

January 2013

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Review was denied in the following cases during the month of January 2013:

Secretary of Labor, MSHA v. Rock N Roll Coal Company, Docket No. WEVA 2011-1710. (Judge Steele, December 6, 2012)

Secretary of Labor, MSHA v. Art Wilson Company, Docket No. WEST 2012-743-M. (Judge Miller, order issued December 7, 2012-not a final disposition)

Secretary of Labor, MSHA v. Art Wilson Company, Docket No. WEST 2012-1164-M, WEST 2011-1216-M. (Judge Miller, order issued December 7, 2012- not a final disposition)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

January 3, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2012-652
ADMINISTRATION (MSHA)	:	A.C. No. 15-17587-276338
	:	
v.	:	Docket No. KENT 2012-656
	:	A.C. No. 15-17587-273440
OHIO COUNTY COAL COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 2 and March 7, 2012, the Commission received from Ohio County Coal Company (“Ohio”) two motions seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2012-652 and KENT 2012-656, both captioned *Ohio County Coal Company, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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

The record indicates that proposed assessment No. 000276338 was delivered on January 10, 2012, and became a final order of the Commission on February 9, 2012. Proposed assessment No. 000273440 was delivered on December 6, 2011, and became a final order of the Commission on January 5, 2012. Ohio asserts that its safety manager only received proposed assessment No. 000276338 on January 23, 2012, and proposed assessment No. 000273440 on December 21, 2011. Ohio states that it has been unable to determine what caused the failure to its internal mail delivery system. Ohio states that it only became aware of the delinquencies when it received MSHA delinquency notices, dated February 29, 2012 and January 27, 2012.

The Secretary does not oppose the requests to reopen based solely on the fact that the penalty contests were mailed six and seven days, respectively, after becoming a final order. The Secretary also notes that MSHA received two payments for the uncontested penalties, by checks dated February 21 and January 20, 2012. The Secretary cautions that she may oppose future motions to reopen penalty assessments that are not contested in a timely manner.

The Commission has made it clear that where a failure results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). We urge the operator to take all steps necessary to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 3, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2012-654
v.	:	A.C. No. 15-19374-275039
	:	
RIVER VIEW COAL, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 2, 2012, the Commission received from River View Coal, LLC (“River”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on December 19, 2011, and became a final order of the Commission on January 18, 2012. River asserts that it mailed a notice of contest on January 30, 2012, and received MSHA's delinquency notice on February 8, 2012. River states that the mine was idle from December 24, 2011 to January 2, 2012. Moreover, River's clerk was on maternity leave, and the temporary staff was unaware of the timely nature of the assessment.

The Secretary does not oppose the request to reopen, and notes that MSHA received a payment for the uncontested penalties, by check dated January 20, 2012. The Secretary cautions that she may oppose future motions to reopen penalty assessments that are not contested in a timely manner.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 3, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2010-81-M
	:	A.C. No. 21-03031-197296
	:	
	:	Docket No. LAKE 2010-122-M
v.	:	A.C. No. 21-03031-200438-01
	:	
	:	Docket No. LAKE 2010-123-M
	:	A.C. No. 21-03031-200438-02
	:	
BILLINGTON CONTRACTING, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 20, 2012, the Commission received from Billington Contracting, Inc. (“Billington”) a motion seeking to reopen three penalty assessment proceedings and relieve it from the default orders entered against it.¹

On March 14 and 16, 2011, Chief Administrative Law Judge Lesnick issued three Orders to Show Cause which by their terms became Default Orders if the operator did not file an answer within 30 days. These Orders to Show Cause were issued in response to Billington’s failure to answer the Secretary’s March 18, 2010 Petitions for Assessment of Civil Penalty. The Commission did not receive Billington’s answers within 30 days, so the default orders became effective on April 14 and 18, 2011.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2010-81-M, LAKE 2010-122-M and LAKE 2010-123-M, all captioned *Billington Contracting, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

The judge's jurisdiction in these matters 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 orders here have become final decisions of the Commission.

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

Under Rule 60(b) a motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect under subsections (1), (2), and (3) of the rule, not more than one year after the judgment, order, or proceeding was entered or taken. This motion to reopen was filed more than one year after the assessments became final orders. Therefore, Billington's motion is untimely. *JS Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Accordingly, we deny its motion with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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January 14, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2013-422 ¹
ADMINISTRATION (MSHA)	:	A.C. No. 46-08994-273633
	:	
	:	Docket No. WEVA 2012-918
	:	A.C. No. 46-08704-279357
	:	
v.	:	Docket No. WEVA 2012-919
	:	A.C. No. 46-08994-279358
ARGUS ENERGY WV, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

CORRECTED 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 March 8 and 30, 2012, the Commission received from Argus Energy WV, LLC (“Argus”) three motions seeking to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).² The Secretary does not oppose the requests to reopen.

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

¹ This case was previously incorrectly docketed as WEST 2012-634 and as WEVA 2012-634. This corrected order reflects the correct docket number: WEVA 2013-422.

² Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2013-422, WEVA 2012-918 and WEVA 2012-919, all captioned *Argus Energy WV, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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January 31, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 2013-86-M
ADMINISTRATION (MSHA)	:	A.C. No. 36-09172-296177 A
	:	
v.	:	Docket No. PENN 2013-87-M
	:	A.C. No. 36-09172-296178 A
DENNIS S. BELL and MICHAEL P. DUFFY,	:	
employed by DUFFY, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On November 28, 2012, the Commission received a motion seeking to reopen two penalty assessments under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become final orders of the Commission. The motion was filed by counsel for Duffy, Inc., on behalf of Dennis S. Bell and Duffy, Inc.’s late owner, Michael P. Duffy.¹

Under the Commission’s Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers PENN 2013-86-M and PENN 2013-87-M. 29 C.F.R. § 2700.12. Because Duffy, Inc., is not a party to these proceedings, it cannot be treated as such. However, we assume that counsel is authorized to represent both individuals involved for the narrow purpose of reopening these cases, even though Mr. Duffy is deceased.

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

The record indicates that proposed assessment No. 00296177A was delivered on August 11, 2012, and became a final order of the Commission on September 10, 2012. Proposed assessment No. 00296178A was delivered on August 20, 2012, and became a final order of the Commission on September 19, 2012. Counsel asserts that Duffy, Inc.’s corporate secretary timely mailed both notices of contest on September 7, 2012. Counsel states that he discovered the delinquency while discussing a separate case with an attorney from the Office of the Solicitor. Duffy, Inc., further states that its owner, Michael P. Duffy, was killed in a plane crash on June 14, 2012, before MSHA issued the section 110(c) proposed assessment against him on July 27, 2012.

The Secretary does not oppose the request to reopen, and notes that there is no record that MSHA received the penalty contest forms. The record also shows that delinquency notices were mailed on October 26, and November 5, 2012. The Secretary requests that the Commission rule on the reopening requests in an expedited manner so that the section 110(c) action against Mr. Duffy may be expeditiously vacated, and the section 110(c) action against Mr. Bell may be consolidated and litigated with the related action against the operator.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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January 31, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2010-304
v.	:	A.C. No. 44-06499-214250-01
	:	
DOMINION COAL CORPORATION	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 16, 2012, the Commission received from Dominion Coal Corporation (“Dominion”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On March 16, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Dominion’s failure to answer the Secretary’s May 13, 2010 Petition for Assessment of Civil Penalty. The Commission did not receive Dominion’s answer within 30 days, so the default order became effective on April 18, 2011.

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, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as

practicable by the Federal Rules of Civil Procedure”); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Dominion asserted that it attempted to reach a settlement agreement with MSHA, but was unable to do so. On March 23, 2012, the Commission sent Dominion a letter asking it to explain why it did not timely answer the penalty petition and Show Cause Order, and what office procedures were implemented to prevent future defaults. In response, Dominion asserts that it failed to file timely answers due to personnel changes and a shortage of personnel. Moreover, Dominion states that the Default Order was not received by the correct person at the company. Dominion’s compliance coordinator maintains that he made this issue his primary responsibility, trained employees regarding the importance of receiving and routing mail, and began working with a law firm to timely file future motions.

The Secretary opposes the request to reopen, and notes that MSHA mailed a delinquency notice on August 25, 2011, and the case was referred to the Department of Treasury for collection on October 13, 2011. The Secretary maintains that the operator makes no showing of exceptional circumstances that warrant reopening. Moreover, the Secretary states that Dominion does not explain why it took eleven months after the Show Cause Order was issued, and six months after receiving the delinquency notice, to request reopening. The Secretary further asserts that a settlement agreement was not reached in this case, and notes that MSHA received a payment through Treasury collection and applied it to this case on November 17, 2011.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). In this case, we conclude that the lack of any procedure to properly route and assess MSHA correspondence represents an inadequate or unreliable internal processing system.

Additionally, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator’s receipt of a delinquency notice and the operator’s filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC at 1316-17 (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the delays in responding to MSHA’s delinquency notice and the Commission’s Show Cause Order amounted to six and eleven months. Despite being given a second chance, Dominion failed to explain in detail why it did not address its personnel shortage in the ten months it had from the date MSHA filed its

penalty petition on May 13, 2010, until the issuance of the Show Cause Order on March 16, 2011.

Having reviewed Dominion's request and the Secretary's response, we conclude that Dominion has failed to establish good cause for reopening the penalty assessment proceeding and vacating the Default Order. Accordingly, we deny its motion with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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January 31, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2012-1406-M
	:	A.C. No. 46-00007-266987
	:	
v.	:	
	:	
RIVERTON INVESTMENT CORPORATION :	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On July 2, 2012, the Commission received from Riverton Investment Corporation (“Riverton”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on September 21, 2011, signed for by C. Knisley, and became a final order of the Commission on October 21, 2011. A notice of delinquency was mailed on December 6, 2011, and the case was referred to the U.S. Department of Treasury (“Treasury”) for collection on March 29, 2012.

Riverton asserts that in 2009 it adopted a centralized procedure for handling proposed penalty assessments, requiring employees to forward all MSHA correspondence to Essroc’s corporate safety manager (“Manager”). In 2011, Essroc began to receive delinquency notices from Treasury and several collection agencies regarding unpaid MSHA penalty assessments. Essroc maintains it has been working with MSHA, Treasury, and the collection agencies to properly account for the outstanding penalties. Upon receiving this proposed assessment, Essroc’s Manager scheduled an informal conference with MSHA and indicated to Essroc’s management that he had contested the assessment. In April 2012, the Manager resigned his position, and Essroc discovered that the assessment was not timely contested.

The Secretary opposes the request to reopen and asserts that the operator identified no exceptional circumstances warranting reopening. She states that Essroc and Riverton have been in business for many years and are familiar with the contest procedures, and that Essroc should have known that a conference request does not alter the deadline or the procedure for contesting a proposed penalty. Riverton has two additional motions to reopen with similar circumstances pending before the Commission (VA 2012-234-M; VA 2012-235-M). The Secretary asserts that these motions to reopen, combined with the other delinquency notices and collection actions Essroc has been receiving since 2011, should have put it on alert. The Secretary further notes that the inadequacy of the operator’s procedures is underscored by the significant amount of money at stake in this proposed assessment, \$224,136. Moreover, the operator fails to explain why it took seven months after receiving the delinquency notice and three months after discovering the collection action to request reopening.

Riverton has not replied to the Secretary’s opposition to its motion. We encourage parties seeking reopening to **provide further information in response to pertinent questions raised in the Secretary’s response.** See, e.g., *Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1316 n.3 (Nov. 2009).

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC at 1315; *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). In this case, we conclude that the lack of any procedure to confirm that the required paperwork was timely filed represents an inadequate or unreliable internal processing system.

Additionally, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator’s

receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC at 1316-17 (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the unexplained delay in responding to MSHA's delinquency notice amounted to seven months. Riverton has not provided an explanation for filing its motion to reopen more than 30 days after receiving the delinquency notice.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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January 31, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2012-768
v.	:	A.C. No. 46-09244-275668
	:	
INMAN ENERGY	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2012-653
v.	:	A.C. No. 15-19097-273454
	:	
PROCESS ENERGY	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2012-1199
v.	:	A.C. No. 46-08808-276806
	:	
SPARTAN MINING COMPANY, INC.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2012-1198
v.	:	A.C. No. 46-08801-276805
	:	
ARACOMA COAL COMPANY	:	
	:	Docket No. WEVA 2012-1200
	:	A.C. No. 46-09299-276820

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 24, March 2, and May 22, 2012, the Commission received from Inman Energy (“Inman”), Process Energy (“Process”), Spartan Mining Company, Inc. (“Spartan”), and Aracoma Coal Company (“Aracoma”) (collectively “the operators”) five motions seeking to reopen five penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹ Alpha Natural Resources (“Alpha”) is the parent company of all of the operators seeking relief in this case.

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

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

MSHA’s record indicates that Inman’s proposed assessment was delivered on December 21, 2011, and became a final order of the Commission on January 20, 2012. Inman asserts that it filed its notice of contest on January 24, 2012, and was unaware of its delinquency until it received MSHA’s notice, dated February 1, 2012. Process asserts that it received the proposed assessment on December 5, 2011, and it became a final order of the Commission on January 4, 2012. Process states that it filed its notice of contest on January 12, 2012, and received MSHA’s delinquency notice on February 6, 2012. Spartan and Aracoma assert that they received the proposed assessments on January 9, 2012, which became final orders of the

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2012-768, KENT 2012-653, WEVA 2012-1199, WEVA 2012-1198 and WEVA 2012-1200, involving similar procedural issues. 29 C.F.R. § 2700.12.

Commission on February 8, 2012. Alpha's executive assistant discovered Spartan and Aracoma's delinquencies on May 8, 2012.

In affidavits filed in all dockets, Alpha's executive assistant stated that she is responsible for processing and filing notices of contest for all Legacy Massey Energy ("Massey") mines acquired by Alpha. She stated that this processing system has prevented any late filings in the past, but due to a holiday break and the increasing workload regarding the Massey settlement, she was unable to file timely contests in these matters.

The Secretary does not oppose the requests to reopen, and notes that MSHA received payments for Inman and Process' uncontested penalties by checks dated January 6 and 19, 2012. The Secretary cautions that she may oppose future motions to reopen penalty assessments that are not contested in a timely manner.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 4, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2011-47-M
Petitioner	:	A.C. No. 47-03287-232182
	:	
v.	:	
	:	
ALLIED STONE, LLC,	:	Mine: Allied Stone – Portable #1
Respondent	:	

DECISION

Appearances: Pamela F. Mucklow, Esq., U.S. Department of Labor, Denver, Colorado, on behalf of the Secretary of Labor;
John Rutkowski, Fennimore, Wisconsin, on behalf of Allied Stone, LLC.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petition alleges that Allied Stone, LLC is liable for nine violations of the Secretary’s Safety and Health Standards for Surface Metal and Nonmetal Mines¹, and proposes the imposition of civil penalties in the total amount of \$1,043.00. A hearing was held in Madison, Wisconsin, and both parties filed a post-hearing brief. Two of the violations were settled during the hearing. Remaining at issue are seven violations for which the Secretary has proposed penalties in the amount of \$843.00. For the reasons that follow, I find that Allied Stone committed five of the seven violations and impose civil penalties in the total amount of \$450.00 for the contested violations.

Findings of Fact - Conclusions of Law

At all times relevant to this proceeding, Allied Stone operated the Portable #1 mine, a surface limestone mine, located in Fennimore, Wisconsin. The operators of the mine are John and Jeff Rutkowski. Jeff Rutkowski has been in the mining field since 1989, in the business of crushing stone since 1999, and is familiar with safety procedures at various types of mines in the region, including his own. Tr. 111.

¹ 30 C.F.R. Part 56.

On July 21, 2010, Kevin LeGrand, a mine safety and health specialist for MSHA's Metal/Non-metal Division, conducted an inspection of the Portable #1 mine. Tr. 22-23. LeGrand joined MSHA in 1999 as an inspector and became a supervisory inspector in 2002. Tr. 24-25. From 1984 to 1994, he worked as an equipment operator and mechanic at a company that operated surface limestone, open-pit quarry, and sand and gravel mines. In 1994 he moved to a safety director position within the same company doing workplace inspections and safety training. Tr. 26-28. LeGrand holds a degree in Occupational Safety and Health from Columbia Southern University. Tr. 29.

Based on LeGrand's observations and conversations with the operators during the inspection, nine citations were issued. Eight of the violations were safety related and one was a paperwork violation. During the hearing, Allied Stone withdrew its contest of Citation No. 6499833, agreeing to pay the penalty amount of \$100.00. Tr. 108. Additionally, Citation No. 6499834 was settled during the hearing. The negligence was reduced to "low," and Allied Stone agreed to pay the assessed penalty of \$100.00 for that citation. Tr. 108. The other seven citations remain at issue and are discussed below.

Citation No. 6499835

Citation No. 6499835 was issued at 9:18 a.m. on July 21, 2010, pursuant to section 104(a) of the Mine Act. It alleges a violation of 30 C.F.R. § 56.3131 which states "[i]n places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall." Other conditions that create a "fall-of-material hazard" must also be corrected. The violation was described in the "Condition and Practice" section of the citation as follows:

There were loader tire tracks parallel to the high wall measuring 2 feet away from a 30-foot high wall which contained numerous loose rocks and a section with about a 3-foot over hang. Inadvertent falling of rock onto equipment operating near the base of the high wall exposed persons to crushing type injuries. Persons operate a skid steer type of small loader and a mid-sized loader near the wall regularly to move spilled material out from under the plant as part of normal mining operations. The owner indicated he did not notice the close distance of equipment operation to the high wall during clean up activity.²

Ex. G-1.

LeGrand determined that the violation was reasonably likely to result in a fatal injury, that it was significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$243.00 was assessed for the violation.

² Spelling and grammar errors have been corrected in quotations from documents prepared in the field.

The Violation

The unconsolidated material consisted of loose rock, both large and small in size, in various spots along the highwall, and an overhang area. Tr. 39; Ex. G-2-6. An overhang is rock that protrudes horizontally from a wall with no material underneath it. Tr. 95. LeGrand calculated that the highwall was approximately 30 feet high, using an Abney level³ and a tape measure. The overhang area was estimated at 10' long x 5' high x 3' deep. Tr. 41-42, 102. Respondent contends that the highwall was only 20-22 feet high. Tr. 124. A photograph taken in January of 2012, a year and a half after the citation was issued, was introduced to support Respondent's contention. Ex. R-1. It depicts a grade stick⁴ being held against the highwall. However, the top of the wall, the base of the wall, and the numbers on the grade stick are not clearly visible. Ex. R-1.

The hazard presented by loose rock is not only that it can fall to the ground, but that it can land on a ledge, initiating additional rock fall. Tr. 42. Falling rock has the potential of crushing or injuring a person working close to the base of the highwall. Tr. 48. LeGrand maintained that in order to be safe from rock-fall, a person should be at least 10 feet away from the wall. Tr. 60. There were tire tracks parallel to, and within 2 feet of, the highwall. Ex. G-2. As noted in the citation, LeGrand believed that two loaders, a small skid steer and a mid-sized Volvo, were used near the highwall during normal business operations. Ex. G-1. A large CAT loader was also used for some of the operations. While no footprints were seen near the wall, loader tracks established that at least one person was put at risk of injury. Tr. 78, 89.

Jeff Rutkowski⁵ testified that the tracks were made by the Volvo loader, which was used to pile rocks next to the highwall, and that the skid steer was not used near the highwall. Tr. 49, 112. Using the dimensions of the Volvo loader, if the tracks were 2 feet from the base of the wall and the loader was parallel to it, the operator would have been no closer than 8 feet to the wall and would have been seated 9.5-10 feet above the ground and 13-15 feet below the top of the wall. Tr. 129; Ex. R-4. Rutkowski contended that the Volvo loader was usually perpendicular to the wall, which would have placed the miner at least 12 feet from the base of the highwall. Tr. 159.

Miners picked up and placed rock with the Volvo or CAT loader in the area near the base of the highwall. The loose rocks on the highwall and the overhang consisted of loose or unconsolidated material within the meaning of the standard. There was no angle of repose established, nor was there a barrier set up to keep miners away from the base of the highwall. The operator of the Volvo loader had been approximately eight feet from

³ An abney level is an engineering instrument used to measure topographic elevation.

⁴ A grade stick is a long ruler with measurements written on it.

⁵ Any reference to "Rutkowski" below refers to Jeff Rutkowski, who testified at the hearing, unless otherwise stated.

the base of the wall, in a position where the loader and he could have been struck by falling unconsolidated material. I find that Respondent violated the standard..
Significant and Substantial

The Commission reviewed and reaffirmed the familiar *Mathies*⁶ framework for determining whether a violation is S&S in *Cumberland Coal Res.*, 33 FMSHRC 2357, 2363-65 (Oct. 2011):

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained:

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984).

....
....

The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*") (affirming an S&S violation for using an inaccurate mine map). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984). The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*") (affirming an S&S violation for using an inaccurate mine map). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard

⁶ *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury.” *Id.* at 1281. Importantly, we clarified that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* The Commission also emphasized the well-established precedent 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)).

The fact of the violation has been established. It contributed to the discrete hazard of loose rock falling off the wall, crushing or injuring a miner at the base. Whether the violation was S&S turns on whether the hazard was reasonably likely to result in an injury of a reasonably serious nature.

LeGrand determined that the violation was significant and substantial because exposure of the operator in the loader was frequent enough that a serious injury was reasonably likely. Tr. 78. He also determined that the injury could be fatal, stating that he had seen reports of fatal accidents involving material falling from highwalls and onto operators of front-end loaders. Tr. 70, 72; Ex. G-15. In one of the reports, the loader was much larger than Respondent’s Volvo. Tr. 72-73. LeGrand explained that a miner might not always be killed but could suffer a permanently disabling injury or lost workdays. Tr. 76-77.

Respondent contended that when the Volvo loader was used to pick up rock, the time spent at the base of the highwall was approximately two minutes per trip, and that the rocks that fell did not land more than 1 foot from the wall. Tr. 112, 120, 122. In addition, Respondent’s Volvo loader had a roll over protection unit, safety glass, and a screen that protected the operator from falling objects. Tr. 127; Ex. G-43, R-4.

LeGrand’s S&S determination was largely based upon his belief that the small skid-steer loader was used regularly near the highwall, and that the tracks near the highwall had been made by the skid steer. Tr. 55, 58, 66; Ex. G-5. He did not attempt to match the tracks to the size of the tires or the tread pattern on the loaders. Tr. 66. Rutkowski testified that the skid steer was used to clean up around the plant, but was never used near the highwall. Tr. 111-12. He also testified that the tracks near the wall were made by the Volvo loader, and that they matched the width and tread design of the tires on the Volvo. Tr. 111-12.

LeGrand’s belief that the skid steer was operated regularly near the highwall was grounded on statements made during the inspection that the skid steer was used to clean around the plant, which was 30-35 feet away from the wall. His recollection of those statements was limited, save for brief references in his notes. I accept Rutkowski’s testimony that the tracks were made by the Volvo loader, and that the skid steer was not used near the highwall. He compared the tracks to the loader’s tires. It also appears

unlikely that the skid steer, with its small, four-foot wide bucket, would have been used near the highwall.

The operator of the 73,000 pound Volvo loader would have been eight feet away from the high wall's base, and sitting 10 feet off the ground, if it was operated parallel and close to the wall. The operator of the larger CAT loader would have been even further from the area of the hazard posed by falling material. While a rock could fall from the wall and strike the loader and/or the operator's cab, it would be unlikely to result in an injury to the operator. A falling rock would likely cause, at most, lost workdays or restricted duty injury.

