 (Dec. 2004)(ALJ Feldman). In applying these standards, I have considered the credibility of the witnesses from both sides and the credibility of the process used to reach the decision to fire Keele.

A. Hostility or Animus Against Keele and the Union

Deer Creek is a United Mine Workers Union mine. (Tr.2 at 208:8-17) The labor contract between Energy West and the union expired in January, 2013, and Respondent and the union had been in negotiations over a new contract since November, 2012. (*Id.*; Tr.2 at 248:21 – 249:18) At the time of the trial, the parties were still conducting contract negotiations, but were continuing production under the old contract. (Tr.2 at 208:8-17)

Paul Priest testified that he observed an escalation in the tension between the union and company representatives because of the contract negotiations. (Tr.2 at 249:7-13) Priest also testified that there was an increased number of grievances, and an increase in the number of unfair labor practice charges filed during the time of contract negotiations. (Tr.2 at 249:22-24) Cindy Crane, the person who made the ultimate decision to terminate Keele, testified that there was a contentious labor negotiation environment, and that she believed Keele exploited that environment to help the union's cause. (Tr.3 at 26:10-22)³⁰

When Keele and Lea tagged out the seven mantrips on December 17, 2012, it was obvious to management (Clayton Cox and Rick Poulson) that they were not going to be able to accomplish the next shift change in time to avoid a disruption in coal production which, according to Rick Poulson, would cost the company upwards of \$400.00 per minute. (Tr. 2 at 202:22 – 203:6) Although both Cox and Poulson claimed in their testimony that their angry encounters with Keele had nothing to do with the fact that Keele and Lea had tagged the mantrips out of service as they did, I am persuaded that their claims are false. Their angry and aggressive actions and language toward Keele and Lea were consistent with their being upset at the prospect of a costly disruption at the next shift change. Further, contrary to the evidence in

³⁰ It is notable that at no point during Keele's testimony did he refer to the tension between the union and the company.

the record, Cox and Poulson (as well as other management personnel) were convinced that Keele and Lea had staged the tagging out incident with the knowledge and intent that doing so, when and how they did, would cause a disruption at the shift change, and that this was somehow done as part of a concerted larger union plot to cause the company trouble during the rancorous labor contract negotiations. As tenuous as this sounds, it is apparent from the testimony of management witnesses that management acted towards Keele with this as their operating assumption.

From this I conclude that the company harbored animus towards the union in general, and Keele in particular. I find also that this animus permeated the investigation of Keele's allegation of assault, management's deliberations, and the ultimate decision to terminate Keele's employment. "Animus" is used in the broad sense to mean either a motivation to do something, or the presence of hostility or ill feeling. Animus is evident in the way the company investigated Keele's assault complaint against mine manager Rick Poulson and in the process used to reach the decision to fire Keele, in particular with regard to the way management applied the company's code of business conduct and equal employment opportunity, discrimination, and harassment policies. This animus calls into question the *bona fides* of the company's reaction to Keele's protected activity and related complaints. As discussed further below, I have taken the Respondent's animus into consideration in evaluating whether its claimed business justification for terminating Keele is credible and plausible.

B. Energy West's Code of Business Conduct and Equal Employment Opportunity, Discrimination and Harassment Policy

An evaluation of the credibility of Energy West's claim that it would have taken adverse action against Keele irrespective of the protected nature of his workplace complaints must include an analysis of its Code of Business Conduct and EEO, discrimination, and harassment policies and an assessment of the integrity of the company's interpretation and application of those policies. Respondent argued that the decision to terminate Keele was reached by applying the substance of the company's policy statements to the facts available to it. In doing so, it argued, its decision makers were careful to assess the evidence available to them and to apply the applicable policy statements in an even-handed manner. The company obligated itself through its policies to use good faith in applying its policies to the facts. The presence of animus justifies a careful evaluation of the good faith and credibility of the process the company applied to justify Keele's termination.

The court is keenly aware that it must not merely substitute its own sense of fairness for Energy West's business decision to terminate Keele. In order to keep the decisional analysis within the limits set by the legal principles outlined above, it helps to compare what Energy West actually did to what its policy statements lead Keele, other employees, and now this court by extension, to expect it to do. Identifying the deviations between what was promised and what was actually done helps the court assess whether Respondent's actions vis-à-vis Keele are credible and deserve to be left alone, or otherwise. Such a comparison is also an established method for evaluating whether the company's proffered justification for adverse action is a credible and allowable response to the employee's actions, or is more accurately seen as a pretext contrived by the company to cloak prohibited retaliation. It is important to consider not only the individual

credibility of the decision makers and other players in this case, but also to weigh the believability of the process used by the decision makers to reach the decision to terminate Keele. I call this aspect of the analysis “process credibility.” My conclusion is that the process used to fire Keele lacks credibility and was not applied in good faith. This conclusion is the result of weighing credibility, not just substituting judgment.

MidAmerican Energy Holdings Company’s Code of Business Conduct and its Equal Employment Opportunity, Discrimination and Harassment Policy govern Energy West as well as its holding company.³¹ (Ex. S-32; Ex. S-33) Among other things, these policies prohibit unwanted physical contact and actions that are intimidating or threatening. (Ex. S-32, pgs. 11-12). They also prohibit physical conduct that is sexual in nature, including same sex harassment, which creates an intimidating, hostile, or offensive work environment. (Ex. S-33, pgs. 3, 6) The EEO Policy also states that “[i]f the company determines an individual has misused the process by intentionally filing a false charge of discrimination or harassment, he or she may be subject to discipline, up to an including termination of employment.” (Ex. S-33, p. 508)

Employees are also promised protection from retaliation for good faith reporting of ethical violations and violations of the code of business conduct. (Ex. S-32, p. 4; Ex. S-33, p. 9; Ex. S-34, p. 3) The Business Code states:

You may report ethical violations in confidence without fear of retaliation. No retaliatory action of any kind will be permitted against anyone making such a report in good faith. In many instances, retaliation is against the law. *Good faith reporting of violations or possible violations will not result in adverse consequences to the person reporting them, even if perceived violations are ultimately proven not to have occurred [...]* However, if a report is made in bad faith – for instance, if a false or misleading report is made in a deliberate effort to get someone in trouble (as opposed to an honest mistake) – the person making the report may be subject to disciplinary action.

Ex. S-32, p. 4 (emphasis added)

The EEO Policy states:

Retaliation against any person who complains of or participated in the investigation of a harassment or discrimination complaint is prohibited. Where the company finds retaliation has occurred, individuals who engage in the retaliatory behavior may be subject

³¹ Energy West is an operating division of Interwest Mining, a wholly owned subsidiary of PacifiCorp. PacifiCorp is a wholly owned subsidiary of MidAmerican Energy Holdings Company. Energy West employees are subject to the MidAmerican Energy Holdings Company’s Code of Business Conduct. (Stipulations 8, 9, and 10)

to discipline, up to and including termination of employment, regardless of whether the original complaint is substantiated.

Ex. S-33, p. 9 (emphasis added)

MidAmerican's Ethical Standards and Performance Expectation's policy states:

You may report violations of the company codes of business conduct, policies and the law without fear of retaliation. Good faith reporting of violations or possible violations will not result in adverse consequences to the person reporting them, *even if the perceived violations are ultimately proved not to have occurred.*

Ex. S-34, p. 3 (emphasis added)

The highlighted text in the Business Code above makes it clear that Energy West created a self-imposed obligation to determine if Keele's allegations of assault against Rick Poulson were made in bad faith, not merely whether they should be believed. If it had hewn to its own policies, Energy West would have taken steps to assure that the evidence it evaluated supported a conclusion that Keele's complaint was made in bad faith. However, it appears that it stopped far short of doing so, which along with the evidence of animus makes its retaliatory intent very clear.

The company's policies are clear; making an allegation such as Keele's in a manner that is merely unconvincing is specifically and unequivocally protected. "Good faith reporting of violations or possible violations will not result in adverse consequences to the person reporting them, even if perceived violations are ultimately proven not to have occurred [...]." *Id.* Moreover, the policy statement is internally consistent when it places the focus on the complaining party's perception of whether his complaint is factually accurate, not on the ultimate believability of the report. Energy West promised to evaluate Keele's assault allegations on the basis of his perception and intent, not on whether his version is ultimately provable or even believable.

Only when the complainer deliberately makes a false report with the intent to mislead, such as with intent to get someone in trouble, will the report be deemed to have been made in bad faith. Even then, whether a person who makes a bad faith report is subject to disciplinary action is equivocal, adverse action may or may not be taken in response. However whether a person who makes a subjectively good faith report is protected from disciplinary action is clear and unequivocal. Missing this distinction can be the result of either an honest misreading and misinterpretation of the policy or the deliberate misapplication of the policy. The former is an issue the court should not touch; the latter is consistent with, and proof of the larger issue of animus and is an important indicator of pretext.

The company's policy statements repeatedly promise to protect Keele against adverse action and retaliation if he makes a complaint that he subjectively believes to be true, even a complaint with criminal or sexual implications. This promise is guaranteed by a second

commitment, i.e., that no adverse action will result even if his complaint cannot be determined to be factually true or cannot be believed, unless it is shown that he made the complaint knowing its substance to be false and with the intent to harm someone else. Here, the Respondent argues that Keele made the complaint with the knowledge that it was false and for the purpose of getting Poulson in trouble. Stone's investigative report concludes that Keele's "allegation of assault was not substantiated," (Ex. S-31, p. 5) but she did not find that Keele made his allegation in bad faith.

It is not for the court to decide whether it is prudent for an employer to make such promises to its employees, but when it does, and when it appears, as it does in this case, that it acted against the employee and against its published policies under the cloud of animus, the court must evaluate that action by weighing the evidence and concluding whether the company acted in good faith. The ultimate determination of pretext relies at least in part on an evaluation of the company's good faith. I conclude for the reasons that follow that Keele made his allegations of assault in good faith and that the way the company applied its policies in response was done in bad faith.

The operative wording in Respondent's Business Code is "intentionally filing a false charge." The company ignored all the consistent evidence that Keele made his complaint from a good faith belief and perception that he had been sexually assaulted. Aside from Keele's personal conviction that his complaint was made in good faith, the weight of the evidence is that the assault happened. The fact that the video does not show the sexual part of the claim or that the County Sheriff declined to prosecute does not prove that Keele complained in bad faith. Exhibit S-38, the letter from W. Brent Langston, Deputy Emery County Attorney, to Mr. McLeod reflects the view of the prosecuting authorities that "something may have happened" although, in their estimation, the video evidence they reviewed was not conclusive and would not support their requirement to prove the alleged assault beyond a reasonable doubt to attain a criminal conviction.³² It appears that management seized on that information as being consistent with a desire to retaliate against Keele.

C. Keele's Accusation Did Not Violate Energy West's Business and Ethics Codes

The record contains several items that weigh heavily against the proposition that Keele intentionally made a false claim of assault by Rick Poulson. Keele made consistent statements about the assault:

- To his coworkers within minutes of the event (December 17, 2012);
- Over the company's hotline (December 18, 2012, Ex. S-24);

³² Prosecution was declined on January 22, 2013, just 37 days after Keele made his complaint. Keele was fired on March 7, 2013, forty-five days after Poulson was released from any criminal exposure. Cindy Crane testified that management "never got anything definitive saying, 'We're not doing this' or 'We are doing this,' but in verbal conversation Paul Priest was able to obtain [. . .] information" that the County Attorney was not going to prosecute. (Tr.3 at 20:1 –21:4.)

- To the Emery County Sheriff's Office over the telephone (December 17, 2012);
- To the Sheriff's Office in writing, under oath, and subject to criminal sanctions under Utah law.³³ (December 19, 2012, Ex. S-25) Importantly, Keele provided a written sworn statement to the Sheriff under penalty of perjury that Rick Poulson had sexually assaulted him;
- To two interviewing Sheriff's deputies (December 19, 2012);
- To Debra Stone in an interview setting (December 19, 2012);
- To MSHA (December 28, 2012, and March 11, 2013, Ex. S-42);
- To Steven Ortiz (February 25, 2013, Ex. S-30); and
- To Utah Workforce Services (Ex. S-37) for unemployment purposes.

The consistency among all of Keele's statements about the circumstances of the assault: (1) supports the credibility of his claim of assault; (2) was available to the company to consider in reviewing whether Keele's statements were made in bad faith; and, (3) undercuts the credibility of the company's claim that its review was done in good faith and without pretext.

Additionally, the fact that Keele made his complaint to the prosecuting authorities under oath, subject to potential criminal penalties, and the fact that those prosecuting authorities did not even mention that dimension of Keele's complaint in the "no-prosecution" letter certainly does not support management's perception that the prosecutor's declination to file criminal charges against Poulson provided proof of Keele's having made a false statement. Management's eagerness to characterize Keele's allegations as false is weighty evidence of their intent to retaliate. The weight of the evidence underscores the consistency of Keele's various statements about what happened. I do not find any evidence in this case to support a finding of bad faith on Keele's part, especially considering the fact that he filed a sworn statement, subject to the penalties of perjury, with the Sheriff's Department regarding the assault.

The second reason for termination, i.e., that Keele offered no reasonable explanation to attorney Ortiz why the surveillance video footage was inconsistent with Keele's statement, also fails to show Keele acted in bad faith, which is purportedly the standard created by the company against which to judge allegations such as Keele's. First, Ortiz's question does not square with the good faith statement standard set out in the company's policies. If the decision makers were concerned about fairly applying the policy statements relating to reporting of alleged assaults and the assurance of no reprisal in response to such reporting, they could have focused on whether Keele's allegations were made in good faith, not whether they were in agreement with their own decidedly self-protective interest in making this very messy allegation go away.

Second, it is questionable whether Keele could have answered the question Ortiz posed in a manner that would have satisfied the decision makers at all. Keele was fired for failing to convince the decision makers – a group that included the accused, Rick Poulson – that his assault

³³ Under § 76-8-504 of the Utah Code: "A person is guilty of a class B misdemeanor if (1) He makes a written false statement which he does not believe to be true on or pursuant to a form bearing a notification authorized by law to the effect that false statements made therein are punishable [...]" In Utah, a class B misdemeanor is punishable by up to six month in jail and up to a \$1,000.00 fine. See Utah Code §76-3-204 and §76-3-301.

accusation was consistent with their prior interpretation of the surveillance video. The structure of this inquiry (loaded question or complex question fallacy) is the equivalent of the famous joke question: “When did you stop beating your wife?” It presupposes a conclusion that is at least arguably at odds with most of the evidence, including the video itself. It is also posed in such a way that any response could be seen as a condemnation. The question attempts to limit any direct reply to be one that serves the questioner’s agenda.³⁴ Since management had already reached the desired conclusion that Keele’s story was inconsistent with the video evidence (Tr.3 37:14-25), Keele could not have provided any clarity to the inquiry without either agreeing with the pre-determined interpretation that the video did not show an assault or agreeing that his allegation of assault was false in the first place.

This is not merely a curious conundrum. It is evidence of pretext. It is evident that a decision had already been made to twist away from the company’s policy statements about encouraging free reporting of prohibited behaviors and freedom from reprisal for making even an erroneous report in good faith. The process offered in evidence to show the *bona fides* of management’s response to and handling of Keele’s accusation was distorted and misapplied. Not only was the process unconvincing, it was used as a tactic to defend against Keele’s accusation.

It must be noted that Respondent’s entire argument rests on the surveillance video footage. Respondent claims that based on this alone, Keele was lying about his assault claim. This is simply not true. Respondent cannot base its argument solely on the fact that the video does not explicitly show a sexual assault. The angle of the camera does not allow viewers to explicitly see Poulson’s actions because he was partially blocked by the mantrip. Thus, Respondent cannot claim with certainty that Rick Poulson did not assault Keele. I have, however, as discussed above, concluded that based upon a preponderance of evidence Rick Poulson did assault Keele.

The company failed to consider any alternative interpretation of the video. There is no discussion of what other elements bear on their assessment of Keele’s good faith in making his complaints. This “rush to judgment” seriously undercuts the credibility of the company’s decision making process, which in turn supports a finding of pretext. Furthermore, the fact that the company consulted with Rick Poulson in deciding to fire Keele further erodes the process credibility. The company ignored its policy promise not to take action against an employee who lodges a good faith complaint by allowing Poulson to participate in the decision-making process.

The other pieces of evidence relating to the alleged assault are independently sufficient to at least give the Respondent reason to carefully evaluate and weigh Keele’s allegations against the surrounding contextual facts, which they appear not to have done. Even independent of the context of the company’s policy statements regarding freedom from assault and protection against retaliation for anyone making a good faith claim of assault in the workplace, Keele’s unwavering adherence to his claim of assault and the evidence corroborating its elements strongly support a finding that an assault did happen and even more strongly support Keele’s good faith in making the claim.

³⁴ Douglas N. Walton, *Informal logic: a handbook for critical argumentation* 36–37 (1989).

I conclude that the company's actions against Keele were not taken in good faith. They were a pretext. Management chose to ignore the company's policy promises and to ignore the preponderant evidence that Keele was telling the truth. This supports the further conclusion that the company's proffered justification for termination and the process by which it was done were neither credible nor plausible.

D. Inadequate Investigation into Keele's Complaint

An employer's insufficient investigation into an employee's complaint may be evidence of discriminatory motive or intent. *Sec'y of Labor ex rel. Lopez v. Sherwin Alumina*, 36 FMSHRC 730 (Mar. 2014)(ALJ Bulluck)(the investigation was a "sham" that amounted to a "witch hunt" designed to fire the miner, in particular where the employer had already decided to fire the miner before meeting with him as part of the investigation). I conclude that the decision to discipline Keele was the result of such an insufficient and questionable investigation.

Stone only interviewed Keele, Lea, and Cox. (Ex. S-31) She did not interview Rick Poulson because she was not permitted to speak to him because the company had hired him a criminal defense attorney (Tr.2 at 182:21 – 183:5), and he had been advised not to participate. (Tr.2 at 183:1-3; Tr.2 at 254:23-25; Tr.3 at 19:5-6) It is troubling that the company hired Poulson a criminal defense attorney before conducting an investigation into the events of December 17, 2012. It calls into question the company's *bona fides* in carrying out its published policies of soliciting good faith complaints from employees and honestly and competently investigating such complaints. It is astounding that, in addition to hiring Rick Poulson a criminal attorney, which had the effect of shielding him from an internal investigation, the company allowed Poulson to participate in the decision to fire Keele. Including Rick Poulson in the decision to terminate Keele severely impugns Respondent's process credibility.

The February 25, 2013 interrogation by Ortiz provided no additional information, as Keele's testimony was essentially the same as the report from Stone. Again, Keele gave Ortiz details about other alleged incidents of bullying behavior on the part of Rick Poulson, however, Ortiz did not follow up on Keele's allegations. (Ex.S-30 at 45:2-47:17) Keele even told Ortiz that this incident was not the first time Poulson had threatened him. (Ex. S-30, at 47:1-22) Around the end of July or beginning of August, 2012, Poulson allegedly threatened Keele for making grievance complaints. *Id.* Surprisingly, no one from management, nor anyone hired by management to investigate the incident on December 17, 2012, looked into this. Russell Archibald, Keele's union representative was present during the Ortiz interview, and he corroborated the information about Poulson's past assault on at least one miner. (Ex. S-30, at 47:16-25) Additionally, both Don Childs and Paul Priest reviewed the Ortiz investigation transcript and failed to react to the additional allegations made against Rick Poulson. (Tr.2 at 220:17-19; Tr.2 at 263:3-11; Tr.2 265:8-13)

Cindy Crane made the ultimate decision to terminate Keele. However, she did not review anything other than the video footage. (Tr. 3 at 37:14-15) She did not review the hotline complaint, (Tr.3 at 38:15-23) or any reports or information from Stone or Ortiz, (Tr.3 at 33:11-20), or any of Keele's statements, including the sworn statement provided to the Sheriff. *Id.* Additionally, Crane had input and recommendations from Paul Priest, Don Childs, and Rick

Poulson as to whether Keele should be terminated. (Resp. Brief at 17; Tr.2 at 263:1-16; Tr.3 at 15:5-8; Ex. S-40, p. 10)

I find that the insufficiency of the investigation is evidence of discriminatory intent against Keele. This lack of process credibility is proof of pretext.

VI. Conclusions of Law

From December 17, 2012, until March 7, 2013, the day Keele was terminated, he engaged in ten instances of protected activity. Respondent made an unconvincing “business judgment” argument for Keele’s termination, namely that Keele falsely accused Poulson of sexually assaulted him, and thus violated the company’s Business Code. Based on the weight of evidence submitted at the hearing, I am convinced that mine management had already made a determination to fire Keele, and they used Keele’s assault allegation as a means to their preferred end. The weight of evidence and reasonable inferences drawn from it support the conclusion that Keele engaged in protected activity and that Respondent terminated him in response.

Respondent’s proffered reasons for Keele’s termination are unpersuasive. Management’s claim that Keele fabricated the assault story to retaliate against management because of contract negotiations is unconvincing and far-fetched. Other than mine management’s notably uniform opinion that Keele’s tagging out the mantrips was an intentional attempt to disrupt mining operations motivated by his loyalty to the union, there is no evidence to support the idea that Keele had any motive related to the tensions surrounding the contract negotiations. It is noteworthy that all of the company’s witnesses candidly expressed markedly similar suspicions that Keele and Lea were out to sabotage production, while at the same time uniformly denying any intent on their own part to retaliate in response. Management’s perception that Keele’s actions were related to increased tension is mere speculation. However, due to the lack of connection between Keele’s complaint about the assault and the apparent degree to which management seems to have been motivated to act against him, it is reasonable to infer that management’s failure to competently, fairly, or thoroughly investigate all of the pertinent and obvious evidence Keele suggested in his various statements about the assault was consistent with: (1) an intent to retaliate against Keele; (2) their perception of union chicanery; and (3) their purpose to push back against it.

I can detect no modicum of honest effort by the Respondent to fully develop the facts and evaluate what happened here. The overriding impression I get from reviewing the evidence is that the Respondent used its business processes as a pretext to avoid fairly evaluating Keele’s allegations. This is particularly significant because Keele’s termination for engaging in protected activity has the potential of discouraging other minors from making safety complaints for fear of retaliation.

This is not a situation where the court disagrees with the company’s decision. Management’s decision results from a self-protective and perhaps vindictive interest in discrediting Keele. Objectively, the only thing that supports the company’s assessment of Keele’s lack of good faith is its interpretation of the video evidence. The failure to conduct a credible investigation and to credibly weigh all the evidence, and the immediate decision

(ignoring preponderant and consistent evidence to the contrary) that Keele was lying justify the court's conclusion that management used the internal investigation process as a pretext to fire Keele.

In light of the evidence of discriminatory animus and the deviation from established company policy, I conclude that Keele has shown by a preponderance of the evidence that the proffered reason for the termination was a pretext.

VII. Penalty Amount

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."); *see American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, *Sellersburg Stone Co.*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria.). In addition, Commission ALJs are obligated to explain any substantial divergence between a penalty imposed and that proposed by the Secretary. *See Sellersburg Stone Co.*, 5 FMSHRC at 293.

The size of this operator and the controlling entity as of 2012 was 3,294,734 in annual tonnage. The number of violations per inspection day was 0.28. There was no history of 105(c) violations. Respondent stipulated that the proposed penalty will not affect Energy West's ability to remain in business.

As to gravity and negligence, Respondent's response and investigation into Keele's December 17, 2012, complaint was inadequate and motivated by animus. Keele's work duties were curtailed in response to his tagging out the mantrips. Management's actions could have a chilling effect on miners who wish to raise legitimate safety and health concerns. This is unacceptable when the Mine Act is written to protect miners who wish to alert mine management and MSHA of health and safety violations. Therefore, I conclude that the Respondent violated Sec. 105(c), and its negligence was high. Accordingly, the Secretary's penalty recommendation of \$20,000.00 is reasonable and appropriate.

WHEREFORE, it is **ORDERED** that:

1. Keele is **REINSTATED** at the Deer Creek Mine to the same or equivalent position he held at the time of his suspension;
2. The Respondent must expunge Keele's employment record of any negative reference to these discrimination proceedings, and any negative statements or inferences regarding the Respondent's claim that Keele fabricated false statements;
3. Energy West must pay \$20,000.00 in civil penalties;
4. Keele's temporary economic reinstatement is hereby **DISSOLVED**; and
5. Within 30 days of this Decision, the parties must send their post decision briefs regarding the narrow issue of Keele's claim that the Respondent failed to pay all that he was entitled to under the economic reinstatement agreement.

/s/ L. Zane Gill

L. Zane Gill

Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 26, 2015

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

v.

NORTHSHORE MINING COMPANY,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2013-458-M
A.C. No. 21-00831-319425

Docket No. LAKE 2013-596-M
A.C. No. 21-00831-327651

Docket No. LAKE 2013-674-M
A.C. No. 21-00831-330143

Mine: Northshore Mining Company

DECISION AND ORDER

Appearances: Carol Liang, Esq., Ryan L. Pardue, Esq., U.S. Department of Labor,
Office of the Solicitor, Denver, CO for Petitioner

Arthur M. Wolfson, Esq., Jackson Kelly, PLLC, Pittsburgh, PA for
Respondent

Before: Judge Barbour

This consolidated case is before me on petitions for assessment of civil penalty filed by the Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA) against Northshore Mining Company (“Northshore”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 815(d). The Secretary alleges that Northshore is liable for 34 violations of various mandatory safety standards for the nation’s metal and nonmetal mines.¹ The Secretary proposed a total assessment of \$79,023.00 for the alleged violations. The parties presented testimony and documentary evidence at a hearing in Duluth, Minnesota. They also filed post-hearing briefs.²

Twenty-five violations were settled before the conclusion of the hearing. Details of the settlement are discussed at the end of this decision. The Secretary asserts that a total penalty of \$35,983.00 is appropriate for the nine remaining violations, which are alleged in Citation Nos. 8672113, 8672114, 8672460, 8672461, 8672520, 8672522, 8672527, 8672530, and 8672537.

¹ The standards are set forth at 30 C.F.R. Part 56 (safety).

² In this opinion, the Secretary’s post-hearing brief is abbreviated as “Sec’y Br.” Northshore’s post-hearing brief is abbreviated as “Resp. Br.”