Therefore, I find that this violation was not significant and substantial.

Negligence

LeGrand found Respondent's negligence to be moderate because the operator knew or should have known about the violation. Tr. 81. LeGrand testified that when asked about the tracks, John Rutkowski responded by saying they "must have got closer to the wall than he thought." Tr. 69. LeGrand maintains that John Rutkowski had the opportunity to observe the wall and its condition any day he was working around it or conducting a workplace exam. Tr. 82. John Rutkowski admitted that the loader got too close to the wall. A miner operating a loader within 2 feet of the highwall, with its loose and unconsolidated material, would have been an obvious violation. I find that Respondent's negligence, while bordering on high, was properly marked as moderate.

Citation No. 6499836

Citation No. 6499836 was issued at 9:27 a.m. on July 21, 2010, pursuant to section 104(a) of the Mine Act. It alleges a violation of 30 C.F.R. § 56.14107(a), which requires machine parts to "be guarded to protect persons from contacting gears... head, tail, and take-up pulleys... that can cause injury." The violation was described in the "Condition and Practice" section of the citation as follows:

There was a 4 inch wide x 3 inch high opening at the tail section of the Cedar rapids jaw crusher under the conveyor tail pulley which exposed the fins of the self cleaning tail pulley. The opening measured 32 inches above ground level. Contact with this type of moving machine part can result in hand or finger lacerations. Persons shut down the plant and use a skid steer unit for clean up and maintenance activity. The condition was positioned in an open and obvious area and the owner was well familiar with the equipment guarding standard requirements.

Ex. G-16.

LeGrand determined that the violation was unlikely to result in an injury, that an injury could reasonably be expected to result in lost workdays or restricted duty, that one person was affected, and that the operator's negligence was high. A civil penalty in the amount of \$100.00 was assessed for this violation.

There was a small opening in the guarding around the crusher conveyor's tail pulley in the area of the belt adjustment mechanism. The opening was depicted in the photograph taken by LeGrand; it measured 3" x 4" and was located approximately 30 inches above the ground. Tr. 188-89; Ex. G-18. The opening would have become wider if the belt was tightened and smaller if the belt was shortened or re-spliced. Tr. 192. Square tubing, encasing a threaded rod that was used to adjust the tension of the belt, was mounted several inches outside the opening and extended its full length, from the conveyor frame to the pulley shaft bearing, at least partially obstructing direct access to the pulley. Ex. G-18. In addition, it appears that only the center part of the spinning pulley could have been contacted. The more dangerous pinch point, where the belt started to wrap around the bottom of the pulley, was several inches below the opening. Ex. G-18.

LeGrand believed that a miner would be in the area to do maintenance work or clean-up, which he inferred from grease seen around the bearing housing. Tr. 189; Ex. G-18. Additionally, adjusting the pulley, to tighten or loosen the belt, would require work in that area. Tr. 190. However, maintenance and adjustments were not done when the equipment was running. Tr. 200. The belt was adjusted about once a year and the bearing was greased every two months during slow production periods. Tr. 201. In regard to diagnostic tests, Rutkowski could not recall anyone getting close enough to become entangled. Tr. 201. Further, during the time of the inspection, the plant was locked out and tagged out and when the equipment was running, miners stood clear of the crusher while it was being fed because rocks would fall in the area Tr. 200.

Based on the fact that one person normally did the maintenance and clean-up around the plant, LeGrand determined that one miner was put at risk of injury. Tr. 192. However, no footprints were seen in the area. Tr. 196. Lost workdays or restricted duty was considered to be the most serious injury a miner was reasonably likely to suffer because the injury would have involved getting one's clothes or finger caught in the pulley, causing crushing, lacerations, or bruising. Tr. 192. LeGrand had read about similar injuries occurring, but since maintenance and clean-up was usually done when the plant was shut down, he determined that an injury was unlikely to occur. Tr. 193. He believed that the machine may not have been shut down to do a diagnostic test if it was making noise. Tr. 198.

While there are no specifications for how big an opening in a guard must be in order to be deemed a violation, the standard does require a reasonable possibility of injury. Tr. 196, 282-83. The purpose of a guard is to protect from inadvertent contact. Tr. 197. However, in this situation, a person would have to intentionally insert his hand around the bearing housing and tubing, into the very small opening. LeGrand conceded that injury was unlikely because the plant was shut down when maintenance was done, but he was more concerned with contact while a diagnostic test was being performed. Even though a person may have gotten close to the

opening while performing a diagnostic test, that action would not have entailed putting a hand into or near the small opening or any other action that could reasonably have been expected to result in inadvertent contact with the pulley. It would have likely involved listening to and observing the machine to determine what might have been causing the problem. I find that there was no reasonable possibility of injury and therefore, no violation of section 56.14107(a). Citation No. 6499836 will be vacated.

In the alternative, I find that Respondent did not have fair notice of the Secretary's interpretation of the standard as applied to the opening. The Secretary must provide fair notice of the requirements of broadly written safety standards. *Allen Lee Good*, 23 FMSHRC 995, 1004-05 (Sept. 2001) (opinion of Commissioners Jordan and Beatty) (citations omitted).

The language of the guarding standard is very broad in order to incorporate a wide range of situations where guarding might be appropriate. In *Good*, the Commission held that the guarding standard was ambiguous in the applications at issue and that it did not specify the extent to which moving machine parts should be guarded. As stated above, the purpose of the standard is to protect against inadvertent contact and I found that the opening presented no reasonable possibility of injury. The plant was previously inspected by MSHA and the condition was not cited even though the crusher was in the exact same position, although the opening may have been slightly larger in 2010 due to adjustments of the belt. Tr. 203; Ex. R-10. MSHA issued a revised guarding book in 2004 that discussed discrepancies on how inspectors looked at guarding standards, and published a power point presentation about guarding on the MSHA website in 2010. Tr. 282. However, in LeGrand's words, MSHA has not "gotten technical" about the size of holes. Tr. 283.

Considering that the general area was guarded, that the opening in the guard was very small and access to it was obstructed by the belt adjustment mechanism, and no citation was issued in past inspections when the same opening existed, I find that Respondent was not given a reasonable opportunity to know that its conduct was prohibited. This finding is consistent with my decision in *Knife River Materials* to vacate a citation for lack of fair notice where a pulley was guarded, a miner would have had to reach around and inside the guard in order to contact rotating parts, and the condition had not previously been found to be inadequate. *Knife River Materials*, 33 FMSHRC 1210, 1224 (May 2011).

Citation No. 6499837

Citation No. 6499837 was issued at 9:43 a.m. on July 21, 2010, pursuant to section 104(a) of the Mine Act. It also alleges a violation of the guarding standard, which was described in the "Condition and Practice" section of the citation as follows:⁷

⁷ The Secretary filed a motion to amend the Condition and Practice section of Citation No. 6499837 to add a description of a second allegedly violative condition. The motion, which was filed six days prior to the hearing, was opposed by Respondent. After argument prior to commencement of the hearing, the motion was denied. Tr. 14-15.

A guard was not provided for the under side of the self cleaning tail pulley located on the conveyor feeding the Telsmith cone crusher. The opening consisted of about 28 inches long x 14 inches wide, positioned 6 feet 8 inches above the ground level. Contact with this type of moving machine component can result in entanglement injuries to body parts involved. Persons normally shut down the machine prior to maintenance activity. The location of the unguarded tail pulley was in an obvious location and the owner is familiar with the guarding standard.

Ex. G-20.

LeGrand determined that the violation was unlikely to result in injury or illness, that injury or illness could reasonably be expected to result in permanent disability, that one person was affected, and that the operator's negligence was high. A civil penalty in the amount of \$100.00 was assessed for this violation.

The cone crusher conveyor was missing a guard on the bottom of the self-cleaning pulley. Tr. 206. The dimensions of the unguarded area were 28" x 14-15" and the belt was 30 inches wide. Tr. 207. This left approximately 1-1½ inches of the self-cleaning fins and edge of the tail pulley exposed on one side. Tr. 205-07; Ex. G-21. Additionally there was a pinch point area⁸ on the bottom side of the tail pulley where the conveyor belt wrapped around the back side. Tr. 208. The specified area was accompanied by a caution sticker next to the bearing of the tail pulley that read, "Caution, Pinch Point Area." Tr. 223; Ex. G-24.

The standard does not require guarding machine parts that are more than 7 feet, or 84 inches, away from walking or working surfaces. 30 C.F.R. § 56.14107(b). The height from the ground to the bottom of the conveyor belt, where the unguarded area and pinch-point were located, was 80 inches. Tr. 221; Ex. G-20. The belt was composed of three layers. Rutkowski testified that the top and bottom layers of the belt were 1/4 inch thick, and the middle layer was 3/16 inch thick. Tr. 225. He also stated that the last time the plant was operated, about three weeks prior to the investigation, there was a lot of "washing-in" of loose material, which reduced the height of the unguarded area to less than 84 inches. Tr. 227. Rutkowski estimated that 5-6 inches of material was washed in. Tr. 227.⁹ Additionally, he contended that no cleanup was done, and the plant was locked out. Tr. 226, 228. However, cleanup was always done before

⁸ A pinch point is "[a]n area where there's access where material comes together... and creates a point when it could draw anything into it, like clothing, hands, fingers." Tr. 207.

⁹ LeGrand was not made aware of any material being washed under the conveyor that would have decreased the height of the unguarded area. Tr. 215-16.

starting to run the plant, and the daily workplace examination records showed that Allied Stone was in production on July 19, 2010, two days prior to the inspection.¹⁰ Tr. 229; Ex. G-45.

LeGrand determined that one person was put at risk of injury because one person normally did the maintenance on the cone crusher. Tr. 209. He also determined that an injury was unlikely to result from the missing guard. Tr. 208; Ex. G-20. LeGrand marked the injury reasonably expected to be permanently disabling, which would occur if a miner's clothing was "wrapped" into the fin-type pulley. Tr. 210, 218. He had read about incidents where miners became entangled in a tail pulley. Tr. 211. However, the unguarded area of the pulley was 6 feet 8 inches above the nearest walking or working surface, and a miner would not contact the pulley if he tripped. Tr. 218. Additionally, there were no footprints underneath the pulley or the conveyor, and the machine was usually shut down before maintenance was performed. Tr. 209, 211, 217. Rutkowski reiterated that no maintenance was ever done when the plant was operating, and when it was operating, only a skid loader traveled in the area of the crusher. Tr. 226, 227. Maintenance consisted of the bearing being greased once every two months. Tr. 226.

Even if the belt was as thick as Rutkowski stated, the height from the walking or working surface to the unguarded pinch point would have been 80 11/16 inches, still less than 84 inches. Rutkowski's testimony regarding 5-6 inches of accumulation washing-in is unconvincing. Photographs depicting the ground around the crusher appear to show a smooth, firm, surface with tracks from a loader. Ex. G-2, G-6, G-21. As Petitioner argues in her brief, if a storm caused "washing in" and the plant had been locked out, tracks would likely not be visible. Sec'y Br. at 16.

Since there was an unguarded pinch point within 84 inches of a walking or working surface, I find that Respondent violated the standard. While the purpose of a guard is to protect a miner from inadvertent contact, here, a person would have had to reach up, move to the side of the exposure area, and reach further up in order to make contact with the rotating tail pulley. Tr. 226. I find that LeGrand's determination that an injury was "unlikely" was proper. I also agree that, if an injury were to occur, it could reasonably have been expected to be permanently disabling.

The negligence level was marked as high because LeGrand thought the missing guard was an open and obvious condition.¹¹ Tr. 211-12. He also stated that Rutkowski agreed with him that the condition was open and the area was not guarded. While it was clear that there was no

¹⁰ Matt Rutkowski, also an operator, told LeGrand that the plant was run the week before the inspection. Tr. 233-35.

¹¹ LeGrand mentioned seeing four bolt holes on the tail pulley that he believed were for a guard to cover the hole. Tr. 214. However, he never worked for an equipment manufacturer or assembled equipment. Tr. 224. There was no indication that anything was recently taken off the area, exposing the bolt holes on the pulley, or that there was an extra guard lying around. Tr. 224. Rutkowski maintained that no guard was provided by the factory. Tr. 226.

guard on the bottom of the pulley, it was far from clear that an obvious hazard existed. Therefore, I find that the negligence level should be reduced to “moderate.”

Citation No. 6499838

Citation No. 6499838 was issued at 9:55 a.m. on July 21, 2010, pursuant to section 104(a) of the Mine Act. It also alleges a violation of the guarding standard, which was described in the “Condition and Practice” section of the citation as follows:

There was no guard for the bottom side of the fin type tail pulley located on the side discharge conveyor on the Masaba screen unit. The opening on the bottom measured 42 inches long x 15 inches wide, positioned 74 inches above the ground. Contact with this type of moving machine component can result in entanglement injuries to the body parts involved. Due to location, the condition was not that obvious and no one knew the guarding was not provided on the bottom side of tail pulley.

Ex. G-26.

LeGrand determined that the violation was unlikely to result in an injury, that an injury could reasonably be expected to result in permanent disability, that one person was affected, and that the operator’s negligence was high. A civil penalty in the amount of \$100.00 was assessed for this violation.

A pinch point was not guarded on the bottom side of the self-cleaning tail pulley of the conveyor on the Mesaba screen unit. Tr. 240; Ex. G-27. Approximately 1-1.5 inches of the pulley’s metal fins were visible beyond the edges of the belt on each side of the pulley, creating an entanglement hazard. Tr. 242-43; Ex. G-28. The pinch point, where the belt engaged the bottom of the pulley, measured 74 inches to the ground directly beneath. Tr. 243.

LeGrand determined that one miner was at risk of injury because one person normally did the clean-up and maintenance on the conveyor. Tr. 243, 246. Also, a grease-line for the bearing on the left side of the guard on the tail pulley indicated that maintenance work was done around the unguarded area. Tr. 244; Ex. G-27. However, no one walked around or worked in the area when the conveyor was running, and the grease line was on the guard because the grease fitting could not be accessed when the guard was in place. Tr. 255-56.

LeGrand determined that a permanently disabling injury was the most serious injury that could reasonably be expected to occur due to the unguarded area. If a person got caught in the fin-type pulley, he could have been pulled in and experienced crushing injuries or broken bones. Tr. 245. A lesser injury of lost workdays or restricted duty was also considered possible. Tr. 245.

Rutkowski explained that the conveyor was reversible, and was run in the opposite direction for different products. Tr. 255. If the allegedly required guard was in place and the conveyor was reversed, the material would have had no where to go after being crushed. Therefore, reversing the conveyor would necessitate removing the guard. Tr. 253. Moreover, the cited area had never been guarded, no citations had been issued for this condition when the plant was previously inspected in 2008 and 2009, and Respondent was not aware that additional guarding was needed on the bottom of the pulley. Tr. 250, 255-57; Ex. R-10.

As discussed above in Citation No. 6499836, the purpose of a guard is to protect from inadvertent contact. Tr. 197. In addition, the standard requires a reasonable possibility of injury. Tr. 196, 282-83. In order to have contacted the limited exposed edge of the pulley, one would have had to reach up under the existing guard. The grease line had been extended so that the bearing could be greased without coming in close proximity to the pulley, and the height and location of the opening made inadvertent contact highly unlikely. I find that the unguarded area presented no reasonable possibility of injury and, therefore, was not a violation of the standard. Citation No. 6499838 will be vacated.

In the alternative, I find that Respondent did not have fair notice of the Secretary's new interpretation of the standard. As stated above, the language of the standard is ambiguous and very broad in order to incorporate a wide range of situations where guarding might be appropriate. The purpose of the standard is to protect against inadvertent contact with machine parts, and I found no reasonable possibility of injury. The plant was previously inspected by MSHA and no citations were issued. Considering that the cited area had never been guarded, and no citation was issued in past inspections, I find that a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would not have recognized the specific prohibition asserted here. Citation No. 6499838 will be vacated.

Citation No. 6499839

Citation No. 6499839 was issued at 10:23 a.m. on July 21, 2010, pursuant to section 104(a) of the Mine Act. It alleges a violation of 30 C.F.R. § 56.14108, which requires overhead drive belts to be "guarded to contain the whipping action of a broken belt if that action could be hazardous to persons." The violation was described in the "Condition and Practice" section of the citation as follows:

The double v-belt drive for the head pulley located on the Cedar Rapids 3656 conveyor was not provided with any type of guarding to prevent whipping action of a broken belt. The over all length of the v-belt measured 4 feet. The distance to the walkway directly beneath the v-belt measured 101 inches. If persons were on foot in the area, inadvertent breakage of the v-belt could expose them to high impact hazards associated with a whipping belt. Persons normally shut down unit

prior to any maintenance activity. The owner indicated not acknowledging the danger and not being familiar with this requirement.

Ex. G-30.

LeGrand determined that the violation was unlikely to result in injury or illness, that injury or illness could reasonably be expected to result in lost workdays or restricted duty, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$100.00 was assessed for this violation.

The double v-belt drive on the cone crusher conveyor did not have guarding to prevent whipping action in the event that a belt broke. Tr. 263-64; Ex. G-31. The unguarded drive is depicted in a photograph, along with a similar drive that was guarded. Ex. G-31. The belts were 4 feet long. Tr. 264. Only belt drives where a broken belt would present a hazard to persons require guarding. In this case, the distance from the v-belts to the walkway below was 100-101 inches. Tr. 269; Ex. G-32. Rutkowski contends that the v-belts were more than 101 inches away from the walkway, but he did not take a measurement. Tr. 289.

In a double v-belt, if one belt breaks and the other remains intact, it acts as a driving mechanism for the broken belt to whip around. Tr. 270. If it struck a person, it could cut him or cause other injury that could result in lost workdays or restricted duty. Tr. 270, 272. LeGrand heard of injuries caused by broken belts. He had also sustained an injury when he was hit in the shoulder by a whipping belt, suffering a cut that resulted in lost workdays. Tr. 273.

One person was at risk of injury because one person did the repair and maintenance on the crusher. Tr. 272-73. Additionally, a person could have been on the walkway below the belts, which LeGrand believed would be accessed when the belt was running. Tr. 271. Injury was unlikely because the crusher was normally shut down when any kind of activity was done around the plant, there were no operator controls in the area, and a person could not reach the belt when standing on the walkway. Tr. 274, 276. The belt was located in the center of the plant and a person was unable to stand directly beneath it. Tr. 288, 290; Ex. R-9. A photograph depicts machinery located directly underneath the v-belt. Ex. G-9. However, a person was able to stand next to that machinery.

Respondent's primary challenge to this citation is that the drive was farther away from the walkway, such that a broken belt would not have presented a hazard. Several distance measurements were presented in its post-hearing brief. However, the measurements were not introduced into evidence, and are not part of the record. LeGrand measured the distance from the drive to the walkway surface, Rutkowski did not. I find that LeGrand's measurements were accurate and that a broken v-belt could have inflicted injury on a person on the walkway. Therefore, I find that Respondent violated the mandatory safety standard in section 56.14108.

The negligence level was marked as moderate by LeGrand because John Rutkowski told him no one ever pointed out the condition, and he was not familiar with the particular guarding

standard. Tr. 274. LeGrand believed that the unguarded drive belt should have been obvious to him, particularly since a similar v-belt drive, a few feet away, was guarded. Tr. 275. I find that Respondent's negligence was moderate, and I agree with the gravity determinations made by LeGrand.

Citation No. 6499840

Citation No. 6499840 was issued at 10:45 a.m. on July 21, 2010, pursuant to section 104(a) of the Mine Act. It alleges a violation of 30 C.F.R. § 56.12004, which requires that electrical conductors that are exposed to damage be protected. The violation was described in the "Condition and Practice" section of the citation as follows:

There was a 480 volt cable which pulled out of its bushing connection and is exposing about 2 inches of inner color coded conductors to mechanical damage. The lack of protecting inner conductors can allow for contact with the metal frame, presenting shock hazards to persons in the area. Persons have not normally worked around the conveyor during use as part of normal mining operations. The condition was not located in an obvious place and the owner was familiar with the standard's requirement.

Ex. G-33.

LeGrand determined that the violation was unlikely to result in injury or illness, that injury or illness could reasonably be expected to result in lost workdays or restricted duty, that one person was affected, and that the operator's negligence was high. A civil penalty in the amount of \$100.00 was assessed for this violation.

Two inches of an electrical cable had been pulled out of a bushing on an electrical motor on the conveyor. Tr. 297, 300; Ex. G-37. The exposed two inches of inner conductors were located at the end of the cable at the very top of the conveyor. Ex. G-37. Exposure of the inner electrical conductors created a shock hazard because vibration could have resulted in wearing-through of the wire's insulation and shorting out to the metal junction box. Tr. 301. If this occurred, it could have caused the metal framework of the conveyor to become electrically energized. Tr. 301. However, the resulting voltage disruption would cause the power to be cut, assuming that the circuit protection setting was correct. Tr. 307.

The electrical conductors carried 480 volts, and if touched, could have caused burns resulting in lost workdays or restricted duty. Tr. 302. LeGrand's determination of potential injuries came from reading investigations on electrical hazard injuries. Tr. 303. One person was put at risk because one person worked around the plant. Additionally, an injury would have been unlikely to occur because no one would have been around the area when the plant was operating. Tr. 303-04.

Respondent's main argument against the citation is that the condition was not reflected on previous preoperational examinations, the plant was shut down at the time of the inspection, and the condition would have been discovered and fixed during the next workplace exam. However, the condition almost certainly existed when the plant had last been shut down, and the fact that it may have been discovered in a preoperational examination is not a defense under the Act's strict liability scheme.

I find that the condition violated the standard. I agree that an injury was unlikely and that any injury could have reasonably been expected to result in lost workdays or restricted duty.

LeGrand determined the level of negligence to be high because the condition was obvious. John Rutkowski indicated to LeGrand that the condition was obvious, such that it should be discovered and corrected during a workplace exam. Tr. 304. LeGrand was unable to determine how long the condition had existed. Tr. 306. Because it is uncertain whether the condition existed prior to the last preoperational workplace examination, I find that the negligence level should be reduced to "moderate."

Citation No. 6499842

Citation No. 6499842 was issued at 12:15 p.m. on July 21, 2010, pursuant to section 104(a) of the Mine Act. It alleges a violation of 30 C.F.R. § 46.3(a), which requires an operator to develop an approved, written plan that includes a list of the persons and/or organizations who will provide the training. The violation was described in the "Condition and Practice" section of the citation as follows:

There was an organization identified as NICC indicated as the competent person who conducted the company's annual refresher training in 2012 on the 5000-23 training form, however the company's part 46 training plan competent persons list did not indicate this provider.

Ex. G-38.

LeGrand determined, in regards to the violation, that there was no likelihood that injury would occur, that an injury could reasonably be expected to result in no lost workdays, that it did not affect any persons, and that the operator's negligence was moderate. A civil penalty in the amount of \$100.00 was assessed for this violation.

At the hearing, Allied Stone stipulated to the violation and all determinations made by LeGrand, except for the degree of negligence. Tr. 309. A training certificate reviewed by LeGrand reflected that Linda Moyna provided refresher training to Jeff Rutkowski on March 30, 2010. Tr. 310-11; Ex. G-40. A photograph of the certificate shows the name "Linda Moyna" as the competent person who provided the training. Ex. G-40. However, her name was not listed as a competent person in the training plan. Tr. 310, 312; Ex. G-39. LeGrand determined the negligence level to be moderate because Respondent was not aware that Moyna's name was not in the training plan, a fact

that Respondent should have known. Tr. 312-13. It was established that Moyna was from a nearby community college and that the name of the college could have been listed, which would have covered different trainers from the college. Tr. 314-15.

The standard clearly requires that a person or entity that provides training be listed in the plan. Respondent should have known that neither Moyna nor the community college was listed on the plan. Therefore, I find that there was a violation of section 46.3(a), and I agree with the gravity and negligence as assessed.

The Appropriate Civil Penalties

As the Commission recently reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC ___ (Aug. 7, 2012) (slip op. at 4-5):

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, 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).

Under this clear statutory language, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 (“[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.”). While there is no presumption of validity given to the Secretary’s proposed assessments, we have 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*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (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. In addition to considering the statutory criteria, the judge must also set forth a discernible path that allows the Commission to perform

its review function. *See, e.g., Martin Co. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

Good Faith - Operator Size - Ability to Continue in Business

The parties stipulated that Allied Stone demonstrated good faith in abating the violations and that the proposed penalties would not affect its ability to remain in business. Stipulated Facts. The parties did not stipulate to the size of Allied Stone as an operator. However, forms reflecting calculations of penalty assessments, filed with the petitions, indicate that Allied Stone is a small operator, and I so find.

History of Violations

Allied Stone's history of violations is reflected in a report generated from MSHA's database, typically referred to as an "R-17." Ex. G-41. The report reflects that no violations became final between April 21, 2009 and July 20, 2010. The assessment forms for the seven litigated violations reflect that no points were added for overall violation history or for repeat violations. I find that Allied Stone's overall history of violations, as relevant to these violations, was low, and should be considered a mitigating factor in the penalty assessment process.

Citation No. 6499835 is affirmed as a violation. However, the violation was found to be unlikely to result in injury, any injury was reasonably expected to result in lost workdays or restricted duty, and it was not S&S. A civil penalty in the amount of \$243.00 was proposed for this violation. A penalty calculated pursuant to Secretary's Part 100 regulations for the citation, as modified, would have resulted in an assessment in the range of \$112.00. Considering the factors itemized in section 110(i), I impose a penalty of \$100.00 for this violation.

Citation No. 6499837 is affirmed as a violation. However, Allied Stone's negligence was found to be moderate rather than high. A civil penalty in the amount of \$100.00 was proposed for this violation. Considering the factors itemized in section 110(i), I impose a penalty of \$75.00.

Citation No. 6499839 is affirmed as a violation in all respects. A regularly assessed penalty in the amount of \$100.00 was proposed for this violation. Considering the factors itemized in section 110(i), I impose a penalty of \$100.00.

Citation No. 6499840 is affirmed as a violation. However, Allied Stone's negligence was found to be moderate rather than high. A civil penalty in the amount of \$100.00 was proposed for this violation. Considering the factors itemized in section 110(i), I impose a penalty of \$75.00.

Citation No. 6499842 is affirmed as a violation in all respects. A regularly assessed penalty in the amount of \$100.00 was proposed for this violation. Considering the factors itemized in section 110(i), I impose a penalty of \$100.00.

THE SETTLEMENT

As announced at the commencement of the hearing, the parties agreed to settle Citation Nos. 6499834 and 6499833. The total of the penalties assessed for those violations is \$200.00 and the proposed penalties for settlement total \$200.00. The bases for the compromises were disclosed at the hearing. I have considered the representations and evidence submitted and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly the settlement will be approved and Respondent will be ordered to pay civil penalties in the amount of \$200.00 for the settled citations.

ORDER

Upon consideration of the above, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay penalties in the amount of \$200.00 for the settled violations.

Citation Nos. 6499836 and 6499838 are **VACATED**. Citation Nos. 6499839 and 6499842 are **AFFIRMED**. Citation Nos. 6499835, 6499837, and 6499840 are **AFFIRMED, as modified**. Respondent, Allied Stone, LLC, is ordered to pay civil penalties in the amount of \$450.00 for the litigated violations.

Civil penalties in the total amount of \$650.00 shall be paid within 45 days.¹²

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

Distribution (Certified Mail):

Pamela F. Mucklow, Trial Attorney, U.S. Department of Labor, Office of the Solicitor, 1999
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John Rutkowski, Allied Stone, LLC, 850 Wilson St., Fennimore, WI 53809

¹² 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

721 19TH STREET, SUITE 443
DENVER, CO 80202-2536
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January 8, 2013

SIERRA ROCK PRODUCTS, INC.,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. WEST 2010-1390-RM
v.	:	Order No. 8561259; 05/19/2010
	:	
	:	Docket No. WEST 2010-1391-RM
SECRETARY OF LABOR,	:	Order No. 8561267; 05/27/2010
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Sierra Rock Products
Respondent.	:	Mine ID 04-03489
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2010-1589-M
Petitioner,	:	A.C. No. 04-03489-224728
	:	
	:	Docket No. WEST 2011-315-M
	:	A.C. No. 04-03489-237108-01
	:	
v.	:	Docket No. WEST 2011-316-M
	:	A.C. No. 04-03489-237108-02
	:	
	:	Docket No. WEST 2011-747-M
	:	A.C. No. 04-03489-247239
SIERRA ROCK PRODUCTS, INC.,	:	
Respondent.	:	Docket No. WEST 2011-1029-M
	:	A.C. No. 04-03489-253672
	:	
	:	Sierra Rock Products

Appearances: Cheryl L. Adams, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for the Secretary;
Kristin R. B. White, Esq., Jackson Kelly PLLC, Denver, Colorado, for Sierra Rock Products.

Before: Judge Manning

DECISION

These cases are before me upon notices of contest and petitions for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Sierra Rock Products, Inc. (“Sierra Rock” or “Respondent”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.

§801 et seq. (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Sacramento, California. In lieu of filing post-hearing briefs, the parties presented oral argument at the hearing and filed statements of authority. The cases involve five orders and three citations issued in May 2010 at its quarry and crusher in Tuolumne County, California.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Electrical Citations and Orders

1. Background and Summary of the Evidence.

On May 18, 2010, MSHA Inspector William Edminister entered the property of Sierra Rock to inspect the premises. (Tr. 43). At that time, he had been an MSHA inspector for almost 4 years. (Tr. 19). Inspector Edminister had previously inspected Sierra Rock in November 2009 and issued several citations during that inspection. (Tr. 28). Sierra Rock is owned by Jim Hatler, and his son, Barry, is the mine foreman.

During the May 18 inspection, Inspector Edminister observed a large, metal electrical panel that housed breakers. (Ex. G-1 at 12; Ex. R-5).¹ The Inspector saw an electrical panel with switches on his previous inspection and he assumed that these switches on the door were designed to deenergize the electrical components on the inside of the panel before opening the door. (Tr. 32-36). Upon further inspection, Inspector Edminister learned that the switch did not deenergize the components on the inside of the panel. (Tr. 36). Barry Hatler demonstrated that, when he or his father needed to shut off the power inside the panel, one of the two men would open the panel door, reach inside the panel while some of the parts were still electrified, and throw the breaker switches which are about 6 inches away from the exposed electrified components. (Tr. 36, 39). Barry Hatler informed Inspector Edminister that no protective equipment was used during this deenergizing procedure. (Tr. 46).

The condition of the electrical panel and the operator’s procedure for deenergizing it led Inspector Edminister to issue Citation No. 8561252. (Ex. G-1). This citation, issued under section 104(d)(1) of the Mine Act, alleged that Sierra Rock violated 30 C.F.R. § 56.12040² because electrical components inside an electrical panel that was located outside were not “guarded or protected by location when needing to rack out³ the breakers for the system.” The breaker for the #1 and #2 conveyors was located inside the panel where Barry or Jim Hatler would open the panel door to access the breaker, exposing them to a hazard of inadvertently

¹ The Secretary presented a separate exhibit for each citation and order and the page number refers to the Bates number on the bottom of each page.

² The safety standard provides that “[o]perating controls shall be installed so that they can be operated without danger of contact with energized conductors.”

³ Throughout the hearing, the parties used the term “rack out” to refer to switching a breaker to open a circuit so that electricity would no longer flow beyond that breaker. (Tr. 68-69).

contacting live 480-volt electrical connections. The breaker switch was about 6 inches from the nearest energized connector.

Inspector Edminister concluded that the condition was reasonably likely to cause an injury due to the close proximity of the breaker switch to electrified components. (Tr. 40). The Inspector also testified that nothing secured the hinged panel door once it was opened and that it could swing closed in windy conditions and bump the person trying to flip the breaker. *Id.* He determined that the violation was significant and substantial (“S&S”) because the cited condition was reasonably likely to result in a serious injury. (Tr. 43). Addressing the citation’s high negligence designation, Inspector Edminister testified that Sierra Rock was aware of the obvious hazard for a long period of time but failed to do anything to correct the condition. (Tr. 42).

Inspector Edminister returned to Sierra Rock on May 19, 2010, and inspected an indoor electrical panel. (Tr. 46). This second electrical panel had the same setup as the panel cited the previous day and Inspector Edminister informed Jim Hatler that this panel violated the same safety standard. *Id.* Hatler told the inspector that this panel was cited 10 to 15 years earlier for a different condition, but when Respondent abated the violation the MSHA inspector accepted the configuration of the panel when he terminated that citation; it has been in the same condition ever since. *Id.* Inspector Edminister consulted with his district office and determined that regardless of previous citations, a new citation should be issued because the current condition violated the standard. (Tr. 47-48).

Later that day, Inspector Edminister informed Jim Hatler that he would issue a citation regarding the second panel and asked Hatler to deenergize the panel for documentation purposes. (Tr. 49-50). The inspector testified that as they approached the second panel, he reminded Hatler that the panel should be deenergized before he opened the door to the breaker panel. (Tr. 50). Inspector Edminister testified that Jim Hatler became angry, aggressively reached inside the panel, and flipped the breaker switches without deenergizing the panel. (Tr. 50-51). The inspector estimated that the breaker switch that Hatler flipped was about 12 inches away from the electrified components. (Tr. 56; Ex. G-4 at 50-51, 53). The inspector also testified that the door to the breaker panel did not open completely due to an obstruction and he concluded that the door could swing closed if opened in an aggressive manner. (Tr. 62; Ex. G-4 at 52). He explained that within the same small room containing the electrical panel there was a main power switch. Throwing that switch would shut down the power, allowing Hatler to access the electrical panel safely. (Tr. 71). Jim Hatler’s actions and the setup of this electric panel led the inspector to issue Imminent Danger Order No. 8561259 and Order Nos. 8561260 and 8561261.

In Imminent Danger Order No. 8561259, Inspector Edminister stated that he advised Jim Hatler to open the main breaker to deenergize the circuits inside of the panel before he flipped the individual breakers. (Ex. G-3). Hatler ignored his advice, aggressively opened the panel door, and reached into the panel to open three breakers. “Jim demonstrated no regard for his own safety and was wearing no protective equipment/clothing.” *Id.*

Inspector Edminister issued Order No. 8561260, alleging a violation of 30 C.F.R. § 56.12017, because Jim Hatler did not deenergize the components inside the panel before

reaching into it. (Tr. 54-55; Ex. G-4).⁴ The inspector testified that he thought that an injury was highly likely due to Hatler's fast and aggressive manner of reaching into the panel. (Tr. 51, 55). Inspector Edminister indicated that contacting 480 volts would cause a fatal injury. (Tr. 56-57). He explained that the violation was the result of Sierra Rock's reckless disregard because Hatler reached into the electrified panel immediately after Inspector Edminister reminded him to first deenergize the panel. (Tr. 58). Inspector Edminister stated that MSHA applies a heightened standard for a failure to deenergize power circuits because such violations are frequently cited as the cause of fatalities in mines. *Id.* Inspector Edminister also testified that the condition was S&S. *Id.* He stated that Jim Hatler's actions represented an unwarrantable failure because Hatler had a responsibility to ensure compliance at his mine and to set an example for other miners. (Tr. 59).

The inspector issued Order No. 8561261, alleging a violation of 30 C.F.R. § 56.12040 for the same reason that he issued Citation No. 8561252. Inspector Edminister concluded that injury was reasonably likely due to the close proximity of the breakers to energized electrical components. He was especially concerned because the panel door did not fully open. (Tr. 67). The inspector stated that the level of negligence was high because the operator was aware of the condition but took no corrective action. During cross-examination, Inspector Edminister clarified that the operating controls were not far enough away from the energized components to be "guarded by location." (Tr. 98). The inspector considered both electrical panels at issue to be "operating controls." (Tr. 72).

Jim Hatler has been the owner/operator of Sierra Rock "since around 2001." (Tr. 155). Hatler has worked for this mine in some capacity since 1981. Prior to 2001, Hatler's father and uncles operated the mine. (Tr. 157).

Jim Hatler testified that the two electrical panels were in the same condition for over ten years and that other inspectors, including John Perez, had examined the panels and found no problems. (Tr. 157-59). Hatler explained that he asked Inspector Edminister to look at the second panel to show the inspector that his procedures were safe and legal. (Tr. 167). Jim Hatler testified that he did not oppose correcting the condition, but enforcement actions were unwarranted because the panels were in the same condition during multiple inspections over a long period of time. (Tr. 170).

With respect to Imminent Danger Order No. 8561259, Jim Hatler admitted that he refused to power-down the electrical panel before reaching inside to flip the breakers; Hatler also stated that he was angry with Inspector Edminister at the time. (Tr. 170-71). During cross-examination, Hatler admitted that the mine's deenergizing procedure created a minor risk. (Tr. 186).

MSHA Inspector John Perez, who is now a Conference and Litigation Representative, testified that he inspected Sierra Rock in 1999, but that he had no memory of approving the layout of the mine's electrical panels. (Tr. 220, 223). Perez testified that a violation occurs

⁴ Section 56.12017 provides, in part, that "[p]ower circuits shall be deenergized before work is done on such circuits unless hot-line tools are used."

when a miner opens a panel box and operates the switches within while the box is still energized. (Tr. 232).

2. Summary of the Parties' Arguments

With respect to Citation No. 8561252 and Order No. 8561261, the Secretary cites three cases involving circuit breakers in close proximity to energized conductors. In all three cases the judge found that the setup of the electrical panels represented a violation of 30 C.F.R. § 56.12040. *TXI Port Costa Plant*, 22 FMSHRC 1305, 1313 (Nov. 2000) (ALJ); *Nelson Quarries Inc.*, 30 FMSHRC 254, 310 (Apr. 2008) (ALJ); *Moltan Company*, 12 FMSHRC 149, 151 (Jan. 1990) (ALJ).

Sierra Rock denied the Secretary's contention that 6 or 12 inches was not far enough to separate the breaker switches and electrified components. (Tr. 247). Sierra Rock argues that 30 C.F.R. § 56.12040 does not indicate how far the operating controls must be from electrified components. It contends that it was simply Inspector Edminister's personal opinion that this distance was insufficient. (Tr. 247-48).

With respect to Order No. 8561260, the Secretary cites *Mountain Cement Company*, in which a miner was electrocuted while retrieving tools near an electrified component. The operator in that case argued that section 56.12017 did not apply because the miner was not doing work on the circuits that killed him. 15 FMSHRC 1418, 1426 (July 1993) (ALJ). The judge held that a violation of the standard exists once "a situation of close proximity exists[.]" *Id.* The argument that no "work" was actually being done at that time did not persuade the judge. *Id.*

Sierra Rock points out that section 56.12017 provides that "power circuits shall be deenergized before work is done on such circuits." Sierra Rock contends that there was no violation of the standard because even though Hatler failed to deenergize the electrical panel before reaching in, he was not performing "work" upon the panel. (Tr. 252-53). Sierra Rock argues that Hatler was simply demonstrating the mine's normal lockout procedure for the inspector and this act was not "work." *Id.*

a. Significant and substantial

The Secretary argues that the violations were S&S because injury was reasonably likely to occur. The Secretary compares Sierra Rock's electrical panels to those in the *Moltan* case, in which the judge held that the violation was S&S because an injury was reasonably likely. 12 FMSHRC at 151. The Secretary alleged that an injury was reasonably likely because the breaker switches had to be accessed about 3 times each week, the switches were only 6 or 12 inches away from electrified components, and no protective equipment was used. (Tr. 235).

Sierra Rock argues that this practice was not reasonably likely to cause injury because the electrical components immediately around the breaker were covered. (Tr. 249). Also, Jim and Barry Hatler were aware of the presence of live components in the panels and an injury was not reasonably likely because they were the only people who opened the panels. *Id.*

b. Fair Notice, Unwarrantable Failure and Negligence

The Secretary argues that this citation should be upheld as an unwarrantable failure because mine management showed a high degree of negligence. Mine management was aware of the dangerous activity and allowed it to continue. (Tr. 235-36). The Secretary again cites *TXI Port Costa Plant*, in which the judge found the violation to be an unwarrantable failure because the mine management was aware that miners were opening the electrical panel and exposing themselves to live wires; the operator's argument that its level of negligence was low because the condition had existed for 10 years without any previous MSHA citations did not persuade the judge. 22 FMSHRC at 1315.

With respect to Order No. 8561260, the Secretary maintains that the level of negligence was reckless disregard because Hatler showed no regard for his own safety or the safety of Inspector Edminister. Hatler demonstrated a high level of negligence by engaging in this behavior immediately after Inspector Edminister reminded him to power down the panel. (Tr. 236-38).

Sierra Rock argues that the violation was not an unwarrantable failure because the operator was unaware that the electrical panel setup constituted a violation. (Tr. 250). It argues that in order for a violation to be considered an unwarrantable failure, the operator must engage in aggravated conduct. *Id.* Sierra Rock contends that it had no knowledge that the electrical panels were in violation and the operator was not on notice that greater efforts were necessary to comply with the standard. (Tr. 250).

With respect to Order No. 8561260, Sierra Rock also maintains that the Secretary did not establish that the alleged violation was a result of its aggravated conduct. (Tr. 253-54). Hatler demonstrated the procedure for Inspector Edminister because Hatler believed that his actions did not violate section 56.12017. Sierra Rock contends that Hatler did not open the panel in an aggressive manner. *Id.* Sierra Rock argues that a reasonably prudent person in the mining industry would have assumed that the electrical panels were in compliance because the panels were not cited during previous inspections. (Sierra Rock's Br. at 2).

Sierra Rock attempts to distinguish the present case from *Nelson*, in which the operator unsuccessfully tried to argue that the mine lacked notice of the standard because the problem was never cited in previous inspections. (Sierra Rock's Br. at 3; 30 FMSHRC at 295). As opposed to *Nelson*, Sierra Rock argues John Perez, a qualified electrical inspector, inspected their mine numerous times but never cited that particular condition as a violation. *See* Sierra Rock's Br. at 3.

The Secretary argues that Sierra Rock had notice of the standard because the Secretary consistently interpreted that electrical panels violate the standard if they expose a miner to live wires. *Walker Stone Co., Inc.*, 156 F.3d 1076, 1084 (10th Cir. 1998) (holding that a mine owner should be on notice of a standard if there is a long history of the Secretary issuing citations for similar violations and the Commission has upheld such citations). The Secretary also argues that even if a government agency inconsistently enforces a regulation, the agency is not estopped

from future enforcement unless the agency demonstrates affirmative misconduct. *United States v. McCorkle*, 321 F.3d 1292, 1297 (11th Cir. 2003).

3. Discussion and Analysis.

I find that the Secretary established a violation of section 56.12040 in Citation No. 8561252. The breaker switch inside the electrical panel was an operating control. The operating control inside the subject panel was located 6 inches from live electrical parts. The photographs show that a “switch” on the outside of the panel door was not attached to anything. (Ex. G-1 at 8, 11). To abate the condition, Sierra Rock installed a new control device on the outside of the panel and labeled it “480 Volts.” (Ex. G-1 at 14). At the time the inspector issued the citation, the primary disconnect switch for Conveyors #1 and #2 was inside the panel near energized parts. (Ex. G-1 at 11). This condition clearly violated the safety standard.

I also find that this violation was S&S. An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S, “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). 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 *Mathies* criteria).

The third element is established if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)).

It is clear that Sierra Rock violated a safety standard that created a discrete safety hazard. I also find that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury. Although both Jim and Barry Hatler were aware of the live connections inside the box and carefully avoided touching these parts, unpredictable events occur. The wind could blow the door against the operator’s hand, something could distract him, or he could be unusually tired and inattentive. “Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions.” *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). Assuming continued mining operations, it was highly likely that someone would be seriously injured or even killed by accidentally contacting a live connection when throwing the switch inside the electrical panel. Consequently, I am modifying the gravity of the violation in section 10A of the citation from reasonably likely to highly likely.

Inspector Edminister determined that the violation was the result of Sierra Rock's high negligence and its unwarrantable failure to comply with the safety standard. 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 at 136. Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See e.g. 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).

In *Mainline Rock and Ballast*, the Tenth Circuit Court of Appeals ruled that "MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator," and that "regulations provide adequate notice of the regulated conduct, and thus satisfy due process requirements, 'so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require.'" *Mainline Rock and Ballast, Inc.*, 693 F.3d 1181, 1187 (10th Cir. 2012) (quoting *Walker Stone Co.*, 156 F.3d 1076, 1083-84 (10th Cir. 1991)).⁵

I find that the safety standard provided fair notice of its requirements, but a lack of previous enforcement must be considered when analyzing the negligence of an operator. The violation existed for a considerable length of time. Sierra Rock had not been put on notice that greater efforts were necessary for compliance. The violation posed a high degree of danger and it was obvious to a trained electrician. Taking into consideration all these factors, I find that Sierra Rock did not demonstrate aggravated conduct. Jim and Barry Hatler were certainly negligent when they endangered themselves by turning the belts off and on in the manner cited, but they believed that, by being careful, they were acting in a safe manner that did not violate any MSHA safety standards. The live connectors were at the bottom of the panel, while the breaker was at the top. The fact that several MSHA inspectors examined the electrical panel during previous inspections and did not issue a citation or even comment on the condition helped lull Sierra Rock into believing that its procedures were safe and legal. I find that Sierra Rock's

⁵ "To make out a claim of estoppel against the Government, a party must adduce evidence of the following: (1) words, conduct, or acquiescence that induces reliance; (2) willfulness or negligence with regard to the acts, conduct, or acquiescence; (3) detrimental reliance; and (4) affirmative misconduct by the Government." *See Tefel v. Reno*, 180 F.3d 1286, 1302-04 (11th Cir. 1999). Affirmative misconduct requires more than governmental negligence or inaction; otherwise, prong two and prong four would be redundant. *See United States v. McCorkle*, 321 F.3d 1292, 1297 (11th Cir. 2003).

negligence was moderate with respect to this violation and I vacate the unwarrantable failure designation. I also modify Citation No. 8561252 to a section 104(a) citation. The Secretary proposed a penalty of \$12,900.00. I find that a penalty of \$6,000.00 is appropriate for this violation given the high degree of danger posed.

In Order No. 8561261, Inspector Edminister alleged an identical violation for the electrical panel controlling the stacker/bypass conveyor. This panel was located inside a building, but the door to the panel did not open completely, which made access more difficult. (Ex. G-9 at 69). In this instance, the live components were 12 inches from the breaker switch.

For the same reasons discussed above, I find that the Secretary established an S&S violation of section 56.12040. I find that an injury was highly likely and that Sierra Rock's negligence was moderate. I vacate the inspector's unwarrantable failure determination. Order No. 8561261 is modified to a section 104(a) citation with moderate negligence and a high degree of gravity. The Secretary proposed a penalty of \$13,600.00 for this violation. A penalty of \$6,000.00 is appropriate.