These citations were issued pursuant to section 104(a) of the Mine Act. 30 U.S.C. § 814(a). The Secretary further asserts that five of the violations were significant and substantial contributions to mine safety hazards (“S&S”),³ that each of the violations affected one person, and that all of the violations were a result of negligence by the operator ranging from “low” to “high.”

STIPULATIONS

1. At all times relevant to this matter, Northshore was the operator of Northshore Mining Co.⁴ (“Mine” or “Northshore Mine”).
2. Northshore’s operation at the Mine involved products which entered commerce or products which affected commerce.
3. Between January 9, 2013 and April 8, 2013; and between June 10, 2013 and August 21, 2013; the Mine Safety and Health Administration (“MSHA”) inspected the Mine.
4. The individuals whose signatures appear in Block 22 of the citations at issue were acting in their official capacities and as authorized representatives of the Secretary of Labor when the citations were issued.
5. True copies of the citations at issue were served on Northshore as required by the Mine Act.
6. The certified copy of the MSHA Assessed Violations History reflects the history of the citation issuances at the Mine for the 15 months preceding the citations at issue, and may be admitted into evidence without objection by Northshore.

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

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.* 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

⁴ The facility to which the term refers is Northshore’s taconite pellet processing plant, although it also shares its name with the operator of the mine.

7. The parties stipulate to the authenticity of their exhibits but not the relevance or truth of the matters asserted therein.
8. Northshore demonstrated good faith in the abatement of the citations.
9. The proposed penalties will not affect Northshore's ability to continue in business.

Sec'y Prehearing Report 1-2; Resp. Prehearing Statement 1-2, 23; Tr. 14-15.⁵

BACKGROUND

Northshore Mine, which is located in Silver Bay, Minnesota, is a surface processing and shipping facility for taconite ore, a form of iron. Tr. 21-22, 46, 48. The raw material is originally mined in Babbitt, Minnesota, and delivered by rail to the Northshore Mine, where it is crushed, separated, concentrated, and “pelletized” before being shipped to steel mills. Tr. 21, 48-50.⁶ Northshore contracts out a portion of its maintenance work at the Mine to various independent contractors, including Northern Belt & Conveyor, Inc. (“NBC”) and C.R. Meyer & Sons, Co. (“CR Meyer”). *See* Tr. 98, 258-59.

Annually, during what Northshore refers to as “the summer outage,” the Mine is “offline completely” and “not producing any pellets” in order to allow for maintenance. Tr. 269, 304. Northshore employees and the employees of independent contractors both perform cleaning and maintenance work during this period. *See* Tr. 269-70. Several of the contested citations in this case were issued during the summer outage.

Between January 9, 2013, and April 8, 2013, and June 10, 2013, and August 21, 2013, MSHA Inspectors, including William Soderlind, primarily, and Richard Allen King, secondarily, conducted regular inspections at the Northshore Mine. Tr. 23-24.⁷ Northshore’s plant safety

⁵ In this opinion, the abbreviation “Tr.” refers to the hearing transcript.

⁶ The iron ore is concentrated into powder form through a series of mills and separators in the concentrator plant, mixed with binding agents and turned into rounded pellets in the pellet plant, and sent into a load-out facility or to the yard to await shipment. A number of conveyor belts carry the material in its various states to each facility. The pump house allows the company to pump water used to process the ore back into the system instead of into Lake Superior. The contested citations in this matter were issued in the concentrator, pellet plant, pump house entrance, and the yards and dock area. Tr. 49-50, 203-04.

⁷ Soderlind testified that he “probably inspected 80 percent of the mine,” while “King came up to help with the inspection to try to get it done faster.” *Id.* At the time of the hearing, Soderlind was an MSHA field office supervisor. He had worked as an MSHA inspector for five and a half years. Tr. 18. He had experience with “[n]umerous different types of mines” and had inspected the Northshore Mine “at least four times,” each inspection lasting about “three to four” months. Tr. 20-21. King was an MSHA inspector who had worked in various capacities for the agency since 2005. Tr. 112.

inspector, Jared Conboy, and its safety representative, Scott Alan Blood, accompanied Soderlind and King respectively during the Mine inspections that give rise to this dispute. Tr. 48, 153.

HOUSEKEEPING VIOLATIONS

Citation No. 8672460

Inspector Soderlind testified that he issued the citation after observing a “loose mud-like” mixture of “fines material” and “standing water” on the floor of the concentrator basement alongside a conveyor belt. Tr 28-30. Soderlind tested the material with one foot and found that his foot “would slide.” Tr. 31. Conboy, on the other hand, walked through the material while abating the condition and found the mixture “thick, cake-like, dense, and walkable” rather than slippery. Tr. 52-54. However, he agreed that the area of the material that Soderlind tested would have had more of a mixture of fines and water than the area he walked through. Tr 78.⁸

Soderlind found the condition to be S&S. GX-2 at 1. He testified that the material was located along “the side of the conveyer [one] would typically walk on to travel through,” that the area was traveled “daily” by “people that work in the concentrator,” and that he observed footprints traveling through the walkway. Tr. 29-30. A photograph taken by Soderlind confirms the presence of footprints. *See* GX-2 at 3. Soderlind also testified that the area was dark. Tr. 28. Conboy disagreed, but admitted that “a low-hanging pipe . . . does block a little bit of the light out in [the] area.” Tr. 60. Soderlind found it reasonably likely that a miner would walk through the area, slip, and suffer an injury, resulting in lost work days or restricted duty. GX-2 at 1; Tr. 30-32.

Soderlind believed that “somebody” at Northshore “had reason to know that . . . there was a . . . condition that needed attending.” Tr. 33. He testified that he was told that “miners that work in the area conduct their own work area inspections and then report that back to management.” *Id.* The issue was “obvious” and did not look as though it had “just happen[ed].” Tr. 33-34. As a result, Soderlind found Northshore to be moderately negligent. *Id.* During cross examination, Soderlind admitted that he did not see anyone working “in the immediate area” at the time of the inspection, and that contractors were working in the concentrator that day. Tr. 40-41, 44. The company contends that the Secretary did not provide any evidence that the area had been visited during the timeframe of the violation by anyone other than a contractor or a rank-and-file miner, neither of whose negligence can be imputed onto the operator. Resp. Br. 9-10. Further, the company argues that if no Northshore employee was working in the area, it would not have been required, under 30 C.F.R. § 56.18002, to conduct workplace inspections there. *Id.*; Tr. 38-39.

⁸ Conboy also testified that six months earlier a “slip-test” conducted in the same area found a similar type of mixture to be “not slippery.” But the court chooses to disregard this testimony because the test was conducted too far in the past to offer a reliable comparison, and Conboy himself admitted that the consistency of spills could be different on different days. Tr. 62-70, 76.

Citation No. 8672461

Soderlind issued this S&S citation after observing a slick oil, water, and grease spill “up to half an inch deep” across the walkway of the concentrator sub-basement area. Tr. 83; GX-3 at 1. He felt that the spill posed a slip and fall hazard, particularly if a miner were to “step on a slippery spot in the oil.” Tr. 86. He observed “several footprints” and “cart” tracks running through the spill, and “more than two or three” miners working in the area. Tr. 84-85. According to Soderlind, in order to bypass the hazard, a miner would need to go up a level and come back down around from the other side of the walkway. Tr. 86. As with the previous citation, Soderlind believed that it was reasonably likely that a miner would suffer an injury in a fall, resulting in lost workdays or restricted duty. *Id.*

Conboy testified that he was able to step over the spill without difficulty to avoid walking through it (Tr. 101), and that even were a miner to walk through the spill, the solid concrete floor and “ANSI certified boot[s]” that miners wear would provide traction on the floor. Tr. 101-102.⁹ Further, Conboy believed that the spill was “more water” than oil (Tr. 104), which the company argues is supported by photographs depicting all of the oil being swept up and cleared through the use of a limited number of thin absorbent pads. *See* Resp. Br. 16; RX-14(b).

Soderlind found Northshore to be moderately negligent because in his opinion the spill was obvious and “people [were] working” in the area. Tr. 88-89. He concluded that the extent of the spill and the absence of any ongoing leak indicated that the spill had been present for “a good amount of time.” Tr. 89. Soderlind reiterated that Northshore miners are expected to conduct their own workplace examinations and report safety violations to management, and that this practice applies in this area as well. Tr. 88. His understanding, based on discussions with Northshore, was that management would also try to inspect an area such as this once a week. *Id.*

Conboy testified that electrical contractors and CR Meyer’s employees worked in the area from which the oil spill originated and that the footprints observed in the spill were “more likely” from one of them. Tr. 98, 109. The company disputes that any Northshore employees were working in the area and, once again, argues that there is no clear evidence that any Northshore employee encountered the spill or had reason to know about it. *See* Resp. Br. 18-19. Rather, there is more reason to think that contractors were primarily negligent in this situation. *Id.*

Citation No. 8672522

Soderlind observed a mix of pellets and standing water on the ground of the pellet plant, near the tail pulley. Tr. 250, 252-53. According to Soderlind, the pellets—which were approximately 1/4 to 3/8 of an inch in diameter—were scattered across inclined walkways on either side of the No. 46 conveyer belt. Tr. 250, 252-53. Additionally, guards, planks, and a hose were submerged under two feet of water in the area. *Id.*

⁹ Presumably, Conboy was referring to standards for safe footwear set by the American National Standards Institute (“ANSI”).

Soderlind saw a miner slipping on the pellets on the floor, although Conboy clarified that this did not result in a fall. Tr. 255, 276-77. Soderlind also observed other miners working in the area, and he testified that the area provided passage between different parts of the pellet plant. Tr. 257. When asked directly, Soderlind answered that the miners in the area were “Northshore employees[.]” Tr. 266. Conboy testified that, because it was summer, the individuals in the area would have been a contractor’s employees, as he was not aware of any “Northshore employees [being] given any tasks with respect to the [No.] 46 conveyor,” during the summer outage. Tr. 269-70. The nearest Northshore workers Conboy recalled seeing “were working on [a separate] conveyor . . . on the opposite side of the wall from the [No.] 46 conveyer, . . . somewhere around 100 feet from the tail pulley.” Tr. 270.

According to Conboy, independent contractor NBC had contracted with Northshore to replace a conveyor. Tr. 269. NBC’s employees had been on the job “for quite some time.” Tr. 286. NBC had a foreman and safety representative on site during the timeframe in which the violation occurred. Tr. 259, 263. Additionally, NBC’s Master Service Agreement with Northshore specified that NBC would “remove all debris and trash daily.” RX-73 at 2, 15. However, the Agreement also allowed Northshore to implement corrective measures at its contractor’s expense for housekeeping violations if the contractor neglected to correct those problems immediately upon request. RX-73 at 15.

The Secretary argues that Northshore should be held responsible for its contractors’ conduct because the company failed to implement additional training for contractors on housekeeping and orderliness, outside of the single paragraph instructions in the 18-page “Master Services Agreement” that all of Northshore’s contractors must sign. *See* Sec’y Br. 16; RX-73 at 2, 15.¹⁰ Conboy did however testify that Northshore requires its contractors to “receive the same training” that it requires of its own employees through MSHA and that contractors are “not allowed on the property without their 5000-23 [inspection certificates].” Tr. 287-88¹¹

¹⁰ The full “Housekeeping and Orderliness” paragraph of the Master Service Agreement states:

In additional [*sic*] to any requirements in the Agreement, Provider agrees that all equipment, tools, materials and other apparatus will be stored, stacked, placed, temporarily spotted or setup [*sic*] in such a manner as to maintain safe egress and a clean and orderly workplace. Provider agrees to remove all debris and trash daily. Should Company or its representative deem the Provider in nonconformance with these requirements, Company or its representative will direct Provider to take immediate corrective action. Should the Provider neglect to take such corrective measures, Company may terminate the Agreement or implement the corrective measures at the expense of Provider and may also deduct the cost thereof from any payments due or to become due to Provider.

RX-73 at 15.

¹¹ Form 5000-23 “provides a means for mine operators to record and certify Part 48 mandatory training received by miners.” *MSHA - Forms and Online Filings – Form 5000-23 Certificate of Training*, Mine Safety and Health Administration, <http://www.msha.gov/forms/elawsforms/5000-23.htm> (last visited Feb. 24, 2015)

Further, contractors have to “watch [a] site-specific safety video in which [Northshore] cover[s] [b]riefly” housekeeping protocol. *Id.*

THE VIOLATIONS, THEIR S&S NATURE, THEIR GRAVITY, AND THE COMPANY’S NEGLIGENCE

The Violations

Section 56.20003(b) requires that, “The floor of every workplace shall be maintained in a clean and, so far as possible, dry condition” The floors of the three cited areas were not maintained in such a condition. Both Soderlind’s and Conboy’s photos indicate extensive spills in violation of the mandatory standard. *See* GX-2 at 3-4, GX-3 at 3-6, GX-10 at 6-16; RX-3, RX-14, RX-72. The court finds that the conditions of the cited areas were as depicted in these photographs and in Soderlind’s testimony (*see* Tr. 30-32, 86, 252-53) and that the housekeeping violations existed as charged.

The Gravity and S&S Nature of the Violations

Soderlind found that all three violations were S&S and reasonably likely to result in lost workdays or restricted duty. GX-2 at 1, GX-3 at 1, GX-10 at 1. The court agrees. The discrete safety hazard contributed to by each of the violations was a slip and fall accident, and the conditions in each area made it reasonably likely that an injury would result from this hazard. Tr. 30-32, 86, 252-53. Citation No. 8672522 presented an additional hazard of tripping over submerged items, with the same likelihood of resulting injury. Tr. 252-53.

For Citation No. 8672460, the court credits Soderlind’s testimony on the slipperiness of the material and the diminished visibility in the area. Tr. 28, 31. Conboy’s testimony does not refute these assessments. While he did not find the area slippery, he admittedly walked through a different portion of the material with a different consistency than Soderlind. Tr. 52-54, 78. Regarding the lighting, he agreed that a low hanging pipe in the area blocked some of the light, and his own photographs appear to confirm the inadequacy of the area lighting. Tr. 60; *see also* RX-3(d). Furthermore, a miner attempting to avoid a low hanging pipe in a dimly lit area would be at an increased risk of slipping and falling after failing to observe the hazard.

Regarding Citation No. 8672461, the court finds that the extent of oil and grease in the mixture was sufficient to create a discrete slip and fall safety hazard. Neither work boots nor solid concrete can sufficiently counteract this risk. This hazard would be reasonably likely to lead to injury as well. There was extensive evidence of work being conducted in the area, including right through the spill itself, increasing the chances of a miner contacting the spill and losing his or her footing. *See* Tr. 84-85.

Citation No. 8672522 presents an even clearer case of reasonably likely injury, given that an individual actually slipped on the pellets in the middle of the inspection. Tr. 255. The submerged debris in the area presented miners with additional slip and fall hazards as well. Tr. 252-53. With miners working in the area at that time and others potentially accessing the area to perform maintenance on the belts or pumps or to travel to other parts of the pellet plant,

continued normal mining operations would make further slips, and consequent injuries, reasonably likely. Tr. 257.

The court is convinced that the resulting injury from each violation would likely be reasonably serious. While the S&S nature of a violation and the gravity of a violation are not synonymous, (*see Consolidation Coal Co.*, 18 FMSHRC 1541, 1550) (explaining 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”), the facts in these citations justify findings of both S&S and serious gravity. Soderlind detailed various injuries that could occur from a slip and fall accident in either area, including joint or muscle strains or sprains, all of which strike the court as entirely plausible and likely to result in lost workdays or restricted duties. Tr. 30-32, 86, 255-56.

The Company’s Negligence

Soderlind found Northshore moderately negligent for Citation Nos. 8672460, 8672461, and 8672522. GX-2 at 1, GX-3 at 1, GX-10 at 1. Moderate negligence reflects the Secretary’s determination that “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. §100.3(d). Northshore contends that the court should reduce the negligence finding for Citation No. 8672460 and find no negligence for Citations Nos. 8672461 and 8672522. *See* Resp. Br. 9, 19, 45. “Low negligence” is appropriate when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” 30 C.F.R. § 100.3(d). A finding of “no negligence” indicates that “[t]he operator exercised diligence and could not have known of the violative condition of practice.” *Id.*

Northshore cites the holding in *Fort Scott Fertilizer-Cullor*, 17 FMSHRC 1112, 1115-16 (citing *Southern Ohio Coal*, 4 FMSHRC at 1464), that “conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes” and argues that the Secretary has not proven by a preponderance of the evidence that anyone other than a contractor or a rank-and-file miner knew or should have known about the violations. Resp. Br. 9, 18, 45. However, the Commission has also stated that “[t]he fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent.” *A.H. Smith Stone, Co.* 5 FMSHRC 13 at 15. In assessing an operator’s negligence in such cases, the Commission takes into account “such considerations as the foreseeability of the miner’s conduct, the risks involved, and the operator’s supervising, training, and disciplining of its employees to prevent violations of the standard in issue.” *Id.* Finally, the Commission has explained that “a history of similar violations at a mine may put an operator on notice that it has a recurring safety problem in need of correction and thus, this history may be relevant in determining the degree of the operator’s negligence.” *Peabody Coal Co.*, 14 FMSHRC 1258, 1264.

The court finds that Northshore was minimally negligent in all three citations. The company had a significant history of housekeeping violations over the prior 15 month period, as well as a history of slip and fall injuries. *See* GX-1 at 5-6; Tr. 87. This history put the company on notice that it had a recurring safety problem in need of correction and gave rise to a heightened duty to carefully inspect for housekeeping violations. The court credits Soderlind’s

testimony that the spills were obvious and likely occurred over an extended period of time, as these conclusions are supported by both parties' photographic evidence. *See* Tr. 33-34, 89, 257; *see also* GX-2 at 3-4, GX-3 at 3-6, GX-10 at 6-16; RX-3, RX-14, RX-72. Given these conditions, Northshore should have discovered all three of these violations before the citations were issued.

There is however insufficient evidence to support Soderlind's finding of moderate negligence for any of the three citations. The court finds that there was no work being conducted in the cited area in Citation No. 8672460 at the time of the violation, consistent with Soderlind's own testimony (*see* Tr. 44), and that only contractors were working in the cited areas in Citation Nos. 8672461 and 8672522. The Secretary failed to present testimony that any Northshore employees had worked in the cited area in Citation No. 8672461, while Conboy testified that contractors worked in the vicinity. *See* Tr. 110. There is conflicting testimony from Soderlind and Conboy regarding whether Northshore employees were working in the area in Citation No. 8672522 (*see* Tr. 266, 269-70), however the court credits Conboy's testimony that they were not. He provided greater detail on the specific location of the closest Northshore employees -- around 100 feet from the tail pulley -- and adequately explained why no Northshore employee would have been near the cited area. *See* Tr. 269-70. As the mandatory safety standards for surface metal and nonmetal mines only require an operator to conduct shift examinations of working places, Northshore would not have discovered the violations through such means. 30 C.F.R. § 56.18002

Finally, the court does not find that Northshore's selection, training, or supervision of its contractors elevated its level of negligence. Its contractors assumed some responsibility over the areas in which they worked through their Master Service Agreement with the company and took considerable steps to assure Northshore that they could meet this responsibility, including appointing experienced foremen and safety representatives and completing safety training. Tr. 259, 263. The Secretary's argument that Northshore should have provided further training or instruction to its contractors is unpersuasive given the absence of any evidence that MSHA cited Northshore for inadequate training of its contractors. *See* Sec'y Br. 16. Accordingly, the court finds low negligence on Northshore's part for Citation Nos. 8672460, 8672461, and 8672522.

Citation No. 8672530

Soderlind issued this citation for a violation of 30 C.F.R. § 56.20003(a) after observing pellets on the "dark," "inclined" walkways on each side of conveyer belt H, at a landing at the top of a set of stairs. Tr. 293-94, 296, 298. He designated the violation non-S&S because the conveyer belt in the area was not running, and "there [were] not a lot of people working in the area at the time." Tr. 297. The injury reasonably expected was a "sprain and strain" from a slip and fall, leading to "lost work days or restricted duty." Tr. 298. Soderlind found low negligence because Northshore employees were not working in the area at the time. Tr. 299. Conboy clarified that this was during the two weeks summer outage (Tr. 304-05), that the closest miners in the area were "250 to 300 feet" away (Tr. 309), and that during the summer outage he could not conceive of any reason why miners would have to go the H belt area. Tr. 310. Moreover, the pellets were cited on a "U-shaped walkway" that only provides "roundabout" access around the H conveyer belt. Tr. 306. An individual who traveled on the walkway would end up "back to where [he] started" and nowhere else. Tr. 310.

THE VIOLATION, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE

Section 56.20003(a) states that, "Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." The cited walkway was clearly not kept clean or orderly due to the extensive presence of pellets scattered about the floor. *See* Tr. 293-94; *see also* GX-12 at 3-4. Neither party contends that the walkway was a workplace, and due to the absence of any work being performed in the area during the summer outage, the court agrees that the cited area was not a workplace. The key area of dispute between the parties is whether the cited area was a "passageway" under the terms of the standard. *See* Sec'y. Br. 23; Resp. Br. 52. The Mine Act and mandatory safety standards do not define the term, and the Commission has not addressed the issue. The company relies on *Spencer Quarries, Inc.*, 32 FMSHRC 644 (June 2010) (ALJ) to argue in its brief, "Whether an area is considered to be [a] passageway that requires cleaning is determined, in part, by whether it is an active area at the time at issue." Resp. Br. 51. In *Spencer Quarries*, Commission Administrative Law Judge Richard Manning vacated a citation alleging a violation of Section 56.11016 due to inactivity on the cited walkway. But Section 56.11016, unlike Section 56.20003(a), makes no mention of the term "passageway" and therefore the court finds that *Spencer Quarries* fails to provide meaningful guidance in defining the term.

The Secretary cites *U.S. Silica Co.*, 32 FMSHRC 1699 (Nov. 2010) (ALJ) in which Commission Administrative Law Judge Margaret Miller directly dealt with the question with which this court is now confronted. Judge Miller first noted that the standard does not use the term "travelway," which is defined in Part 56 as a "passage, walk or way regularly used and designated for persons to go from one place to another." *Id.* at 1706 (quoting 30 C.F.R. § 56.2). She then contrasted the regulatory definition of "travelway" with the dictionary definitions of "passageway" ("a way that allows passage") and "passage" ("a way of exit or entrance: a road, path, channel, or course by which something passes"). *Id.* (quoting *Webster's New Collegiate Dictionary* 830 (1979)). Judge Miller concluded that the cited area was both a passageway and a workplace, as "people access it, pass through it, and perform work there." *Id.* at 1707. She further concluded that work did not have to be ongoing and an individual did not have to be traveling through the area for it to qualify as such. *Id.*

The court agrees with Judge Miller's analysis and finds that the cited area qualifies as a "passageway" under the *Webster's New Collegiate* definitions of "passageway" and "passage." The area may not have been regularly used or designated for persons to go from one place to another, but those factors are primarily relevant in determining whether or not an area is a "travelway." The cited area satisfies the much more limited requirement of allowing passage, or a path by which miners may pass. Because the cited area was a passageway that was not kept clean and orderly, the court finds the violation existed as charged.

Finally, the court agrees with Soderlind's determination that injury was unlikely and negligence was low due to the summer outage and lack of activity in the area, but that if an injury did occur it would result in lost workdays or restricted duty, from sprains or strains. Tr. 297-98; GX-12 at 1. The court finds that the violation's gravity was serious, while the company's negligence was low.

THE SAFE ACCESS VIOLATION

Citation No. 8672113

Inspector King issued this citation after observing “icicles hanging down in front of doors at the pump house.” Tr. 181. He found that the violation was reasonably likely to cause a fatal injury, and that it was S&S. GX-6 at 1. He believed that the icicles could fall on and seriously injure or kill a miner passing underneath them. Tr. 182. His belief was supported by his recollection of a “fatality in Kentucky in [19]95” caused by falling icicles. Tr. 182, 200-01. King testified that the icicles at Northshore’s mine were between 6 and 24 inches in length and “an inch to an inch and a quarter” in diameter. Tr. 186. Blood testified that they were “a couple inches . . . to about a foot and a half long.” Tr. 206. King also testified that the icicles were twelve feet above the ground and that they were “big enough to cause damage if they hit you right.” Tr. 187, 189.

Northshore argues that “[t]he Secretary did not produce any . . . evidence to detail the nature of the event in Kentucky . . . [including] the size of the icicles or how far away they were from the miner,” presumably suggesting that the icicle fatality King was relying on in his gravity assessment may have involved much bigger icicles falling from a much greater height. Resp. Br. 24; Tr. 193. The Secretary, however, points out that both King and Blood testified that due to the rapid freezing and thawing cycle in the region at that time of the year, icicles could grow considerably overnight. Sec’y Br. 33; Tr. 198, 214. Any gravity determination would have to account for the likelihood of the icicles developing and growing more dangerous, assuming continued mining operation.

King’s notes suggest that the area was accessed daily (GX-6 at 2; Tr. 185), but he also testified that the pump house was “out by itself,” and that he could not remember if there was a lot of traffic in the area. Tr. 190, 196. Blood clarified that the area was not an access point for anything other than the sump pump (Tr. 204) and that employees had “no need to go in there” unless the red light above the door indicated that the room needed maintenance. Tr. 205. Furthermore, the area was not known to “require . . . a lot of maintenance.” *Id.*

Blood also spelled out a number of protections that minimized the risk of injury to miners from falling icicles. First, overhangs on the buildings above the doors ensured that icicles would not fall on miners while they were opening or closing a door (Tr. 206), which is one scenario that King speculated could “cause [the icicles] to jar loose.” Tr. 189. Second, the icicles were “tiny” and “fragile.” Tr. 206. Last, all miners were also provided hard hats and winter coats with collars that icicles would be unable to pierce. Tr. 207-08.

King designated Northshore’s negligence as “high” due to the “open and obvious” nature of the violation, the expectation that the violation should have been found and abated by the time of the inspection, and the fact that the area was not flagged or barricaded off for the benefit of other miners. Tr. 189-90. The company argues that King’s negligence assessment was based on the false premise that Northshore employees had been in the area all morning. Resp. Br. 30. Blood testified that, as far as he was aware, no one had been at the pump house since the icicles developed the previous day. Tr. 209.