The inspector also issued Order No. 8561260 at the electrical panel controlling the stacker/bypass conveyor. Jim Hatler, in the inspector's presence, opened the electrical panel without first deenergizing the power within the panel and flipped the two breaker switches to open the circuits to the conveyors. Inspector Edminister specifically asked Hatler to deenergize the panel at the main breaker before he opened the panel door. In anger, Hatler refused to do so and reached into the panel with his bare hand at least two times to shut down the stacker and the bypass conveyor.⁶ Live components were about 12 inches below these breakers in the panel.

This order alleges a violation of section 56.12017, which requires that power circuits be deenergized and locked out before "work is done on such circuits." The first issue is whether this order duplicates Order No. 8561260. The fact that two citations may be abated with the same actions is not the focus of the Commission's analysis in determining if citations are duplicative. *See Spartan Mining Company, Inc.*, 30 FMSHRC 699, 718 (Aug. 2008). The Commission has held that citations are not duplicative if "the standards involved impose separate and distinct duties" upon an operator. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003 (June 1997) (citing *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993)). I hold that the requirement to deenergize and lock out an electrical circuit before work is performed on that circuit is separate and distinct from the requirement to locate operating controls so that there is no danger of contacting energized conductors. Consequently, the two orders are not duplicative.

Sierra Rock maintains that it did not violate the lockout tag out provision because the procedure was to put a lock on the panel door once the two breakers were switched to deenergize the two circuits. Thus, no work was performed on either circuit until the circuits were deenergized and the panel door was locked. It argues that the act of deenergizing the circuits by throwing the breakers was not "work" as that term is used in the safety standard.

⁶ The stacker and the bypass conveyor each have their own breaker within the electrical panel.

For the reasons set forth below, I find that, under the facts of this case, using the circuit breakers inside the electrical panel to de-energize the circuits for the stacker and bypass conveyor circuits amounted to “work done on such circuits.” Using the breakers to open the circuits controlling the stacker and bypass conveyor was the first step in starting work. That first step constituted work on the circuits, even if the circuits were opened and locked out to shut down the stacker or the conveyor for mechanical maintenance. Barry and Jim Hatler were exposed to a hazardous condition while performing the work of opening the circuits.

For the reasons discussed above, the violation is S&S and an injury was highly likely considering continued normal mining operations. For the same reasons as discussed above, Sierra Rock’s negligence was moderate and the violation was not the result of its aggravated conduct. Order No. 8561260 is modified to a section 104(a) citation with moderate negligence and a high degree of gravity. Given the above, the small size of Sierra Rock, and Sierra Rock’s history of previous violations, I find that the Secretary’s proposed penalty of \$52,600.00 is too high. A penalty of \$6,000.00 is appropriate.

Order No. 8561259 was issued under section 107(a) of the Mine Act. The order alleges that when Jim Hatler “aggressively opened the [panel] door, reached into the panel to rack out another breaker located inside that disconnects the power to the ‘Stacker,’ [and] reached in a second and third time to rack out the other breaker which provides power to the ‘Bypass Conveyor,’ ” he “demonstrated no regard for his own safety. . . .” (Ex. G-3 at 30). The order goes on to state that an “oral 107a imminent danger order was issued to Barry Hatler, at 1416 hours on this date due to the unique circumstances that had taken place.” *Id.*

Section 3(j) of the Act defines “imminent danger” as the “existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.” “Imminent danger orders permit an inspector to remove miners immediately from a dangerous situation, without affording the operator the right of prior review, even where the mine operator did not create the danger and where the danger does not violate the Act or the Secretary’s regulations. This is an extraordinary power that is available only when the ‘seriousness of the situation demands such immediate action.’ ” *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991) (quoting from the legislative history of the Federal Coal Mine Health and Safety Act of 1969, the predecessor to the 1977 Act).

An imminent danger exists “when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.” *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989)). While the concept of imminent danger is not limited to hazards that pose an immediate danger, “an inspector must ‘find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.’ ” *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555 (Aug. 2006). Inspectors must determine whether a hazard presents an imminent danger without delay, and an imminent danger determination must be supported “unless there is evidence that [the inspector] had abused his discretion or authority.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC at 2164.

While an inspector has considerable discretion in determining whether an imminent danger exists, that discretion is not without limits. Under the circumstances, an inspector must make a reasonable investigation of the facts and must make his determination on the basis of the facts known or reasonably available to him. As the Commission explained in *Island Creek Coal Co.*:

While the crucial question in imminent danger cases is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector's subjective "perception" that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving [her] case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he believes to be hazardous, the reasonableness of an inspector's imminent danger finding is subject to subsequent examination at the evidentiary hearing.

15 FMSHRC 339, 346-47 (Mar. 1993). An inspector "abuses his discretion . . . when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners." *Utah, Power & Light Co.*, 13 FMSHRC at 1622-23.

I find that Inspector Edminister did not abuse his discretion when he issued the imminent danger order. Jim Hatler was directly in front of the open electrical panel and he was angry. He had just flipped the breakers to disconnect the power to the stacker and the bypass conveyor while the conductors at the bottom of the panel were electrified. Given Hatler's agitated state, it was not unforeseeable that he would flip the switches back on again to show the inspector how it was done. Such an action would have exposed Hatler to electric shock hazards. It was therefore reasonable for the inspector to remove Jim Hatler from the area to get him away from the open, energized electrical panel. Inspector Edminister's decision to issue an oral imminent danger order was eminently reasonable. The written order simply memorializes his oral order. Inspectors usually prepare written imminent danger orders after the miners are removed from the hazard. Order No. 8561259 is **AFFIRMED**.

B. Other Citations and Orders

1. Background and Summary of the Evidence

On May 27, 2010, Inspector Edminister returned to Sierra Rock Products for further inspection. (Ex. G-80). As Inspector Edminister arrived at the mine site, he observed a miner standing on top of a shaker screen without fall protection. (Tr. 102-03; Ex. G-7, at 82). The inspector testified that if the miner fell, the distance of the fall would have been as little as 4 feet or as great as 17 feet, depending upon the location of the fall. (Tr. 104-07; Ex. G-7, at 82-84). Inspector Edminister talked to Barry Hatler and informed him that the condition created an

imminent danger, that an order would be issued (Order No. 8561267), and that the miner needed to come down from the screen. (Tr. 121; Ex. G-7).

Inspector Edminister also issued Citation No. 8561268 because the miner had no fall protection. (Tr. 105; Ex. G-8). The citation alleged a violation of section 56.15005⁷ and alleged that the miner was “grinding the edges of the guards just installed on the #3 Shaker Screen Feed Belt while standing on the top of the #3 Shaker screen.” (Ex. G-8). Inspector Edminister testified that an injury was highly likely as a result of this condition because the miner’s vision was obstructed by his welding face mask, the miner was close to the edge of the shaker, there was an electrical cord curled up near the miner’s feet which he could have tripped over, and the miner used an unsafe method of entering and exiting the screen. (Tr. 109). The inspector concluded that the potential injury could reasonably be expected to be fatal; he indicated that a 17-foot fall could cause a severe head injury or internal bleeding. (Tr. 110). Inspector Edminister determined that the operator was only moderately negligent because the operator had no knowledge that the miner was in an unsafe location and there was a fall protection harness hanging on the wall near this location. (Tr. 110-11).

In conjunction with the fall protection citation, Inspector Edminister also issued Citation No. 8561269 for unsafe access. (Tr. 112; Ex. G-9). After seeing the miner on top of the shaker screen, Inspector Edminister asked the miner to demonstrate how he accessed that area. (Tr. 112-13). The miner showed the inspector that he climbed onto the screen using the screen mount and mid-rail of the shaker as steps. (Tr. 113-14). The citation alleges a violation of section 56.11001⁸ because the “miner was not provided with safe access . . . while accessing the #3 Shaker Screen to perform maintenance on the screen feed head pulley guard that has just been installed.” (Ex. G-9). Inspector Edminister testified that at this entry location, the miner was only a foot or two away from edge of the shaker where there is a 17-foot fall. (Tr. 114; Ex. G-9, at 104, 106). The inspector concluded that this entry point location made injury highly likely. (Tr. 115). Like the previous citation, Inspector Edminister testified that injury from a 17-foot fall could reasonably be expected to be fatal and the level of negligence was moderate because the operator was unaware of the miner’s presence on the screen. (Tr. 116-17).

Jim Hatler testified that there were no normal everyday work tasks which would require a miner to be up atop the shaker screen. (Tr. 196). Hatler testified that the method of entry used by the miner would be safer than using a ladder. (Tr. 198). Hatler explained that the side of the shaker is only 4 feet from the shaker platform, there are 2 steps, good hand holds, and ladders are not easy to secure. *Id.*

In November 2009, Inspector Edminister was inspecting Sierra Rock when Barry and Jim Hatler asked him to look at some newly installed machinery to ensure that the area complied with the Act. (Tr. 131-32). Inspector Edminister pointed out a gap next to the walkway which

⁷ Section 56.15005 provides, in part, that “[s]afety belts and lines shall be worn when persons work where there is a danger of falling. . . .”

⁸ The safety standard provides that “[s]afe means of access shall be provided and maintained to all working places.”

was about 8 to 12 inches wide and about 10 feet long and he advised them to close the gap. (Tr. 133; Ex. G-2, at 26, 27). He did not issue a citation regarding this condition in November 2009 because there was no power hooked up to the area and it did not appear to be in use. (Tr. 132-33).

When Inspector Edminister returned to the mine on May 19, 2010, he discovered that this gap near the walkway remained in the same condition. (Tr. 133). Inspector Edminister issued Order No. 8561257 under section 104(d)(1) of the Mine Act, concluding that an injury was reasonably likely because miners needed to access that area once a day or every other day and there were no signs to warn miners of the hazard. (Tr. 134-35; Tr. 142). The order alleges a violation of section 56.11012⁹ and states that the #3 Shaker platform had “an opening on the right hand side along the shaker screen’s left side platform.” (Ex. G-2). Inspector Edminister testified that this gap could cause strain or sprain type injuries, leading to lost workdays or restricted duty for an injured miner. (Tr. 136). Inspector Edminister concluded that the level of negligence was high because the mine operator was aware of the condition for at least 6 months but took no corrective action. *Id.*

A month or two prior to May 19, 2010, mine management noted in an internal workplace exam form that this condition needed to be fixed. (Tr. 141-42; Ex. G-6 at 79). Inspector Edminister issued Citation No. 8561264 because Respondent did not correct this known hazard in a timely manner. (Tr. 140-41). This citation alleges a violation of section 56.14100(b)¹⁰ and states that “safety defects noted on the mine operator’s workplace examination [record] from 5/01/2010 [were] not corrected in a timely manner.” This citation addressed two conditions that Respondent did not fix in a timely manner: the gap near the walkway and moving machine parts that were not properly guarded. Since this citation included the issue of moving machine parts, Inspector Edminister indicated that a potential injury could reasonably expected to be permanently disabling. (Tr. 143). The inspector concluded that injury was reasonably likely because miners needed to access the area daily. (Tr. 142). Inspector Edminister testified that the operator was moderately negligent because the operator documented the problem in an internal workplace exam form, but failed to correct the problem in a timely manner. (Tr. 144).

2. Discussion and Analysis with the Parties’ Arguments

a. Citation No. 8561268 - Fall Protection

Sierra Rock did not contest the fact of the violation. The Secretary argues that an injury was highly likely because the miner atop the shaker was wearing a welding mask which obstructed his vision, he was surrounded by tripping hazards, and he had no fall protection

⁹ The safety standard provides, in part, that “[o]penings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers.”

¹⁰ The safety standard provides that “[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.”

equipment. (Tr. 240). The Secretary contends that the injury could have been fatal because the distance of the fall could have been up to 17 feet, while even a 4-foot fall could result in serious injury. (Tr. 240-41).

The Secretary compares this condition to two prior cases involving fall protection issues. In *Dix River Stone, Inc.*, a miner was working 10 feet above the ground with no fall protection. Respondent argued that, if the miner fell, a platform surrounding the area which was only four feet below would catch him. 32 FMSHRC 1779, 1780 (Nov. 2010) (ALJ). Respondent's argument did not persuade the judge and he upheld the violation as S&S. *Id.* In another case cited by the Secretary, a miner was atop the 5-foot-high block of granite operating a drill. The judge found that regardless of the low height, this was a S&S violation because a fall from that location could cause bruising, a spinal injury, or death. 26 FMSHRC 119, 120-24 (Feb. 2004) (ALJ). The Secretary further argues that the lack of fall protection demonstrated moderate negligence.

Sierra Rock argues that this violation is not S&S because the miner was working near the head pulley and at that location the shaker is surrounded by a platform that extends 4 feet horizontally and has a guardrail. (Tr. 257-58). Therefore, if the miner fell, he would only fall 4 feet and land on the platform. *Id.* Sierra Rock argues that, because neither Jim nor Barry Hatler were aware that the welder was on the screen and working on the screen was very unusual, it was not negligent. In addition, it cites that it trained its employees to use fall protection.

I find that the violation is S&S, but that an injury was only reasonably likely instead of highly likely. I also find that a fatal accident was not reasonably likely. The most likely accident would result in lost workdays or restricted duty, although a permanently disabling injury was also possible. I reach this conclusion because the miner was working at the opposite end of the screen where there was a serious falling hazard of 17 feet. There was a substantial rim where the miner was working, making it less likely that he would fall five feet to the deck along the sides of the screen. (Ex. G-8, at 91, 94). The violation is S&S because the evidence establishes that there was a reasonable likelihood that the hazard contributed to by the violation would result in an accident in which there was a reasonably serious injury, assuming continued mining operations. I have considered that the miner was wearing a welding mask and there were several tripping hazards in the area.

I find that the operator's negligence was moderate to low. I credit the testimony of Hatley that management was unaware that the miner would work atop the shaker screen without fall protection. The Secretary proposed a penalty of \$1,700.00 for this violation. I find that a penalty of \$1,000.00 is appropriate.

b. Citation No. 8561269 - Safe Access

The Secretary emphasizes that the miner entered the shaker by using the spring mount as a step, without using the ladder for entry, and without fall protection. (Tr. 241-42). The Secretary argues that an injury was highly likely because this entry point near the spring mount is close to the edge of the shaker and the shaker is slanted. *Id.* The Secretary also noted that this section of the shaker is close to the area that is 17 feet above the ground and a fall from that

height would likely be fatal. *Id.* The Secretary argues that the evidence supports the inspector's moderate negligence determination.

Sierra Rock argues that at this entry point, there are two parts on the side of the shaker which function as steps. (Tr. 259). Respondent claims because these step-like parts are built into the shaker, they are safe and more stable than a ladder. *Id.* Lastly, Sierra Rock argues that the miner accessed the shaker from the platform, so if he fell, he would have fallen onto the platform and a 17-foot fall was not reasonably likely. *Id.* Sierra Rock maintains that the alleged violation is not S&S and it was not negligent with respect to this alleged violation.

I find that the Secretary established a violation. Although I understand that a ladder might pose safety hazards, the miner stepped over the rim onto the screen at the end immediately adjacent to the 17-foot drop-off. If he were to slip, he could fall that distance to the ground. (Ex. G-9, at 104,106). Respondent did not provide safe access to the miner's working place.

I find that the Secretary established that the violation was S&S. It was reasonably likely that the hazard contributed to by the violation would result in an accident in which there was a serious injury. I credit the testimony of Inspector Edminister on this issue. Although a fatal accident was possible, it was more likely that lost workdays or a permanently disabling injury would result from an accident.

For the same reasons discussed with respect to Citation No. 8561268, I find that Sierra Rock's negligence was moderate to low. The Secretary proposed a penalty of \$1,700.00 for this violation. I find that a penalty of \$1,000.00 is appropriate.

c. Order No. 8561267 - Imminent Danger Shaker Screen

The Secretary argues that Inspector Edminister did not abuse his discretion when he issued this imminent danger order. An injury was highly likely because of the numerous tripping hazards, the seriousness of potential injury from a 17-foot fall, and the miner's obstructed vision. (Tr. 240).

Sierra Rock opines that Inspector Edminister saw the miner on top of the screen but he did not order that miner down from the screen. Instead, he went to the mine office and instructed Barry Hatler to remove the miner from the screen. (Tr. 257). Sierra argues that had the miner actually been in imminent danger, Inspector Edminister had the power to personally instruct the miner to come down from the shaker. *Id.* Sierra also argues that there was no imminent danger at the time the order was issued because the miner was working near the head pulley of the shaker and, at that location, there was no danger of a 17-foot fall because the miner was surrounded by a platform 4 feet below, which had a guardrail. *Id.* at 257-58.

As discussed above with respect to Order No. 8561259, the issue is whether the inspector abused his discretion. An inspector "abuses his discretion . . . when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners." *Utah, Power & Light Co.*, 13 FMSHRC at 1622-23. In this instance, the inspector did not immediately order the welder to come down from the screen. Instead, he

walked to the mine office to tell Barry Hatler to do so. During cross-examination, Inspector Edminister explained why he proceeded in this fashion:

Q. Mr. Edminister, the imminent order that you issued that we see in 1267, when you first drove in and saw the employee up on the shaker, you didn't drive right over to him and tell him to get down?

A. I believe I was already parked at that time. I don't recall. I do remember seeing him. And so I went to notify Barry Hatler. Because, number one, by yelling up to a miner in a hazardous location with a danger of falling, you yell up to get down, for one, you are going to startle them, which could trigger them to lose balance and fall. So it is procedure to notify the agent or operator that is an imminent order and to have the operator get the miner down. Also, that way we are not directing the workforce.

Q. So you went over and asked Barry Hatler if he would get the miner down?

A. Yes. Let him know there is imminent danger order. Let him know what is going on. As he headed up there, if I remember correctly, he had already gotten him down.

(Tr. 120-21). By asking Barry Hatler to get the welder down from the screen, the inspector delayed the welder's withdrawal from the dangerous location. There is no evidence as to the length of the delay, but it was likely to have been insignificant given the small size of the mine. I find that the inspector did not abuse his discretion when he ordered the mine foreman to get the welder down from the screen rather than immediately ordering the miner down.

With respect to Citation No. 8561268, which the inspector issued in conjunction with the imminent danger order, I determine that the violation is S&S but I reduce the gravity from highly likely to reasonably likely. I hold that Inspector Edminister did not abuse his discretion when he issued the imminent danger order. He observed a miner at the top of a screen in a hazardous position and he determined that the miner must be removed from the hazard. The concept of imminent danger is not limited to hazards that pose an immediate danger; the inspector has the discretion to issue such an order when he observes a condition that has "a reasonable potential to cause death or serious injury within a short period of time." *Cumberland Coal Resources*, 28 FMSHRC at 555. Inspector Edminister reasonably believed that the welder faced a serious safety hazard and he did not abuse his discretion when he issued the imminent danger order. Consequently, Order No. 8561267 is **AFFIRMED**.

d. Order No. 8561257 – Opening on Shaker Screen Platform

There is no dispute that the cited condition violated the safety standard; only the severity of the violation and the negligence of Sierra Rock are at issue. (Tr. 254). The Secretary argues that an injury was highly likely because miners accessed the area every day or every other day

and that a miner could be injured if his foot were to be caught in this gap. (Tr. 243). The Secretary contends that the potential injury would have been a slip-and-fall or a strain or sprain-type of injury. Either of these injuries could lead to lost work days or restricted duties. *Id.*

The Secretary argues that the operator's level of negligence was high because Inspector Edminister showed the hazard to Jim Hatler during a previous inspection, but Sierra Rock did nothing to correct it. (Tr. 243). In her brief, the Secretary cites a case in which there was a 2-by-3-foot hole in the wooden planks in front of a scale house. The judge held that this condition created an unwarrantable failure violation of section 56.11012 because the hole was obvious and was present for at least a week. *W.J. Bokus Industries, Inc.*, 15 FMSHRC 1800, 1804-1808 (July 8, 1993) (ALJ).

Sierra Rock argues that the third and fourth factors in a typical S&S analysis are missing in this case because the potential injury was not reasonably likely to occur and would not be serious. (Tr. 254). Sierra Rock contends that an injury was not reasonably likely because an employee who accesses the area "walks along the platform and greases part of the guard and leaves the platform [W]e don't believe walking on a platform makes an accident more likely than less likely." (Tr. 254-55). Sierra also argues that the strain or sprain-type injury described by the Secretary is not serious.

Sierra Rock also maintains that the level of negligence should be lower because the task of fixing this problem was on the mine's maintenance list. It planned to fix the problem but had not done so because other maintenance items had higher priority. (Tr. 255).

I find that the Secretary established that the violation is S&S. The opening was quite substantial and was along the walkway around the screen. (Ex. G-2 at 25-26). Someone could easily stumble or have a foot fall through this opening while walking along the walkway performing routine maintenance. There was a reasonable likelihood that the hazard contributed to by the violation would have resulted in an injury of a serious nature, assuming continued mining operations. I find that sprains and other similar injuries are of a serious nature.

I also find that the evidence demonstrates that the violation was the result of Sierra Rock's high negligence. The inspector told Sierra Rock in November 2009 that the opening violated the safety standard and that the condition should be corrected. Six months later the opening still existed. As a consequence the operator demonstrated a high level of negligence. I also hold that the operator's indifference to the hazard amounted to aggravated conduct. The violation had existed for at least six months, Sierra Rock's management was aware of the violation and had been put on notice that greater efforts were necessary for compliance, the condition was obvious, and although it did not pose a high degree of danger, it presented a serious safety risk. The Secretary proposed a penalty of \$4,000.00 for this violation. I find that a penalty of \$2,000.00 is appropriate.

e. Citation No. 8561264 – Safety Defects

This citation alleges that the operator failed to fix the gap near the walkway in a timely manner and that it did not install proper guarding around the shaker's feed conveyor. Sierra Rock admits the violation as to the gap next to the walkway but disputes that the condition of the guard violated the safety standard. (Tr. 255-56). First, Jim Hatler was under the impression, based upon a discussion during the previous inspection, that the guard already protected against *inadvertent contact* so no changes were needed. (Tr. 256). Second, miners do not access this area while the shaker is running, so there is no risk of a permanently disabling injury. *Id.* The Secretary argues that it is reasonably likely that a miner could suffer a permanently disabling injury from entanglement in the machinery and that the machinery does not necessarily have to be running for that to happen. *Id.* Sierra Rock also argues that the degree of gravity should be reduced from "Permanently Disabling" to "Lost Workday," because the citation should only apply to the gap, not the guarding issue. *Id.* at 256.

The evidence establishes that both conditions were previously noted as needing correction during a previous MSHA inspection. (Tr. 140-41). Inspector Edminister conducted that inspection in November 2009. On May 1, 2010, both conditions were listed as needing attention on the company's workplace exam record. (Ex. G-6 at 79). I find that the Secretary established a violation as to both the opening in the platform and the inadequate guarding on the #3 shaker screen feed conveyor. I credit the testimony of the inspector on this issue. Six months had passed since Respondent discussed the conditions with the inspector and they also were noted during a workplace exam about 20 days prior to this inspection. Sierra Rock did not correct the conditions in a timely manner and it took no action to danger off the conditions until they could be fixed. I also credit the inspector's testimony as to the hazards presented and affirm his gravity findings. The Secretary proposed a penalty of \$873.00 for this violation. I find that a \$500.00 penalty is appropriate.

C. Ability to Continue in Business Criterion

Sierra Rock argues that the Secretary's proposed total \$87,000.00 penalty for the citations and orders that were not settled in these cases would have a negative impact on its ability to continue in business and that the tax returns provided at the hearing are sufficient proof on this issue. (Tr. 259; Sierra Rock's Br. at 3-4). Respondent cites *Nats Creek Mining Co.*, in which the administrative law judge determined that a mine owner provided insufficient proof of the mine's financial hardships. 17 FMSHRC 115, 132 (Feb. 1995) (ALJ). The *Nats* judge noted that there were no company records or tax returns provided as proof of the hardship. Sierra Rock argues that providing such returns would have been sufficient proof. *Id.* The Respondent also cites two cases in which, after the hearing, the ALJ allowed the operator to produce audited financial documents as proof of financial hardship. *Johnco Materials, Inc.*, 33 FMSHRC 1431, 1433 (June 2011); *Apex Quarry, LLC*, 2011 WL 6962441 (Dec. 2011) (ALJ).

At the hearing, Sierra Rock introduced its corporate tax returns for the periods of July 2010 through June 2011 and July 2009 through June 2010. (Ex. R-12; Ex. R-13). These returns, which were prepared by an accounting firm, show a loss of \$1,500.00 for the fiscal year ending in June 2011 and no income for the fiscal year ending in June 2010.

The Secretary contends that the burden lies with the Respondent to prove that penalties will negatively affect the mine's ability to stay in business and in the absence of such proof it is presumed that no such adverse effect would occur. *Sellerburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983) (citing *Buffalo Mining Co.* 2 IBMA 226 (1973)). The Secretary argues that the tax returns provided by Sierra are insufficient evidence. (Tr. 245). The Secretary cites cases holding that tax returns and financial statements which show that the mine suffered recent financial losses are not sufficient to reduce penalties. *Spurlock Mining Inc.*, 16 FMSHRC 697, 700 (Apr. 1994) (citing *Peggs Run Coal Co.*, 3 IBMA 404, 413-14 (1974)).

The Secretary also cites the Mine Act's legislative history in arguing that the mine's ability to stay in business is only one factor the judge should consider and that penalties should not be reduced based upon that factor alone. (Sierra Rock's Br. at 8). The Secretary points out that the size of the penalties should be "sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance." S. Rep. No. 95-181 at 40-41 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 628-29 (1978). The Secretary argues that the main purpose of the penalties is to act as a deterrent and therefore the penalties should not be reduced. (Sierra Rock's Br. at 8).

As I have noted in other cases, the mining industry is cyclical. A company may have good years followed by bad years. Submitting a few tax returns is not sufficient evidence to establish that a given penalty will have an adverse effect on that operator's ability to continue in business. In this instance, it appears that Sierra Rock broke even in 2010. I do not reduce the penalty amounts based upon the ability to continue in business criterion in these cases.

II. SETTLED CITATIONS

The following citations and orders at issue in these cases settled at the hearing: Citation No. 8561254, Citation No. 8561256, Order No. 8561258, and Order No. 8561262. The parties proposed that the two orders be modified to section 104(a) citations with moderate negligence. I approve these settlements. The ordering paragraph below includes the settlement amounts.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have reviewed the Assessed Violation History Report, which is not disputed. (Ex. G-11). Sierra Rock has a history of 13 violations in the 15 months preceding May 27, 2010, and three of those violations were designated as S&S. At all pertinent times, Sierra Rock Products, Inc. was quite small. In 2010, it worked 9,461 man-hours and employed about three people including Jim and Barry Hatler. I have reduced the penalties because of Respondent's small size. The violations were abated in good faith. The gravity and negligence findings are set forth above.

IV. ORDER

Based upon the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2010-1589-M		
8561264	56.14100(b)	\$500.00
8561254	56.9100	314.00
8561256	46.11(b)(7)	314.00
WEST 2011-315-M		
8561262	46.3(a)	403.00
WEST 2011-316-M		
8561268	56.15005	1,000.00
8561269	56.11001	1,000.00
WEST 2011-747-M		
8561252	56.12040	6,000.00
8561257	56.11012	2,000.00
8561261	56.12040	6,000.00
8561258	56.14107(a)	112.00
WEST 2011-1029-M		
8561260	56.12017	6,000.00
	TOTAL PENALTY	\$23,643.00

For the reasons set forth above, the citations are **AFFIRMED** or **MODIFIED** as set forth above. Sierra Rock Products, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$23,643.00 within 40 days of the date of this decision.¹¹ The two contest proceedings are hereby **DISMISSED**.

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

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RWM

¹¹ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 10, 2013

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of WAYNE BRAGG,	:	Docket No. WEVA 2013-322-D
Complainant	:	MSHA Case No.: HOPE-CD-2013-02
	:	
v.	:	
	:	
MAPLE COAL COMPANY,	:	Mine: Huffman Surface Mine No. 1
Respondent	:	Mine ID: 46-07058

DECISION AND ORDER
REINSTATING WAYNE BRAGG

Appearances: Matthew Babington, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, representing the Secretary of Labor (MSHA) on behalf of Wayne Bragg

R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, representing Maple Coal Company.

Before: Judge Steele

Pursuant to section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor (“Secretary”) on December 12, 2012, filed an Application for Temporary Reinstatement of miner Wayne Bragg (“Bragg” or “Complainant”) to his former position with Maple Coal Company, (“Maple Coal” or “Respondent”) at the Huffman Surface Mine No. 1 pending final hearing and disposition of the case.

On November 5, 2012, Bragg filed a Discrimination Complaint alleging, in effect, that his termination was motivated by his protected activity.¹ In the Secretary’s application, she

¹ Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act. *See 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 (3rd Cir. 1981).

represents that the complaint was not frivolously brought, and requests an Order directing Respondent to reinstate Bragg to his former position as a bulldozer operator at the Huffman Surface Mine No. 1.

Respondent filed a request for hearing on December 19, 2012. An expedited hearing was held in Charleston, West Virginia on January 3, 2013. The Secretary presented the testimony of the complainant, and the Respondent did have the opportunity to cross-examine the Secretary's witness, and present testimony and documentary evidence in support of its position. 29 C.F.R. §2700.45(d).

For the reasons set forth below, I grant the application and order the temporary reinstatement of Bragg.

Temporary Reinstatement

Relevant law

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine Act]" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990).

Temporary Reinstatement is a preliminary proceeding, and narrow in scope. The plain language of the Act states that "if the Secretary find that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). Neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July

1999). The substantial evidence standard applies.² *Sec’y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining “whether the evidence mustered by the miners to date established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.” *Jim Walter Resources*, 920 F.2d at 744.

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *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 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

However, in the instant matter, Bragg need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the “reasonable cause to believe” standard. Thus, there must be “substantial evidence” of both the applicant’s protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec’y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a “motivational nexus between protected activity and the adverse action that is the subject of the complaint.” *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The evidence

On November 5, 2012, Mr. Bragg filed a Discrimination Complaint, which included a brief Discrimination Report. In his Complaint, he reported that he was terminated from his job as a bulldozer operator at the Huffman Surface Mine on October 19, 2012. In the Summary of Discriminatory Action, Bragg wrote the following: “I was laid off after reporting a safety hazard on the bulldozer I was operating.” Exhibit B, Application for Temporary Reinstatement.

² “Substantive evidence” means “such relevant evidence as a reliable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

Following the filing of the complaint on November 5, 2012, the Secretary performed an investigation and determined that the Complaint was not frivolously filed. On December 12, 2013, the Secretary filed an Application for Temporary Reinstatement of Wayne Bragg.

Submitted with the Application for Temporary reinstatement was the December 10, 2012 Affidavit of David E. Rhodes. The affidavit, in pertinent part, is as follows:

1. I am employed as a supervisory special investigator by the Mine Safety and Health Administration, United States Department of Labor, in Mount Hope, West Virginia.
2. As part of my official responsibilities, I investigate claims of discrimination filed by miners pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Act"). In this capacity I have investigated the discrimination claim filed by Wayne Bragg on November 5, 2012. My investigation to date has revealed the following facts:
 - d. On November 5, 2012, Bragg filed a discrimination complaint for being discharged on October 19, 2012 after he listed hazardous conditions in the pre-operational slips for the mine's bulldozers and/or after he was perceived to have made an anonymous complaint to MSHA about hazardous conditions on the mine's bulldozers.
 - e. From May 2012 through July 2012, Bragg engaged in protected activity by documenting hazardous conditions for a Caterpillar D-11 T bulldozer in the daily pre-operational reports were reviewed by agents of the Respondent.
 - f. On August 1, 2012, MSHA conducted an inspection at the mine in response to an anonymous complaint alleging that one of the Caterpillar D-11 T bulldozers had defective seals that there was dust inside the bulldozer's cab. Inspector Michael Boggs examined the Caterpillar D-11 T bulldozers and determined that the door seals on both of the bulldozers were defective. Inspector Boggs issued one violation, Section 104(a) Citation No. 8151132, for a violation of 30 C.F.R. § 77.1606(c).
 - g. Less than a week after Inspector Boggs issued Citation No. 8151132, Superintendent Tony Underwood made a threatening statement to Bragg and at least one other miner about the anonymous complaint to MSHA. In effect, Underwood stated that if he determined who had anonymously complained to MSHA, that person would be fired.
 - h. Respondent laid off twenty employees on October 19, 2012. Only four day-shift employees were included in the layoff, including Bragg and the other Caterpillar D-11 T bulldozer operator who had been working on August 1, 2012.
 - i. Due to the fact that Bragg had experienced hostility from an agent of the Respondent regarding the anonymous complaint about the defective door seals on one of the Caterpillar D-11 T bulldozers, and that Bragg was eventually discharged along with the other day-shift Caterpillar D-11 T

bulldozer operator who had been working on August 1, 2012, Bragg has reason to believe that the Respondent terminated him because Bragg repeatedly recorded hazardous conditions in the pre-operation slips and/or because the Respondent suspected that he had made the anonymous complaint to MSHA regarding those same hazardous conditions.

- j. There is reasonable cause to believe that Bragg was discharged because he was engaged in protected activities and/or because he was perceived to have engaged in such activities. Bragg suffered an adverse action when he was discharged on October 19, 2012.

Exhibit A, Application for Temporary Reinstatement.

Stipulations of the parties

During the hearing, the parties entered the following stipulations on the record:

1) The Administrative Law Judge has jurisdiction over these proceedings pursuant to Section 105 of the Federal Mine, Safety and Health Act of 1977, The Act, 30 U.S.C. Section 815, as amended.

2) Maple Coal Company is the operator of Huffman Surface Mine No. 1, Sycamore project.

3) Maple Coal Company's products affect commerce within the meaning and scope of Section 4 of The Act, 30 U.S.C. Section 804.

4) Wayne Bragg, the complainant in this matter, was employed as a bulldozer operator at Maple Coal Company. He began employment on November 6, 2008. He was laid off for the first time on March 16th, 2009, and rehired on July 31st, 2009.

5) Mr. Bragg was laid off on October 19th, 2012.

6) On August 1st, 2012, MSHA Inspector Michael D. Boggs issued a Section 104(a), non-S&S, citation, number 8151132, for an alleged violation of 30 CFR Section 77.1606(d) 1606(c) related to cab door seals on two Caterpillar D11 dozers. The inspection was prompted by a Section 103(g) complaint. The penalty proposed and paid for the citation was \$100.00.

Testimony of Wayne Bragg:

Wayne Bragg, Sr. began mining in 1976 or 1977 at American Electric Power driving a rock truck. Tr. 17. He then worked for Cedar Coal, where he operated a D9 bulldozer and a 992 Cat endloader. Tr. 17. His next position, between 1992 and 1996, was with Rodney Polatino for the DEP running an excavator, bulldozer and loader truck in order to reclaim mine seals at

abandoned mines. Tr. 17-18. Bragg then worked at Frasure Creek where he operated a bulldozer, truck, and hoe. Tr. 19. He then went to Coal River before coming to Maple Coal in 2008. Tr. 19-20. At Coal River and Frasure Creek, Bragg received several trainings on a dozer, loader, rock truck, grader, motor grader, road grader, and backhoe. Tr. 19-20, 23.

At Maple Coal, Bragg primarily operated a D11 bulldozer. Tr. 20, 22. According to the Maple Coal training records, admitted as GX-4, Bragg received training on May 2, 2011, to operate a D9T bulldozer, a D11T bulldozer, and a D10 bulldozer. Tr. 21-22. These trainings were all certified by Underwood. Tr. 22. Bragg also received training on January 2, 2010, to operate a 777 rock truck, which has a dozer, loader, grader, excavator, and truck. Tr. 22. This training was certified by the evening shift foreman, William Treadway. Tr. 22. On November 6, 2008, Bragg received training, which was signed by Underwood, on a dozer, excavator, loader, and grader. Tr. 22-23.

Bragg testified that he reported safety hazards concerning defective door seals on the bulldozer he was operating after the seals had broken loose from the door. Tr. 26-27. As a result of the defective seal, dust was entering the cab and clogging the filters. Tr. 27. Bragg testified that he was suffering from headaches, sinus problems, and nose bleeds from excessive dust in his cab. Tr. 28.

On May 11, 2012, Bragg wrote in his pre-operational report that “the door seal’s falling off.” Tr. 29; GX-2.³ In his May 21, 2012 pre-operational report, Bragg also wrote about the defective door seals. Tr. 30; GX-2. In his June 12, 2012 pre-operational report, Bragg again complained again about the defective door seals. Tr. 30; GX-2.

Bragg testified that he discussed the door seals problems with a foreman, named Melvin Adkins, and Superintendent Underwood. Tr. 31-32. Underwood responded that they were going to order a new door seal. Tr. 32. On one occasion, Adkins responded that he would address the issue when he had time, and on a second occasion said he that he would have the evening shift put seals on the bulldozer door. Tr. 32. Bragg testified that the evening shift did a poor job of gluing the seals back on, so that they quickly came off again. Tr. 32-33. Underwood told Bragg in May or June that the seals were being ordered. Tr. 33.

On August 1, 2012, Citation No. 8151132 was issued for the condition complained of by Bragg. Tr. 34; GX-3. The citation was pursuant to an E04 inspection, which are verbal hazard complaint inspections. Tr. 35. On the hazard complaint, admitted as GX-5, it lists problems with the window seals. Tr. 38.

On the Monday morning following the citation and issuance of the citation, Bragg attended the weekly safety meeting. Tr. 39-40. After the meeting, Underwood approached Bragg and Dave Williams, who operates an endloader, in the parking lot and spoke to them about the

³ The pre-operational reports are also referred to as “per-shift reports.”

recent citation. Tr. 40. Bragg testified that Underwood told them, "I don't know who called MSHA in there, but if I find out who did it, if they've had a bad...day, I will fire their asses." Tr. 40.

Prior to the issuance of the citation, Bragg testified that he and Underwood got along well, and that Underwood was never critical of Bragg's work. Tr. 40, 41. Bragg never received any disciplinary actions at Maple Coal. Tr. 44. However, following the citation, Underwood was very critical of Bragg's work. Tr. 41. Bragg testified about one incident on the day before he was laid off where he was told by Underwood to perform a task, and then after 10 hours was told that he was not supposed to perform that task. Tr. 41-42. He described such incidents occurring often after the citation, stating, "I couldn't do nothing [sic] right after that." Tr. 41.

On October 19, 2012, Bragg received a call from someone in safety telling him that he was laid off. Tr. 42. Bragg believed the call to be a hoax, and when he tried to go to the mine the following day, the guards would not let him enter. Tr. 43. Bragg testified that he believes he was laid off for reporting the defective door seals, stating, "After that door seals [sic], my job went downhill." Tr. 44.

On cross-examination, Bragg testified that the pre-shift reports that he used to complain about the door seals go to the foreman, but that he did not know if they are then sent to maintenance. Tr. 46. He further testified that he was aware that there were layoffs occurring at other mines in the industry, particularly in southern West Virginia. Tr. 48. He testified that Williams, the other worker that Underwood spoke to, was not laid off, but was put on the evening shift by himself. Tr. 50. Bragg testified that three other day-shift employees were laid off on the strip. Tr. 50, 54.

Bragg also testified on cross-examination that he was planning on retiring in six months. Tr. 51. On redirect, Bragg stated that he was planning on retiring when he turned 65 years old. Tr. 54-55. Bragg also expressed uncertainty concerning his financial stability and any timeframe for retirement. Tr. 54-55.

Testimony of Eddie Turner:

Eddie Dale Turner has been the manager for all the above-ground operations for Walter Energy in West Virginia, which includes Maple Coal, since January 2010. Tr. 61. He has 31 years of experience in the surface mining industry. Tr. 61. For 12 years, Turner was an engineer at a coal company, and for the remainder of the time he has managed large surface operations. Tr. 61-62. He has a degree in civil engineering, is a registered professional engineer in West Virginia, Wyoming, and Kentucky, and has a surface mine certification in Kentucky. Tr. 62.

Turner testified that the company lost an order in April 2012 in Summersville and as a result the company shut down the operation and laid off 47 men. Tr. 62. Taylor described as "the triggering factor" for the layoffs the news in October that Maple Coal was out-bid on a coal order that it believed to be a certainty. Tr. 63. He testified that the company had over 100,000

tons of coal uncovered. Tr. 63. In the period between the layoff and the hearing, the company has not been producing coal, but instead has been hauling coal in order to deplete the inventory. Tr. 63.

Turner described the layoff process as being “three-fold,” which included a reduction at the underground mine, a reduction at the plant, and a reduction at the surface mine. Tr. 64. Turner was responsible for selecting the individuals to be laid off, and he testified that he used a five-point ranking system. Tr. 64. The first and second steps involve the HR representative reviewing the files to find any discipline or attendance problems. Tr. 64-65.⁴ The third step involves a review of operator skill. Tr. 65. In the fourth step they look at “versatility.” Tr. 65. The fifth step is implemented in a tie-breaker, where they look at time of service at the mine and time of service with the company. Tr. 65.

Turner testified that he began the evaluation process with 48 men. Tr. 65. Turner ranked the employees in groups of ten. Tr. 65. He then “massaged” the numbers, taking into account issues such as which individuals had EMT or foreman certifications. Tr. 65. The resulting color-coded spreadsheet was admitted as RX-1. Tr. 66.⁵ The color yellow symbolizes the equipment operators at the Sycamore Surface Mine, and they were all retained. Tr. 66-67. The color green symbolizes those on the reclamation crew, and the color brown symbolizes the maintenance crew. Tr. 67-68. The employees without color-coding were the individuals who were laid off. Tr. 68. The numbers on the left side of the sheet indicate Turner’s personal rankings of the employees. Tr. 69. Five of the numbers are skipped, and when asked about this discrepancy, Turner replied that it was the result of his starting at the top and working to the bottom of the list. Tr. 68; RX-1. Bragg is listed as number 45 because Turner viewed Bragg’s skillset as low among the workers. Tr. 69.

Also included on the spreadsheet are employees’ birthdates, hire dates, race, pay type, position, and the cities where they live. Tr. 69-70; RX-1. The last column has a mixture of EMT designations and nicknames such as “Smiley,” “Greasy,” and “Freddy.” Tr. 70-71; RX-1.

Turner testified that before he decided who to layoff, he consulted with Beth, the HR manager. Tr. 71. She cautioned him about possible age discrimination, and told him not to layoff all the workers over 40 years old. Tr. 71. Turner said that he ended up laying off most of the younger workers, and described it as “almost a reverse discrimination deal.” Tr. 71. Turner testified that he had difficulty making the layoff decision among some workers, but not with Bragg. Tr. 71-72.

Turner testified that 67 people were laid off, which constituted more than half of the workforce, and included all but seven of the day shift workers and one person on the evening

⁴ Turner testified that the first step of the 5-point system involved HR looking at discipline and attendance problem. He then skipped over number two and went straight to number three. Therefore, I am presuming he intended to testify that the first two steps were conducted by HR.

⁵ Turner testified that there were multiple versions of the spreadsheet, but that the one submitted into evidence was the one he worked off of for layoff purposes. Tr. 83.

shift. Tr. 72, 78. All of the supervisors were retained. Tr. 72. Turner testified that one D11 bulldozer was shut down, and a bulldozer operator was needed to load coal and run the grade on the evening shift, and Dave Williams was chosen for retention. Tr. 72, 79. Turner stated that Melvin Adkins, the son of one of the supervisors, was laid off. Tr. 73. However, Melvin Adkins was recalled the day before the hearing because they needed a driller. Tr. 91. Ernest and William Underwood, who were brothers of Anthony Underwood, were not laid off. Tr. 84.

Turner testified that he laid off bulldozer operators that were better than Bragg. Tr. 74. He also stated that in the summer of 2012 the maintenance manager remarked to Turner that Bragg and John Patterson “were the worst two dozer men he had ever witnessed.” Tr. 74. After hearing this comment, Turner stated that he began watching Bragg and Patterson more closely. He stated, “These two guys work hard; they just can’t get the job done.” Tr. 74. Turner testified that starting in April or May, he put additional pressure on Adkins and Underwood to increase Bragg’s and Patterson’s production. Tr. 74-75. Prior to the layoff, Patterson left work for an illness, and Greg Querry took his place. Tr. 75. Turner testified that Bragg performed better working with Querry. Tr. 75. Turner testified that Jerry Shaw replaced Bragg after the layoff, and that Shaw is a “solid” employee. Tr. 78-79.

On cross-examination, Turner testified that they have pre-shift daily checklists as required by West Virginia law. Tr. 79-80. He does not look at the checklists every day, but only if something becomes an issue. Tr. 80. Turner testified that the problem with the door seals did not come to his attention until after the citation was issued. Tr. 80.

On cross-examination, Turner testified that by “versatility” he meant the ability to run multiple pieces of machinery. Tr. 80-81. Turner did not consider Bragg as versatile because he only saw him operating a bulldozer. Tr. 81. He testified that he never looked at Bragg’s file or original employment application to find out what other equipment he could run. Tr. 81, 86. He also did not speak to any of the foremen or to Bragg directly about additional equipment that he could operate. Tr. 86. He testified that he conducted no investigation as to whether Bragg was a versatile operator. Tr. 86. He stated that he based it solely on his personal perception. Tr. 87. Turner did not direct Bragg’s work on a daily basis, but he did witness Bragg’s work on occasion. Tr. 87. He testified that Underwood understood one of Turner’s reasons for laying off Bragg was that he was not versatile. Tr. 99.

Turner further testified that Bragg did not have any absenteeism, discipline, or safety problems. Tr. 81-82. Turner denied that Bragg’s complaints about the door seals or the 103(g) complaint had anything to do with Bragg’s layoff. Tr. 82.

Turner testified that he did not record how many points each employee received on his point system. Tr. 85. He testified that with regards to disciplinary action and absenteeism, all 50 employees received the same points. Tr. 85. Therefore these two factors were not relevant to the decision. Tr. 86.

After making the list, Turner provided Adkins, Underwood, the HR manager, Beth Roberts, and the senior safety manager, Herb Shady, the opportunity to review the list and question any layoff decisions. Tr. 87. Turner testified that Underwood saw the final list and made no changes. Tr. 88. They discussed the possibility of retaining Melvin Adkins, because his father was a supervisor, and instead laying off Curtis Stover. Tr. 88. They also discussed whether to layoff Joey Chambers or Joey Mullins, but decided to retain Chambers because he was an EMT. Tr. 89.

Turner testified that several workers have been recalled, including Melvin Adkins on the day before the hearing and Bernard Fleshman on August 13. Tr. 95. Additionally, James Shaffer, Joey Mullins, Rick White Jr., Larry Hudson, and Shane McComas were scheduled for recall on January 7. Tr. 91.

Turner testified that the mine is leased from Pardee Minerals. Tr. 92. Maple Coal compensates Pardee per ton of extraction, and there is a minimum payment in the terms of the lease. Tr. 92. Maple Coal was not having trouble making those lease payments to Pardee. Tr. 92-93.