Blood also testified that Northshore places signs and barricades for “very large” icicles in “high areas,” or simply takes them down, but that these icicles were not deemed hazardous. Tr. 209, 220. According to Blood, after they were cited, the icicles were knocked down with a broom handle to abate the violation, and they “shattered into many pieces and . . . little chunks.” Tr. 220. Further, Blood testified that Northshore had never previously been cited for icicles hanging off of overhangs, nor, to the best of his knowledge, had a company employee ever suffered an icicle-related injury, in spite of icicles developing every spring at the mine. Tr. 208-09.

THE VIOLATION, ITS S&S NATURE, ITS GRAVITY, AND THE COMPANY’S NEGLIGENCE

Section 56.11001 states that, “Safe means of access shall be provided and maintained to all working places.” The court concludes that the Secretary has narrowly established the fact of a violation by a preponderance of the evidence. Based on the photographic evidence and areas of agreement in King’s and Blood’s testimony, the court finds that the icicles were up to a foot and a half in length, roughly an inch in diameter, and twelve feet above ground. *See* GX-6 at 3-4; Tr. 187, 206. The specific icicles in this case rendered access to the pump house minimally unsafe. However, the court finds the gravity and negligence to be considerably lower than the Secretary has alleged. While the court accepts that the violation contributed to a discrete safety hazard, it was unlikely that an injury would result, and such an injury could not reasonably be expected to have been fatal or even permanently disabling. Therefore, the S&S designation cannot stand.

The court credits Blood’s testimony on the infrequency with which the area was accessed. *See* Tr. 204-05. His testimony that the pump house was not an access point for any other area, that operators would only enter if maintenance was required, and that maintenance was not often required went unrefuted and leads most naturally to the conclusion that the entrance was not frequently accessed. *Id.* King’s own testimony about the area being out by itself and his lack of recollection of traffic in the area support this conclusion. Tr. 190, 196. The court also agrees with Conboy that the precautions taken by Northshore significantly decreased the likelihood of an icicle directly contacting a miner. *See* Tr. 207-08. For an injury to occur, an icicle would have to fall while a miner was looking up or was positioned in such a way to expose an unprotected part of his or her face or body to the falling icicle. And the miner would have to stop far enough away from the door to avoid the shelter of the overhang when the icicle fell. In every other conceivable scenario, the combination of a hard hat, winter coat, and the overhang was sufficient to prevent or to significantly minimize injury.

Given that the icicles shattered harmlessly upon contact during the violation’s abatement, the court finds it likely that the only injury that could reasonably be expected would at most involve lost workdays or restricted duty, although this injury still renders the violation reasonably serious. *See* Tr. 206.

The Secretary did not demonstrate that the cited icicles bore any resemblance to those that may have proven fatal in the case King recalled (Tr. 193), and although the Secretary is correct to point out that, assuming continued mining operations, the rapid thawing and cooling cycle could have caused the icicles to grow to dangerous proportions overnight, (Sec’y Br. 33;

Tr. 198, 214), the fluctuating temperature could just as easily have caused the icicles to shrink to entirely harmless proportions. Moreover, Northshore's stated practice of dealing with more hazardous icicles and the company's absence of any history of injuries from such icicles indicate that, in the event of continued mining operations, Northshore likely would have knocked down the icicles before they harmed anyone. *See* Tr. 208-09, 220.

Finally, the court finds that Northshore's negligence was low. It is unlikely anyone had encountered the icicles between their prior night's formation and the afternoon inspection, given the remoteness of the pump house and the absence of any need to visit it that day. *See* Tr. 190, 196, 204-05. Further, had anyone visited the area, he or she might well have failed to recognize a safety hazard. The court accepts Blood's testimony that icicles are common in the area and that the cited icicles were not especially hazardous. *See* Tr. 208-09, 220. The court further notes that Northshore's lack of a history of icicle-related injuries and icicle-related violations would not necessarily alert the company to the potential safety hazards of otherwise routine icicles. *See* Tr. 208-09.

THE ICY WALKWAY VIOLATION

Citation No. 8672114

King cited Northshore for failing to sand or salt what he deemed to be a "slick ice" walkway, approximately "six [feet] wide and 40 inches deep," in front of the pump house entrance. Tr. 223, 226.¹² The icy walkway created a slip and fall hazard, which King designated as S&S. GX-7 at 1. King testified that the ice was "slicker" than normal because it was "starting to melt." Tr. 223. He also believed that Northshore employees contributed to this hazard by "tromp[ing] down" or "walking over the snow" that later became ice in front of the entrance. Tr. 227-28. Footprints near the entrance indicated to King that miners traveled through the area at some point between the buildup of snow and the formation of ice without clearing the snow. *See* Sec'y. Br. 37; Tr. 227.

King thought that an injury was reasonably likely because the area was, from what the operator had told him, "accessed daily." Tr. 227. The injury, whether it be "a sprain, a bone bruise, [or] a broken arm," could reasonably be expected to cause lost workdays or restricted duty. Tr. 228. King viewed Northshore's negligence as high because the hazard was "open" and could have been dealt with simply by placing a "bucket of sand...by the entrance." Tr. 229. Additionally, the area was not flagged or barricaded for the protection of miners. Tr. 230.

Blood testified that the ice was not in fact slippery. Tr. 238. Instead, it was "uneven and . . . hard to walk on." *Id.* Blood also disagreed with King's contention that the area was "accessed daily." Tr. 228. Being that this was the same area cited in Citation No. 8672113, Northshore notes that Blood's testimony for that violation regarding the infrequency of access applies equally here. *See* Resp. Br. 36. Northshore also argues that infrequent access mitigates against a high negligence finding by making it less likely that any agent of Northshore knew or should have known about the hazard. *See* Resp. Br. 38. Additionally, Northshore notes that the company provided buckets of sand and tailings "inside [all Northshore] doorways," so that

¹² This was the same structure discussed in Citation No. 8672113. Tr. 241.

miners could deal with this problem when it arose, and the company provided training to all employees to ensure compliance. Resp. Br. 38, Tr. 237-38. The Secretary responds that these measures are inadequate because, as Blood admitted, a miner would still have to traverse the unsalted icy terrain to get to the bucket and take care of the hazard. *See* Sec’y. Br. 39, Tr. 242.

THE VIOLATION, ITS S&S NATURE, ITS GRAVITY, AND THE COMPANY’S NEGLIGENCE

Section 56.11016 requires regularly used walkways and travelways to be “sanded, salted, or cleared of snow and ice as soon as practicable.” There is no dispute that there was snow or ice leading up to the pump house entrance, and that the cited area had not been sanded, salted, or cleared. *See* Tr. 223, 238. The preponderance of evidence further suggests that Northshore failed to clear the snow that later became ice when it would have been practicable to do so. This should have occurred when someone walked through the snow earlier, causing the footprints that can be seen in the inspector’s photograph of the cited entrance. *See* GX-7 at 4; Tr. 227. Therefore, the court finds that Northshore violated the standard.

There is, however, insufficient evidence to support an S&S designation and a high negligence finding. As with the prior citation, and for the same reasons, the court credits Blood’s testimony that the area was infrequently accessed. *See* Tr. 204-05.¹³ And given both Blood’s testimony that he did not find the ice to be slippery when he walked on top of it and the indeterminate amount of ice in the Government’s photographs, the court is not convinced that the ice was slippery or extensive enough to injure the rare individual that might walk through there. *See* GX-7 at 3-8; Tr. 238. The chance of injury was unlikely. Therefore, the inspector’s S&S finding must be vacated. However, were a slip and fall injury to occur on the ice, it was reasonable to expect lost workdays or restricted duty to result, just as King determined. Tr. 228. Although the violation was not S&S, it was nonetheless serious.

As for negligence, the court finds that the remoteness of the area and Northshore’s institution of a policy to address icy entrances when miners encounter them slightly mitigate the company’s negligence. *See* Tr. 237-38. The court concludes that the company’s negligence was “moderate” rather than “high.”

THE ELECTRICAL JUNCTION BOX VIOLATIONS

Citation Nos. 8672520 and 8672527

Both of these citations deal with closely related facts and issues. Citation No. 8672520 involved an electrical junction box with its door ajar and holes exposing live, energized 120 volt wiring inside. Tr. 327-28. The cover plate door was “rusted through.” Tr. 335. Citation No. 8672527 involved an electrical junction box near the No. 161 conveyer belt with the cover plate

¹³ While neither party has raised the issue, the court understands that its finding that the area was infrequently accessed could be viewed as inconsistent with its finding of a violation, since the standard only applies to regularly used walkways and travelways. However, the court accepts that the walkway was “regularly” used, as the term is used in the standard, even if it was not traveled frequently enough to sustain an S&S designation.

and the box itself “corroded through,” according to Soderlind, exposing the same type of wiring, although the wires were not energized. Tr. 373-74, 386. There was no evidence in either case that the wires lacked insulation (*see* Tr. 335, 382), but Soderlind noted that both areas were wet and therefore water could get inside the boxes through the exposed areas and damage the inner conductors. Tr. 327, 339, 375-76. Soderlind concluded that rust had formed on the first box as a result of “water [being] sprayed in the area to clear the area and . . . splash[ing] up” onto the box. Tr. 333. He did not know how the second box came to be in the condition he cited. Tr. 379

Soderlind designated each alleged violation as Non-S&S. GX-9 at 1, GX-11 at 1. The first did not occur in a regularly accessed area; the second was “behind a handrail” and the “belt [in the area] was shut down” for the summer outage, making contact with the box unlikely. Tr. 328, 374-75. But, Soderlind determined that were a miner to experience an electrical shock from either box, a fatal injury could be reasonably expected. Tr. 328, 375. Soderlind stated that “120 volts has been known to kill people . . . on mine sites.” Tr. 329. However, Northshore points out that Soderlind also acknowledged that individuals “get shocked by 120 volts, probably every day,” without injury, (Resp. Br. 57, Tr. 329), and that Soderlind had actually written “lost workdays or restricted duties” as the injury that could reasonably be expected when he wrote a citation for a similar violation. Tr. 332. Soderlind maintained that he “didn’t evaluate [the cited condition] correctly” when he wrote the citation to which Northshore refers. *Id.*

The primary dispute over Soderlind’s “fatal” designation in both citations concerns the circumstances under which a fatal shock could plausibly occur. Chris Goerd, an electrical supervisor for Northshore, testified that for a fatality to occur, “a person would have to have . . . one hand in the box . . . making contact with the live wires” and the other hand either “on steel” or also in the box. Tr. 364.¹⁴ The company argues that this would not be reasonably likely to occur with either box, in part because both boxes had fully insulated wires. *See* Resp. Br. 56-57, 63-64. Goerd also felt this would not happen in the cited area in Citation No. 8672520 because of the inability to “fit [one’s] hand in the box without it being open” and because of the difficulty of even reaching the box in the first place. Tr. 364. Goerd and Conboy testified that this box is located “underneath [a] conveyer” belt, past support beams, and that there was no reason to cross the beams except “to do work on that electrical [junction] box” itself, in which case “the power [would be] locked out.” Tr. 364, 345-46. The Secretary argues that someone might have to enter the area and cross the beams in order to replace the tail pulley guards from the No. 44 conveyor next to the box, and Conboy agreed that this was a possibility. Sec’y Br. 26-27; Tr. 356. Soderlind testified that a miner could contact the second box while “sweeping[,] shoveling[,] or changing a...belt.” Tr. 376-77.

The Secretary also does not agree that a miner would need to reach inside the box itself to be shocked. *See* Sec’y Br. 27, 30. Soderlind and Goerd both agreed that the insulation for the wires could be damaged as a result of water being sprayed on them and because of the conditions

¹⁴ This is apparently because electricity is more likely to flow through an individual if he is contacting another conductor, such as steel.

outside of the box. *See* Tr. 339, 368, 384.¹⁵ Goerdts also agreed that if an exposed wire were to contact the inside of the box and the grounding failed, “it could energize the metal around the box” and “any other metal component that the box might be touching.” Tr. 367-68. The Secretary argues, in such a circumstance, that the entire box and metal framework around it would become an electrocution hazard. Sec’y Br. 27-28. Additionally, Soderlind testified that there was “a lot of chance to make contact with metal or water [in the area] and complete the circuit.” Tr. 329. He clarified later that since “water is a conductor,” the combination of water and metal was “just increasing the likelihood that electricity would flow through” an individual, from either box into a conductor. Tr. 376.

Regarding Citation 8672520, Soderlind designated Northshore’s negligence as high, because the violation was obvious and he had written “the same citation for the same box under the same condition on an inspection that was two years prior.” Tr. 329-31. The only difference this time was “there [were] holes that actually had rusted through.” Tr. 332. The company addressed that problem at the time of the original citation by re-attaching a loose cover. Tr. 336. Conboy did not believe that two years was an inordinate amount of time between maintenance efforts when dealing with “thousands of boxes” along “hundreds of miles of conduit.” Tr. 352. But Soderlind’s concern was that the company did not appear to have done anything to address the problem of corrosion from splashing water since he first observed it two years prior. Tr. 338-39. Soderlind concluded that the rusting must have been occurring for “a long time” to generate these types of “holes that show . . . through.” Tr. 330. Conboy responded that no mention was ever made of the need to alleviate a problem of water splashing in the original citation that was issued two years prior. Tr. 351. But Conboy did not accompany Soderlind during the issuance of that prior citation and was not privy to Soderlind’s conversations regarding abatement of the citation at the time. Tr. 358.

As for Citation 8672527, Soderlind found Northshore’s negligence to be moderate because the violation was “open and obvious,” it was his understanding the area was inspected “at least once per shift,” he was told that supervisors “try to get to every area at least [once a] week,” and his experience led him to conclude that the rusting he observed happened over the course of “at least a year, [or] longer.” Tr. 377-78.

Northshore argues that the normal mining conditions in the area undercut Soderlind’s negligence analysis. *See* Resp. Br. 65. According to Conboy, Soderlind observed the area during the company’s summer outage when the hazard was “easy to see.” Tr. 390-92. Conboy testified that no work was planned in the area during the two week summer outage, so no employees passed by the belt when the box was easier to see. Tr. 393, 396. When the belt *was* actually running and employees *were* present, Conboy felt that the violation would not be open and obvious due to “heavy steam” in the area clouding visibility and the box’s obscured “location, next to . . . guarding, behind a handrail.” Tr. 391-92.

¹⁵ The Secretary’s questions during direct and cross-examination made reference to damage to both the “inner conductors” and “insulation” of the wires. The court assumes that the Secretary was primarily concerned with damage to the insulation.

THE VIOLATIONS, THEIR GRAVITY, AND THE COMPANY'S NEGLIGENCE

The Violations

Standard 56.12032 mandates that inspection and cover plates shall be kept in place at all times on electrical equipment and junction boxes. Neither party expressly disputes that Northshore violated this section by having an open cover plate on one box and a cover plate with holes on each box, and the court agrees. In the first citation, the cover was partially open and was therefore not kept in place. In addition, both the first and second violations deal with covers that had rusted through, conditions that have been held to be functionally equivalent to open covers. *See, e.g., LTM Inc. – Knife River Materials*, 33 FMSHRC 1210, 1238 (May 2011) (ALJ) (finding a violation of the standard for holes in electrical panel boxes and noting that “the regulation has been applied to require that there be no openings in electrical control boxes”). The court finds that these conditions violated the standard.

The Gravity of the Violations

The court finds that it was unlikely an injury would result from either violation for the very reasons the Secretary has offered. Both boxes were in remote or, at the time, empty areas, and miners were unlikely to make contact with the boxes and their contents. Tr. 328, 374-75.

However, the court finds that the injury that could reasonably be expected in each case would have been fatal. The Secretary presented a more than plausible scenario where outside conditions and the water that potentially damaged the boxes could also damage the insulation, exposing the conductor wiring, and those wires could energize the boxes themselves if the grounding failed. A miner cleaning or replacing a guard or belt could very well contact the box and “complete the circuit,” with the amount of metal and water in each room serving as a conductor. *See Sec’y Br. 27-28; see also Tr. 329, 339, 367-68*. The court finds that both violations were very serious.

The Company's Negligence

The court finds “high” negligence on the company’s part with regard to Citation No. 8672520. Northshore was cited for a violation of the same standard involving the same box two years prior and had not made any attempt to address the issue of rusting which left the inner wires exposed. Tr. 329-31. Regardless of whether Soderlind expressed concern over the rusting or splashing issues two years prior or allowed Northshore to abate the violation without addressing them, the court credits Soderlind’s testimony that the issues existed at the time. Tr. 339. The initial citation should have alerted Northshore to the need to address any and all issues with this box that were present at the time and to closely monitor the situation as mining continued.

The court finds Northshore to be moderately negligent with regard to Citation No. 8672527. The court accepts as reasonable Northshore’s contention that it did not have an opportunity to identify the violation during the two week summer outage, and that conditions significantly impaired visibility in the area prior to the outage. Tr. 391-93. In the court’s view,

both factors serve to mitigate the company's negligence. This stated, the court agrees with the Secretary that the company should have discovered the very large holes in the junction box during the year or more that the Secretary credibly maintains the rusting occurred. *See* Tr. 377-78. The poor visibility only increased Northshore's duty to inspect the area carefully, which the court finds it failed to do.

THE GUARDING VIOLATION

Citation No. 8672537

Soderlind issued this citation for a violation of Section 56.14107(a) on July 1, 2013, after determining that adequate guarding needed to be installed at the head of the No. 163 conveyer belt to protect miners from the shaft and head pulley. Tr. 397, 399. The head pulley was "partially guarded" by a "plate steel" (Tr. 400, 414-15), but the existing guard left "a square opening over the shaft," a smaller opening to the right of the shaft, and a larger opening in the "top right-hand corner" exposing the pulley itself. Tr. 402, 405; *see also* GX-13 at 7. Soderlind was concerned about the risk of a miner getting an arm entangled with the rotating pulley or shaft through the unguarded areas. Tr. 403. Soderlind's main focus was on the "center piece that was cut out," (*see* GX-13 at 7) (labeled "unguarded area"), because the "bolted coupling on the inside" of that area would "tend to grab [one's] clothing" if it got caught inside. Tr. 430-31. That particular opening to the shaft was located behind a pillow block (Tr. 422) and was "four to five feet" above the ground, while the larger opening to the right was, according to Soderlind's unmeasured estimation, "six to seven feet up" above the ground. Tr. 433-34.

Soderlind designated the violation non-S&S and unlikely to lead to injury due to the remoteness of the area. Tr. 403, GX-13 at 1. But by that same token, Soderlind concluded that the injury that could reasonably be expected would be "fatal," since Northshore might not "discover somebody missing an arm or a hand" in such a remote location until after a miner had already "[bled] out." Tr. 404. Additionally, Soderlind deemed Northshore to be moderately negligent because, he testified, he had already "made a strong recommendation" to the company "a week prior" that it "need[ed] to get this [area] guarded better." Tr. 406. According to Soderlind, he did not cite Northshore at the time because the conveyer belt was not running. Tr. 411. But when he returned to the area a week later and found that the belt was running and the head pulley was still inadequately guarded, Soderlind decided to issue a citation for a violation of section 56.14107(a) along with a finding that the company was moderately negligent. Tr. 401.

Conboy's recollection was quite different. Conboy recalled Soderlind telling him during the previous week's inspection that the head pulley was "primarily guarded by location" and therefore did not need further guarding. Tr. 421. In other words, "based on [the hazard's] location, a miner would not be able to make contact with the moving machine parts." Tr. 407. Soderlind's inspection notes from the prior week's walk through of the area do not reference this conversation near the head of the No. 163 conveyer belt, neither corroborating his own account nor Conboy's. *See* Resp. Br. 75, *see also* RX-107. Conboy's notes from that week are similarly silent on this point. *See* RX-103. But, Conboy recalled a conversation on June 26, 2013, almost a week prior, about "the tail of the [No.] 63" conveyer belt, which "run[s] parallel" to the No. 163 belt, albeit "a thousand feet...or more" from the cited area. Tr. 419. According to Conboy,

Soderlind made guarding recommendations for the No. 63 belt, and Northshore promptly complied. Tr. 420. Conboy's June 26 notes are fully consistent with this account. *See* RX-103. Soderlind's June 26 notes also reference this recommendation shortly after mentioning his inspection of the No. 63 conveyor belt tail. *See* RX-107 at 15.

Conboy also testified that the cited area of the head pulley had to his knowledge remained in its partially guarded state going back to the structure's creation in 1956, yet had never been cited despite regular MSHA inspections of that area. Tr. 417.

The Violation

Section 56.14107(a) requires, in relevant part, "Moving machine parts shall be guarded to protect persons from contacting....pulleys,...shafts,...and similar moving parts that can cause injury." Section 56.14107(b) further states, "Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces." The company raises two arguments for why Northshore should not be held liable – first pleading adequate guarding, second pleading inadequate notice. *See* Resp. Br. 70-77. The court finds that second argument to be persuasive and dispositive in this citation. Effectively, Northshore is arguing that the citation should be vacated for lack of notice of the Secretary's interpretation of the standard as applied to the cited area, regardless of whether this court agrees with that interpretation and application.¹⁶ *See* Resp. Br. 73-77.

The Commission has held that a "broad [mandatory standard] must afford reasonable notice of what is required or proscribed." *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (Jan. 1983). The test for whether an operator has had fair notice 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 applying this standard, the Commission has taken into account a wide variety of factors, including the text of the regulation, its placement in the overall regulatory 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. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694–95 (July 2002).

¹⁶ The court recognizes that other courts and judges have come to different conclusions on questions of notice involving this standard. For cases rejecting inadequate notice arguments for guarding violations, see *Mainline Rock & Ballast, Inc. v. Sec'y of Labor*, 693 F.3d 1181 (10th Cir. 2012); *Crimson Stone v. FMSHRC*, 198 F. App'x 846 (11th Cir. 2006); *Highland Enterprises, LLC*, 34 FMSHRC 1633 (July 2012) (ALJ); and *D. Holcomb & Co.*, 33 FMSHRC 1435 (June 2011) (ALJ). Unlike the present matter before the court, however, none of the above cases involved allegations of prior explicit assurance from MSHA that the cited areas were adequately guarded. For decisions vacating a guarding violation due to inadequate notice, see *Blue Mountain Production Co.*, 32 FMSHRC 1464 (Oct. 2010) (ALJ); *Sangravl Company, Inc.*, 30 FMSHRC 1111 (Nov. 2008) (ALJ); *Weirich Brothers Inc.*, 28 FMSHRC 66 (Feb. 2006) (ALJ); and *Higman Sand & Gravel, Inc.*, 24 FMSHRC 87 (Jan. 2002) (ALJ).

In *Alan Lee Good, an individual doing business as Good Construction*, 23 FMSHRC 995 (Sept. 2001), the Commission applied these principles to the Secretary's enforcement of Section 56.14107(a), the standard at issue here. In that case, Commissioners Jordan and Beatty concluded the judge erred in applying the "reasonably prudent person test" and believed the case should be remanded for that reason. *Id.* at 1004-07. Chairman Verheggen and Commissioner Riley concluded the operator did not have notice of the Secretary's interpretation of the standard and would have reversed his decision and vacated the subject guarding violations. However, to avoid an evenly split decision that would have left standing the judge's affirmance of the citations, the Chairman and Commissioner Riley joined Commissioner Jordan and Beatty in agreeing to remand the case. *Id.* at 1009-10. Although the Commissioners produced a split decision, all agreed that the standard was ambiguous as applied, and all focused heavily on the inconsistency of prior enforcement as a key factor in determining whether the "reasonably prudent person" test had been satisfied.

This court does the same. The standard does not clearly specify the extent of guarding necessary in cases such as this where significant guarding efforts are already in place. Accordingly, this court finds the standard to be broad and ambiguous as applied to these facts. MSHA agrees hazards that are seven feet or more above the ground are guarded by location. 30 C.F.R. § 56.14107(b), Tr. 430. Soderlind testified that at least one of the exposed moving parts in this citation may have been up to seven feet high, although he did not measure the distance. Tr. 434. The Secretary therefore did not meet his burden to demonstrate inadequate guarding for that particular hazard. The other exposed area of primary concern required an individual to reach over a pillow block to access it. Tr. 433. Conboy testified that he believed the specific exposure to be adequately guarded due to the pillow block in front of it. Tr. 422. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard could have easily agreed and failed to recognize this as a hazard that required guarding.

Further, the court finds that the inconsistency of the Secretary's prior enforcement at this mine is serious enough to outweigh all other notice considerations in a "reasonably prudent person" test. Conboy's testimony is credible and raises serious doubts about whether Soderlind ever warned Northshore about the potential violation, instead of suggesting that it was adequately guarded. *See* Tr. 419-21. Soderlind lacks any documentation supporting his claim that he had warned Northshore; indeed, his own notes, as well as Conboy's, from a week prior to the citation reinforce Conboy's claim that Soderlind had only warned the company about a different unguarded area. *See* RX-103, 107. Consequently, this court finds Conboy's version of events more credible than Soderlind's, including his testimony that Soderlind had informed him the cited area was adequately guarded within the past week. In the face of this explicit reassurance from Soderlind and a long history of non-enforcement from MSHA, Citation No. 8672537 indeed "amounts to a grossly inconsistent enforcement practice" just as Northshore contends. Resp. Br. 77. Accordingly the citation will be vacated for a lack of notice.

OTHER CIVIL PENALTY CRITERIA

The court has found violations and it must assess civil penalties taking into account the statutory civil penalty criteria. 30 U.S.C. § 820(i).

History of Previous Violations

The mine's history of violations is reflected in a report from MSHA's database. GX-1. The report lists violations issued at the mine and indicates that 234 violations became final between December 2011 and June 2013. The court accepts the figures in the report as accurate and finds that the exhibit reflects a large history.

Size of the Operator

The parties did not stipulate to the size of the operator, however on Exhibit A of the civil penalty petitions, the Secretary recorded 2,410,235 controller hours worked for the operator and 812,741 hours worked for the mine, and assigned 7 out of a possible 10 points for the size of the operator and 10 out of a possible 15 points for the size of the mine. Based on this record, I find that Northshore is a moderately large operator.