Prior to the October 19 layoff, there were two operating ten-hour shifts. Tr. 94. Turner testified that they currently expect a large deal with Stemcor that will allow them to bring back more employees. Tr. 93-94. There are no industry requirements as to how recall decisions are made. Tr. 94.

Testimony of Anthony Underwood:

Anthony L. Underwood has worked as the superintendent of Maple Coal's Sycamore Surface Mine since July 2008. Tr. 100-101. He described his duties as implementing the mine plan with Turner and Adkins. Tr. 101.

Underwood testified that the door seals represented an ongoing problem because Caterpillar no longer manufactures the needed seals. Tr. 101. Therefore, the seals that were tried did not resolve the problem. Tr. 101. They tried to modify the seals they received from Caterpillar, but the glue failed to keep the seals intact. Tr. 102. Underwood testified that the defective seals did not constitute a major problem because the air conditioning systems in the equipment had positive pressure systems. Tr. 102. He testified that this system pulls air through filters at the top of the cab, and that a small gap should not lead to excessive dust in the cab. Tr. 103. Underwood admitted that Bragg told him about problems of the door seams and dust on several occasions. Tr. 103.

With regards to the pre-shift reports, Underwood testified that each operator was required to fill them out and, after doing so, Adkins collected them. Tr. 104. Adkins would then prioritize problems that needed immediate attention, and pass them on to the mechanics to fix. Tr. 104. Reviewing the collection of safety checklists, admitted as RX-2, Underwood testified that Bragg made several complaints in May and June, but did not list the door seals as a problem in July. Tr.

105-106. Underwood testified that other operators also reported the door seals, but did not know if any complained more than Bragg. Tr. 107.

Underwood testified that on the day of the inspection he accompanied Inspector Boggs. Tr. 107. He stated that he permitted Boggs to talk with Bragg and Patterson. Tr. 108. He testified that he was not upset about the citation, but that in his opinion the citation would not have been issued if there had been no complaint. Tr. 108-109. Underwood stated that in 2012, a total of seven citations were issued at the mine, and he was proud of that figure. Tr. 109. Underwood denied confronting or threatening Bragg and Williams after the citation was issued. Tr. 109. On cross-examination, he stated that he could not remember if he talked with them on that day. Tr. 113. He testified that as far as he knew neither the citation nor the previous complaints were factored into Bragg's layoff. Tr. 109. Underwood further denied that he treated Bragg any differently after the citation. Tr. 110. Underwood testified that he did give Bragg increased attention following Turner's discussion with him. Tr. 110.

On cross-examination, Underwood testified that the pressurized system in the cab would be reduced from any leaks. Tr. 111-112. After Bragg complained about the door seals in May and June, Underwood examined them a few times. Tr. 112. Underwood testified that in August he ordered a new style door seal from Caterpillar that appeared to work better than the previous replacements. Tr. 112.

Underwood testified that he had minimal input during the layoff process, and did not know about it until a few days before it went into effect. Tr. 114. Underwood stated that he discussed the list several times with Adkins, and thought it was fair. Tr. 115. He stated that he did not have a conversation specifically about Bragg. Tr. 115. Underwood confirmed that he told the investigator, David Rhodes, that Bragg was a good employee but that he could only operate one type of equipment. Tr. 115-116. In the six years that he has known Bragg, Underwood has only known him to operate a bulldozer. Tr. 116-117. Underwood task trained Bragg on several pieces of equipment, but he only ever assigned him to operate the bulldozer. Tr. 117. He stated that Bragg liked running the dozer and he was never needed on other equipment. Tr. 117. Underwood testified that Bragg was a good employee, but not among the best employees. Tr. 118. He testified that he laid off other employees that he also considered good employees. Tr. 119.

Contentions of the parties:

The Secretary and operator dispute both the facts at issue in this case and the scope of a temporary reinstatement proceeding. The Secretary argues that the scope of a temporary reinstatement proceeding is narrow and limited to a determination of whether a miner's complaint was frivolously brought. As such, the Secretary cites *CAM Mining*, 31 FMSHRC 1085, for the propositions that the judge may not resolve conflicts in testimony, make credibility determinations, or weigh the operator's rebuttal or affirmative defense evidence against the Secretary's prima facie case evidence. The operator takes the position that the Secretary's burden of proof in establishing that the complaint was not frivolously brought is broader than

described by the Secretary. The operator argues that the judge must consider all the evidence presented in determining whether the Complainant engaged in protected activity and whether there was a nexus between that activity and the adverse employment action. The operator contends that the inferences required in determining a nexus should be made sparingly and should fully consider the operator's stated reasons for the adverse employment action.

With regards to the facts in dispute, the Secretary argues that Bragg engaged in protected activities when he listed hazardous conditions in the pre-operational reports for the mine's bulldozers in May and June, 2012, when he made verbal complaints in July, 2012, and when he came under suspicion for making an anonymous safety complaint regarding the same hazardous condition. Following an August 1 inspection of the bulldozers, mine superintendent Anthony Underwood made threatening statements to Bragg, and their previously positive relationship deteriorated. Bragg suffered an adverse action on October 19, 2012, when he was included in a large layoff of workers. The Secretary argues that there was a nexus between the protected activities and the adverse action suffered by Bragg. The Respondent had actual or constructive knowledge of the contents of Bragg's pre-operational report as well as the anonymous safety complaint and MSHA citation. The Secretary argues that the Respondent's agent, Superintendent Underwood, showed animus or hostility toward the anonymous complaint to MSHA when he stated that if he found the person who complained, that individual would be fired.

The operator denies that Bragg was perceived to have brought anonymous complaints to MSHA about hazardous conditions or that Superintendent Underwood made any threatening statements. The bulldozer seals were a relatively minor issue from the operator's perspective, and other miners made more complaints about the bulldozers than Bragg. It argues that Bragg was laid off as part of a larger reduction in force, which included one third to one half of Maple Coal employees. Additionally, the operator makes three additional requests: that if temporary reinstatement is granted, I demand a report by February 6, 2013; that if temporary reinstatement is granted, that the operator be permitted to rehire Bragg to an alternative job with the same pay and benefits; and that I take into account alleged statements that Bragg made concerning a planned retirement within six months.

Findings and conclusions

Protected activity

On May 11, 2012, Bragg wrote in his pre-shift report that there were problems with the door seals in his bulldozer. Tr. 29; GX-2. On May 21, 2012, Bragg again wrote in his pre-shift report that there were problems with the door seals in his bulldozer. Tr. 30; GX-2. On June 12, 2012, Bragg again wrote in his pre-shift report that there were problems with the door seals on his bulldozer. Tr. 30; GX-2. During that time, Bragg complained verbally about the defective door seals with foreman Adkins and superintendent Underwood. Tr. 31-32, 103. Bragg testified that as a result of the gap in the door seals, excessive dust was filling his bulldozer cab and

clogging the air filters. Tr. 27. The dust led to headaches, sinus problems, and nose bleeds. Tr. 28.

On August 1, 2012, MSHA conducted an E04 inspection of the bulldozers after it received an anonymous complaint. GX-5. Underwood testified that during the inspection, Inspector Boggs spoke with Bragg and Patterson about the conditions of the bulldozers. Tr. 108. As a result of the inspection, MSHA issued Citation No. 8151132 for defective door seals on two bulldozers. GX-3. Less than one week after the citation was issued, Underwood spoke with Bragg and Williams, telling them, "I don't know who called MSHA in there, but if I find out who did it, if they've had a bad...day, I will fire their asses." Tr. 40. Following the citation, Underwood became highly critical of Bragg's work. Tr. 41. Bragg testified that, "After that door seals [sic], my job went downhill." Tr. 44. Bragg testified that this treatment continued until he was laid off on 10/19/2012. Tr. 41-42.

Section 105(c)(1) states, in relevant part:

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

30 USC § 815(c)(1).

By reporting the defective door seals and dust in his bulldozer cab, verbally complaining about these hazards to supervisors, and being suspected of making an anonymous complaint about the problem, Bragg engaged in protected activity. Each of these activities counts as protected activity, and because they involve a prolonged effort to fix a discrete hazard, they can be viewed as a whole.

The complaints about the defective door seals in the pre-shift reports, as well as the verbal complaints, are covered under the plain meaning of §105(c)(1). The operator does not dispute this, but argues that the anonymous complaint to MSHA was not protected activity because there were no allegations that Bragg actually made the complaint. It also argues that the hazard report shows that the complaint was primarily about window seals, which would have led management to have concluded that another employee made the complaint.

An anonymous complaint to MSHA about a health or safety violation is protected activity. Similarly, discrimination based on suspicion that an employee made an anonymous complaint, even when the employee did not make the complaint, can constitute a violation of §105(c). *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475 (Aug. 1982). In the instant case, the complaint was anonymous and there is no confirmation in the record that Bragg made the complaint. In *Moses*, the Commission found discrimination when the operator harassed the

complainant on suspicion that he had made an anonymous complaint to MSHA. In *Moses*, the complainant did not make the complaint, but the Commission held that the operator still violated §105(c). 4 FMSHRC at 1480. Citing the legislative history, the Commission stated:

Miners would be less likely to exercise their rights if no remedy existed for discriminatory action based on an operator's mistaken belief that a miner had exercised a protected right. Indeed, the adverse effect of such action might be even more debilitating than discrimination over actual protected activity. In such instances, employees could reasonably fear that they might be treated adversely on the basis of suspicion alone, and thus would seek to avoid even the appearance of asserting their rights.

4 FMSHRC at 1480.

In the instant case, there is substantial evidence that management suspected Bragg of making the anonymous complaint to MSHA concerning the hazards with the bulldozer. Bragg understood Underwood's comments to him, as well as the increased hostility, as stemming from management's belief that he had complained to MSHA. Tr. 40-44. Underwood denied making threatening comments to Bragg concerning the citation and Turner testified that the change in treatment towards Bragg stemmed from a complaint by the maintenance manager. Tr. 74-75, 109. This conflict in testimony cannot be resolved in these proceedings. The Commission has made clear that the scope of a temporary reinstatement proceeding is limited, and the judge should not resolve conflicts in testimony or make credibility determinations. *CAM Mining*, 31 FMSHC at 1089. The judge's role is to "evaluate[] the evidence of the Secretary's prima facie case and determine[] whether the miner's complaint of discrimination 'appear[s] to have merit.'" *Id.* (citations omitted).

Bragg's pre-shift reports would be enough to find protected activity. However, viewed as a whole, his pre-shift complaints, verbal complaints, and suspicion of anonymous complaints, all about the same subject matter, add up to protected activity.

Nexus between the protected activity and the alleged discrimination

Having concluded that Bragg engaged in protected activity, the examination now turns to whether that activity has a connection, or nexus to the subsequent adverse action, namely the October 19, 2012 layoff.

The Commission has recognized that a nexus between protected activity and a subsequent adverse action is rarely supplied exclusively by direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. More often, the determination of nexus is made by the trier of fact drawing an inference from circumstantial evidence. *Id.* In the instant case, inferences may be drawn from the evidence presented. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *CAM Mining, LLC*, 31 FMSHRC at 1089. The Commission has

also stated that it is appropriate for the judge to look at instances of disparate treatment of the complainant. *See, e.g., Phelps Dodge Corp.*, 3 FMSHRC at 2510.

Hostility or animus towards the protected activity

“Hostility towards protected activity--sometimes referred to as ‘animus’—is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries.” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 2 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted). Here, Bragg testified that Underwood threatened to fire the person who made the anonymous complaint to MSHA concerning the bulldozers. Tr. 40. Furthermore, Underwood became more critical of Bragg’s work after the citation. Tr. 41-44.

The operator denies that Underwood made threatening statements toward Bragg or that the increased attention Bragg received was because of the citation. Underwood testified that he was not upset about the citation, and viewed the hazard as minor. Tr. 108-109. He also testified that he did not recall talking to Bragg in the week following the citation, and was certain that he did not threaten him. Tr. 109, 113. Turner testified that following a complaint he received about Bragg’s work in April or May from the maintenance manager, he told Underwood and Adkins to put additional pressure on Bragg to increase production. Tr. 74-75.

Turner testified that Bragg’s layoff was not the result of his complaints about the door seals, but rather part of a large layoff of approximately half the workforce. Tr. 62-63. If the operator presented evidence of the mass layoff as an affirmative defense, it is not appropriate to consider the operator’s defenses in this proceeding. *CAM Mining*, 31 FMSHRC at 1091. However, if the operator presents the evidence in order to show that that the layoff process was purely objective and therefore Bragg’s complaint was frivolously brought, I find that the process described by the operator was highly subjective and susceptible to animus.

Turner managed the layoff process and described it as following a five-point ranking system that considered discipline, attendance, skill, versatility, and seniority. Tr. 64-65. However, the system as described by Turner was not as objective as he attempted to portray it. First, there were several numbers missing from the chart, and Turner provided no plausible explanation for the omissions. Tr. 68; RX-1. Second, Turner did not record how many points each employee received, or how he ranked the different factors, thereby making his method impossible to review for objectivity. Tr. 85. Third, Turner testified that all employees received the same number of points for discipline and attendance, thereby making two of the five (or four) factors irrelevant. Tr. 85-86.

Based on his testimony, the primary factor Turner considered was versatility, and he testified that, at least in regards to Bragg, Turner did not perform even a minimal investigation into Bragg’s ability to operate other pieces of machinery. Tr. 81-86. Bragg was task trained and has experience on a variety of equipment. Tr. 17-23. However, Turner believed that Bragg was

only able to operate the bulldozer. Tr. 81. He never looked at Bragg's file or original employment application. Tr. 81, 86. He never spoke with any of the foremen or to Bragg to find out whether Bragg was able to operate other equipment. Tr. 86. He based the impression of Bragg's limited abilities exclusively on the fact that he never saw Bragg operate other machinery. Tr. 87. Underwood testified that the reason Bragg did not operate machinery other than the bulldozer was because Underwood did not assign him to other machinery. Tr. 117.

Considering the record as a whole, I find that Respondent had hostility or animus towards Bragg's protected activity.

Knowledge of the protected activity

Bragg's supervisors had knowledge of his complaints about the door seals on the bulldozers. Underwood testified that he was aware of Bragg's complaints in his pre-shift reports and had discussed the issue with Bragg. Tr. 101-103. Underwood testified that he was trying to remedy the problem by ordering new door seals from Caterpillar. Tr. 102. Underwood accompanied the inspector and witnessed him talking with Bragg. Tr. 107-108. Bragg testified that Underwood singled him out for threats over the anonymous complaint to MSHA. Tr. 40. Accordingly, I find sufficient evidence that the Respondent had knowledge of Bragg's protected activity.

Coincidence in time between the protected activity and the adverse action

In the present matter, the time between the protected activity and the adverse action is in dispute. The date of the adverse action was October 19, 2012. The Secretary argues that the last date of protected activity was the August 1 inspection, which would make the time between the protected activity and the layoff approximately two and a half months. The operator argues that the last date of protected activity was the June 12 pre-shift report where Bragg complained about the door seals. According to the operator, the time between the protected activity and the layoff was over four months.⁶

As the Commission has noted, "[a] three week span can be sufficiently close in time", especially when there is evidence of intervening hostility, animus or disparate treatment. *CAM Mining, LLC*, 31 FMSHRC at 1090. Likewise, in *All American Asphalt*, a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a layoff; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure. *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999). Similarly, in *Pamela Bridge Pero v. Cyprus Plateau Mining Corp.*, the Commission found a five-month gap to constitute close temporal proximity between the protected activity and the adverse employment action. 22 FMSHRC

⁶ It should be noted that treatment of Bragg deteriorated after he was suspected of having made the complaint to MSHA, with a threatening statement made less than one week after the inspection. Tr. 40, 41-42.

1361, 1365 (Dec. 2000).⁷ The Commission 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.” *Sec’y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34, 47 (Jan. 1999) (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)).

Under Commission precedent, both the Secretary’s more liberal timeframe and the operator’s more conservative timeframe satisfy the proximity in time factor. I find that the time between Bragg’s protected activity and his layoff was approximately two and a half months. This time frame is not so short that it alone would create a presumption of a nexus, however it is not so long that it is implausible that the adverse employment action stemmed from the protected activity. Taken together with the other factors, I find that there was a nexus between the protected activity and the adverse employment action.

The operator has requested that if temporary reinstatement is granted, (1) I demand a report from the Secretary by February 6, 2013; (2) that the operator be permitted to rehire Bragg to an alternative job with the same pay and benefits; and (3) that I take into account alleged statements that Bragg made concerning a planned retirement within six months. With regard to the first request, §105(c)(3) of the Act provides time limits for the Secretary to follow, and it is presumed that the Secretary will follow the prescribed timeframes. With regard to the second request, I order the operator to immediately reinstate Bragg to the position he held prior to his layoff on October 19, 2012, at the same rate of pay and benefits for that position, or to a similar position with the same or equivalent duties, at the same rate of pay and benefits. With regard to the third request, I place no durational limits on the reinstatement.

Conclusion

In concluding that Bragg’s complaint herein was not frivolously brought, I give significant weight to the evidence of record that he had a history of complaining about the door seals in written reports and verbally. I also conclude that the operator showed animus toward Bragg’s protected activities and there was a sufficiently close connection in time, approximately two and a half months, between the suspicion of his complaint to MSHA and his layoff.

The operator asserts that its layoff of Bragg was not the result of discrimination, but simply part of a larger reduction in force. Although the operator may, in any subsequent proceedings, prevail on the merits, I find that the operator’s evidence on this record is not sufficient to demonstrate that Bragg’s complaint of discrimination was frivolously brought. To the contrary, since the allegations of discrimination have not been shown to be lacking in merit, I find they are not frivolous.

⁷ In *Pero*, the complainant also suffered increased scrutiny in the period following her protected activity. 22 FMSHRC at 1362.

ORDER

Based on the above findings, the Secretary's Application for Temporary Reinstatement is granted. Accordingly, Maple Coal Company is **ORDERED** to provide immediate reinstatement to Wayne Bragg, at the same rate of pay for the same number of hours worked, and with the same benefits, as at the time of his discharge.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall provide a report on the status of the underlying discrimination complaint **as soon as possible**. Counsel for the Secretary shall also **immediately** notify my office of any settlement or of any determination that Maple Coal did not violate Section 105(c) of the Act.

/s/ William S. Steele
William S. Steele
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue N.W. , Suite 520 N
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January 14, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2011-876-M
Petitioner	:	A.C. No. 11-03074-259167
	:	Foster Road Pit
v.	:	
	:	Docket No. LAKE 2011-957-M
BEVERLY MATERIALS, LLC,	:	A.C. No. 11-03067-261815
Respondent	:	Beverly Materials West Pit

DECISION

Appearances: Breyana A. Penn, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner.

Dave Zumbrunn, General Manager, Beverly Materials L.L.C., *pro se*, and Robert Cox, Hoffman Estates, Illinois

Before: Judge Moran

This matter involves six contested citations issued to the Respondent during 2011¹. None of the citations were alleged to be significant and substantial and each penalty was proposed at \$100.00. A hearing was held in Wheaton, Illinois on October 16, 2012.

Docket No. LAKE 2011 876 M

Citation No. 6555728. This Citation relates that “[t]he brake lights on the Caterpillar 980 C front end loader, # 6035, did not function when tested.” 30 C.F.R. § 56.14100(b), the provision cited, entitled, “Safety defects; examination, correction and records; safety devices and maintenance requirements,” provides: “ (a) Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift.”

The Secretary notes that, according to the Inspector who issued the citation, Thomas H. Heft, he observed the loader at one location when he first arrived at the mine on May 17, 2011,

¹ There were nine contested citations set to be heard, but several matters were settled during the course of the hearing.

at about 7 a.m., and that it was later at a different location when he inspected it, about an hour and twenty minutes later. He therefore concluded that the loader was in use. Upon conducting his inspection of the loader, he found the brake lights malfunctioning. Respondent concedes that the brake light switch had corroded and needed replacement.²

The factual dispute here is whether there was an opportunity for a pre-shift examination of the loader prior to the inspection. Respondent relates that it had to move its loader to the location of the steepest grade the machine would travel in order to perform a proper pre-shift exam. The Secretary does not challenge that assertion about the proper testing location. The loader's location change, Respondent explains, is the explanation for the loader being moved. Further, Respondent contends that both the loader operator and the mine's supervisor, Mr. Cox, informed the Inspector that they had yet to do the pre-shift exam for the equipment but that, despite their protests, the inspection of the loader proceeded. This was fundamentally unfair, from the Respondent's perspective because, as noted, in order to do a proper inspection of the loader, first *it had to be moved* to the steepest grade. This explains, and simultaneously undermines, the Inspector's observation that, while indeed it had been moved, it was moved for the purpose of conducting the exam.

The resolution of this dispute is clearly a factual matter, which necessarily involves some credibility determinations. Applying those credibility determinations, the Court finds that the front end loader was not in fact in service. There is no support for the conclusion that the equipment was in its second location to perform work. Rather, the only credible conclusion on this record is that it was moved so that the pre-shift exam could be so performed. The Secretary, for example, did not counter with any testimony that the vehicle's location was not located in the area of the steepest grade in which it would be used. The Inspector never noted the loader performing its loading function; he only saw it in two locations and made assumptions based on

² Both sides refer to an administrative law judge decision in *Wake Stone Corp.*, 33 FMSHRC 1205 (Judge Gill, May 2011). Decisions by fellow administrative law judges have no precedential effect. However, reasoning in such cases may persuade other judges to adopt the same interpretation. Here, the Secretary maintains that *Wake Stone* is distinguishable because the mine's pre-shift exam was conducted at the same time as the MSHA inspection and both exams found the same defects. Sec. Br. at 10. Beverly was cited for failing to conduct a pre-shift exam prior to placing the equipment in operation. In *Wake Stone* the operator was cited for not maintaining service horns on vehicles and not for a 30 C.F.R. § 56.14100 violation. Judge Gill declined to read the horn violation completely apart from the pre-shift duty. In what was essentially grounded in a credibility determination, Judge Gill determined that the mine did not use the pre-shift requirement as a dodge to avoid the defective horn citations. Instead, he concluded that the vehicles were not yet in service and that in the course of conducting its pre-shift exam the mine operator found the defects at the same moment that the problems were identified by the Inspector. As the vehicles were not yet in service, the pre-shift exam requirement precluded finding the horn violations. As with Judge Gill's decision, credibility determinations are central to the Court's conclusion for this citation.

that observation. Further, the very early time of the citation's issuance, 8:20 in the morning, is indicative that the equipment had not yet been placed in operation.

Accordingly, the citation is vacated.

Docket No. LAKE 2011-957-M

For **Citation No 6555594**, alleging a violation of 30 C.F.R. 56.14130(i) on the basis of a seat belt assembly which was not maintained in functional condition, the Court, having first heard the evidence, stated on the record that it would affirm this Citation. However, the Court announced that a penalty of \$50.00 (fifty dollars) was appropriate, not the \$100.00 proposed by the Secretary. The parties agreed to this resolution.

Citation No 6555595. In this instance, the Respondent was cited for an alleged violation of 30 C.F.R. § 56.9300(b). That section, entitled, "Berms or guardrails, Safety devices, provisions, and procedures for roadways, Railroads, and loading and dumping sites," provides that "(a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." A berm was present, but the Secretary contended that it was inadequate, citing the requirement under subsection (b) of the standard and its provision that "Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway."

Inspector Peter Ackley issued the citation because "the ramp going up to the feed hopper, the jaw crusher, they weren't maintaining berms at mid-axle height for the largest piece of equipment that used that ramp." Tr. 141. Mid-axle height for that largest equipment, a front-end loader, is 52 inches but the berm, at its highest point, was only 36 inches. Ackley stated that the front-end loader used the ramp to feed the hopper. It would dump a load in the hopper and then back down the ramp. The ramp was about 125 feet long with a 15 foot width. A drop off of about 16 feet was present on both sides of the ramp. Tr. 144., Gov. Ex. 11. In some areas there was a berm, but it was not of sufficient height. In other parts of the ramp, for example at the top, there were areas with no berm.³ Gov. Ex. 11, Page 2 & 3.

The Respondent contends that the cited ramp is not a roadway. Instead, it views it as "a loading dock and not a throughway by which traffic passes." In support of this characterization, it adds that the ramp "has a terminal point just as a loading dock does, [and this feature] not only limits passage but speed of travel as one must achieve a full stop at the terminus point to deliver the payload." R's Br. at 5. While the Respondent acknowledges that "some ramps may be roadway . . . not *all* ramps are a roadways." *Id.* (emphasis added). The Respondent urges that

³ The Inspector stated that the missing berms had been washed away. Tr. 147. Perhaps the best photograph to illustrate the ramp drop off is GX 11, page 5. An excavator was used to build up and otherwise fix the berms.

its ramp is one of those that is not a roadway but rather is “a part of the production crusher.” It adds that the ramp is essential for the delivery of material to the crusher and that is the ramp’s sole purpose.

The Court understands the Respondent’s good faith belief in its argument that this ramp should not be deemed a roadway. It is true that the ramp does not fit in the classic concept of a roadway. The average citizen, asked to imagine a “roadway” would tend to think, as Respondent has, of a “thoroughfare.” However, while the ramp may be outside of the common conception of a roadway, it does not logically follow that the public’s general conception is correct. In short, a ramp can be a roadway, albeit perhaps in some instances a short roadway, as here.

The Court also notes that a roadway and a road are essentially interchangeable terms, with the former defined as a “road, especially the part over which vehicles travel,” and a “road” as “an open way, generally public, for the passage of vehicles, persons, and animals.” *American Heritage Dictionary*, (New College Edition) 1980. Accordingly, the ramp is found to be a roadway within the meaning of the cited standard.

Given the above, the Court’s focus is whether a drop-off existed which was of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment and whether the berm, which was present, was inadequate, per the requirement of subsection (b) of the standard and its provision that “Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.”

The Respondent also contended that the citation didn’t acknowledge that openings for drainage are permitted, nor did it specify exactly which areas such drainage openings would be allowed. Tr. 163. In this regard, the Respondent acknowledged that there was a 9 foot opening for drainage at the top end of the ramp but that the loader, having a width of 16 feet, couldn’t pass through it. Additionally, the loader would be traveling at a very slow speed, at only about 3 mph. Tr. 167.

When the Court asked additional questions of the Inspector, he stated that there were areas with insufficient berm height on the way up the ramp and that the issue was not limited solely to the top, flat spot. Tr. 177-178. The Inspector also confirmed that he had issues with insufficient berm height on the level approach pad, as shaded in Respondent’s Exhibit, “A-1.” Tr. 179. The Inspector did not see any locations he believed were drainage areas. Tr. 180.

Based on the entirety of the credible evidence, the Court finds that the standard was violated. In determining an appropriate penalty, the Court takes into account that the Inspector believed an injury would be unlikely because of the low speed of the loader in using the ramp. Tr. 151. He considered the negligence to be moderate because the condition was open and obvious. Apparently the berm deterioration had been recent, attributable to the weekend’s rain. Based upon consideration of each of the statutory penalty criteria, the Court finds that a civil penalty of \$75.00 is appropriate to be imposed.

Citation No 655596. The parties agreed that the violation and penalty would be upheld as proposed for this citation, involving a labeling issue for a seat belt assembly. Tr. 140. There was no defect found with the seat belt itself. A civil penalty of \$100.00 (one hundred dollars) is imposed.

Citation Nos. 655597 and 655600.

As these two citations share common issues, they are discussed together. MSHA Inspector Ackley issued Citation No. 655597 and 655600, asserting violations of 30 C.F.R. § 56.12018. That standard, entitled, “Identification of power switches,” provides: “Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.”

At hearing, the Respondent agreed that the cited switches were not labeled but contended that the standard does not apply to those switches. Further, Respondent asserted that the switches could be readily identified by their location. Tr. 183-184. For the first citation, the Inspector cited what he believed to be a 220 volt breaker, which he found to be in the ‘on’ position, and for which that breaker was not labeled to show what circuit it controlled. He added that one “could not make identification readily [by] looking at the box.” Tr. 185. The Inspector stated that he considered the this to be a “principal power switch” because “*it shuts the power on and off to a circuit.*” Tr. 186 (emphasis added).

GX 13, page 1, a photograph, shows one of the circuits cited by the Inspector. An arrow on that photo particularly identifies the breaker in issue. GX 13, page 2, another photograph, shows the location of the panel box inside the MCC room for the primary crusher in the trailer. Tr. 189. The MCC room is located “off a roadway” and there would be travel by it. Tr. 189. Last, GX 13, page 3, shows the breaker, post-abatement, after it had been labeled. The words, “auto comp”⁴ were written and the inspector believed that referred to a compressor. Tr. 188. That was the only circuit in issue for the Inspector. He stated that another layperson would not be able to figure out what the breaker controlled and that this would be a concern in the event of an emergency. Tr. 190. The Inspector stated that lost workdays could ensue because of “someone working on it or if they could get entangled in a piece of equipment or shut off,”

⁴ Respondent’s Mr. Cox stated that “Auto comp” stands for “[a]utomation Computer.” Tr. 212. In terms of the time to abate the citation, Mr. Cox stated that it was corrected, that is the labeling was added, within seconds of the time it was cited. This makes sense and Court finds that abatement time as fact, as it obvious that adding the words would be a simple and easy task. Both citations were abated virtually immediately. Accordingly, Mr. Cox did not agree that it took long to correct the cited subjects and he noted that the Inspector was also misinformed that 220 volts were involved. Tr.213. The Court finds, by the very simple nature of the abatement effort, merely writing the info on the breaker with a permanent marker pen, that the Respondent’s version is accurate. Further, the Court finds that the Inspector was misinformed about the voltage; 110 volts, not 220, were involved.

although he conceded that was an “unlikely” occurrence. Tr. 191. This “unlikely” assessment was sound, as the Inspector conceded that the MCC door was locked and only three people had the keys to gain access to the locked building; the crusher operator, Mr. Cox and the electrician. Tr. 191. Inspector Ackley agreed that it is traditional industry practice to label such breakers. Tr. 191. The Inspector noted that the operator told him that the cited breaker had been unlabeled “for a couple of years.”⁵ Tr. 193.

When the Court inquired of Inspector Ackley how he determined that the breaker is a “principal power switch,” he responded “[b]ecause that would be the principal spot where you actually would shut off the power to that circuit.” Tr. 193. However, he admitted that a “principal power switch” is not a defined term, but rather his definition was just an “understood term.” Tr. 193.

With regard to the second, similar, citation, No. 6555600, GX 14, the Inspector cited the same standard provision as he did for the panel box listed in GX 12, 30 C.F.R. 56.12018, upon finding “four breakers in the on position that weren’t labeled for what they controlled.” Tr. 195. The box is located in the wash plant MCC. Tr. 197. Here too, Inspector Ackley described the breakers as a principal power switch because “they shut the power on and off to a circuit. They disconnect it and connect the power to a circuit.” Tr.195. The condition he observed is shown in a photograph at GX 15, page 1. The Inspector stated that four of the breakers were not labeled, but the exhibit, GX 15, page 1, does not show that any are labeled, whereas all were labeled in the abatement photo of the box, GX 15, page 3.⁶ He later learned that the breakers in the panel box controlled lights and outlets and a horn. The gravity was listed as ‘lost work days’ because, at 110 volts, it was not a lot of current. The Inspector acknowledged it was marked as “unlikely” because “the main power disconnect [was] within 3 ½ feet [of the panel box]. Furthermore, the Inspector advised that “miners normally start and stop the plant from the control tower. So I don’t have the exposure of miners being in there daily using that breaker box, and if they had to in an emergency, they could just lock the whole power off to that.” Tr. 198. He listed the alleged violation as of “moderate negligence” because the plant doesn’t run at night and so the panel box would not be used to control lights.” Tr. 200.

The Court asked the Inspector to compare the relative severity of these two, like, citations. He noted, incorrectly, that the first citation involved a 220 volt circuit. For that reason, he considered it a greater danger. Tr. 201. However, for that same, “first,” citation, the

⁵ The Inspector maintained that the mine didn’t know itself what the circuit controlled. Tr. 195.

⁶ However, the Inspector maintained that two *were* labeled, explaining that it would require an enlargement of that photographic exhibit to show that was the case. Tr. 197.

Inspector acknowledged that it was located in the MCC⁷ room, which is normally locked. If the operation were running, the crusher operator would have a key to access that room. Tr. 201-202.

The Respondent called Mr. Cox on these issues. Mr. Cox explained that both instances involved 120 volt circuit breakers. Thus, he stated the Inspector was incorrect in asserting that 220 volt circuits were present. Tr. 204. As noted, the Court finds as fact that both instances involved 120 volts. He further stated that, per GX 13, page 3, “auto comp” refers to the “automation computer” and that there is no compressor anywhere in that area. Instead, there are three 120 volt breaker switches on the top row and the fourth switch is “a blank and the cover plate.” Tr. 204. Then, there are two on the bottom row. All are 120 volts. In fact, Mr. Cox stated there is no 220 volt circuit anywhere at the plant. Instead, the mine’s heavier equipment runs off of 480 volts.

In *both* cited instances, the boxes are adjacent to a primary service disconnect. Tr. 205. Mr. Cox considered both of the cited matters do not involve primary power switches, but instead they are “secondary power switches.” Tr. 205. The basis for his view is that a “principal power switch is the disconnect that feeds the power to [the] box.” Tr. 206. What the Inspector cited, Mr. Cox maintained, were “branch circuits that branch out to small 110 items [such as] light bulbs, wall plugs, [and] a computer.” Tr. 206. Cox is not an electrician but he stated that the “National Electric Code describes a principal or primary power switch to be the main disconnect in the control panel.” Tr. 206. At this mine, the main control panel is to the right of the cited panel. Tr. 206. Thus, it was Mr. Cox’s position that neither of the cited matters involved principal power switches. Instead, in both instances, the primary was located next to the cited panels and those had a 120 volt sticker and were marked that they were the shutoff for the boxes. Tr. 207. To be more precise, for GX 13, page 3, the primary was 3 ½ feet away and, for GX 15, at page 2, the panel box is barely in the picture but Cox stated, and the Court accepted, his statement that the power switch was in fact in the left hand corner of that photograph. Tr. 208.

As mentioned for the first citation, as depicted in the photos for GX 13, at page 2, the principal power switch is on the *outside* of the room in that photograph.⁸ In addition, the room itself is normally locked. Tr. 209. By shutting off the primary feeder on the outside of the building, one kills all the 110 power in that building. Tr. 210-211. Mr. Cox also stated that a blank is installed in the slot of a switch breaker if it isn’t there anymore so that there is not simply an open hole. Tr. 211. Thus, for GX 13, where it says “auto comp,” there’s a blank next to a 110 switch. A compressor could not run off this panel because it needs 480 volts.⁹

⁷ The Inspector believed that “MCC” stood for “Motor Control Center trailers that [the mine] used.” Tr. 202.

⁸ The “room” was also, appropriately, described as a small building.

⁹ As a matter relevant to any penalty, if the citations had been affirmed, Mr. Cox stated that, for any electrical issues at the plant, the company’s certified electrician takes over. On
(continued...)

Discussion.

The principal issue for these two citations is whether the cited breakers were “principal power switches” or, as the Respondent contends, they were “secondary power switches.” The Respondent contends that the principal power switch is the disconnect that feeds the power to the panel boxes and therefore not the panel boxes themselves. The panel boxes, Respondent asserts, are “branch circuits that feed out to small 110 items.” The Secretary acknowledges that, per the National Electrical Code (“NEC”), the term “principal power switch” refers to the “main disconnect in the control panel.” Sec. Br. at 19. While the Secretary admits that Mr. Cox testified that there were primary circuits which were located nearby and that those circuits were marked as shut offs, he also stated that, for Citation No. 6555597, the primary for the panel box was not located next to the cited circuit, but rather was outside the building.

The Secretary’s position is that its definition of a “primary power switch” is entitled to deference. Sec. Br. at 20, citing *Chevron*, 467 U.S. 837, at 843-45 (1984), *Twentymile Coal Co.*, 411 F.3d at 261-62, *Excel Mining, LLC*, 334 F.3d at 6. However, in the next breath, the Secretary admits that MSHA has not “expressly defined” the term. It adds that the NEC has not expressly defined the term either. *Id.* The Secretary, moving from the general principle of deference, cites to specific cases which, it contends, support the argument that 110/120 volt breakers have been found to be principal power switches. *Cemex Construction Materials of Florida*, 2012 WL 362193 at *4, Judge Zielinski, Jan. 2012 (“*Cemex*”), *Homestake Mining Co.*, 2 FMSHRC 493, 502 (Judge Fauver, Feb. 1980), *Blue Mountain Production Co.*, (Judge Miller, Oct. 2010). Pointing particularly to the *Blue Mountain* decision, the Secretary notes that the judge there held that because the switch de-energized portions of an area and because the issuing inspector was a certified electrician, weight was given to that view.¹⁰ The Court, having examined both decisions, notes that as they are not Commission level decisions no deference is

⁹(...continued)

cross-examination, Mr. Cox agreed that the breakers *do control something* at the plant, but he noted again that it was a secondary shutoff for a light bulb or a computer. Those things can be shut on or off through the switch. Tr. 216-217. The Secretary contends that, as the Respondent admitted that the breakers were not marked, and as there is a duty to know of the Mine Act’s regulatory requirements, there was moderate negligence here. Sec. Br. at 22. Even if established, the negligence would be less than moderate, as the mine had never labeled the breakers and no one from MSHA had ever cited Beverly Materials for this. R’s Br. at 8. The penalty issues are not reached because the Court concludes that these violations were not established.

¹⁰ However, the Secretary then acknowledges that in this case, Inspector Ackley is not a certified electrician but still seeks deference to his opinion because he “hold[s] an electrical certificate, and has spent a substantial amount of time working with electrical equipment during his tenure.” Sec. Br. at 22. This is shockingly insufficient, in the Court’s view, for *deference* to be afforded.

required. Beyond that, the cases are not persuasive because there is *no discussion* within them on the matter in contention here. In *Cemex*, for example, it was simply an uncontested and unarticulated given that the breaker was a “principal power switch.” In *Blue Mountain*, although it was challenged that the power switch box was a principal power switch, the judge simply credited the testimony of the inspector, who was a certified electrician, that it was one. However, it seemed that part of the judge’s reasoning was that the switches could de-energize *large portions of the area* by throwing a switch.

For its part, the Respondent counters that, if the Secretary’s view is adopted, a simple light switch, as it shuts power on and off to a circuit, could be deemed a “principal power switch.” This would seem to be true under the Secretary’s interpretation.¹¹

In response to the Inspector’s stated concern, in support of the standard’s application in this instance, that the need for prompt recognition of a circuit for the purpose of repairs or to deal with an emergency, make such identification critical, the Respondent counters that its *main disconnect*, being located a mere 3 and ½ feet away from the circuit, addresses those concerns. R’s Br. at 8. That main, it submits, is what anyone would turn off for such issues.

The crux of the Respondent’s position is that the breakers cited were branch circuits, not principal power switches. R’s Br. at 8. In support of this, Respondent turns to the testimony of Mr. Cox, who stated that the principal power switch is *the disconnect that feeds* the power to the panel boxes which were cited. The cited panel boxes are only branch circuits that feed power to the 110 volt items. Mr. Cox’s position was supported by the fact that there were primary circuits located nearby and those were marked as shut-offs. As the cited panel is housed within a metal, 20-foot-long, shipping container, it makes sense that the emergency shut-off panel is located outside that building. Respondent also correctly points out that no one who testified at the hearing for the Secretary was a qualified electrician and therefore the case for deference to the Secretary’s interpretation is unsupported. R’s Br. at 9.¹² The Court agrees.

¹¹ The Respondent notes that, while the location housing the breaker is normally locked, the Inspector stated that a fair amount of travel could occur in the MCC room. The Respondent disputes the “fair amount of travel” claim, as well as the assertion that it took a considerable time to abate the citations. The Court agrees with these contentions of the Respondent.

¹² The Respondent further contends that the cases cited by the Secretary do not in fact support her contention, because those related to equipment carrying 480 volts, not light bulbs, as in Respondent’s situation. The Respondent is mistaken in that claim. The *Cemex* case involved a 120 volt breaker. Although that decision referenced another case, *Omya Arizona*, a November 2011 decision by another administrative law judge, which did refer to a 480 volt power circuit, that was discussed solely in the context of determining if the violation was significant and substantial. In *Blue Mountain*, the decision does not disclose the voltage involved.

The Court concludes, while normally the Secretary is entitled to deference, as an *evidentiary matter*, it did not establish that deference is due here.¹³ The Secretary did not point to any policy interpretation, nor any authoritative source, nor to any Commission law establishing what is meant by a “principal power switch.” Instead, it merely claimed that the cited boxes were such switches because the inspector, who is not an electrician, and who did not point to any electrical code definition, simply asserted that they were. Deference certainly requires more than that. This is especially true given that the Inspector was found to be misinformed about critical information relating to his citations and because he either did not know about or misunderstood the close proximity of the main switches nearby the cited switch boxes.

Accordingly, the Secretary having failed to meet her burden of proof for both these citations, they are VACATED.

Citation No 6555598.

For Citation No 6555598, Inspector Ackley cited the Respondent under 30 C.F.R. 56.14132(a). That section, entitled “Horns and backup alarms,” provides: “(a) Manually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.” The Inspector tested the horn on a scraper and it did not sound. There is no dispute that the cited scraper is a piece of “self-propelled mobile equipment” and therefore within the standard’s coverage. Although the mine operator told the Inspector that it had been working, the Inspector never heard it function. There was another scraper in the area but no persons were on foot beyond the Inspector and the person with him for the inspection. This prompted him to list the gravity as “unlikely.” Tr.224. The Inspector also listed the violation as “moderate negligence” because the scraper had just been brought to the mine site that day. He calculated that it had been on site for approximately five hours. Tr. 225- 226. He also acknowledged that a horn could simply stop working overnight, and he had no idea how long the problem had been present. Tr. 226. Having acknowledged that, the Inspector still felt that the operator should have detected the problem, as part of its safety check before putting the equipment in operation.

While the operator told the Inspector that the horn *had* been working, it never worked when the Inspector was present for a test. Tr. 228. Still, the Inspector acknowledged that he heard it sound when it was operating. It simply didn’t work when tested. Tr. 229. The Inspector, based on his hearing it working while he was present, albeit not when tested, agreed

¹³ *Cf. Hibbing Taconite Co.*, 28 FMSHRC 143, 2006 WL 870520, (March 2006, Judge Barbour). As contrasted with the *Hibbing* case, in this matter there is no “plain meaning” for a “principal power switch” presented in this record. In addition, the Secretary presented nothing to establish any kind of fair notice of its interpretation. *Secretary v. Island Creek Coal*, 1997 WL 833381, *13 (Jan. 1997), dissenting view of Commissioner Verheggen. A regulation must give fair notice. *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982).

that it was possible that the horn worked when it was tested during the preshift examination. Tr. 232-233. The Inspector simply could not recall if he examined the preshift reports to see if the horn had been checked that day. Tr. 233. Based on the Inspector's testimony, it is fair to conclude that the horn worked intermittently but that it never worked when tested and the Court finds this as a fact.

Mr. Cox then testified about the matter, but his recounting varied from the Inspector's, as he asserted that in fact the horn did sound at least some of time when it was tested in front of the Inspector. Tr. 234. Mr. Cox corrected the Inspector's testimony, asserting that it was actually the scraper's second day at the site. According to his version, the horn was tested pre-shift and found to be working that day. Tr. 235, 236. Thus, Respondent contended that the horn problem developed *after* the pre-shift, at some point during that day's operation. Tr. 236. Respondent added, without contradiction, that the scraper had been working in a jarring environment, (i.e. under dusty, dirty and rough conditions) which is harsh on such equipment as horns and lights. Ultimately, the horn was replaced, because it was found to be unreliable. Tr. 237.

Accordingly, for Citation No 6555598, the Court finds that the horn was working when the equipment was examined during its pre-shift and that it worked, albeit only intermittently, when the Inspector was present. On this record, it is concluded that the horn was working when the shift began and only later started acting up, working intermittently thereafter. The citation is therefor VACATED.

Citation No. 8662001.

The parties briefly addressed the Citation pertaining to a D8T bulldozer with a fire extinguisher missing its identifying tag, Citation No. 8662001. The Respondent maintained that the tag "blew off" the extinguisher. The parties agreed that the Secretary would amend that Citation to reflect "no lost workdays," but the negligence would remain as "moderate." This change, they parties acknowledged, would impact the penalty the Court would assess. Tr. 242-244. Given this change, the Court AFFIRMS the violation and assesses a penalty of \$75.00.

Citation No. 6555599.

The last Citation in issue, Citation No. 6555599, alleges a violation of 30 C.F.R. 56.12004. Entitled, "Electrical conductors," it provides: "Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected."

Inspector Ackley found the outer protected jacket of a cable to be damaged, exposing inner conductors. "The damaged section was hanging on part of the metal frame for the Grade 9 stacker, the tail section." Tr. 246. The Inspector focused on the last sentence of the cited standard and its provision that "[e]lectrical conductors exposed to mechanical damage shall be protected." Here, the copper wires inside the power cable were his concern. This was a 480 volt

cable and it was damage to the outer protected jacket that the Inspector cited. Tr. 248. As with the other citations, photographs were taken for this matter as well. GX 19, pages 1, 2, & 3. If matters worsened to the point that the inner conductors were exposed, a fault could occur if those inner conductors were to contact the nearby bare metal that was the frame of the conveyor. If that were to occur, electrical injury, shocks and electrocution could occur. Tr. 249. Still, the Inspector marked the violation as “unlikely” because the inner conductors were not yet damaged at the time of the citation. Tr. 251. He also listed the negligence as “moderate.” He believed that the mine should have discovered the condition as part of its daily workplace examination requirement. Based upon its appearance, he did not feel that the condition he observed was a fresh break. Tr. 252. The defective area was approximately 2 inches long and a half-inch wide.

For the Respondent’s part, it had its Exhibit 2 admitted. It is a cross-section of a typical cord. The Respondent conceded the violation in that it agreed that the outer protective jacket was cut. Tr. 258. However, not only were the inner leads still insulated, but the Inspector agreed that all 3 inner leads would need to be bare for one to receive a full 480 volt shock.¹⁴ Tr. 259. Mr. Cox testified about the Citation for the Respondent. In total, he estimated that the mine would have in the neighborhood of 3 to 4 miles of such cable. Tr. 263. This was plainly offered to make the point that keeping up with the condition of every inch of the cable is no easy task.