Ability to Continue in Business

The parties stipulated that the proposed penalties will not affect Northshore's ability to continue in business, and the court finds that the same is true for the penalties assessed below. Tr. 15; Stip 9.

Good Faith Abatement

The parties stipulated that Northshore terminated the conditions giving rise to the violations in a good faith manner. Tr. 15; Stip. 8.

CIVIL PENALTY ASSESSMENTS

Citation No. 8672460

The court has found that the violation was serious, that an accident was reasonably likely, and that the violation was due to the company's low negligence. The Secretary proposed a civil penalty of \$1,304.00, but given these findings and the civil penalty criteria discussed above, the court finds that a penalty of \$586.00 is appropriate. The court has departed from the proposed penalty because it has found the company's negligence to be lower than the Secretary alleged.

Citation No. 8672461

The court has found that the violation was serious, that an accident was reasonably likely, and that the violation was due to the company's low negligence. The Secretary proposed a civil penalty of \$1,304.00, but given these findings and the civil penalty criteria discussed above, the

court finds that a penalty of \$586.00 is appropriate. The court has departed from the proposed penalty because it has found the company's negligence to be lower than the Secretary alleged.

Citation No. 8672113

The court has found that the violation was serious although an accident was unlikely and that the violation was due to the company's low negligence. The Secretary proposed a civil penalty of \$8,209.00, but given these findings and the civil penalty criteria discussed above, the court finds that a penalty of \$250.00 is appropriate. The court has departed from the proposed penalty because it has found the negligence, likelihood of injury, and severity of injury that could reasonably be expected to be lower than the Secretary alleged.

Citation No. 8672114

The court has found that the violation was serious although an accident was unlikely and that the violation was due to the company's moderate negligence. The Secretary proposed a civil penalty of \$2,473.00, but given these findings and the civil penalty criteria discussed above, the court finds that a penalty of \$300.00 is appropriate. The court has departed from the proposed penalty because it has found the negligence and likelihood of injury to be lower than the Secretary alleged.

Citation No. 8672520

The court has found that the violation was very serious although an accident was unlikely and that the violation was due to the company's high negligence. The Secretary proposed a civil penalty of \$11,306, and given these findings and the civil penalty criteria discussed above, the court finds that a penalty of \$11,306 is appropriate.

Citation No. 8672522

The court has found that the violation was serious, that an accident was reasonably likely, and that the violation was due to the company's low negligence. The Secretary has proposed a penalty of \$3,405.00, but given these findings and the civil penalty criteria discussed above, the court finds that a penalty of \$1,400.00 is appropriate. The court has departed from the proposed penalty because it has found the company's negligence to be lower than the Secretary alleged.

Citation No. 8672527

The court has found that the violation was very serious although an accident was unlikely and that the violation was due to the company's moderate negligence. The Secretary has proposed a penalty of \$4,689.00, and given these findings and the civil penalty criteria discussed above, the court finds that a penalty of \$4,689.00 is appropriate.

Citation No. 8672530

The court has found that the violation was serious although an accident was unlikely and that the violation was due to the company's low negligence. The Secretary has proposed a penalty of \$329, and given these findings and the civil penalty criteria discussed above, the court finds that a penalty of \$392 is appropriate.

Citation No. 8672537

The court has found that the Secretary did not prove the alleged violation. Therefore, a penalty cannot be assessed.

SETTLED VIOLATIONS

The parties have agreed to the following settlements:

Docket No. LAKE 2013-458-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672441	2/20/13	56.12004	\$499	\$499

Northshore will accept the citation as written and pay the proposed penalty. Tr. 436.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672446	2/25/13	56.12004	\$392	\$220

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 436.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672447	2/25/13	56.12032	\$425	\$425

Northshore will accept the citation as written and pay the proposed penalty. Tr. 436.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672451	2/26/13	56.12004	\$392	\$220

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 436.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672452	2/26/13	56.12032	\$425	\$270

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 436.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672458	3/5/13	56.12030	\$745	\$500

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 436.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672459	3/5/13	56.12032	\$1,111	\$800

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 437.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672465	3/6/13	56.12008	\$334	\$200

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 437.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672111	3/12/13	56.20003(b)	\$4,329	\$2,500

The Secretary will delete the inspector's finding that the violation was S&S and will change the inspector's evaluation of the likelihood of injury from reasonably likely to unlikely. Tr. 437.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672112	3/12/13	56.12032	\$5,961	\$2,600

The Secretary will delete the inspector's finding that the violation was S&S and will change the inspector's evaluation of the likelihood of injury from reasonably likely to unlikely. Tr. 437.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672116	3/12/13	56.11016	\$2,473	\$1,500

The Secretary will delete the inspector's finding that the violation was S&S, will change the inspector's evaluation of the likelihood of injury from reasonably likely to unlikely, and will change the negligence finding from high to moderate. Tr. 437.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672117	3/12/13	56.12004	\$1,111	\$950

The Secretary will reduce the proposed penalty. Tr. 437.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672118	3/12/13	56.20003(a)	\$362	\$100

The Secretary will change the inspector's negligence finding from moderate to low.¹⁷

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672120	3/13/13	56.12004	\$1,111	\$800

The Secretary will change the inspector's negligence finding from moderate to low. Tr. 437.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672121	3/13/13	56.12032	\$1,203	\$800

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling" and will change the negligence finding from "moderate" to "low."

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8735065	3/18/13	56.12032	\$362	\$362

Northshore will accept the citation as written and pay the proposed penalty. Tr. 437.

Docket No. LAKE 2013-596-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672119	3/12/13	56.14100(b)	\$2,473	\$722

The Secretary will delete the inspector's finding that the violation was S&S and will change the inspector's evaluation of the likelihood of injury from reasonably likely to unlikely. Tr. 437-38.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672505	6/11/13	56.20003(a)	\$7,578	\$6,798

The Secretary will reduce the proposed penalty. Tr. 438.

¹⁷ In a series of emails following the hearing, representatives for the Secretary and Northshore informed the court that Citation No. 8672118 had settled at the hearing but that the settlement was missing from the transcript. The parties articulated the settlement terms for the citation in those emails, and the court accepted those terms into the record.

Docket No. LAKE 2013-674-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672525	6/19/13	56.12018	\$2,901	\$1,900

The Secretary will change the inspector's finding of the injury that could reasonably be expected from fatal to permanently disabling and will change the negligence from moderate to low. Tr. 438.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672528	6/24/13	56.12008	\$1,203	\$900

The Secretary will reduce the proposed penalty. Tr. 438.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672533	7/1/13	56.12032	\$1,530	\$850

The Secretary will change the inspector's finding of the injury that could reasonably be expected from fatal to lost workdays or restricted duties. Tr. 438.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672534	7/1/13	56.12032	\$1,530	\$500

The Secretary will change the inspector's finding of the injury that could reasonably be expected from fatal to lost workdays or restricted duties. Tr. 438.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672536	7/1/13	56.12032	\$1,530	\$1,070

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 438.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672547	7/11/13	56.12032	\$1,530	\$1,070

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 438.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8672549	7/15/13	56.12032	\$1,530	\$1,070

The Secretary will change the inspector's finding of the injury that could reasonably be expected from "fatal" to "permanently disabling." Tr. 438.

ORDER

In view of the above findings, conclusions, and settlement approvals, within 30 days of the date of this decision the Secretary **IS ORDERED** to:

Modify Citation Nos. 8672460, 8672461, and 8672522 to reduce the level of negligence from “moderate” to “low;” modify Citation No. 8672113 to reduce the likelihood of injury from “reasonably likely” to “unlikely,” to reduce the level of injury that could reasonably be expected from “fatal” to “lost workdays or restricted duty,” to delete the “significant and substantial” designation, and to reduce the level of negligence from “high” to “low;” modify Citation No. 8672114 to reduce the likelihood of injury from “reasonably likely” to “unlikely,” to delete the “significant and substantial” designation, and to reduce the level of negligence from “high” to “moderate;” and vacate Citation No. 8672537.

Further, if he has not already done so, within 30 days of the date of this decision, the Secretary **SHALL** modify Citation Nos. 8672446, 8672451, 8672452, 8672458, 8672459, 8672465, 8672536, 8672547, and 8672549 to reduce the level of injury that could reasonably be expected from “fatal” to “permanently disabling;” modify Citation Nos. 8672111, 8672112, and 8672119 to reduce the likelihood of injury from “reasonably likely” to “unlikely” and to delete the “significant and substantial” designation; modify Citation No. 8672116 to reduce the likelihood of injury from “reasonably likely” to “unlikely,” to delete the “significant and substantial” designation, and to reduce the level of negligence from “high” to “moderate;” modify Citation Nos. 8672118 and 8672120 to reduce the level of negligence from “moderate” to “low;” modify Citation Nos. 8672121 and 8672525 to reduce the level of injury that could reasonably be expected from “fatal” to “permanently disabling” and to reduce the level of negligence from “moderate” to “low;” and modify Citation Nos. 8672533 and 8672534 to reduce the level of injury that could reasonably be expected from “fatal” to “lost workdays or restricted duty.”

Finally, within 30 days of the date of this decision, the company **SHALL PAY** civil penalties in the amount of \$19,509.00 for the contested violations found above and pay \$27,626.00 for the settled violations. Upon payment of the civil penalties, modification of the citations, and vacation of the citations, this proceeding **IS DISMISSED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 26, 2015

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

v.

REMINGTON, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2014-315
A.C. No. 46-09230-336310

Mine: Winchester Mine

DECISION DENYING SETTLEMENT MOTION

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a motion to approve settlement.¹ The originally assessed amount was \$15,794.00, and the proposed settlement is for \$9,500.00, a reduction of 40% overall. The Secretary requests that the three alleged violations in this proceeding be modified. The support, such as it is, is noted in **bold** print, below.

For Order No. 8156851, the *entirety* of the Secretary's motion provides the following reasoning:

Order No. 8156851 was issued to the Respondent on April 30, 2013, and alleged a violation of 30 C.F.R. § 75.370(a)(1) and § 104(d)(1) of the Act, 30 U.S.C. § 814(d). The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could be reasonably expected to be permanently disabling; that the violation was significant and substantial; that seven persons were affected; and that the operator's conduct in the violation demonstrated a high degree of negligence. The Secretary assessed a penalty of \$10,705.00. **The Respondent disputes the alleged violation and contends that the alleged degree of negligence and the allegation of unwarrantable failure are not supported by the evidence in that there were circumstances present that mitigated the operator's negligence in**

¹ In paragraphs 3 and 4 of the Motion to Approve Settlement, the Secretary continues to stake out his position that he need not explain the basis for settlement, a position which is immaterial and impertinent to the issues legitimately before the Commission. Those paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act.

that the operator had taken two air readings prior to mining coal and the second reading had shown an amount of air that complied with the approved ventilation plan. And, the Respondent states they would present evidence to that effect. In light of the contested evidence and the costs and uncertainties of pursuing further litigation of this matter, the Secretary has agreed to reduce the alleged negligence from High to Moderate, to modify the 104(d)(1) unwarrantable-failure order to a 104(a) citation, and to reduce the penalty to \$6,500.00, and the Respondent has agreed to pay the reduced amount.²

For Order No. 8156865, the *entirety* of the Secretary's motion provides the following reasoning:

Order No. 8156865 was issued to the Respondent on May 8, 2013, and alleged a violation of 30 C.F.R. § 75.503 and § 104(d)(1) of the Act, 30 U.S.C. § 814(d). The Secretary determined that the violation was unlikely to cause an injury; that an injury from the cited condition could be reasonably expected to be fatal; that the violation was not significant and substantial; that one person was affected; and that the operator's conduct in the violation demonstrated a high degree of negligence. The Secretary assessed a penalty of \$2,748.00. **The Respondent disputes the alleged violation and contends that the alleged degree of negligence and the allegation of unwarrantable failure are not supported by the evidence in that the two small wires found by the inspector to be protruding from the scoop were not in plain sight or obvious as the light was mounted in a recessed area between the frame and the battery and, therefore, the failure to observe and address the wires did not constitute high negligence or unwarrantable failure. And, the Respondent states they would present evidence to that effect.** In light of the contested evidence and the costs and uncertainties of pursuing further litigation of this matter, the Secretary has agreed to reduce the alleged negligence from High to Moderate, to modify the 104(d)(1) unwarrantable-failure order to a 104(a) citation, and to reduce the penalty to \$1,500.00, and the Respondent has agreed to pay the reduced amount.

For Order No. 8156866, the *entirety* of the Secretary's motion provides the following reasoning:

Order No. 8156866 was issued to the Respondent on May 8, 2013, and alleged a violation of 30 C.F.R. § 75.512 and § 104(d)(1) of the Act, 30 U.S.C. § 814(d). The Secretary determined that the violation was unlikely to cause an injury; that an injury from the cited condition could be reasonably expected to be fatal; that the violation was not significant and substantial; that one person was

² As reflected above, the putative grounds for each settlement ends with the same refrain to the Secretary's settlement song, with the chorus intoning, "In light of the contested evidence and the costs and uncertainties of pursuing further litigation of this matter, the Secretary has agreed to reduce the alleged negligence from High to Moderate, to modify the 104(d)(1) unwarrantable-failure order to a 104(a) citation, and to reduce the penalty [with the vocalist inserting the figure here.]"

affected; and that the operator's conduct in the violation demonstrated a high degree of negligence. The Secretary assessed a penalty of \$2,341.00. **The Respondent disputes the alleged violation and contends that the alleged degree of negligence and the allegation of unwarrantable failure are not supported by the evidence in that the two small wires found by the inspector to be protruding from the scoop were not in plain sight or obvious as the light was mounted in a recessed area between the frame and the battery and, therefore, the Respondent's examination, which missed these wires, did not constitute high negligence or unwarrantable failure. And, the Respondent states they would present evidence to that effect.** In light of the contested evidence and the costs and uncertainties of pursuing further litigation of this matter, the Secretary has agreed to reduce the alleged negligence from High to Moderate, to modify the 104(d)(1) unwarrantable-failure order to a 104(a) citation, and to reduce the penalty to \$1,500.00, and the Respondent has agreed to pay the reduced amount.

Determination of the Court

For the reasons which follow, the settlement must be rejected. At the outset, it must be noted that the Secretary, at the behest of some top level official, includes in virtually *every* one of his motions for decision and order approving settlement his objection that he really need not be bothered with the process of complying with Section 110(k) of the Mine Act and its relevant provision that "no proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission."

Instead, it is the Secretary's position that, notwithstanding Section 110(k), all he need do is to advise, in the rote fashion he invokes with each settlement, that

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

Given his view that he need not provide more to the Commission than an unsupported conclusion that a given settlement is sufficient, it should not be surprising that, when the Secretary alternatively does provide some justification, usually, as here, it is a minimalist effort. An examination of the grudging submission by the Secretary in this instance demonstrates its inadequacy.

For the first matter, a section 104(d)(1) order, Order No. 8156851, dealing with an alleged ventilation plan violation, for which a penalty of \$10,705.00 was proposed, the Secretary

seeks a 39% reduction from the proposal based on Respondent's disputing the violation, but more particularly, as noted above, because it

contends that the alleged degree of negligence and the allegation of unwarrantable failure are not supported by the evidence in that there were circumstances present that mitigated the operator's negligence in that the operator had taken two air readings prior to mining coal and the *second reading* had shown an amount of air that complied with the approved ventilation plan. And, the Respondent states they *would present evidence to that effect*.

Motion at 2 (emphasis added).

It is noted that the Secretary has not disclosed whether discovery has taken place, nor that the Respondent has offered more than the claim that it *would* present evidence to the effect that the negligence and the unwarrantable failure claims are not supported by the evidence. The only mitigating factor articulated was that *one* of two air readings met the ventilation plan. Accordingly, the Court notes that the Secretary's Motion does not declare that the Respondent has actually presented evidence in support of its claim.³

In contrast, when one examines the MSHA Mine Inspector's (d)(1) Order, one learns that document asserts:

Order # 8156851

The operator [has] failed [to] follow the Approved Section Specific Methane and Dust Control Plan Page, FACE VENTILATION section, Item C 003-0 MMU. Upon arriving at #3 entry Bk#14 on West #2 belt, the miner was cutting in #3 with the scrubber on. Accompanied with the Eve Shift Mine Foreman and with the attendance of the Section Foreman found the Joy 14CM15 Continuous Miner (Serial #JM6484) cutting in the #A cut. When asked to take air reading, the C/M was pulled back to the intersection and the quantity behind the line curtain was measured 3,024 CFM. Section Foreman took air reading and confirmed the violation. After pulling the curtain further and putting rocks on it to keep it away from the rib and tighten the curtain down, the reading was 4,410 CFM. 2 readings were [taken] by the section foreman confirming the violation. There were 4 miners working in the West section at the time of citation. Black Lung[] is the most lethal disease and hazard for coal miners. The operator is engaged in aggravated conduct constituting more than ordinary negligence. Ventilation plan requirements are of fundamental importance in assuring a safe working environment underground. Serious lack of reasonable care exacerbates the likelihood for accidents to occur. ***The operator has been made aware of the need for greater effort toward compliance and the need of the ventilation plan requirements through citations, discussions and notices. There are no***

³ A vivid way to examine the Secretary's submission is that, out of the 228 words pertaining to the settlement for Order No. 8156851, only 67 relate to settlement information, but when examined closer, only 17 of those words present actual settlement justification information. Regardless of the word count, the few words offered are empty of useful supportive information.

mitigating factors in the issuance of this citation observed by the inspector. The line curtain was tight and the fly pad on all entries were tight and doubled. The existence of these ventilation hazards have increased exponentially the reasonable likelihood that a serious injury of a reasonably serious nature will occur. Where safety standards are not complied with safety diminishes.

(emphasis added). The Order continues, noting that “**Standard 75.370 (a) (1) was cited 31 times in two years at mine 4609230** (31 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard[.]” (emphasis added).

Given the text of the Order, it was incumbent upon the Secretary to provide more information, if any actually exists, to demonstrate the evidence actually presented for the first and second readings, and beyond that, to explain how the second reading served to mitigate the violation, especially in light of the Inspector’s remarks about continuing ventilation problems at this mine. Further, the Inspector, in conference with the mine, already allowed for mitigating circumstances with the effect that the injury was reduced to permanently disabling, instead of fatal, and the number affected was reduced from 14 to 7.

Accordingly, the settlement motion for this Order is rejected. It should be obvious that this rejection is *not* suggesting that any settlement would be insufficient. Rather, the Secretary is directed to provide adequate information to support it or to prepare for hearing. This observation applies equally to the other Orders.

For the second matter, Order No. 8156865, another section 104(d)(1) order, which was proposed at \$2,748.00 and for which the Secretary now seeks a 45% reduction, reducing the penalty to \$1,500.00, as noted, the Secretary offers up the following in support of its proposed settlement amount and the revisions to the terms of the order:

The Respondent disputes the alleged violation and contends that the alleged degree of negligence and the allegation of unwarrantable failure are not supported by the evidence in that the two small wires found by the inspector to be protruding from the scoop were not in plain sight or obvious as the light was mounted in a recessed area between the frame and the battery and, therefore, the failure to observe and address the wires did not constitute high negligence or unwarrantable failure. And, the Respondent states they would present evidence to that effect.

Motion at 3 (emphasis added).

The first observation is the echoing of much of the supporting rationale for this matter, as with the previously discussed order, above. Both make the same claim that “[t]he Respondent disputes the alleged violation and contends that the alleged degree of negligence and the

allegation of unwarrantable failure are not supported by the evidence.”⁴ That, of course, tells the Court precisely nothing.

When the motion finally comes around to providing specifics, it advises that the two small wires found by the inspector to be protruding from the scoop *were not in plain sight or obvious* as the light was mounted in a recessed area between the frame and the battery and, therefore, the failure to observe and address the wires did not constitute high negligence or unwarrantable failure. And, the Respondent states they *would present evidence* to that effect.

Motion at 3 (emphasis added).

As with the discussion of the first Order, above, the Secretary’s Motion does not contend that, in fact, through discovery or otherwise, that the Respondent *actually provided* such evidence. Instead, the Secretary simply proceeds from the Respondent’s claims and returns to its repeated phraseology that

[i]n light of the contested evidence and the costs and uncertainties of pursuing further litigation of this matter, the Secretary has agreed to reduce the alleged negligence from High to Moderate, to modify the 104(d)(1) unwarrantable-failure order to a 104(a) citation, and to reduce the penalty to [] and the Respondent has agreed to pay the reduced amount.”

Equally troubling is that, putting aside that the settlement does not declare that the Respondent actually provided such evidence, as opposed to what it “would present,” the mine inspector’s Order flatly contradicts the “not in plain site or obvious” assertion.

Order# 8156865 states:

The operator has failed to maintain the permissible electrician’s maintenance scoop CO# 508, S/N 488-2111 in a permissible condition. When checked the scoop outby the loading point, found the offside rear light’s explosion-proof enclosure ***has 2 wires sticking out of it and connected together with a wires nut.*** When asked to de-energize the scoop and open the enclosure, found that these 2 wires are the light bulb wires. When disconnected the wires the light bulb didn’t work. This scoop is a maintenance scoop. ***Only electrician[s] are allowed to perform electrical duties on it. The sticking out wires were very obvious to the average observer. The electrician who change[d] the light bulb last was supposed to check for flange openings to assure the enclosure permissibility.***

⁴ It will not be surprising to learn that the same verbiage appears for the third matter, that “[t]he Respondent disputes the alleged violation and contends that the alleged degree of negligence and the allegation of unwarrantable failure are not supported by the evidence,” but at least in this last matter, the repetition can be defended on the basis that both Order Nos. 8156865 and 8156866 arose out of the same electrical hazard on a maintenance scoop, with the former involving face equipment not being maintained in permissible condition while the latter cites the related violation for *not properly examining* and maintaining such equipment, per section 75.512.

The enclosure lid was shut tight with 4 bolts and [its] washers mashing down the sticking out wires. The wires nut had a burned spot from the light's heat. The operator's Agent is engaged in aggravated conduct[] constituting more than ordinary negligence. Permissibility examination[s] are of fundamental importance in assuring a safe working environment underground. Serious lack of reasonable care exacerbates the likelihood for accidents to occur. **The operator has been made aware of the need for greater effort toward permissibility's compliance and the need of the adequate electrical examination through citations, discussions and notices. There are no mitigating factors in the issuance of this order observed by the inspector.** There were 14 miners working on the section at the time of the order. **The scoop was examined by agent of the operator on 5/8/2013.** The condition was not detected, reported or corrected.⁵

Further, it is noted in the Order that the alleged violation of the permissible equipment requirement, "Standard 75.503[,] was cited 31 times in two years at mine 4609230 (31 to the operator, 0 to a contractor. This violation is an unwarrantable failure to comply with a mandatory standard." To the Court, that seems like a high number of repeat violations, but the subject is not addressed in the motion either.

Subsequently, the Inspector noted that the light was repaired, eliminating the openings in the explosion proof enclosure. The Inspector, apparently displaying a reasonable posture, subsequently recorded that due to mitigating factors, the order was modified to reduce the number of persons affected from 14 to 1, *but this reduction was already reflected in the proposed penalty amount of \$2,748.00. See Exhibit A.*

Thus, the Secretary's submission is deficient in that not only does it refer solely to what the Respondent *would* provide but also it does not deal with the contradictory assertions in the Inspector's Order.⁶

⁵ In other words, the Order was issued on the same date that the exam had been made, thereby eliminating any claim that the condition had recently arisen.

⁶ As the Court noted in its recent denial of the settlement motion in *Janney Painting*, Docket Nos. VA 2014-28-M, VA 2014-50-M (Feb. 9, 2015), "Whether the Secretary should continue to have unreviewable authority to vacate citations is not presently in issue. Perhaps the time for reconsideration of that unfettered authority has arrived." Given the paucity of information so often provided by the Secretary in its settlement motions, and remembering that, even the information which is reluctantly provided comes with an objection over its disclosure, with that attitude, it is fair to inquire what protections there are for the safety and health of miners when a matter is simply vacated. Presently, no explanation from the Secretary is required at all. Perhaps the affected community will demand more.

For the third matter, Order No. 8156866, the entirety of the Secretary's motion provides the following reasoning:

Order No. 8156866 was issued to the Respondent on May 8, 2013, and alleged a violation of 30 C.F.R. § 75.512 and § 104(d)(1) of the Act, 30 U.S.C. § 814(d). The Secretary determined that the violation was unlikely to cause an injury; that an injury from the cited condition could be reasonably expected to be fatal; that the violation was not significant and substantial; that one person was affected; and that the operator's conduct in the violation demonstrated a high degree of negligence. The Secretary assessed a penalty of \$2,341.00. **The Respondent disputes the alleged violation and contends that the alleged degree of negligence and the allegation of unwarrantable failure are not supported by the evidence in that the two small wires found by the inspector to be protruding from the scoop were not in plain sight or obvious as the light was mounted in a recessed area between the frame and the battery and, therefore, the Respondent's examination, which missed these wires, did not constitute high negligence or unwarrantable failure. And, the Respondent states they would present evidence to that effect.** In light of the contested evidence and the costs and uncertainties of pursuing further litigation of this matter, the Secretary has agreed to reduce the alleged negligence from High to Moderate, to modify the 104(d)(1) unwarrantable-failure order to a 104(a) citation, and to reduce the penalty to \$1,500.00, and the Respondent has agreed to pay the reduced amount.

Motion at 3 (emphasis added).

The same infirmities identified for the previous Orders exist here as well, as the motion offers the same platitudes about evidence that the Respondent *would* present, as opposed to identifying information obtained through discovery or otherwise.

In this instance, it is possible to view this Order as graver, in a sense, than the related Order, No. 8156865, addressing the scoop itself, because, more fundamentally, this Order reflects a problem with the examination process itself. As the Inspector contended in his Order, for **No. 8156866**, an

*[i]nadequate examination has been [i] conducted on CO# 508 S/N 488-2111 maintenance scoop on 5/8/2013. Order # 8156865 was issued on 5/8/2013 for [an] obvious safety hazard. The condition was very obvious, extensive and has . . . existed for [a] long time. The light bulb's wires were sticking out [of] the explosion-proof enclosure and the enclosure lid was closed tight[,] mashing the wires. It's [a] very serious part of the permissibility examination . . . to check for flange openings. **If the electrician would have checked for the flange openings he would have found the hazard.** The condition was not detected, reported or corrected. The electrical examination records indicate[] no hazard for the scoop. The condition had to exist for a period of time because there were accumulation[s] of dirt inside the bolt holes and lubricants had to be used to*

loosen[] the bolts. The condition constitutes that the explosion-proof enclosure has not been checked for flange openings for [a] long time because of the sticking out wires. Permissibility[] and electrical examination[s] are considered [the] first line of defense in assuring a safe working environment underground and safe mobile equipment[] operation. Serious lack of reasonable care exacerbates the likelihood for accidents to occur.

(emphasis added).

The Order went on to state that “Standard 75.512 was cited 21 times in two years at mine 4609230 (21 to the operator, 0 to a contractor).” The Order also continued, noting that a

certified electrician performed an examination on the same day the condition was cited. The condition wasn’t detected, reported or corrected. . . . [and that upon] reviewing the notes and previous citations, the operator was put on notice [by the Inspector] for a greater effort toward electrical examinations and permissibility requirements on citation# 8156863 and during an official meeting with the company’s upper management representatives on 5/8/2013.

None of these issues of concern were addressed in the Motion and, as with the others, mitigating factors were already taken into account in formulating the proposed penalty. The point, of course, is that the settlement motion offers nothing in the way of identifying further mitigating factors, nor does it address the serious deficiencies alleged in the Order.

Accordingly, the proposed settlement for this Order is also rejected.

Conclusion

Apart from the Commission’s statutory role in approving settlements, one is left to wonder just exactly what the principled objection is that causes the Secretary, in its anti-transparency manner, to balk at explaining the basis for its settlements. One would think that, beyond Section 110(k), MSHA would be insisting that its lawyer, the Solicitor of Labor, show the public and the miners who depend upon effective enforcement of the Mine Act for their safety and health, the basis for its settlements. Instead, the Secretary offers the platitude that “the Secretary has evaluated the value of compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt,” essentially telling the affected community, “Move along, there’s nothing to see here.”

Settlement motions such as this, in the Court’s view, raise a question of whether there is merely paper-pushing going on. This concern should not be interpreted as suggesting that the Court is stating matters should not be settled. To the contrary, it is simply a matter of providing the Court with real information to support the motion so that the Court can fulfill its statutory responsibilities and, as a bonus which all should embrace, so that the Secretary can show the Nation’s miners, with genuine transparency, that the Secretary’s motions comport with the statutory aims of the Mine Act rather than simply asserting that they do.

Accordingly, for the foregoing reasons, the Court has considered the representations submitted in this case and concludes that the proffered settlement is not appropriate under the criteria set forth in section 110(i) of the Act, and it is therefore DENIED.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 27, 2015

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

v.

JUSTICE ENERGY COMPANY,
INCORPORATED,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2012-940
A.C. No. 46-06578-282610

Mine: Red Fox Surface Mine

DECISION

Appearances: Emily O. Roberts, Esq., U.S. Dept. of Labor, Office of the Solicitor,
Nashville, Tennessee, for Petitioner;

James F. Bowman, Justice Energy Company, Incorporated, Midway, West
Virginia for Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”), against Justice Energy Company, Incorporated (“Justice”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary seeks a total civil penalty in the amount of \$255,992.00 for nine alleged violations of his mandatory safety standards.¹

A hearing was held in South Charleston, West Virginia. The issues before me are: (1) whether Respondent violated 30 C.F.R. §§ 77.1608(a), 77.1605(k), 77.404(a), and 77.1104; (2) whether the violations were significant and substantial, where alleged; and (3) whether the violations were a result of Justice’s high or moderate negligence, as alleged. The parties’ Post-hearing Briefs are of record.

For the reasons set forth below, I **AFFIRM** the citations, as issued, assess penalties against Respondent, and approve the parties’ Partial Settlement.

¹ The parties reached a settlement on two of the nine contested citations. The total civil penalty proposed for the seven remaining alleged violations is \$220,008.00.

I. Stipulations

The parties stipulated as follows:

1. Justice Energy, Incorporated, owns and operates Red Fox Surface Mine, I.D. No. 46-06578. Red Fox Surface Mine is located in McDowell County, West Virginia;
2. Red Fox Surface Mine is a “mine” as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 803;
3. Justice Energy, Incorporated, is subject to the Federal Mine Safety and Health Act of 1977;
4. Justice Energy, Incorporated, is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the presiding Administrative Law Judge has the authority to hear this case and issue a decision;
5. At all times relevant to this proceeding, Red Fox Surface Mine had an effect upon interstate commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803;
6. Red Fox Surface Mine is large, producing 751,359 tons of coal in 2011;
7. Copies of the citations in contest are authentic and were served on the Respondent by an Authorized Representative of the Secretary employed by the Mine Safety and Health Administration;
8. The Respondent timely contested these violations;
9. MSHA’s Proposed Assessment Data Sheet and “Exhibit A-Docket Number WEVA 2012-940” accurately set forth: (a) the number of assessed penalty violations charged to the Respondent for the period stated; and (b) the number of inspection days per month for the period stated; and
10. The penalties proposed will not affect the Respondent’s ability to continue in business.

Ex. P-1.

II. Factual Background

Justice Energy owns and operates the Red Fox surface mine (“Red Fox”), a highwall surface coal mining operation, located in McDowell County, West Virginia. Stip. 1. On the morning of January 11, 2012, MSHA Inspector Jeffrey Presley, prior to conducting a quarterly E-01 inspection of Red Fox, participated in a safety meeting held by mine managers at the mine

portal. Tr. 31-33. Presley was initially accompanied on the inspection by Justice's dozer operator, Todd Neely, and later joined by safety manager, Gilbert Witt. Tr. 34, 290, 297.

As Presley drove away from the mine portal, he observed rock trucks slipping on a roadway covered with mud and standing water. Tr. 38-39. Therefore, he issued a citation for the operator's failure to keep the haul road reasonably free of debris, posing a collision hazard. Tr. 39; Ex. P-3. Also, having observed that a roadside berm was constructed of mud and failed to reach the requisite mid-axle height of the trucks, Presley issued a citation for Justice's failure to maintain an adequate berm. Tr. 48-51; Ex. P-4.

On the second morning of Presley's inspection, January 13, he observed a school bus, being used by Justice as a mantrip, with motor oil accumulations on the engine, an inoperable fire extinguisher, and four inoperable rear lights; he issued three citations for these conditions. Tr. 59, 65-66, 71-72; Exs. P-5, P-6, P-7.

Presley also inspected highwall drill numbers 834 and 841. Tr. 76-77. On the 841 highwall drill, he observed a half inch of slack in the mast jack pin, and extensive oil leaks covering the engine, hydraulics, and electrical components.² Tr. 77-78, 89. Consequently, he issued a citation for the operator's failure to keep the drill in safe operating condition, and another for allowing accumulations of hydraulic oil where they created a fire hazard. Tr. 77-78, 96; Exs. P-8, P-9. While inspecting the 834 highwall drill, Presley cited Justice for failure to maintain the drill in safe operating condition, identifying nine defective conditions; he issued another citation for allowing accumulations of hydraulic and motor oil where they created a fire hazard. Tr. 100, 117; Exs. P-10, P-11.

III. Findings of Fact and Conclusions of Law

A. Citation 8144189

1. Fact of Violation

Presley issued 104(a) Citation No. 8144189, alleging a "significant and substantial" violation of section 77.1608(a) that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Justice's "moderate" negligence.³ The "Condition or Practice" is described as follows:

When the haul roads were traveled they were covered in debris in the form of a large amount of mud. The roads were very slick due to the condition and pick-up trucks and large rock trucks were observed sliding and spinning tires for traction

² The mast jack pin holds the jack in place; the jack raises and lowers the mast. Tr. 79.

³ 30 C.F.R. § 77.1608(a) provides that "dumping locations and haulage roads shall be kept reasonably free of water, debris, and spillage."

due to loss of traction. These are high traffic roads traveled all shift and these conditions can result in a wreck.⁴

Ex. P-3. The citation was terminated after the haul road was cleared of debris.

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred “by a preponderance of credible evidence.” *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

Presley had worked for MSHA since 2007, and had inspected Red Fox over 50 times prior to 2012. Tr. 23-24, 27. He described the haul road as being covered with mud several inches deep and standing water forming puddles 30 by 50 feet, which caused rock trucks to lose traction. Tr. 38-39. In his opinion, given the heavy truck traffic, vehicles losing traction would collide, resulting in drivers sustaining broken bones, paralysis, or even death. Tr. 42. Presley concluded that Justice was moderately negligent because the muddy conditions had been discussed that morning in the safety meeting but, from his observation, no graders were being operated to clear the roadway. Tr. 33, 45.

Safety manager, Gilbert Witt, had worked at Red Fox since 2008. Tr. 282. Contrary to Presley’s testimony, Witt testified that, while accompanying Presley on his inspection, he observed graders working on the haul road, and that he did not see any conditions presenting a challenge to maneuverability of the trucks. Tr. 296-97. Witt also testified that he took photographs of the roadway, and he identified one photograph, showing a roadway free of mud and debris, as depicting the conditions observed by the inspector. Tr. 291; Ex. R-14. Dozer operator, Todd Neely, testified similarly, that the roadway was clear, and also attested to the photograph being a fair depiction of it at the time of inspection. Tr. 467-74.

Mine superintendent, Gregory Browning, had been employed at Red Fox for three years. Tr. 552-53. He explained that the mine’s normal practice is to run a 16G motor grader, unless it is out of service, in which case a rubber-tired dozer is used to maintain the roads; he testified that both were in use on the day of inspection. Tr. 557, 560. Nevertheless, Browning conceded that some mud was present a quarter of the way out of the pit; he described it, however, as only a light, tacky mud, which he would not consider to be debris. Tr. 554, 562. Michael Dale, 994 loader operator, essentially corroborated Browning’s testimony, explaining that, using the main loader, it only took him approximately 10 to 15 minutes to scoop the mud off the road. Tr. 495.

The photograph upon which Justice relies to support its contention that only an inconsequential amount of mud had accumulated on the roadway depicts pristine conditions that do not comport with its witnesses’ cumulative testimony. Ex. R-14. Witt initially testified that he had taken the collection of evidentiary photographs contemporaneous with Presley’s inspection. Tr. 291, 301-02, 350-51, 368, 391-92, 403, 405. The Secretary’s challenge to their authenticity, however, called into question the timing of the snapshots and who, in fact, had taken them. Justice’s safety director, Raymond Simpson, substantiated the Secretary’s contention that Witt

⁴ Contrary to the wording in the narrative, the testimony makes clear that Presley cited one roadway on which multiple trucks were traveling.

was not the sole photographer, by pointing out that the snapshots were labeled either “Contemporaneous by Gilbert Witt,” or “Non-contemporaneous, illustrative, Mark Huffman.” Tr. 393, 397; Exs. P-15, P-16, R-14, R-15, R-16, R-17, R-18, R-19, R-20, R-21, R-22, R-23, R-24, R-25, R-26, R-27, R-28, R-29, R-30, R-31, R-32, R-33, R-34, R-35, R-36. Furthermore, neither Witt nor Simpson was able to identify who had labeled the photographs. Tr. 397, 460. Indeed, Witt acknowledged that two photographs of the 834 highwall drill attributed to Huffman, depict warm weather conditions, and he reluctantly admitted that he had no knowledge of when they had been taken. Tr. 454-57; Exs. R-33, R-34. Finally, there is no evidence that establishes any of the photographs as an accurate depiction of the roadway on the date and time that Presley cited the alleged slippery conditions, nor are they authenticated as accurate depictions of other conditions cited during the inspection. Consequently, I find Justice’s photographic evidence of no probative value in establishing any of the conditions encountered by the inspector and, in so finding, I also find Witt’s testimony of his observations unsupported, and his assertion that graders were leveling the roadway at the time of inspection, largely unworthy of credence.

Presley, on the other hand, consistently testified that several of the alleged contemporaneous photographs were not illustrative of the conditions which he observed, and I fully credit his testimony that rock trucks were slipping on the muddy, debris-covered roadway, where no grader was operating. Tr. 578-79, 624. I also find Witt’s, Browning’s, and Neely’s depiction of a relatively mud-and-debris-free roadway completely fabricated, considering their acknowledgement that they had attended the morning safety meeting addressing the hazardous conditions resulting from the overnight rainfall. Tr. 286, 467-68, 554-62. Therefore, I find that Justice violated section 77.1608(a) by failing to maintain the haul road reasonably free of mud and standing water.

2. Significant and Substantial

To prove that a violation is “significant and substantial” (“S&S”) under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981), the Secretary must establish the four criteria set forth by the Commission in *Mathies Coal Company*, 6 FMSHRC 1 (Jan. 1984). The Secretary bears the burden of proving: 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC 1, 3-4; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133,135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based “on the particular facts surrounding that violation.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). The Secretary must prove that there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The fact of the violation has been established. The second criterion of the *Mathies* test has been met, in that rock trucks losing traction and slipping due to the muddy roadway surface were likely to lose control and collide with other vehicles. Clearly, collisions between multi-ton trucks are reasonably likely to result in serious musculoskeletal injuries such as strains, sprains and broken bones, head trauma, paralysis, and even death. Therefore, I find that the violation was S&S.

3. Negligence

The record establishes that Justice was aware of the muddy road conditions, as evidenced by the morning safety meeting held to address the matter, attended by Browning, Witt, and Neely. However, despite permitting commencement of mining operations prior to clearing the roadway, Justice's effort to alert its miners to the hazard mitigates its negligence. Therefore, I conclude that Justice was moderately negligent in violating the standard.

B. Citation 8144190

1. Fact of Violation

Inspector Presley issued 104(a) Citation No. 8144190, alleging a "significant and substantial" violation of section 77.1605(k) that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Justice's "moderate" negligence.⁵ The "Condition or Practice" is described as follows:

When checked the elevated haul road at the Cat 994 pit has berms that are not adequate enough to prevent an accident. This pit is located over the active coal pit and large Cat 789 and 793 rock trucks haul from this location and the berms were not built up to the mid axle of these trucks. The partial berms that were there were constructed of muddy material and not substantial enough to prevent the large heavy trucks from running or sliding through the berms and falling 40 plus feet below. The area at this location was muddy and trucks were observed slipping and sliding. (See Citation No. 8144189).⁶

Ex. P-4. The citation was terminated after the berm was built up using overburden.

Presley explained that to provide protection against overtravel and overturning, the berm was required to extend higher than mid-axle height of the trucks or, if at mid-axle height, be

⁵ 30 C.F.R. § 77.1605(k) provides that "berms or guards shall be provided on the outer bank of the elevated roadways."

⁶ 30 C.F.R. § 77.2(d) defines "berm" as a pile or mound of material capable of restraining a vehicle. Contrary to the wording in the narrative, the testimony makes clear that Presley cited only one berm.

constructed of a substantial material.⁷ Tr. 48-49. He testified that he positioned himself where he could see the truck axles passing the berm, and observed that the majority of the berm was significantly lower than the trucks' mid-axles, with some spots deficient by as much as two feet. Tr. 50-53, 168-70. Presley was able to see that mud had sloughed off the berm to the coal pit below. Tr. 51. He opined that given the slick roadway conditions, a truck could overtravel through the berm and overturn, resulting in a 40 to 50 foot plunge down to the pit. Tr. 54-55.

Witt testified that the berm was approximately eight to nine feet tall and, at first, averred that it was constructed of rock from the pit. Tr. 298-99. However, when viewing Justice's photographs, purportedly of the original berm and the berm that was constructed to abate the violation, Witt identified the original berm as being composed of smaller, finer, and more consolidated material than the one constructed later. Tr. 307-08; Exs. R-15, R-16. Witt also identified a pile of mud atop the berm which, he speculated, could have been dumped on the berm by the front-end loader; however, he added that this was not a normal practice. Tr. 309.

Neely testified that he had built the original berm the day before the inspection to a height of 72 to 74 inches. Tr. 477-79. He admitted that the combination of the previous night's rain and work in the pit had caused some of the berm to "slip off." Tr. 483. Ronald Starcher, loader operator, testified that on the morning of January 11, he used a front-end loader to repair the berm. Tr. 486-88. According to Starcher, the berm had "slagged off" in a couple of spots. Tr. 488. Viewing Justice's photographs of the berm, he admitted that the area that Witt had identified as the original berm was primarily composed of dirt with some rock, and that the rain would have been able to wash it away. Tr. 489-91. Loader operator, Michael Dale, explained that he was tasked with building the berm that terminated the citation, and he also admitted that the original berm had eroded due to rainfall and mining in the pit. Tr. 496-500. Furthermore, Dale testified that the original berm was constructed of rock with a little bit of dirt; however, after examining Justice's photograph, he stated that it looked like "a lot more dirt." Tr. 501-02; Ex. R-15.

I find that the original berm was constructed primarily of dirt rather than rock, and I credit the Secretary's contention that it did not rise to mid-axle height of the operating haul trucks. Even Justice's own photographs, although of dubious origin, show the berm to be constructed of consolidated material, including substantial amounts of dirt and mud. Obviously, inherent in the standard is a requirement that berms or guards be constructed of such material, and in such fashion, as to constitute an effective barrier. A berm primarily constructed of dirt, which does not rise, at least, to mid-axle height, is insufficient to stop multi-ton rock trucks from overtraveling into the pit and overturning. Therefore, I find that the Secretary has proven that Justice violated section 77.1605(k).

2. Significant and Substantial

The first two *Mathies* criteria have been met, in that the violation has been established, and it is apparent that the construction material and height insufficiency of the berm contributed

⁷ See, for example, 30 C.F.R. § 77.1605(l) which provides that "berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtavel and overturning at dumping locations."

to the danger of rock trucks overtraveling and overturning. Here, again, the S&S analysis is dependent upon the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious. Presley testified credibly that a truck operator was reasonably likely to be killed were his truck to slip on the steep, muddy roadway, overtravel through the berm, and likely overturn as a result of plunging 40 to 50 feet down to the pit. Tr. 54-55. Therefore, I find that the violation was S&S.

3. Negligence

The Secretary contends that Justice was moderately negligent in its insubstantial construction of the berm and failure to timely repair it after it had deteriorated, before permitting miners to haul on the roadway. Sec’y Br. at 8. On the other hand, Justice contends that Starcher timely repaired the berm. Resp’t Br. at 18. Crediting the evidence that Starcher had repaired the berm on the morning of inspection, the evidence is also clear that Justice’s remediation was short-lived or entirely missed its mark in the first place. Therefore, I find that Justice was moderately negligent in violating the standard.

C. Citation No. 8144193

1. Fact of Violation

Presley issued 104(a) Citation No. 8144193, alleging a “significant and substantial” violation of section 77.404(a) that was “reasonably likely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Justice’s “moderate” negligence.⁸ The “Condition or Practice” is described as follows:

The company’s bus used as a mantrip is not being maintained in safe operating condition. When checked none of the brake lights work and none of the backup lights work. This machine is operated in low light, foggy, and rainy conditions on high traffic haul roads in off road terrain.

Ex. P-7. The citation was terminated when the back-up lights and brake lights were repaired.

The Commission has found that section 77.404(a) requires an operator to maintain machinery and equipment in safe operating condition, and to remove unsafe equipment from service. *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979).

The Secretary argues that operating the bus with non-functional back-up and brake lights was unsafe, because other vehicles or pedestrians traveling on mine roads would have no visual warning of the bus stopping or reversing, in order to avoid collision. Sec’y Br. at 9-10. Justice makes counter arguments that the bus was in safe operating condition, that it was examined prior to commencement of the shift and found to have no defects, and that it could be operated safely even with inoperative rear lights, since head lights, strobe lights, a back-up alarm, reflective tape, and a CB radio alerted miners to the bus’ mode of operation. Resp’t Br. at 18-19.

⁸ 30 C.F.R. § 77.404(a) provides that “mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.”

Presley testified that none of the bus' back-up or brake lights was working. Tr. 71-72. He opined that while the bus' headlights and strobe light were operational, a pedestrian or vehicle following the bus could lose sight of its rear, especially in low-light or foggy conditions, likely leading to a collision. Tr. 71-74. In the case of a collision, miners inside the bus could suffer sprains, broken bones, or whiplash, and a miner run over by the bus operating in reverse could be killed. Tr. 74-75. Presley testified that the bus was being operated in this hazardous condition twice each shift, and that pickup trucks and large mechanic trucks were operating on the same roads, at the same time that the bus was transporting miners to different work areas. Tr. 73, 219-20.

Witt initially testified to being very confident that the rear lights were working when the shift began, because the pre-operational examiner had not reported them as defective. Tr. 332-33. However, he later admitted that the pre-operational examination was inadequate, acknowledging that only one miner had been involved, while two are needed to check brake lights, and that the lights were not working when Presley inspected the bus. Tr. 346, 432. John Spencer, the bus driver but not the pre-operational examiner, testified that on the morning of January 13, prior to issuance of the citation, the bus had become stuck in a mud hole, which he offered as the cause of the lights failing; he admitted, however, that he had not checked the lights after that incident or prior to beginning his shift. Tr. 540-46. Spencer acknowledged encountering coal trucks, service trucks, and pickup trucks while running his route. Tr. 542-43. Browning attested to the bus using the same haul roads as tractor-trailer coal trucks, pickup, and mechanic trucks. Tr. 563-64.

While there is no evidence establishing that the bus' back-up lights were inoperative when the shift began, the unlikelihood of both lights failing simultaneously casts a shadow upon the thoroughness of the pre-operational examination, especially considering that the examination of the brake lights was shown to be inadequate - - if a check of the bus' rear lights was conducted at all. Operating the bus without functional rear lights, in close proximity to other multi-ton trucks and pedestrians, was highly unsafe and likely to result in vehicular collisions or pedestrians being struck. Therefore, I find that Justice violated section 77.404(a).

2. Significant and Substantial

The fact of the violation has been established. The second *Mathies* criterion has been satisfied, i.e., inoperative brake and back-up lights contributed to a collision hazard involving trucks or pedestrians. In analyzing the third and fourth *Mathies* criteria, I find that a collision between the bus and a mine truck would be reasonably likely to cause miners to suffer musculoskeletal injuries such as strains, sprains, and fractures and, if the bus were to strike a miner on foot, severe crush injuries or even death. Therefore, I find that the violation was S&S.

3. Negligence

Presley noted the unlikelihood of all rear lights failing at the same time, and concluded that the defective condition must have existed for quite some time and should have been discovered during the pre-operational examination. Tr. 76. Justice's argument, that an operator should be afforded a fair opportunity to correct reported pre-operational hazards, need not be

addressed here, since it has been established that the bus' rear lights were not reported as defective in the first place. See Resp't Br. at 8. Because, at the very least, Justice failed to conduct a thorough pre-operational exam of the bus' rear lights, and also considering that the Secretary failed to establish the duration of their inoperative state, I find that Justice was moderately negligent in violating the standard.

D. Citation No. 8144194

1. Fact of Violation

Presley issued 104(a) Citation No. 8144194, alleging a "significant and substantial" violation of section 77.404(a) that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Justice's "high" negligence. The "Condition or Practice" is described as follows:

The company's number 841 high wall drill is not being maintained in safe operating condition. When checked the operator side mast jack has almost ½" of slack near the pin on the barrel end and there are numerous oil leaks. These oil leaks are very excessive and can cause a function of the machine to malfunction or total loss of control. The oil leaks also cause and contribute to citation number 8144195.

These oil leaks were very obvious and listed in the pre-operational check list for this equipment. It's obvious the equipment operator has done a good inspection but the operator failed to fix the conditions or remove the machine from service. These conditions have been cited numerous times in the past and violations issued today are placing management on notice of high enforcement action.

Ex. P-8. The citation indicates that it was terminated by Justice's repair or replacement of the jack, and repair of the hydraulic hoses on the 841 highwall drill.

Arguing that excessive slack in the mast jack pin and leaking hydraulic hoses constituted defects affecting safety, the Secretary contends that since the drill is manufactured to allow for only an infinitesimal amount of slack in the pins, "no visible slack is safe." Sec'y Br. at 12-13. Justice seems to be arguing that Presley could not determine any amount of slack without taking a measurement. Even if there were visible slack in the pin, Justice argues, Presley's opinion that any visible slack is prohibited, without reference to the manufacturer's specifications for the drill, is insufficient evidence for the Secretary to prove the violation. Resp't Br. at 20-21.

Presley testified to two problems with the 841 highwall drill: visible slack in the pin on the barrel end of the mast jack, and numerous oil leaks. Tr. 78. He explained that the highwall drill mast is approximately thirty feet tall and supports a twenty-foot drill steel.⁹ Tr. 87. The mast is propped up by jacks which hinge to the bottom of the drill and provide support as it vibrates, changes heights, and cuts into the highwall. Tr. 78-79, 84-85. The jacks are secured to the mast

⁹ A "drill steel" is a round or hexagonal steel rod for boring in coal, ore, or rock. It consists of a shank, a shaft, and a bit. Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 171 (2d. ed. 1997).

by pins, which, according to Presley, are manufactured to fit snugly between the mast and the jack, without any visible slack. Tr. 80-85. However, he testified, when the operator raised and lowered the mast, he could see about a half inch of slack in the pin. Tr. 78-79, 230. He explained that a pin with any visible slack would be unable to effectively brace the mast against the pressure exerted by the continuously vibrating drill, and if the pin or the jack were to fail, the mast could fall and strike the operator or a bystander, resulting in broken bones and/or sprains. Tr. 80-81, 87, 101-02. On cross-examination, Presley stated that in determining that the drill was unsafe to operate, he saw no need to consult the manufacturer's specifications, because $\frac{1}{4}$ or $\frac{1}{2}$ inch of slack is clearly out of compliance; according to him, the specifications allow, at most, two or three thousandths of an inch of slack. Tr. 231-33.

Presley described the oil accumulated on the drill as "an area at least the size of this booth (the witness stand), the court reporter's and your (Judge's) bench, plum covered in hydraulic oil." Tr. 94-96. By his account, while he could identify the location of one leak, the drill was covered so extensively in hydraulic oil that he could not determine the other sources, stating that "it's like looking in a spider web of hydraulics and they're all covered with oil." Tr. 89-90. In his opinion, the leaks were likely to lead to loss of hydraulic pressure, which could result in the machine suddenly stopping or jerking sideways, causing the operator to be thrown about the cab. Tr. 90, 92-93. Additionally, if a hydraulic hose were to burst, it could strike a miner or spray him with hot oil. Tr. 90-91.

Witt testified that there was no slack in the mast jack pin but, if there were, the pin would have displayed obvious signs of wear. Tr. 348-52; Exs. R-22, R-23. Rodney Cox, the 841 drill operator, testified that he did not check for slack in the mast jack pin as part of his pre-operational examination, but that he had noted the oil leaks in his report, although he felt that the drill was safe to operate. Tr. 506-07, 515.

As has previously been discussed, Justice's photographs are of no probative value in determining the condition of the drill at the time of inspection. I credit Presley's testimony that he observed slack in the pin. Where the Secretary goes out on an unsupported limb, however, is by contending that no visible slack in the mast jack pin is permissible for safe operation of the drill. The Secretary provided no evidence of the manufacturer's specifications, which may be dispositive in determining whether operating the drill with $\frac{1}{2}$ inch of slack is unsafe. As pointed out by the judge in a similar fact situation involving the same operator, the Secretary cannot carry his burden by simply asserting that any visible slack is unsafe operationally, absent objective evidence of manufacturer or industry specifications. *Justice Energy Company*, 36-37 FMSHRC ___, slip op. at 18-23, No. WEVA 2012-375 (January 20, 2015) (ALJ). Consequently, I find that the Secretary has not met his burden of proving that the visible slack in the mast jack pin constituted an unsafe operating condition.

Presley's observation of hydraulic oil leaks on the drill, however, was corroborated by Justice's own witness, and Cox's reporting of the condition lends credence to the inspector's contention that it was extensive. A ruptured hydraulic hose would likely result in broken bones from a miner being struck or thrown about the cab, or burns resulting from the miner's contact with hot oil. Consequently, I find that the Secretary has proven that Justice operated the 841 highwall drill in unsafe condition and, therefore, violated section 77.404(a).

2. Significant and Substantial

The first two *Mathies* criteria have been met, in that the violation has been established, and hydraulic oil leaks contributed to the hazards of sudden mast movement and hose failure. The third and fourth *Mathies* criteria, the reasonable likelihood of injury and its seriousness, have also been met. A miner being thrown about the operator's compartment would be reasonably likely to suffer musculoskeletal injuries such as strains, sprains, or fractures, and a ruptured hose would likely result in burns or broken bones. Therefore, I find that the violation was S&S.

3. Negligence

The Secretary contends that Justice should have been aware of the unsafe condition of the highwall drill, given the obviousness and extensiveness of the hydraulic oil leaks, and the operator's extensive history of section 77.404(a) violations. Sec'y Br. at 14. On the other hand, Justice contends that it was unaware of the condition, since Cox proceeded to operate the drill despite having reported the oil leaks, and the pre-operational report was not retrieved by management until after the citation had been issued. Resp't Br. at 10-12.

Presley testified that the oil leaks were obvious, considering that they were readily apparent as soon as he stepped out of his vehicle. Tr. 94. He also noted Justice's history of section 77.404(a) violations at Red Fox, and that he has discussed these issues with management officials during previous inspections. Tr. 95. Cox's pre-operational report of oil leaks totally discredits Superintendent Browning's testimony that the leaks were not reported and that management was not aware of the condition. Tr. 567-68. I find that the hydraulic oil leaks were extensive and obvious and, given the history of discussions between Presley and Red Fox's management about recurrent violations of a similar nature, that Justice should have been aware of the need to maintain the 841 highwall drill in safe operating condition, free of this defect. Therefore, I find that Justice was highly negligent in violating the standard.

E. Citation 8144195

1. Fact of Violation

Presley issued 104(a) Citation No. 8144195 alleging a "significant and substantial" violation of section 77.1104 that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Justice's "high" negligence.¹⁰ The "Condition or Practice" is described as follows:

The company's number 841 high wall drill is not being maintained free of accumulations of combustible materials. When checked the excessive oil leaks cited in citation number 8144194 has caused oil to saturate the area under the operator's compartment, on and around the valve chests and area between the oil tank and operator's compartment, and all around the center section of the machine.

¹⁰ 30 C.F.R. § 77.1104 provides that "combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard."

These oil leaks were very obvious and listed in the pre-operational check list for this equipment. It's obvious the equipment operator has done a good inspection but the operator failed to fix the conditions or remove the machine from service. These conditions have been cited numerous times in the past and violations issued today are placing management on notice of high enforcement action. This mine has had fires on equipment in the recent past.

Ex. P-9. The citation was terminated when the oil leaks were repaired and the drill was washed.

In establishing a violation of section 77.1104, the Secretary must demonstrate: (1) the presence of combustible material; (2) that the combustible material was allowed to accumulate; and (3) that the accumulations is located in an area where it can create a fire hazard. *See Maxim Rebuild Co., LLC*, 35 FMSHRC 3261, 3268 (Oct. 2013) (ALJ); *Northwestern Resources*, 21 FMSHRC 431, 438 (Apr. 1999) (ALJ).

The Secretary argues that hydraulic oil is a “combustible liquid,” as defined by MSHA’s regulations, because it is a liquid mixture with a flashpoint of 374 degrees Fahrenheit.¹¹ Sec’y Br. at 20. Justice makes the counter-argument that the hydraulic oil on the drill was not combustible, and that the motor did not reach sufficient temperatures to cause an ignition. Resp’t Br. at 23. In support of its argument, Justice asserts that hydraulic oil is classified by OSHA as “not combustible,” and that the Material Safety Data Sheet (“MSDS”) for hydraulic oil states that it is not a fire hazard.¹² Resp’t Br. at 23; Ex. R-11 at 3, 6.

Presley testified that MSHA classifies hydraulic oil as combustible, and that it had accumulated in close proximity to the motor near the exhaust, and around electrical components near the operator’s cab. Tr. 96-98. He opined that the motor and electrical components were hot surfaces and that, if a hydraulic hose were to burst, it could squirt 3,000 pounds per square inch of oil onto the motor and turbo.¹³ Tr. 273. According to him, if the oil were to contact the turbo, which can reach temperatures over 1,000 degrees, a fire would occur. Tr. 267.

Witt testified that Justice used Chevron hydraulic oil in the 841 highwall drill and, according to the MSDS, it has a flashpoint of 374 degrees. Tr. 373-75; Ex. R-11 at 3. He stated that he took the temperature of the turbo and the engine block on the day of inspection, and observed that the turbo started out at about 800 degrees; when he excited the engine, the turbo

¹¹ The term “flashpoint” is defined as “the minimum temperature at which sufficient vapor is released by a liquid or solid to form a flammable vapor-air mixture at atmospheric pressure.” 30 C.F.R. § 77.2(r).

¹² The MSDS, required for each hazardous chemical used by mine operators, lists flashpoints and autoignition temperatures. 30 C.F.R. § 47.51. There is no evidence in the record that the cited oil accumulations were exposed to temperatures sufficient for autoignition.

¹³ Testifying respecting the 834 drill, Presley explained that the turbo is housed in the exhaust. Tr. 264. A “turbocharger,” also known as a “turbo,” is a device that supplies air to an engine at a higher pressure than normal to increase the engine’s power. *Merriam-Webster Online Dictionary*. 2015. www.merriam-webster.com. (2 Feb. 2015).

temperature increased to 1200 degrees, and the temperature of the engine block was 295 degrees. Tr. 373. He added that no more than a light film of oil was visible, that it was at least two feet away from the turbo, and that there was no oil under the operator's compartment. Tr. 367-69, 372; Exs. R-18, R-19, R-20, R-21.

The Commission has recognized the definition of "combustible" as "capable of being ignited and consumed by fire." *FMC Corporation*, 6 FMSHRC 1566, 1567 (July 1984). Several judges have applied this or a similar definition in addressing underground coal violations. *Garden Creek Pocahontas Company*, 15 FMSHRC 2126, 2140 (Oct. 1993) (ALJ); *Shamrock Coal Company*, 12 FMSHRC 2098, 2102 (Oct. 1990) (ALJ); *Eastern Associated Coal Corporation*, 12 FMSHRC 239, 244 (Feb. 1990) (ALJ).

The Secretary's position that hydraulic oil is combustible is supported by the MSDS, which states that "[t]his material will burn although it is not easily ignited." Ex. R-11 at 3. Although Justice argues that there was no possibility of an ignition given that the engine temperature did not reach the flashpoint of hydraulic oil, it fails to rebut the evidence that a burst hydraulic hose could spew oil onto the turbo, which, according to Witt's measurement, reached 1200 degrees, a temperature far exceeding the oil's flashpoint. As noted in *Justice Energy Company*, affirming similar violations of section 77.1104 for accumulations of hydraulic oil on highwall drills at the Red Fox mine, a failure of a hydraulic hose is reasonably likely to atomize the oil and spray it onto hot engine surfaces, including the exhaust and the turbo. 36-37 FMSHRC ___, slip op. at 9-12, 17. Accordingly, I find that, given continued drilling, hydraulic oil would be reasonably likely to spew onto the exhaust and turbo, resulting in an ignition. Therefore, I find that section 77.1104 was violated.

2. Significant and Substantial

The fact of violation has been established, and the violation contributed to the hazard of an engine fire. Again, the focus here is the likelihood and seriousness of injury. I find that ignition of the hydraulic oil is reasonably likely to cause burns or smoke inhalation of a serious nature, which would be reasonably likely to result in, at least, lost workdays or restricted duty. Therefore, I find that the violation was S&S.

3. Negligence

The Secretary reiterates that the extensiveness of the accumulations indicates that they had developed over an extended period of time and were obvious, and that Justice's history of highwall drill violations should have put the operator on notice of the need to maintain them free of combustible accumulations. Sec'y Br. at 14. Justice, again, argues that that Cox operated the drill despite noting the oil leaks in his pre-operational report, and that management was not made aware of the report until after the citation was issued. Resp't Br. at 12. The volume of oil that Presley observed indicates that the accumulations developed over multiple shifts, and Justice's management, having been put on notice of drill maintenance issues, should have had a heightened awareness of this condition. Therefore, I find that Justice was highly negligent in violating the standard.

F. Citation No. 8144196

1. Fact of Violation

Inspector Presley issued 104(a) Citation No. 8144196, alleging a “significant and substantial” violation of section 77.404(a) that was “reasonably likely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Justice’s “high” negligence. The Condition or Practice” is described as follows:

The company’s number 834 high wall drill is not being maintained in safe operating condition. When checked the following conditions exist: 1. There is better than ¼" of slack in the fits at the mast jack on the off side. 2. There is ¼" or more of slack in the fit at the hinge pin for the mast on the off side. 3. The framework for the mast has too many cracks and breaks to list all the locations. 4. Both pull down chains are so loose they have cut into the gussets for the framework on the mast. 5. There is no cab filter. 6. The mat on the floor of the cab has the tread wore out causing a slip, trip, or fall hazard. 7. The machine has numerous oil leaks that affect the function ability of the machine. 8. The mast pin lights do not work. 9. The framework for the elevated walkway has several cracks and breaks.

The oil leaks were very obvious and listed in the pre-operational checklist for this equipment. It’s obvious the equipment operator has done a good inspection but the mine operator failed to fix the conditions or remove the machine from service. These conditions have been cited numerous times in the past and violations issued today are placing management on notice of high enforcement action.

Ex. P-10. The citation was terminated after the conditions were addressed.

Presley described for the record the nine defects that he observed on the highwall drill and cited. Tr. 100-12. He testified that slack in the mast jack pin and hinge pin contributed to the hazard of a mast failure, and that a falling mast could strike the drill operator or a pedestrian, or jar the machine, throwing the drill operator around the cab. Tr. 102. Addressing the mast, Presley stated that it had at least 30 cracks and breaks in the supports, and that it was in “horrible shape.” Tr. 104-05. He described the pull-down chains as having so much slack that they were sawing into the framework of the mast. Tr. 106. Addressing the absence of a cab filter, he stated that operation of the drill generates dust. Tr. 107. He recalled slipping when he entered the cab and noticing a hole in the mat exposing the metal underneath; he opined that since the machine was covered in oil, a miner moving about the cab in rubber-soled boots could slip, trip, or fall, causing a broken ankle or wrist, or head injuries. Tr. 108-09. Focusing on the oil leaks, he testified that hydraulic and motor oil leaks were so numerous that he could not determine their origin. Tr. 110, 117. Addressing the mast pin light, he pointed out that the light indicates that the mast is locked in place for drilling and, without that indicator, the operator could be unaware that the mast has become unlocked. Tr. 111-12. Finally, Presley testified that there were more broken than unbroken cross-braces in the framework of the elevated walkway, and that he could lightly “bounce up and down the catwalk and sit there and watch the cracks separate.” Tr. 112-13. He opined that should the walkway collapse, a miner could fall to the rocky ground below. Tr. 113-14. On rebuttal, Presley testified that Justice’s photographs, purporting to show the condition of

the 834 drill at the time of his inspection, did not depict the violative conditions that he had observed. Tr. 603-620; Exs. R-24, R-26, R-28, R-29, R-30, R-31, R-32, R-35, R-36.

Witt testified that Presley visually inspected the mast jack pin, and told him that the pin was moving. Tr. 377. While he admitted that there were some cracks in the webbing of the mast, he stated that none had broken all of the way through the metal, and that they did not pose a hazard. Tr. 382-83, 390. Witt also opined that the amount of slack in the pull-down chains was the machine's regular operational state. Tr. 402-03. According to him, the cab had an air filter, and no metal was showing through the floor mat, as evidenced by a photograph, taken three and a half or four hours after the citation was issued, showing wear, but no hole in the floor mat. Tr. 404-06; Ex. R-36. Addressing the inoperative mast pin light, Witt stated that more experienced drill operators can use alternative methods to ensure that the mast is locked, and that these lights were only developed several years ago. Tr. 408-09. Finally, Witt acknowledged that there was a crack in the metal frame of the walkway, but stated that it was "rigid and still . . . we was all up there walking around on it." Tr. 409.

John Spencer, operator of the 834 drill, essentially corroborated Witt's testimony, and disagreed with nearly all of Presley's contentions. Tr. 529-45, 548-50. He testified that during his inspection of the drill, Presley became angry after he stepped into the cab and slipped. Tr. 526. Spencer admitted that the floor mat was worn, but opined that the mat would prevent him from slipping and falling. Tr. 529, 538-39. He also admitted that the drill had oil leaks, but contended that it was safe to operate. Tr. 529. Spencer added that the mast pin light consists of two bulbs: green indicating that the mast is locked, and red indicating that it is unlocked. Tr. 530-31. According to him, one of the bulbs was not functioning, although he could not remember which one, but he was able to determine whether the mast was locked based on whether the functional bulb was illuminated. Tr. 530-31.

The evidence establishes that the cited defects, with the exception of slack in the mast jack and hinge pins, rendered the drill unsafe to operate. As discussed previously respecting the 841 highwall drill, the Secretary has not established that ¼ inch of slack in the pins renders the drill unsafe to operate, absent evidence of manufacturer or industry specifications. Regarding the other defects, however, Justice does not dispute that there were cracks in the framework of the mast and walkway, slack in the pull-down chains, hydraulic and motor oil leaks, and a defective mast pin light. Justice's photograph, purporting to depict the cited mat, is of no probative value, as has been previously discussed. Moreover, with the exception of the pins, the evidence as a whole establishes the defects that Presley cited, and I find that the drill was unsafe to operate in that condition. Therefore, based on the fact that the 834 highwall drill was operating with a combination of numerous defects, I find that section 77.404(a) was violated.

2. Significant and Substantial

The first two *Mathies* criteria have been met, in that the violation has been established, and the violation heightened the danger of sudden mast movement, mast failure, and walkway failure. The third and fourth *Mathies* criteria, the reasonable likelihood of injury and the seriousness of injury, have also been met. Sudden mast movement and hose rupture would likely result in the operator being thrown about the cab, struck by a hydraulic hose, or sprayed by hot

oil. Mast failure would likely result in the mast toppling onto a miner, and walkway failure would likely result in a miner falling to the ground. Any of these hazards would cause serious injuries ranging from broken bones and sprains to potentially fatal crush injuries. Consequently, I find that the violation was S&S.

3. Negligence

At the very least, loose pull-down chains and oil leaks were defects noted in the pre-operational report. Indeed, Presley's contention, that the drill was in such poor shape that the operator should have known of its defective condition just by driving around on-site, is supported by the record. Tr. 117. Therefore, due to Justice's operation of the 834 highwall drill with numerous, obvious and extensive serious defects, I find that it was highly negligent in violating the standard.

G. Citation 8144197

1. Fact of Violation

Presley issued 104(a) citation No. 8144197 alleging a "significant and substantial" violation of section 77.1104 that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Justice's "high" negligence. The "Condition or Practice" is described as follows:

The company's number 834 high wall drill is not being maintained free of combustible materials. When checked there is a leak at one of the pumps, and there is a leak on the off side of the hot running motor behind the hot running exhaust. The company has been cited for this condition before and removed the heat shield and factory equipment that was designed for the location around the exhaust.

These oil leaks were very obvious and listed in the pre-operational check list for this equipment. It's obvious the equipment operator has done a good inspection but the operator failed to fix the conditions or remove the machine from service. These conditions have been cited numerous times in the past and violations issued today are placing management on notice of high enforcement actions. This mine has had fires on equipment in the recent past.

Ex. P-11. This citation was terminated when the leaks were repaired and the drill was washed.

Presley described the oil accumulations on the 834 drill as twice as bad as the accumulations on the 841 drill, explaining that the drill had strings of hydraulic oil running down the machine and motor oil leaking directly behind the turbo. Tr. 117-19, 264. Presley observed a hydraulic hose leaking oil, and opined that it could have burst at any time and sprayed oil onto the turbo, causing an ignition. Tr. 266, 274. He testified that motor oil is also combustible and given its proximity to the turbo, it was reasonably likely to catch fire. Tr. 119, 264-67, 274. In his opinion, were oil to contact the turbo, "we'd have been fighting a fire, not citing the conditions that could have caused a fire." Tr. 267. He also noted that Justice had removed the heat shield, a

manufacturer's safety feature designed to protect the motor from the extreme heat of the turbo. Tr. 119-120, 274.

Justice's witnesses, Witt and Spencer, did not dispute that some hydraulic and motor oil had leaked on the 834 drill. Witt testified that there was no oil on the turbo, but that there was a film of motor oil ten inches from the top of it, and oil residue behind the exhaust. Tr. 412. He measured the temperature of the engine block at 195 degrees, and the exhaust at 295 degrees. Tr. 412. Spencer characterized the drill as only having "normal" oil leaks. Tr. 529.

The MSDS for Chevron motor oil states that it will burn, and that it has a flashpoint of 399 to 446 degrees. Ex. R-9 at 3. To reiterate, according to the MSDS for hydraulic oil, it will burn and has a flashpoint of 374 degrees. Justice applies the same defenses to the citations on the 834 drill that it argued for the 841. Resp't Br. at 23-24. According to the evidence, the temperature of the turbo was not taken during the inspection of the 834 drill. By analogy, then, given that Justice has made no distinction between the model of the drills, it is reasonable to conclude that they are similar and that the turbo on the 834 drill also reaches the temperature extremes measured by Witt on the 841 drill, which far exceed the flashpoints of hydraulic and motor oil. The evidence demonstrates that Justice permitted combustible oils to accumulate in close proximity to the hot turbo and, were either oil to make contact, an ignition would have occurred. Therefore, I find that Justice violated section 77.1104.

2. Significant and Substantial

The S&S analysis respecting the 834 highwall drill follows the same reasoning applied to the 841 drill. I find that this hazardous condition was very dangerous, and that a miner would be reasonably likely to suffer serious burns and smoke inhalation were an ignition to occur. Therefore, I find that this violation was S&S.

3. Negligence

Considering that oil accumulations on the 834 highwall drill were twice that of the accumulations on the 841, it is readily apparent that this condition had existed over an extended period of time and was extensive. Moreover, Justice's negligence was heightened by its removal of the manufacturer's protective heat shield. Consequently, I find that Justice was highly negligent in operating the drill with significant oil accumulations in close proximity to the turbo, posing a serious fire hazard.

IV. Penalties

While the Secretary has proposed civil penalties totaling \$220,008.00, the Judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

I find, and the parties have stipulated, that Red Fox is a large mine, and that the proposed penalties will not affect the operator's ability to continue in business. Stips. 6, 10. In reviewing

Justice's Assessed Violation History Report for the fifteen-month period preceding the subject inspection, twenty-six violations of section 77.404(a) had become final orders of the Commission; eight violations of section 77.1104 had become final; and one violation of section 77.1608(a) had become final. Ex. P-14. Presley testified that Justice has consistently received section 77.404(a) violations for inadequate highwall drill maintenance, and that he has personally discussed this problem with the operator on numerous occasions. Tr. 95, 99. Justice makes no argument respecting its violations history, and I find it to be a significant aggravating factor in assessing appropriate penalties. I also find that Justice demonstrated good faith in achieving rapid compliance after notice of the violations.

The remaining criteria involve consideration of the gravity of the violations, and Justice's negligence in committing them. These factors have been discussed fully, respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

A. Citation No. 8144189

It has been established that this S&S violation of section 77.1608(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Justice was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of \$3,143.00, as proposed by the Secretary, is appropriate.

B. Citation No. 8144190

It has been established that this S&S violation of section 77.1605(k) was reasonably likely to cause an injury that could reasonably be expected to be fatal, that Justice was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of \$10,437.00, as proposed by the Secretary, is appropriate.

C. Citation 8144193

It has been established that this S&S violation of section 77.404(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Justice was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of \$40,180.00, as proposed by the Secretary, is appropriate.

D. Citation No. 8144194

It has been established that this S&S violation of section 77.404(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Justice was highly negligent, and that it was timely abated. Therefore, in consideration of the hazardous condition of the drill, but the Secretary's failure to establish visible slack in the mast jack pin as inherently hazardous, I find that a penalty of \$35,000.00 is appropriate.

E. Citation No. 8144195

It has been established that this S&S violation of section 77.1104 was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Justice was highly negligent, and that it was timely abated. Therefore, I find that a penalty of \$37,416.00, as proposed by the Secretary, is appropriate.

F. Citation No. 8144196

It has been established that this S&S violation of section 77.404(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Justice was highly negligent, and that it was timely abated. Therefore, in consideration of the hazardous condition of the drill, but the Secretary’s failure to establish visible slack in the mast jack and hinge pins as inherently hazardous, I find that a penalty of \$35,000.00 is appropriate.

G. Citation No. 8144197

It has been established that this S&S violation of section 77.1104 was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Justice was highly negligent, and that it was timely abated. Therefore, I find that a penalty of \$37,416.00, as proposed by the Secretary, is appropriate.

V. Approval of Settlement

The parties have filed a Joint Motion to Approve Partial Settlement respecting two of the nine citations involved in this docket. A reduction in penalty from \$35,984.00 to \$25,189.00 is proposed. The citations, initial assessments, and proposed settlement amounts are as follows:

<u>Citation No.</u>	<u>Initial Assessment</u>	<u>Proposed Settlement</u>
8144191	\$31,988.00	\$23,000.00
8144192	\$ 3,996.00	\$ 2,189.00
TOTAL:	\$35,984.00	\$25,189.00

I have considered the representations and documentation submitted in these matters under section 110(k) of the Act. Specifically, regarding Citation No. 8144191, the Secretary has credited Respondent’s contentions that the motor oil accumulated on the engine of the bus would not likely rise to a temperature that would cause combustion during short periods of operation and, in the event of an ignition, fewer than eight persons would likely be affected. Regarding Citation No. 8144192, the Secretary has credited Respondent’s contentions that the fire extinguisher on the bus was full and, in the event of an ignition, fewer than eight persons would likely be affected. I conclude that the proffered settlement is appropriate under section 110(i) of the Act.

ORDER

WHEREFORE, it is **ORDERED** that Citation Nos. 8144189, 8144190, 8144193, 8144194, 8144195, 8144196 and 8144197 are **AFFIRMED**, as issued; that the Secretary **MODIFY** Citation Nos. 8144191 and 8144192 to reduce the level of gravity to “unlikely,” “non-significant and substantial” and “two persons affected;” and that Justice Energy Company, Incorporated, **PAY** a civil penalty of \$223,781.00 within 30 days of the date of this Decision. ¹⁴

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

Distribution:

Emily O. Roberts, Esq. U.S. Department of Labor, Office of the Solicitor, 211 7th Avenue North, Suite 420, Nashville, TN 37219

James F. Bowman, Representative, Justice Energy Company, Incorporated, P.O. Box 99, Midway, WV 25878

/ss

¹⁴ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket number and A.C. number.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

February 3, 2015

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on behalf
of GARY KITTELSON
Petitioner

TEMPORARY REINSTATEMENT
PROCEEDINGS

Docket No. LAKE 2015-80-DM
MSHA CASE NO. RM-MD-15-01

v.

NORTHERN AGGREGATE, INC.,
Respondent

Mine: Portable Crusher
Mine ID: 21-02623

**ORDER DENYING MOTION TO AMEND TEMPORARY REINSTATEMENT AND
REQUEST FOR EXPEDITED HEARING ON MERITS**

This case is before me pursuant to an Application for Temporary Reinstatement brought under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c), *et. seq.* (the “Mine Act”). On November 5, 2014, this court issued an Order Approving Temporary Reinstatement. On December 30, 2014, this court issued an Order to Correct and Enforce the Temporary Economic Reinstatement. Before this court now is Respondent’s January 14, 2015 motion to partially toll the temporary economic reinstatement and move the hearing date forward.¹ On January 27, 2015, the Secretary filed objections to the Respondent’s motion. For the reasons that follow, the Respondent’s motion is **DENIED**.

In its motion, the Respondent requests that the court reduce the ordered amount of economic reinstatement from \$1,716.00 per week to \$600.00 per week.² Respondent states that it runs “a seasonal operation that switches to ‘winter season’ or ‘shop hours’ during the freeze up/winter season while mining activities are not feasible.” During the winter season, Respondent alleges that its employees receive lower pay, work limited hours, and rarely work overtime hours. The Respondent states that “similarly situated employees to Petitioner Kittelson (i.e. those with the same or similar experience, training, and longevity with the company), receive an

¹ The Respondent’s motion is captioned “Motion to Amend Order of Temporary Financial Reinstatement and Request for Expedited Hearing on Merits.” However, the motion is in essence a motion requesting partial tolling of the temporary economic reinstatement order.

² At one point in its motion, Respondent requests a reduction to \$600.00 per week, and at another asks for a reduction to \$640.00 per week. Presumably, one of these figures is in error.

hourly rate of \$16.00 per hour and work 40 hour weeks or less on average during the winter season.” *Resp. Motion*, 2. Furthermore, Respondent requests that this reduction be made retroactive to December 1, 2014, and that Respondent be given credit for payments made in excess of this amount.

With regards to the retroactive repayment of backwages, the the Commission has held that miners are not liable for repayments of funds paid during the period of temporary reinstatement. *N. Fork Coal Corp.*, 33 FMSHRC 589, 597 (Mar. 2011), *rev'd on other grounds*, 691 F. 3d 735, 744 (6th Cir. 2012); *see also Shemwell v. Armstrong Coal Co., Inc.*, 2012 WL 10906743, *4 (ALJ) (Sept. 12, 2012).

The Commission has held that an order of temporary reinstatement may be tolled or modified based upon layoffs for economic reasons, or similar conditions. *Ratliff v. Cobra Natural Resources, LLC*, 35 FMSHRC 394, 396-397 (Feb. 28, 2013). However, the mine operator must affirmatively prove that the miner on temporary reinstatement was properly included in the reduction or layoff by either a preponderance of the evidence or under the “not frivolously brought standard,” depending on whether the objectivity of the layoff as applied to the miner is called into question. *Id.* at 397. In the instant case, Respondent has provided pay stubs for one miner from 10/26/2014-12/13/2014. This evidence does not come close to meeting either standard. In order to show that all miners are working fewer hours due to seasonal conditions, Respondent would have to submit evidence that all miners are working less due to seasonal conditions. One possible method of doing so would have been to attach pay stubs for all miners, along with historical data showing the seasonality of this trend.

The Respondent further requests that the hearing for the merits case, currently scheduled for July 2-3, 2015, be heard sooner. Though the undersigned sympathizes with any economic hardship on Respondent that has resulted from the temporary economic reinstatement, this request must be denied. Moreover, this case will involve several discrimination complaints and, as the Secretary notes in her brief, regardless of the outcome of LAKE 2014-705-DM, Kittelson would remain on temporary reinstatement in the instant case. It would be inefficient, and result in no appreciable difference for the Respondent, to have two hearings here. Therefore, all matters relating to Kittelson will be heard on July 2-3, 2015 in Bemidji, MN.

Wherefore it is **ORDERED** that the Respondent’s motion is **DENIED**.

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

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/mzm

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 4, 2015

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

v.

OAK GROVE RESOURCES, LLC,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. SE 2013-301
A.C. No. 01-00851-315187-01

Docket No. SE 2013-352
A.C. No. 01-00851-317727

Docket No. SE 2013-368
A.C. No. 01-00851-319550

Docket No. SE 2013-399
A.C. No. 01-00851-320606-01

Mine: Oak Grove Mine

ORDER SCHEDULING ORAL ARGUMENT

Order No. 8520664, issued on October 3, 2012, concerns an alleged flagrant violation of the mandatory safety standard in 30 C.F.R. § 75.400. This mandatory standard prohibits the accumulation of coal dust and coal fines in active workings. Assuming the significant and substantial (S&S) violation of section 75.400 in fact occurred, and that it was properly characterized as unwarrantable, the central issue in this proceeding is whether the hard packed coal fines and float coal dust accumulations, as cited by the Secretary, can constitute a “flagrant violation” under section 110(b)(2). Section 110(b)(2) of the Act provides:

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

Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006 (“Mine Act” or “the Act”), 30 U.S.C. § 820(b)(2) (emphasis added).

Specifically, Order No. 8520664 in Docket No. SE 2013-368 states:

Combustible material in the form of float coal dust and dry hard packed coal fines were allowed to accumulate on the roof, ribs, footwall, and belt structure of the Main North 3 belt entry. *The hard packed coal fines were in contact with moving roller[s] on the belt line in multiple locations along the belt entry.* The float coal dust existed on the roof, ribs, footwall, and belt structure from the Main North 3 Tail Piece extending outby to crosscut 27. This is an approximate distance of 2100 feet. Due to the extensive amount of accumulations and that this belt is examined every shift this constitutes more than ordinary negligence and is an unwarrantable failure to comply with a mandatory health and safety standard. Standard 75.400 was cited 92 times in two years at mine 0100851 (91 to the operator, 1 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

(Emphasis added).

The Secretary seeks to designate the cited condition in Order No. 8520664 as a repeated flagrant violation based on two prior violations of section 75.400.¹ Obviously, all flagrant violations are S&S in nature. However, the overwhelming majority of S&S violations do not rise to the level of a flagrant violation. In this regard, the threshold for an S&S violation is whether there is a reasonable likelihood that the hazard *contributed to by the violation* will result in a reasonably serious injury. In contrast, to demonstrate a flagrant violation, it must be shown that it is reasonably expected that *the violation has, or will, directly and proximately cause* serious injury or death.

The Commission has concluded that past violative conduct may be considered in determining whether to cite a condition as a repeated flagrant violation. *Wolf Run Mining Company*, 35 FMSHRC 536, 541 (Mar. 2013) (remanding for reconsideration of whether a violation was properly designated as flagrant). Clearly, a history of violations may affect the appropriate civil penalty to be assessed. However, the Commission has not articulated under what circumstances, if any, a history of violations can elevate a violation, not otherwise meeting the statutory criteria for a flagrant designation, to a repeated flagrant violation.²

¹ The predicate citations identified by the Secretary are Order Nos. 4694424 and 8519255. Order No. 4694424 was issued on September 25, 2012, and is part of captioned Docket No. SE 2013-399. Order No. 8519255, in Docket No. SE 2012-537, issued on December 22, 2012, was settled without modification. Judge Zielinski approved Oak Grove's agreement to pay the \$70,000.00 civil penalty proposed by the Secretary. Unpublished Decision Approving Partial Settlement, dated Feb. 18, 2014.

² The Secretary now asserts that a relevant history of violations also meeting the requirements for a flagrant violation with respect to gravity and negligence can serve as the basis for a repeated flagrant violation. *Sec'y Resp. to Order Scheduling Briefing*, at 11 (Apr. 22, 2014). The gravity penalty criterion under section 110(i) of the Mine Act is often viewed in terms of the
(continued...)

Consequently, the parties were ordered to brief the question of the circumstances, if any, under which an S&S violation that will contribute to, rather than proximately cause, serious bodily injury or death, could be elevated to a flagrant violation. *See Order Scheduling Briefing*, 36 FMSHRC 815 (Mar. 2014) (ALJ). Notably, the Secretary conceded in his response brief that “[b]oth reckless and repeated flagrant designations require violations that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.” *Sec’y of Labor’s Response to Order Scheduling Briefing*, at 6 (Apr. 22, 2014). In other words, a violative condition that cannot reasonably be expected to be the proximate cause of serious injury or death cannot be elevated to a flagrant violation simply based on previous violations.

Following consideration of the parties’ briefs, an Order Requiring Secretary’s Prehearing Statement (“Oak Grove Order”) was issued that identified the requisite criteria for establishing a repeated flagrant violation under section 110(b)(2) of the Mine Act. Specifically, the requisite criteria are as follows:

1. A repeated flagrant violation is a flagrant violation that is demonstrated by either:
 - a. A repeated failure to eliminate the violation properly designated as flagrant, or
 - b. A relevant history of violations that also meet the requirements for a flagrant violation with respect to knowledge, causation and gravity, as enumerated below.
2. A flagrant violation must be a known violation that is conspicuously dangerous, in that it cannot reasonably escape notice.
3. A flagrant violation must be the substantial and proximate cause of death or serious bodily injury that has occurred or can reasonably be expected to occur.
 - a. A substantial and proximate cause is a dominant cause without which death or serious bodily injury would not occur.

²(...continued)

seriousness of the violation. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987). Obviously, the gravity of a flagrant violation, which requires the violation to be the substantial and proximate cause of death or serious bodily injury that had occurred, or could be reasonably expected to occur, is greater than the gravity associated with the vast majority of violations.

- b. A serious bodily injury is a grave injury that results in significant debilitating and/or permanent impairment.
- c. Such injury is reasonably expected to occur if there is a significant probability of its occurrence.

36 FMSHRC 1777, 1789-90 (Jun. 2014) (ALJ).³ The Oak Grove Order required the Secretary to file a prehearing brief addressing whether the cited violative condition in Order No. 8520664 satisfied the above criteria for repeated flagrant violation. The Secretary responded:

Because the accumulations included float coal dust and coal dust, they constituted a significant and immediate source of fuel for a mine fire or an immediate source of fuel for a coal dust explosion. An operating conveyor belt system in an underground coal mine is an obvious and significant source of sparking and burning hazards because of the presence of the belt conveyor, belt rollers and other proximate sources of friction heat and ignition. In the present case, hard packed coal fines were in contact with moving rollers on the belt line in multiple locations along the belt entry. Given these ignition sources, it is reasonably expected that, *as normal operations continued*, serious and/or deadly injuries from burns and smoke inhalation would result from a fire or explosion. These injuries would be the proximate and direct result of the fire or explosion because the accumulations would be the necessary fuel source that, when combined with oxygen and an ignition source, would cause the fire or explosion. Because the accumulations existed over a number of shifts and were known to multiple agents of the operator, this violation standing alone constitutes a repeated flagrant violation.

Sec'y Pre-Hearing Statement, at 2 (Aug. 7, 2014) (emphasis added). The Secretary's response did not directly address the central question in this proceeding in that it conflates the current presence of ignition sources with the potential for future ignition sources, as well as the concepts of contributory and proximate causes of injury. In essence, the Secretary's response supports the conclusion that virtually all prohibited coal dust accumulations in proximity to conveyor belts can be properly designated as flagrant violations given potential ignition sources that may arise during the course of continued mining operations.

³ In his response brief, the Secretary asserted that violations that expose miners to only "lost workdays or restricted duty" can be designated as flagrant. Oak Grove Order, 36 FMSHRC at 1787 (citing *Sec'y of Labor's Response to Order Scheduling Briefing*, at 3). The Secretary also argued that whether a violation itself will proximately cause serious injury or death, or whether a violation will contribute to a hazard that will cause serious injury or death, is a distinction without a difference that only shifts the burden of proof. *Id.* at 1785 (citing *Sec'y of Labor's Response to Order Scheduling Briefing*, at 4). The Oak Grove Order declined to afford the Secretary *Chevron* deference because the Secretary's statutory interpretation regarding the degree of causation and gravity necessary to designate a violation as flagrant was determined to be unreasonable. *Id.* at 1786-88. The Secretary did not seek interlocutory appeal of the denial of *Chevron* deference.

The Commission has been precluded from addressing the necessary criteria for demonstrating a flagrant violation on several occasions. For example, in *Conshor*, the Commission unanimously granted interlocutory review of the criteria for demonstrating a repeated flagrant violation under section 110(b)(2). *See Conshor Mining LLC*, 34 FMSHRC 349 (Feb. 2012). However, the Commission subsequently granted the Secretary's motion to vacate the order granting interlocutory review after the Secretary deleted the subject flagrant designations. 34 FMSHRC 571 (Mar. 2012). Similarly, in *Wolf Run*, the Commission was prevented from ultimately addressing the requirements for a repeated flagrant violation after the Secretary agreed in settlement to modify the subject order by removing the flagrant designation. Unpublished Decision on Remand Approving Settlement in *Wolf Run Mining Company*, Docket No. WEVA 2008-1565, dated Apr. 14, 2014; *see also Wolf Run*, 35 FMSHRC 536 (Mar. 2013).

Given the Secretary's repeated failure in this proceeding to meaningfully address the controlling question of law concerning the threshold requirements for a flagrant designation in his briefing and prehearing statements, I certified to the Commission for interlocutory review the order requiring briefing with respect to the Secretary's burden of proof for demonstrating a repeated flagrant violation. *Cert. for Interloc. Rev.*, 36 FMSHRC 2397 (Aug. 2014) (ALJ); 29 C.F.R. § 2700.76(a)(1)(i). On September 9, 2014, the Commission denied interlocutory review because the request for review concerned the propriety of ordering the Secretary to submit a prehearing statement, rather than a controlling question of law. 36 FMSHRC 2412 (Sept. 2014). Thus, the Commission concluded that granting review at that time would amount to "an advisory opinion on an abstract legal principle." *Id.* at 2411.

Consequently, the threshold issue remains whether the accumulation conditions, as cited in Order No. 8520664, satisfy the above-enumerated criteria necessary to demonstrate a repeated flagrant violation under section 110(b)(2). A further delay of a binding appellate resolution of this important question is neither in the Secretary's nor the mining industry's best interest. This issue, which concerns a controlling question of law that will materially advance the ultimate disposition of these proceedings, can best be resolved through oral argument. As such, this issue **IS HEREBY SCHEDULED for oral argument on Wednesday, March 4, 2015, at 10:00 a.m.** The oral argument will be held at the Commission's headquarters in Washington, DC, at the following address:

Federal Mine Safety and Health Review Commission
Richard V. Backley Hearing Room
Fifth Floor, Room 511N
1331 Pennsylvania Avenue, NW
Washington, DC 20004

In preparing for oral argument, the parties should assume that the facts are viewed in a light most favorable to the Secretary with regard to the nature and extent of the cited accumulations in Order No. 8520664. In this regard, the issue is whether the cited accumulations in Order No. 8520664 state a cause of action for a flagrant violation under the aforementioned criteria. In particular, the parties should be prepared to discuss the following:

- 1) A proximate cause is “a cause that directly produces an event and without which the event would not have occurred.” *Black’s Law Dictionary* 213 (7th ed. 1999). As such, can the coal dust accumulations in proximity to properly-functioning conveyer belts, as cited in Order No. 8520664, be the *proximate cause* of a fire or explosion? In answering this question, the parties should address:
 - a. The distinction, if any, between “sources of ignition” and “potential sources of ignition.” *See* Oak Grove Order, 35 FMSHRC at 1790;
 - b. Whether the cited coal dust accumulations themselves, rather than the ignition and resultant combustion of such accumulations, can be properly considered to be the proximate cause of a fire or explosion;
 - i. In addressing (b), the parties should consider the distinction, if any, between a violation that *contributes to* a hazard, as required to support an S&S designation, from a violation that, *in and of itself*, is a substantial, proximate, and dominant cause of potential death or serious bodily harm. *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (holding that the test for S&S is whether there is a reasonably likelihood that the hazard contributed to by the violation will cause injury, and that the Secretary need not prove a reasonable likelihood that the violation itself will cause injury);
 - c. Whether propagation of the cited coal dust accumulations can be the proximate cause of an explosion, or whether such propagation would be a post-explosion event;
 - d. Given the absence of a present ignition source due to a conveyer belt malfunction, as reflected by Order No. 8520664, whether potential ignition sources (such as defective heat-producing rollers or misaligned friction-producing belts) that occur during the course of continued mining operations are sufficient to satisfy the proximate cause criteria in section 110(b)(2);
 - e. Violations of Section 75.400 are the most frequently cited violations of mandatory safety standards in underground coal mines.⁴ Therefore, if the answer to (d) is

⁴ Citations concerning section 75.400 violations constituted approximately 10 percent of all citations issued in 2013 and 11 percent of all citations issued in 2014. MSHA, Most Frequently Cited Standards, www.msha.gov/stats/top20viols/top20viols.asp (accessed January 28, 2015).

“yes,” the parties should address whether the vast majority of section 75.400 violations satisfy the flagrant criteria in section 110(b)(2);

- 2) It is not uncommon for accumulations to contact rollers given the rollers’ close proximity to the ground. As such, do “[t]he hard packed coal fines [that] were in contact with [properly-functioning] moving roller[s] on the belt line in multiple locations along the belt entry,” as cited in Order No. 8520664, provide an adequate basis for a flagrant designation?
 - a. If the answer is “no,” under what circumstances can accumulations along and under conveyer belt structures be properly designated as flagrant violations?
 - b. In addressing this question, the parties should be mindful of section 75.1731(a), which provides that *damaged rollers* or conveyer belt components *that pose a fire hazard* must be *immediately* repaired or replaced;
- 3) The parties should endeavor to stipulate to the location of the cited accumulations in Order No. 8520664 with respect to their distance from the working face. In this regard, the parties should submit a pertinent mine map;
- 4) Assuming the accumulations cited in Order No. 8520664 are conspicuously dangerous because they can proximately cause substantial bodily injury or death, the Secretary should address why the violation was attributed to high negligence, rather than reckless conduct. And;
- 5) In the final analysis, the parties should address whether designating the coal dust accumulations cited in Order No. 8520664 as flagrant, conflates the requirements for S&S and unwarrantable conduct with the requirements for flagrant designations.

The parties may present any additional facts, arguments, or case law that they deem appropriate.

Any person who plans to attend this oral argument and requires special accessibility features and/or any auxiliary aids, such as sign language interpreters, must request them in advance (subject to the limitations set forth in § 2706.160(d)).

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 9, 2015

FRANK SICA,
Complainant,

v.

JACOBS FIELD SERVICES,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-615-DM
RM MD 2014-07

Mine: Freeport-McMoRan Morenci Inc.
Mine ID 02-00024 1PL

ORDER DISMISSING DISCRIMINATION COMPLAINT

Before: Judge Simonton

This matter is before me pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Act”). 30 U.S.C. § 815 (c)(3). The Complainant, Frank Sica, filed a section 105(c)(3) complaint with the Commission on May 6, 2014. Compl. The Respondent filed an Answer and Motion to Dismiss with the court on November 7, 2014. Resp. Ans. The Complainant submitted a response with additional documents on December 1, 2014.¹ The Respondent subsequently filed a reply brief along with several additional affidavits on December 31, 2014. After carefully reviewing Mr. Sica’s complaint and subsequent filings, the Respondent’s Motion to Dismiss is **GRANTED** and this matter is **DISMISSED**.

I. PROCEDURAL BACKGROUND

Mr. Sica worked for the Respondent from approximately February 3, 2014 to February 14, 2014 at the Morenci Mine in Greenlee County, Arizona.² Compl., 1; Resp. Ans., 2. The Respondent terminated Sica’s employment on February 15, 2014.³ Compl., 1; Resp. Ans., 2. Sica filed a discrimination complaint with the Mine Safety and Health Administration (MSHA) on February 19, 2014. February 2014 MSHA Complaint, 1. On March 27, 2014 MSHA notified Complainant Sica that it had determined there was not sufficient evidence to establish that a violation of section 105(c) occurred. Compl., 2-3. Complainant subsequently filed a section 105(c)(3) complaint with the Commission on May 6, 2014. Compl., 1. He sent a copy of his

¹ The court did not receive the Complainant’s filings until December 18, 2014 due to internal technical difficulties. December 22, 2014 Order to Disregard.

² It appears that Mr. Sica participated in workplace orientation, safety training and a medical evaluation with Jacobs Field Services from January 27, 2014 to February 3, 2014 prior to beginning work at the Metcalf Mill project at the Morenci Mine. Resp. Ans., 2-3.

³ Respondent’s management escorted Sica from mine premises on February 14, 2014. February 2014 MSHA Compl., 3-4; Resp. Ans. 4. Respondent’s management made the final decision to terminate Sica’s employment on February 15, 2014. Resp. Ans. 4: Ex. I.

Complaint by certified mail to the Respondent at an address of 4949 Essen Lane, Baton Rouge, LA 70809. Response to Deficiency Letter. On June 26, 2014, the Chief Judge ordered the Respondent to answer the complaint within 30 days and distributed this order to the Louisiana address provided by the Complainant. Order to Respondent to Answer.

On October 7, 2014 the Chief Judge assigned this docket to the undersigned judge. Order of Assignment. After noting that Jacobs Field Services MSHA Contractor ID number listed an Arizona address, the court contacted Respondent's Tucson, Arizona office. The court was informed by Jacob's Safety Manager, Dan Warter, that the Respondent had no knowledge of Sica's 105(c)(3) complaint. The court then forwarded Sica's complaint to Respondent's counsel and ordered the Respondent to submit an answer by November 7, 2014. The Respondent filed an Answer and Motion to Dismiss on November 7, 2014. Resp. Ans.

II. 105(C)(3) COMPLAINT

Mr. Sica's May 6, 2014 Complaint states that he was "a member of a protected class as a new miner" with Jacobs Field Services. Compl., 1. Complainant alleges that Respondent's company policies state that new miners were to be treated with tolerance for the first 30 days of employment regarding mining rules and guidelines. *Id.* Sica alleged that he was fired after 9 days on the job and given no leniency whatsoever. *Id.* He also stated that he sought re-instatement and monetary compensation from February 15, 2014 to February 29, 2014. *Id.*

Complainant attached a copy of his original February 19, 2014 complaint to MSHA within his filing. This filing states as follows:

On February, 14, 2014 at approximately 1:00 am I was told by safety hand named MAUCKE? of Jacobs Field Services that I had to be tied off on a scaffold walk way.

I tried to explain to him that 2 days prior- another safety hand told both me and my working partner that we didn't have to be tied off on the 100% complete-scaffold walkway and that we only had to be tied off on the unguarded decking which was midway between the ground floor and the scaffolding walkway- where we were working each night.

After a long discussion between safety hand- MAUCKE and me, my working partner my temporary foreman- Ozzie- my general foreman- Mickey- the safety hand that told both of us days prior- that we didn't have to be tied off – the scaffold foreman- Sergio- who was responsible for tagging the scaffold

Maucke said it was up to my General Foreman to decide what to do about the situation and then Maucke left ...

February 2014 MSHA Complaint, 1.

Complainant then alleges that he was escorted to the general foreman's office where he was informed that he was being "run off." February 2014 MSHA Complaint, 2. He states that he was not given an explanation for his dismissal or any termination paperwork. *Id.* Sica states that he was escorted from the mine site in a rushed fashion. *Id.* at 3. He further alleges that safety hand Maucke never issued any correction to the other safety hand for previously providing incorrect tie-off instruction to Sica and his partner. *Id.* at 4. Sica similarly states that Maucke failed to reprimand the scaffold foreman Sergio for not properly marking the scaffold walkway as a 100% tie off area. *Id.*

In the Complainant's December 1, 2014 filing, he alleges that his temporary foreman Ozzie fired him to protect himself from disciplinary action from Respondent's management. Sica states that Ozzie had violated company policy by assigning him to work alone on the scaffold. Sica Response, 3-4. Sica states that he applied to work for other contractors at the Morenci mine but was informed that that he was banned from the site for three years. Complainant states that Respondent's personnel informed him that he had been banned from the site for calling people "peons." He later alleges that Respondent has a,

commitment to fire people on a daily basis – to use as a fear tactic- to keep people job-scared and to install fear in all its employees- most of which are Mexicans and Navaho Indians- who do not have a thorough understanding of the English language or any idea whatsoever about their legal rights- OSHA-MSHA-EEOC- NLRB...

Sica Response, 12.

Complainant disputes the Respondent's description of his interaction with scaffold foreman Tavarez but states that "I explained to Tavarez that I was already told by Safety that we didn't have to tie off!" *Id.* at 13. He also denies running away from Respondent's Safety personnel and claims that he could have slipped away if he had wanted but remained on the scaffold because "I was convinced I was in the right!" *Id.* at 14. Sica disputes that there were multiple 100% tie off signs and contends that only 1 or 2 100 % tie off signs were in place on that area of the scaffold. *Id.* at 15.

Complainant also submitted copies of statements he had previously submitted to MSHA in support of his discrimination complaint. In addition to detailing the claims listed above, Sica alleges that Respondent ordered mass layoffs and cursory terminations on a routine basis in order to instill fear in the workforce. Sica Additional Comments March 8, 2014, 4. Sica also states that vandalism occurred at the Morenci mine on a daily basis during his employment there. Sica Additional Comments March 14, 2014, 6.

Referencing the vandalism, Complainant stated that following his termination

“I must say- I understand completely now- what would drive a person to commit these acts!”

Id. at 7.

III. RESPONDENT’S ANSWER AND MOTION TO DISMISS

The Respondent filed an answer and motion to dismiss on November 7, 2010. Resp. Ans. Within, the Respondent submitted a statement of facts which is summarized as follows. Resp. Ans., 2-4. The Respondent stated that Complainant completed his medical evaluation and new miner training from January 27, 2014 to February 3, 2014. Resp. Ans., 2. This new miner training included fall protection and scaffold training. *Id.*; Resp. Ans.: Ex. E. The Respondent stated that on February 14, 2014, Safety Supervisor Michael Mauck received a radio call from a scaffold foreman reporting that an employee was refusing to properly tie-off on a fifteen foot high scaffold. *Id.* at 3.: Ex. F. Mauck directed other safety team members to the area. *Id.* When those safety personnel arrived at the scaffold, Complainant ran away without tying off. Resp. Ans., 3: Ex. G. Eventually, the safety team was able to corner Sica and waited for Mauck to arrive. *Id.* According to Respondent’s employees, Complainant directed abusive and insubordinate language towards the scaffold crew while waiting for Mauck. *Id.*

Once he arrived, Mauck questioned Complainant on why he was not tied off. Resp. Ans., 3. Sica responded that he was previously told that tie off was not necessary in that area and that he did not have to listen to the scaffold foreman because they were “peons.” *Id.* at 3-4. Mauck pointed out to Complainant that there were multiple 100% tie off signs on the scaffold. *Id.* at 3. Other Respondent supervisors then arrived on the scene who escorted Sica away from the scaffold. *Id.* at 4. On February 15, 2014, Respondent’s management then decided to terminate Complainant for his failure to tie off, running without fall protection, and insubordinate behavior. *Id.* The Respondent provided signed statements, work training logs, and termination records to support their statement of facts. Resp. Ans.: Ex. A-N.

The Respondent moved at the end of their answer to dismiss this matter pursuant to Federal Rule of Civil Procedure 12(b)(6). Resp. Ans., 7. The Respondent asserts that as Sica has not alleged or described any protected activity, “it is beyond doubt that Complainant can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at 7-8; *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1920 (Nov. 1996).

IV. ANALYSIS

A. Commission Standard for Motions to Dismiss Section 105(c) Actions

The Commission's procedural rules do not provide formal guidance on a motion to dismiss for failure to state a claim. However, Commission judges addressing similar motions have been guided by Federal Rules of Civil Procedure 12(b)(6) and 12(c) and treated those filings as motions for summary decision. *See e.g., Mona Kerlock v. ASARCO*, 2014 WL 4387693,

(ALJ Miller)(Aug. 2014); *Sec'y of Labor o/b/o Chaparro v. Comunidad Agricola Bianci, Inc.*, 32 FMSHRC 1517 (Oct. 2010) (ALJ Barbour). I have likewise addressed the Respondent's motion to dismiss as I would a motion for summary decision under Commission Procedural Rule 67, which requires the moving party to show:

- 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 CFR § 2700.67.

Additionally, it is well established that a “motion to dismiss for failure to state a claim (for section 105(c) proceedings) is viewed with disfavor and is rarely granted.” *Phelps Dodge*, 18 FMSHRC 1920. Furthermore, the pleadings of pro se complainants are held “to less stringent standards than pleadings drafted by attorneys.” *Id.* Indeed, it is clear that 105(c) complainants are not required to submit extensive offers of proof or demonstrate a likelihood of ultimate success at the pleading stage. *Mona Kerlock v. Asarco, LLC*, 36 FMSHRC 2404, 2405 (ALJ Miller)(August 2014); *Secretary of Labor obo Jennifer Morreale v. Veris Gold*, _ slip opinion (ALJ Simonton)(November 2014).

Instead, Commission Rule § 2700.42 only requires a Complainant to submit a “short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested.” 29 CFR § 2700.42. The Commission has also long held that in order to establish a prima facie case under Section 105(c)(1), a complaining miner must show that,

- 1) He engaged in protected activity; and,
- 2) That the adverse action he complains of was motivated at least partially by that activity.

Sec'y of Labor o/b/o Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (Oct. 1980); *Sec'y of Labor o/b/o Robinette v United Castle Coal Co.*, 3 FMSHRC 803, 817 (Apr. 1981)).

As stated earlier, it is not necessary for a Complainant to establish a prima facie case of discrimination through extensive offers of proof at the pleading stage. *Mona Kerlock v. Asarco, LLC*, 36 FMSHRC 2405 *Secretary of Labor obo Jennifer Morreale v. Veris Gold*, _ slip opinion. However, an ALJ has granted a motion to dismiss for failure to state a claim when a pro se complainant failed to allege or describe any protected activity. *Jason Sheperd v. Black Hills Bentonite*, 25 FMSHRC 129,133 (ALJ Manning)(March 2003) (holding that suffering a workplace injury during the normal work activities did not constitute a protected activity).

B. The Complainant Has Not Submitted a Supportable Claim of Protected Activity

After reviewing all of the parties' submissions, I find that there are no material disputes of fact in this matter as the parties have submitted filings indicating that:

1. Complainant worked for Respondent from approximately Feb 3, 2014 to February 14, 2014. Compl., 1; Resp. Ans. 3.
2. Complainant had received employee safety training and orientation, including fall protection training during his workplace orientation with Respondent. Sica Response, 11; Sica Feb. 21, 2014 MSHA Statement; Resp. Ans.: Ex. E.
3. Complainant was not tied off on a scaffold on the morning of February 14, 2014. February 2014 MSHA Compl., 1; Resp. Ans. 3.
4. Respondent directed Complainant to leave the mine site on February 14, 2014. February 2014 MSHA Compl., 2-4; Resp. Ans. 4.
5. Complainant had not filed any safety complaints with Respondent, the Morenci Mine, or MSHA prior to his termination on February 15, 2014. Compl.; February 2014 MSHA Compl.; Resp. Ans., 1.
6. Respondent officially terminated Complainant's employment on February 15, 2014. Resp. Ans: Ex. I.

Furthermore, after evaluating all submissions in the light most favorable to the Complainant, I find that he has not described any actions that could be construed as protected activity. Instead, Complainant initially contended that as a newly hired employee, he was a member of a protected class. Compl., 1. However, newly hired miners do not receive any special treatment under the Act, as section 105(c)(1) only protects those miners or applicants who have exercised their statutory rights under the Mine Act. 30 USC 815(c)1. Indeed,

(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 (December 1990).

The only specific work activity described by Mr. Sica within his complaint and subsequent filing is his decision not to tie off while on a scaffold platform. February 2014 MSHA Complaint, 1. This court cannot conceive of a set of circumstances in which a refusal to use an available safety measure would constitute protected activity.

At the end of his original complaint to MSHA, Complainant also contends that Respondent's management failed to reprimand other employees for allegedly incorrect tie-off instruction and failure to post tie-off signs. *Id.* at 4. However, Sica does not allege that he raised any safety concerns regarding the conduct of these other employees to the Respondent or MSHA prior to his reprimand for not tying off. Furthermore, Complainant's own filings indicate that after being confronted by Respondent's safety team, he continued to insist he did not have to tie

off on that scaffold level. February 2014 MSHA Compl., 1. Thus, even when accepted as true, Complainant's allegations regarding other employee's conduct would not indicate that Mr. Sica himself undertook any protected activity.

Similarly, Complainant's claim that his foreman improperly instructed him to work on the scaffold by himself, even if accepted as true, does not stand as protected activity.⁴ Complainant did not submit any complaints to the Respondent or MSHA regarding this assignment. More critically, Mr. Sica himself has repeatedly confirmed that the confrontation that occurred on the scaffold revolved exclusively around his continued insistence that he did not have to tie off on that scaffold level. February 2014 MSHA Complaint, 1; Sica Response, 13-14.

Therefore, although this case involves the enforcement of Respondent's safety plan, Complainant has not claimed that he attempted to exercise any statutory rights under the Mine Act. In fact, he has repeatedly stated that he chose not to tie off while working on a scaffold and that this action led to his confrontation with the Respondent's safety team. February 2014 Complaint, 1-2; Feb 3, 2014 Statement 7-11; Sica Response, 13-16. By filing a discrimination claim on that basis, Complainant appears to contend that section 105(c) provides miners the right not to comply with Mine Act regulations and industry safety standards. The Commission could not validly uphold such a claim as it would contradict the very purpose of encouraging individual miners to report and correct safety concerns. 30 USC 815 (c)(1).

Put simply, section 105(c)(1) does not shield workers who refuse to use available safety measures from resulting disciplinary action. For these reasons, I find that the Complainant has not submitted a supportable claim of protected activity. Accordingly, the Respondent is entitled to summary judgment as a matter of law and the Motion to Dismiss is **GRANTED**.

C. The Complainant's Filings Do Not Meet the Less Stringent Pro Se Pleading Standard

As stated above, the pleadings of pro se complainants are held "to less stringent standards than pleadings drafted by attorneys." *Phelps Dodge*, 18 FMSHRC 1920. With this standard in mind, the court provided the Complainant every opportunity to support his claim. The court issued a prehearing order to both parties that stated in plain terms the standards by which the Complainant's 105(c)(3) claim would be evaluated. October 15, 2014 Prehearing Order. At the Complainant's request, all case files, correspondence, and subsequent filings were e-mailed directly to him. After the Respondent filed a Motion to Dismiss, the court's clerk sent Complainant an e-mail outlining summary judgment standards and procedures. The court reviewed Mr. Sica's complaint and filings only to determine whether or not the Complainant has alleged facts that could be interpreted to describe any "discrimination or interference" as required by Commission Rule 30 CFR § 2700.42.

⁴ While not relied upon in my ultimate ruling, Complainant's own filing indicates that he was not in fact working by himself at the time of the incident as he clearly states that he was working only 12 feet above the group of eight scaffold builders and a foreman who initially asked him to tie off. Sica Statement February, 21, 2014, 8. He also emphasizes the fact that there was not a problem communicating with this group of workers. *Id.*

When viewing the record in the light most favorable to the Complainant, as is required by the summary judgment standard, I find no circumstances whereby a violation of section 105(c) 1 of the Mine Act could be established absent an allegation of protected activity. Since Complainant's filings cannot be considered to describe any protected activity, discrimination or interference, the Commission is not an appropriate venue for Complainant to contest his termination.

V. ORDER

For the reasons stated above, this matter is **DISMISSED**. The Complainant may appeal this decision with the Commission within 30 days of the Order. 30 USC 815(c)(3).

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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February 17, 2015

CLARKSON CONSTRUCTION
COMPANY, INC.,
Contestant

v.

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

CONTEST PROCEEDINGS

Docket No. CENT 2014-588-RM
Order No. 8760683; 08/05/2014

Docket No. CENT 2014-589-RM
Citation No. 8760684; 08/05/2014

Docket No. CENT 2014-590-RM
Order No. 8760685; 08/05/2014

Docket No. CENT 2014-591-RM
Order No. 8760686; 08/05/2014

Bonner Springs Quarry
Mine ID 14-01578 KTL

**ORDER GRANTING CONTESTANT CLARKSON CONSTRUCTION'S MOTION FOR
SUMMARY DECISION**

These cases are before me upon notices of contest filed by Clarkson Construction Company, Inc. ("Clarkson") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (the "Mine Act" or "Act"). The parties agreed to file cross-motions for summary decision on the sole issue of whether MSHA had jurisdiction to issue the subject citation and orders. The parties agreed to 13 stipulated facts to use in conjunction with their cross-motions. The parties both assert that no material facts are in dispute and that jurisdiction should be decided based upon the stipulations before me.

I. STIPULATED FACTS

1. Clarkson Construction has not performed any services or construction at a mine site for approximately five years.
2. Clarkson Construction has a cement batch plant that is located on property owned by APAC-Kansas, Inc.
3. The batch plant is located at the Bonner Springs Quarry, approximately 200 feet from the office/scale house.
4. APAC-Kansas, Inc., supplies material for the batch plant from its Bonner Springs Quarry to a stockpile near the batch plant.

5. Clarkson Construction is a customer of APAC-Kansas, Inc.
6. APAC-Kansas, Inc.'s employees or contractors deliver material from Bonner Springs Quarry to a stockpile near the batch plant.
7. Clarkson Construction does not have a contract with APAC-Kansas, Inc. to perform services or construction at the Bonner Springs Quarry.
8. Clarkson Construction's employees who operate the batch plant have received site-specific hazard training.
9. On August 5, 2014, two Clarkson Construction trucks pulled into the Bonner Springs Quarry to tarp truck beds.
10. The tarping area of the mine is approximately 200 yards from the entrance to the mine property.
11. The Clarkson Construction employees driving the trucks did not perform any services or construction at the Bonner Springs Quarry on August 5, 2014.
12. Steve Gilbreath has not worked at any mine site while employed by Clarkson Construction.
13. It is the responsibility of the operator of a mine to enforce mandatory safety standards on all vehicles entering the mine property.

II. BACKGROUND

MSHA Inspector Sidney Garay issued the citation and orders contested in these cases to Clarkson on August 5, 2014, as a result of a single incident at the tarping station near the entrance to the Bonner Springs Quarry, which is owned and operated by APAC-Kansas, Inc. ("APAC"). Clarkson operates a batch plant located on quarry property. The batch plant is subject to inspection by the Department of Labor's Occupational Safety and Health Administration. Under the Interagency Agreement, MSHA does not have jurisdiction over the batch plant. 44 Fed Reg 22827 (Apr. 17, 1979) *amended by* 48 Fed Reg 7,521 (Feb. 22 1983).

On August 5, 2014, Inspector Garay issued one citation, Citation No. 8760684, and two orders, Order Nos. 8760685 and 8760686, to Clarkson under section 104(a) of the Mine Act. He also issued Order No. 8760683 under section 107(a) of the Act. Citation No. 8760684 and Order No. 8760683 both state, in part:

The two truck drivers were not wearing fall protection (Safety Belts and Lines) while climbing on the side of the dump bed, in the dump bed and on top of the headache rack of the Freightliner dump truck, Co#8212, DOT#087210. In addition the truck's engine was running and the wheels were not chocked against motion. The freightliner dump truck was parked in the tarping area of the

mine. The two truck drivers and the truck foreman were exposed to a fall off the dump truck bed, blunt force, impact fatal injury.

(Ex. G-A at 1, 3). Order No. 8760685 states, in part:

The Freightliner Dump Truck, Co. #8212, DOT#087210 was left unattended with the engine running and wheels not chocked against motion, two truck drivers were working in the dump truck bed area, one in the bed, one hanging on the side of the bed and the truck supervisor standing on the tarping catwalk next to the dump truck.

(Ex. G-A 5). Order No. 8760686 states, in part, that “[t]here were persons working near the unattended dump truck[.]” (Ex. G-A at 7).

III. DISCUSSION AND ANALYSIS

I find that there are no disputed material facts and Clarkson is entitled to summary decision as a matter of law because MSHA lacked jurisdiction over Clarkson; I therefore vacate Citation No. 8760684 and Order Nos. 87606843, 8760685, and 8760686.

Under the Mine Act, the term “operator” is defined 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). Although the Act does not provide a definition for independent contractor, MSHA regulations do, asserting that the term “means any person, partnership, and corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine.” 30 CFR § 45.2(c). The Commission has held that any independent contractor that performs “more than *de minimus* services at a mine” is an operator under § 802(d). *Musser Engineering Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1268 (Oct. 2010); *See Northern Illinois Steel Co. v. Sec’y of Labor*, 294 F.3d 844, 848 (7th Cir. 2002); *Joy Technologies Inc., Coal Field Operations v. Sec’y of Labor*, 99 F.3d 991, 999-1000 (10th Cir. 2002); *Otis Elevator Co. v. Sec’y of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990). Although jurisdiction is a legal question, it is highly influenced by factual considerations; the “totality of work” performed upon the pertinent project, not just the work relating to the underlying citations, “must be considered on the jurisdiction issue.” *Musser*, 32 FMSHRC at 1269.

I must consider the above law and the undisputed facts before me in the context of a summary decision. Commission 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, 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.” *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981)). The Commission has also analogized Commission Procedural Rule 67 to Federal Rule of Civil Procedure 56. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *See Also Energy West*, 16 FMSHRC at 1419 (citing *Celotex Corp v. Cartrett*, 477 U.S. 317, 237 (1986)).

When the Commission reviews a summary decision under Comm. P. R. 67, it looks “ ‘at the record on summary judgment in the light most favorable to ... the party opposing the motion,’ and that ‘the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.’ ” *Hanson Aggregates New York Inc.*, 29 FMSHRC at 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

I find that Clarkson did not perform more than *de minimus* services at the Bonner Springs Quarry, was not an independent contractor or operator under the Mine Act, and not subject to MSHA’s jurisdiction. The first of the 13 facts stipulated to by the parties is “Clarkson Construction has not performed any services or construction at a mine site for approximately five years.” Joint Stip. at 1. The parties stipulate, furthermore, that “[t]he Clarkson Construction employees driving the trucks did not perform any services or construction at the Bonner Springs Quarry on August 5, 2014.” Joint Stip. at 11. The Mine Act mandates broad jurisdiction for MSHA to regulate independent contractors. *See Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 154 (D.C. Cir. 2006). Clarkson, however, is not an independent contractor at the Bonner Springs quarry as that term is used in the Mine Act. Clarkson has no contract to perform services for Bonner Springs quarry and does not perform any services for APAC. Considering Clarkson’s actions beyond the underlying citations, its totality of work was not only *de minimus*, but, as the parties stipulate, nonexistent.¹ Under the stipulated facts, Clarkson Construction was not an operator or independent contractor under the Mine Act and therefore MSHA could not cite Clarkson for the alleged violations at issue in these cases.²

¹ Clarkson controls a batch plant adjacent to the mine, but that plant is not under MSHA’s jurisdiction. 44 Fed Reg 22827 at ¶ B.6.b. Clarkson’s operation of the batch plant is not a service for APAC and does not provide a connection or presence at the mine upon which MSHA jurisdiction can be based.

² In *N. Illinois Steel Supply Co.*, a company’s employees routinely drove vehicles onto a mine property and helped unload those vehicles, but the Seventh Circuit found that the company was not subject to Mine Act jurisdiction. 294 F.3d at 848-49. The case before me does not include a regular, scheduled occurrence, but rather a single instance of employees utilizing a tarping station located 200 feet from the entrance to mine property, which was not at the behest of APAC and was not for APAC’s benefit. The entity in *N. Illinois Supply Co.* performed services for a mine and entered that mine on a regular basis, but its actions were *de minimus* and did not subject it to MSHA’s jurisdiction. Although it regularly uses roads appurtenant to the quarry, Clarkson performed no services for APAC; *N. Illinois Supply Co.* suggests that Clarkson is not subject to MSHA’s jurisdiction.

The Secretary argues that the Clarkson employees cited in these violations entered mine property and therefore fall under the jurisdiction of the Mine Act. Clarkson's use of mine roads alone does not confer MSHA jurisdiction over Clarkson. *Sec'y of Labor v. Nat'l Cement Co. of Cal., Inc.*, 573 F.3d 788, 795–97 (D.C. Cir. 2009). The Secretary cites numerous Commission cases to support his assertion; these cases, however, do not hold that an entity such as Clarkson falls under MSHA's jurisdiction.³ The question before me is not whether MSHA has jurisdiction over the tarping area, but whether MSHA has jurisdiction to issue citations to Clarkson. Even assuming that MSHA has jurisdiction to issue citations for violations of safety standards that occur at the tarping area, I find that MSHA does not have jurisdiction to cite Clarkson for that conduct.⁴

The Secretary focuses upon MSHA's broad jurisdiction and cites instances where courts upheld that jurisdiction, but he does not provide precedent or convincing arguments that Clarkson is an operator or independent contractor that is subject to that jurisdiction. The Secretary stipulated that Clarkson performed no services at the mine; the Commission determines jurisdiction of an entity based upon its services performed for the mine. Although broad, MSHA's jurisdiction is not universal and must be based upon specific facts.⁵ The stipulations do not show that Clarkson regularly used the tarping station, but they do show that any use that occurred was not in service of APAC and was not related to mining. Clarkson's

³ The Secretary cites *Calmat Company of Arizona*, which focuses upon MSHA jurisdiction of a dual use area that was used by a batch plant and a mine. 27 FMSHRC 617 (Sept. 2005). In the present case, however, Clarkson does not dispute that the cited area, or the road appurtenant to the mine, are "at a mine." At issue is Clarkson's status as an independent contractor or mine operator. The Commission did not address this issue in *Calmat* "[b]ecause the alleged violations involve an independent contractor performing work on mining equipment under the direction of a mine employee in a dual-use area[.]" *Id* at 624. Clarkson is not an independent contractor and did not work at the direction of APAC or utilize mining equipment. In *Calmat*, moreover, MSHA cited the mine operator and not its independent contractor. *Id*. The Commission's analysis in *Calmat* does not consider the independent contractor status of an entity; it also does not suggest that MSHA has jurisdiction over Clarkson.

⁴ I do not reach the issue of whether MSHA has jurisdiction to cite APAC for actions of Clarkson employees or for actions of any entity at the tarping facility; the issue before me is whether MSHA has jurisdiction to cite Clarkson as an independent contractor.

⁵ The Secretary argues that his interpretation of the Act should be afforded deference and MSHA should have jurisdiction over Clarkson; I do not afford that deference. The language of the Act is clear; for MSHA to exercise jurisdiction, an entity must be an operator or independent contractor. Clarkson performed no services at a mine and therefore cannot be an operator or independent contractor. Even if the language were ambiguous, furthermore, the Secretary's interpretation could not be afforded deference because it is unreasonable. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Udall v. Tallman*, 380 U.S. 1, 18 (1965). The Secretary's interpretation would give MSHA jurisdiction over every person and entity who steps onto mine property, from children on field trips to trespassers.

status as a customer of the quarry,⁶ its operation of the adjacent batch plant, and its use of the road leading to the mine to access that batch plant do not make it an independent contractor.

Clarkson did not perform services at a mine; therefore, Commission precedent and the clear language of the Mine Act dictate that Clarkson was neither an operator nor independent contractor. I find that as a matter of law, Clarkson is entitled to summary decision because MSHA did not have jurisdiction over Clarkson when it issued the subject citation and orders.

IV. ORDER

I hereby **VACATE** Citation No. 8760684 and Order Nos. 8760683, 8760685, and 8760686 because MSHA does not have jurisdiction over Clarkson Construction Company, Inc. Consequently, the Notices of Contest are **GRANTED** and these cases are **DISMISSED** as moot.

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

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⁶ The Secretary argues that customers of a mine are subject to MSHA jurisdiction. He cites *El Paso Rock Quarries, Inc.*, an ALJ decision that is not binding upon me. 1 FMSHRC 2046 (Dec. 1979). That decision, furthermore, does not support the Secretary's argument. *El Paso Rock* addresses citations issued by MSHA to a mine operator and not a customer or contractor. 1 FMSHRC at 2048. The Secretary cites numerous decisions that do not support his position. The Secretary ignores Clarkson's status as an independent contractor.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE NW, SUITE 520N
WASHINGTON, D.C. 20004

February 23, 2015

SCOTT MCGLOTHLIN,
Complainant,

v.

DOMINION COAL CORPORATION,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. VA 2014-233-D
NORT-CD-2013-04

Mine: Dominion No. 7
Mine ID: 44-06499

ORDER OF CONTINUANCE
AND
ORDER ESTABLISHING FILING SCHEDULE

This discrimination proceeding was previously scheduled for hearing on February 24, 2015, in Pikeville, Kentucky. During telephone conferences with the parties conducted on February 10 and February 11, 2015, Scott McLothlin’s counsel represented that he intends to file a motion for summary decision. As discussed below, a preliminary review of the facts reflects that disposition through summary decision may be appropriate as it is not readily apparent that there are disputed issues of material fact. Accordingly, the previously-scheduled hearing shall be continued to permit consideration of McGlothlin’s motion for summary decision and any opposition filed by Dominion Coal Corporation (“Dominion”).

I. Procedural Background

Section 101 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 811 (2006) (“the Act”), authorizes the Secretary to promulgate, consistent with the provisions of section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, “mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.” Part 90 of the Secretary’s regulations was “promulgated pursuant to section 101 of the Act.” 30 C.F.R. § 90.1. Under Part 90, a miner determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis is given the opportunity to work without loss of pay in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air (“mg/m³”). 30 C.F.R. §§ 90.1, 90.3; *see also Goff v. Youghiogeny & Ohio Coal Co.*, 8 FMSHRC 1860 (Dec. 1986).

The anti-discrimination provisions of section 105(c) of the Act provide, in relevant part, that “[n]o person shall . . . in any manner discriminate . . . or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . [who] is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 . . .” 30 U.S.C. § 815(c)(1).

In February 2013, McGlothlin was an hourly employee at the Dominion No. 7 Mine who was assigned to operate a continuous miner at a rate of pay ranging from approximately \$33.00 to \$35.00 per hour. Based on representations made by the parties during the February 10 and February 11, 2015, telephone conferences, it appears that McGlothlin was granted Part 90 status in June 2013 based on his medical condition. The parties further represented that McGlothlin’s pay was reduced to approximately \$25.00 per hour, also in June 2013, after he was transferred to less dusty occupations, including scoop operator and other job duties performed in outby areas of the mine.

Section 90.103 requires a mine operator to “compensate each [P]art 90 miner at not less than the regular rate of pay received by that miner *immediately before* exercising the option under § 90.3 (Part 90 option; notice of eligibility; exercise of option).” 30 C.F.R. § 90.103 (emphasis added). A fair reading of sections 101 and 105(c)(1) of the Act, as well as 90.103 of the Secretary’s regulations, reflects that the issue in this proceeding is whether McGlothlin’s reduction in pay is a violation of section 105(c) of the Act because it interfered with transfer rights and pay protection accorded to McGlothlin under section 90.103—a regulation promulgated pursuant to section 101 of the Act.

II. Parameters for Summary Decision

Commission Rule 67 provides that a motion for summary decision shall be granted if: “(1) 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 issue in this proceeding is whether McGlothlin’s reduction in pay violated section 90.103 of the Secretary’s regulations. **Given the “immediately before” provision in section 90.103, the material facts necessary for resolving this matter through summary decision are whether there was, in fact, a coincidence in time between McGlothlin’s exercise of Part 90 status and his reduction in pay, and, if so, whether this coincidence in time precluded Dominion from reducing McGlothlin’s hourly pay.** The material dates of McGlothlin’s exercise of Part 90 protection, and the effective date of the reduction in his hourly rate of pay, are readily ascertainable and should not be in dispute.

McGlothlin’s motion for summary decision should be limited to the merits of his discrimination complaint. McGlothlin will have the opportunity to submit a proposal for relief if Dominion is deemed to be liable. In support of his motion for summary decision McGlothlin should provide reports of relevant medical evaluations and diagnoses, as well as relevant reports of objective clinical findings based on, but not limited to, radiographic, MRI, or pulmonary function studies. McGlothlin should also provide evidence of the date of his exercise of Part 90

status through relevant copies of his “exercise of option form,” filed pursuant to section 90.3. 30 C.F.R. § 90.3. To support his alleged pay reduction, McGlothlin should provide relevant pay stubs reflecting the date and change of his hourly rate of pay.

Any dispute regarding the documentation provided in support of McGlothlin’s motion for summary decision may be addressed in Dominion’s opposition. In addition, Dominion may address whether the chronological evidence in this matter satisfies the “immediately before” provision in section 90.103. Finally, Dominion should address whether the “immediately before” provision imposes strict liability for any such reduction in pay, or whether McGlothlin must demonstrate that the reduction was motivated by, or made in contemplation of, his exercise of Part 90 status.

During the February 11, 2015, telephone conference, the following filing schedule was established: A motion for summary decision on behalf of McGlothlin must be filed on or before **March 18, 2015**; any opposition by Dominion must be filed on or before **April 17, 2015**; thereafter, the parties may simultaneously file reply briefs on **May 1, 2015**.

ORDER

In view of the above, as the parties have been previously informed, **IT IS ORDERED** that the February 24, 2015, hearing in this matter **IS CONTINUED** without date. **IT IS FURTHER ORDERED** that the parties shall abide by the above filing schedule for the motion for summary decision and the opposition, and replies, if any.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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