Mr. Cox also offered, as a mitigating circumstance, that the mine continually certifies that such equipment is grounded “so that if [it were] to short, it would immediately go to ground.” Tr. 264. The mine also has other safety devices to reduce the risk of shock such as ground fault alarms and thermal protection in the overload to kill the circuit. The Respondent’s point was that it is attentive to this matter and takes the issue seriously. Tr. 265. With the routine vibration these belts are exposed to, it is common for the mine to splice a cord once every week or two. Tr. 265. Mr. Cox did agree that it is practice to repair a condition, such as was cited, as soon as [he] found it.” Tr. 267.

Based on the evidence of record, this Citation is AFFIRMED and the Court imposes the civil penalty of \$75.00 (seventy-five dollars).

¹⁴ Mr. Cox supported that conclusion, advising that each of the 3 conductors would carry 160 volts and it is only all three combined that totals to 480 volts. Tr. 267.

ORDER

Beverly Materials LLC is **ORDERED** to pay a total civil penalty of \$375.00 (three hundred seventy-five dollars) within 40 days of this decision.

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

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January 14, 2013

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of RUSSELL RATLIFF,	:	Docket No. WEVA 2013-368-D
Complainant	:	MSHA Case No.: PIKE-CD-2013-02
v.	:	
	:	
COBRA NATURAL RESOURCES, LLC,	:	Mine: Mountaineer Alma A. Mine
Respondent	:	Mine ID: 46-08730

DECISION AND ORDER
REINSTATING RUSSELL RATLIFF

Appearances: Willow Fort, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, representing the Secretary of Labor (MSHA) on behalf of Russell Ratliff.

William E. Robinson, Esq., Dinsmore & Shohl, LLP, representing Cobra Natural Resources, LLC.

Before: Judge Steele

Pursuant to section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor (“Secretary”) on December 12, 2012, filed an Application for Temporary Reinstatement of miner Russell Ratliff (“Ratliff” or “Complainant”) to his former position with Cobra Natural Resources, LLC, (“Cobra” or “Respondent”) at the Mountaineer Alama A. Mine pending final hearing and disposition of the case.

On October 31, 2012, Ratliff filed a Discrimination Complaint alleging, in effect, that his termination was motivated by his protected activity.¹ In the Secretary’s application, she represents that the complaint was not frivolously brought, and requests an Order directing Respondent to reinstate Ratliff to his former position as a shuttle car operator.

¹ Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act. *See 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 (3rd Cir. 1981).

Respondent filed a request for hearing on December 20, 2012. An expedited hearing was held in Williamson, West Virginia on January 7, 2013. The Secretary presented the testimony of the complainant, and the Respondent had the opportunity to cross-examine the Secretary's witness, and present testimony and documentary evidence in support of its position. 29 C.F.R. §2700.45(d).

For the reasons set forth below, I grant the application and order the temporary reinstatement of Ratliff.

Discussion of Relevant Law

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine Act]" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). "Courts have recognized that establishing 'reasonable cause to believe' that a violation of the statute has occurred is a 'relatively insubstantial' burden." *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001)

Temporary Reinstatement is a preliminary proceeding, and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.² *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the

² "Substantive evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

purpose of determining “whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.” *Jim Walter Resources*, 920 F.2d at 744.

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *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 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

However, in the instant matter, Ratliff need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the “reasonable cause to believe” standard. Thus, there must be “substantial evidence” of both the applicant’s protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec’y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a “motivational nexus between protected activity and the adverse action that is the subject of the complaint.” *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept.1999). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The evidence

On October 31, 2012, Ratliff executed a Summary of Discriminatory Action, filed with his Discrimination Complaint of the same date. In this statement he alleged that he was fired on October 17, 2012. The series of events leading to his termination began on Saturday, October 16, 2012 when the ventilation off of E Panel was changed by modifying stoppings and moving the scoop charger.³ On Monday, October 8, the day-shift did not produce because a federal inspector was on section 11 North. The next morning, day-shift dispatcher Kevin Hutchinson was giving the safety talk and an electrician from 11 North said that it was bad that management could not get ventilation to the face all shift. Hutchinson began to yell at the group and Ratliff told him to stop. Ratliff further stated that conditions on 11 Right had gotten worse in the past six weeks, that every cut was cut through, that cut were being made into intake air, and that there was no cut cycle. Ratliff worked the rest of the week, including Saturday, and wrote 10

³ The actual date was October 6, 2013, Ratliff corrected this mistake in his testimony at hearing. Tr. 45.

“Running Right” cards for those five shifts and put them in the appropriate box on Monday, October 15.⁴ On that same day at around 4:50 p.m., Otto Bryant went into the bathhouse and walked over to Ratliff’s basket. Ratliff was standing with other employees and Bryant asked twice why Ratliff had not helped jack on the mantrip. Ratliff said that he did not know anything about it and said some “curse words.” He worked the next day, but on October 17, 2012 while in the safety meeting he was told in front of everyone to go into the office. He went into the office with his Mine Rep. and was told he was going to be discharged after the decision was approved by Alpha. At approximately 11:15 a.m. he was terminated. (GX-1)

Submitted with the application was the December 12, 2012 Declaration of James Newman, a Special Investigator employed by the Mine Safety and Health Administration. Mr. Newman stated that he had investigated Ratliff’s discrimination claim against Respondent. He had determined the following:

c. On October 9, 2012, Ratliff attended a safety meeting. During the meeting, Ratliff reported that the mine was not following a cut cycle and was cutting into the intake air. On October 15, 2012, Ratliff deposited ten “running right” cards regarding safety concerns in a box kept at the mine. The cards are reviewed by mine management and sent to the Cobra Natural Resources, LLC corporate offices.

d. Ratliff was terminated on October 17, 2012 for alleged insubordination and complaints from co-workers about his attitude and work performance. Ratliff has one written warning of insubordination to a supervisor (October 4, 2011), a documented verbal altercation incident with a co-worker (September 22, 2012), and two documented incidents of being disoriented on the job (June 2011, November 2011). These complaints about Ratliff’s work habits are in his personnel file, but no other action was taken by Respondent until Ratliff made safety complaints on October 12 and October 15, 2012. Ratliff claims that management at Cobra Natural Resources, LLC terminated him because he made safety complaints.

Id. The Special Investigator concluded that the discrimination complaint was not frivolously brought. *Id.*

The Respondent disputes Ratliff’s claim that he spoke at the safety meeting and also denies anyone was aware that he had submitted “Running Right” cards or their contents. Furthermore, Respondent claims that even if Ratliff had not been fired on October 17, he was

⁴ “Running Right” cards are forms provided to employees, allowing them to anonymously document safety concerns.

slated to be laid off on January 15, 2013, with benefits ceasing at the end of January. His lay off was determined based on an objective evaluation of employee performance conducted by Cobra management. His poor evaluation was based on his reputation for insubordination and his tendency to have conflicts with co-workers. The evaluation was conducted seven months before Ratliff's alleged protected activity.

Exhibits

The Secretary submitted two exhibits into the record at the hearing and they were duly admitted into evidence. (TR 46). GX-1 is the Discrimination Complaint filed by Ratliff on October 31, 2012. GX-2 are "Running Right" cards that were turned in to the Respondent around the time of Ratliff's discharge.

Respondent likewise entered eight exhibits into the record at the hearing and they were duly admitted into evidence. (TR 113). RX-A is an employee evaluation form prepared by Respondent in participation of lay offs. RX-B is a chart produced by Respondent containing the performance scores given to each employee. RX-C is an employment information chart. RX-D is a letter signed by Matras and dated November 16, 2012 explaining that there will be a reduction in force. RX-E is a notice regarding wages and work schedules for laid off employees. RX-F is a Health, Welfare and Retirement FAQ for employees terminated on January 25, 2013. RX-G is an e-mail from McClure scheduling a meeting to explain an hourly evaluation tool. RX-H is an employee chart showing miners affected by the lay off.

Testimony of Russell Ratliff

a. Direct Examination

Ratliff began at Cobra on June 8, 2008 at the Cobra mine in Wharncliffe, West Virginia. Tr. 9. He started as a miner operator and worked as a scoop operator and shuttle car operator. Tr. 10. He is certified to operate any piece of equipment underground. Tr. 10. He has also operated bridges, worked on long haul sections, managed and maintained belts, and operated loaders and forklifts outside. Tr. 11, 12. Ratliff began in the mines at 19 years of age at Scotch Ranch mines and worked there for 10 years. Tr. 11. He then worked at another operator before working as an equipment operator at IO Creek Mine from 1989-91. Tr. 11. He received Kentucky bossing papers and worked as a section foreman for a year and then acted as superintendent until 2003. Tr. 11. Bossing papers mean you are certified and responsible for people working beneath you. Tr. 12. Getting West Virginia paper would require passing a 50-question test offered once a week. Tr. 12.

Ratliff was fired on October 17. Tr. 13. On that day, he was in a safety meeting and the mine foreman, Jeff Jackson, called him into his office. Tr. 13. Ratliff learned there would be a meeting in the superintendent's office and was told to get the the on-site mine representative, Roosevelt Payne. Tr. 13. The fact that Payne was coming meant that they wanted a witness beyond Ratliff to know what was said. Tr. 14. At the meeting Wayne Cooper of Human

Resources asked Ratliff about an incident that occurred two days earlier. Tr. 14. Ratliff explained his side of the story, but Cooper said he wanted to know if Ratliff cussed and said that he was going to be terminated over it. Tr. 14.

Following the UBB disaster, there has been a safety meeting at the beginning of every shift. Tr. 15. On October 9, the safety meeting was conducted by dispatcher Kevin Hutchinson. Tr. 16. There were about 34 people at the meeting. Tr. 17. At the meeting, Hutchinson was yelling about Respondent's position and an electrician named Tubby Lewis said it looked bad for the mine to be down the day before for an entire production shift with an inspector present. Tr. 16. Lewis explained that in the last six weeks there had been a change in bosses on the shifts and that the entire day they had worked on the section with no air ventilation because the new bosses were not watching. Tr. 17, 18. Ratliff spoke up and said that the situation was worse in the last six weeks since the change. Tr. 18. After this comment Hutchinson began to yell and Ratliff went further to say that in those six weeks more than 90 percent of the cuts were into intake air. Tr. 18. Also, Ratliff said that the foreman's direction of the cut cycle was getting worse. Tr. 18. The cut cycle is the plan for the cut the miner is going to make as you advance the face. Tr. 19. Respondent was not following the cut cycle and that was the substance of what Ratliff was saying at the safety meeting. Tr. 19, 20. Ratliff was concerned about his health and the health of others because the way they were cutting meant the miners were breathing in lots of dust and this could lead to black lung or silicosis and death. Tr. 20, 21. This would most likely be silicosis because the mine produces about 20% coal and 80% slate mixed with sandstone. Tr. 21.

However, after the safety meeting nothing was changed with respect to how the cut cycle was followed. Tr. 21. Ratliff worked for the rest of the week (four or five days). Tr. 21. In that time he filled out the "Running Right" cards (GX-2) that Cobra encouraged miners to fill out when they have a complaint and turned them in on Monday, October 15. Tr. 21, 22. The idea behind the cards was to cut down on accidents. Tr. 22, 23. There is a once-a-month meeting held in the section safety room to discuss the cards and then they are sent to the corporate office. Tr. 23. Ratliff marked the cards that he filled out with a green "X." Tr. 24. The second one over from the top was marked by Ratliff and states "start of shift" and "11 right, first shift, number 6 right had not been dusted or cleaned for two cuts." Tr. 24. There is an "RR" marked on the card but that was added later. Tr. 24, 25. The card is marked "workplace examination" because the mine is supposed to dust after each cut to protect health and safety. Tr. 25, 26. This card was filled out on October 11 but not submitted until the 15th. Tr. 26.

The next card is on the bottom of the page and dated 10/11 but also turned in on the 15th. Tr. 26, 27. It states "11 right, first shift, 405 miner putting out water on scrubber" and this is an at-risk behavior in a workplace examination. Tr. 26, 27. A scrubber is not supposed to throw water, when it does it means that something is not right and it can cause the shuttle car to get wet and affect ventilation. Tr. 27. It can also cause water and dust inhalation. Tr. 27.

The next card is the sixth one on the page and dated 10/11. Tr. 28. It states, "first shift. No flood dusting on third shift. Today is Thursday and section hasn't been flood dusted all

week.” Tr. 28. “Flood dusting” is when you take around three tons of rock dust and sling it using the scoop to coat the entire area and it is supposed to be done every third shift. Tr. 28, 29. Failure to do so could result in dust in the lungs or an explosions. Tr. 29.

The next card is the fifth one and it dated 10/16. Tr. 29, 30. It states “no flood dusting on third shift.” Tr. 29. This is the same concern as the last card and in the same area. Tr. 30.

The next card is the fourth one on the third page and dated 10/17. Tr. 30, 31. It states, “11 right. No bulk or rock dust put where power center was moved to.” Tr. 31. Whenever a charging station or transformer is moved, a full bulk of dust should be placed prior to the power center being sealed to prevent explosions. Tr. 31. This one has a circle and a question mark around 11 RT but this was added before Ratliff received the card and was not added by MSHA. Tr. 31, 32. The “RR” was also added later. Tr. 31.

The next card is the last one on page three and dated 10/17. Tr. 32. It states, “405 first shift”—“405 miner putting water out of scrubber.” Tr. 32. This is the same concern as described on the card from 10/11. Tr. 32.

The next card is the third one from the top of page 4. Tr. 32. It states, “No flood dusting on third shift.” And is the same concern as the two previous cards. Tr. 33. The “RR” and 11 RT circle and question mark were added at a different time. Tr. 33. The last three cards here were dated on 10/17, the same date that he was fired. Tr. 33. He was fired at the beginning of the shift, after he put these last cards in the box. Tr. 34.

Ratliff submitted other cards but they were not included here. Tr. 33. He submitted 10 cards on the 15th. Tr. 34. He remembers some of them, two were about cutting through to intake air and one was about how the miner had cut three cuts without being cleaned. Tr. 34. The missing cards were serious; the last (d) order the mine received was given because an area was not scooped and cleaned within 80 feet of the face (a condition also described in a missing card). Tr. 34, 35.

The “Running Right” cards do not have Ratliff’s name on them but they were dated and Ratliff believes he could be identified by the information on the card. Tr. 35. He could be identified by his handwriting; Respondent has samples of Ratliff’s handwriting because he often had to write down information and sign his name, including at the daily safety talks. Tr. 35, 36. Additionally, Ratliff put the name of his section on the cards and therefore only the 10 people on that shift could see these conditions. Tr. 36.

On Monday the 15th Ratliff was involved in an altercation with an assistant mine foreman in the bathhouse about twenty minutes after his shift. Tr. 39. The foreman, Otto, asked why Ratliff had not helped jack on the man trip. Tr. 39. Ratliff had no answer because there was no jacking that day. Tr. 39. Otto got red in the face and asked again. Tr. 39. Ratliff does not remember everything said, but he knows that he said that there was no reason for Otto to be in there and that he said some “cuss words.” Tr. 40. The miners changed and shower in the bathhouse and they “cut up” but the foreman rarely goes in. Tr. 40. Ratliff was not wearing

clothes when the foreman spoke to him. Tr. 40. Other rank and file employees were present. Tr. 41.

Ratliff is a rank and file employee and when management has an issue with a rank and file employee the proper procedure is for the foreman to take the employee aside and discuss the matter respectfully. Tr. 41, 42. Ratliff learned about this procedure from meetings Respondent held to go over work rules. Tr. 42. Ratliff does not believe the foreman followed the protocol because he yelled in front of other employees. Tr. 42. Ratliff admits to cussing. Tr. 42.

The mine is still operating and there is still a shuttle car on the first shift. Tr. 43. The mine is not idle and three shifts are still running. Tr. 43. Ratliff has been following lay-offs at the mine by talking to people who still have their jobs and he learned that other people who were laid off immediately got jobs at other mines owned by Alpha (the company that owns Cobra). Tr. 43, 44. In Ratliff's opinion, the people that did not speak up at Cobra still have their jobs. Tr. 46. Ratliff also believes that the lay-offs were done incorrectly because they did not consider seniority and also kept on family members of management. Tr. 46, 47.

GX-1 is Ratliff's discrimination form and aside from a date being wrong, the narrative is true and correct and he signed the document after reading it. Tr. 45. The wrong date is at the top and should say 6th instead of 16th. Tr. 45. There is only one wrong date. Tr. 45.

b. Cross Examination

The plans Ratliff discussed were the section plans submitted to MSHA and the state. Tr. 48. Ratliff does not know the dates of those plans, but they were discussed at the safety meetings and Terry Lambert also explained them. Tr. 48, 49. Lambert never showed the plans, but Ratliff saw the maps and written plans on the wall. Tr. 49. Some of the plans are locked up in the cabinet but Ratliff saw the rock dust plan and others. Tr. 49, 50.

The October 9 safety meeting was held in the corridor where miners sit to go to work, near the lamp room. Tr. 50. The meeting was conducted by Hutchinson with all of the rank and file employees from the two sections. Tr. 50. Some people from management, including Ratliff's foreman Todd (he does not know his last name) and Phil Alford were at the meeting. Tr. 50, 51. Ratliff does not remember who was near him at the meeting but other miners, Dewey Lusk, Ted, and Kevin heard him make comments about cuts being made into intake air. Tr. 52. However, no one actually said "Russell, I heard you say at the October 9 meeting that cuts were being made in the intake air." Tr. 52, 53. Ratliff does not know if anyone indicated to Inspector Newman or anyone at MSHA that they heard the comments. Tr. 55.

The comments at the meeting were directed at Hutchinson and Ratliff believes that Hutchinson is a member of management. Tr. 55, 56. He did not receive any response from management and no one said anything about it. Tr. 56. To his knowledge, there was no follow-up on the issue after the safety meeting. Tr. 56. He does not know if anyone said anything to

anyone about his comment. Tr. 57. He does not recall if Hutchinson discussed the citations that had been issued the day before during the MSHA inspection. Tr. 57. These safety meetings are held daily and Ratliff went to one every day he worked there. Tr. 57. He often participated in the discussions and this was not the first time he had done so. Tr. 57, 58. The purpose of the safety meeting is for people to voice concerns. Tr. 58.

The “Running Right” cards are distributed by Cobra in a little stack in the lamp room and also by Lambert, the safety manager. Tr. 58. The company encourages employees to fill out these cards and put them in the box. Tr. 58, 59. Ratliff thought this was a good program and that the company wanted employees to fill them out. Tr. 59. He does not know if the cards are used to discuss issues at future safety meetings, but he does know they use the cards. Tr. 59. The cards are filled out anonymously and all of Ratliff’s cards were neither signed nor initialed. Tr. 62. Ratliff put his cards in the box in the lamp room along with everyone else’s card. Tr. 62. Management does not see people put cards in the box and there is no camera to Ratliff’s knowledge. Tr. 62, 63. Respondent would know who wrote the cards only from handwriting, but Ratliff does not know who would be able to tell. Tr. 63. He does not know if anyone compared his handwriting to his signature. Tr. 63.

Ratliff knew that the cards dated October 11 were put in the box on October 15 because he remembers putting them in, but he did not keep a record. Tr. 63, 64. One of the other cards was put in on October 16 and the others were put in before the shift started on October 17. Tr. 64, 65. Ratliff does not know how often the cards are taken out. Tr. 65. No one saw the cards before he put them in the box, he did not discuss them with anyone and no one saw him insert the cards. Tr. 64, 65.

Ratliff often filled out cards, but he cannot estimate the number he has filled out over the years or give a weekly average. Tr. 66. Ratliff did not see the cards run on a television screen in the lamp room but he has seen other employees’ cards. Tr. 66. He participated in two employee involvement groups (for a month each time). Tr. 67. While on those groups he looked at some of the cards and there were dozens of them each month. Tr. 67.

The cuts being made in the intake air were in the middle section, three, four, five, or six. Tr. 59, 60. The situation had gotten worse since management on the second shift had changed approximately six weeks earlier. Tr. 60. Changes in management happen every few months. Tr. 60. Ratliff’s crew was not the only crew cutting into intake air. Tr. 61. Todd was the boss on second shift but it was occurring on other crews as well. Tr. 61. He does not know all the section bosses were on those other crews, but Ronny Estep was one. Tr. 61.

The date of the altercation with Otto was the 17th, not the 22nd or 21st. Tr. 68. He was not fired on the 24th, he was fired on the 18th. Tr. 68. He knows these dates because he made notes, but he does not have the notes with him. Tr. 68, 69. The notes show the 18th was the last day he worked. Tr. 69. Regardless of the date, he felt the foreman had breached protocol. Tr. 69. Ratliff responded to the breach of protocol by telling Otto to “shut the fuck up” and he said

this several times before telling him to “get the fuck out.” Tr. 69, 70. This was also a breach of protocol. Tr. 70. He worked another shift after this before being fired. Tr. 70.

Ratliff was not involved in Cobra’s process for reducing its workforce and does not know the criteria used to determine who would be laid off. Tr. 70.

c. Re-Direct Examination

Some people never speak up at the safety meeting but Ratliff speaks up frequently. Tr. 71. Very few others speak up frequently. Tr. 71. He has a reputation at the mine for being a “hot-head” about safety issues. Tr. 71. Some of the other guys on his crew might also have that reputation. Tr. 71.

Ratliff had a verbal altercation with others prior to the one with Otto and he was not fired for it. Tr. 72. He had seen others have altercations with Otto without being fired. Tr. 72.

d. Re-Cross Examination

Two or three other people had verbal altercations with Otto. Tr. 72. K.J. Phillips even used the same or similar language, a little over two year ago. Tr. 73. He could not think of anyone else at this time. Tr. 73.

Ratliff has a reputation about being particular about safety but he also has a reputation for not getting along with co-workers and for being insubordinate. Tr. 73. He had a reputation for fighting with co-workers and this was not the first time he had cussed at a boss. Tr. 74.

Testimony of Raybon Keith Cook, Jr.

a. Direct Examination

Cook is a manager of human resources at Alpha Natural Resources. Tr. 75, 76. He works in the Brook Run South business unit in Beckley, a unit with 14 companies including Cobra. Tr. 76. His responsibilities include overseeing policies covering employment, compensation, performance, workers’ comp, and medical/disability/retirement benefits. Tr. 76. He also deals with reduction in force issues. Tr. 76.

RX-G is an e-mail dated March 6, 2012 from Bill McClure for a meeting regarding an hourly evaluation tool. Tr. 77. Bill McClure is senior vice president of human resources and was one of Cook’s bosses. Tr. 77. The other recipients of the e-mail are directors of human resources. Tr. 77. Cook was not involved in the earlier reduction of force because Brooks Run south was not involved in that previous lay-off. Tr. 77, 78. The e-mail says, “after the dust settled, it was determined that this process must continue,” meaning the evaluation process, including evaluation of employees at Cobra. Tr. 78.

Cook evaluated all the employees at Cobra including Ratliff. Tr. 78. He also attended one of the information meetings referenced in the e-mail on March 7. Tr. 78. At the meeting they discussed the Excel-based evaluation system and an accompanying form. Tr. 79. Cook understood that the point of the program was to evaluate employees based on running right, job efficiency, and initiative. Tr. 79. These evaluations, if used, would be applied to determine who would be laid off. Tr. 79. Cook did not know when the lay off might occur. Tr. 79.

RX-A is the employee evaluation form Cook received during the conference call in March. Tr. 79, 80. This was used to evaluate employees at Cobra and Cook was directly involved in those evaluations. Tr. 80. Employees were given a score of 1-5 in each category with 1 being satisfactory, 2 needs improvement, 3 met expectations, 4 exceeded expectations, and 5 substantially exceeded expectations. Tr. 80. Under the “running right” category there were four subcategories. Tr. 80, 81. There was also a section for employees with additional skills or certifications like EMT. Tr. 81. These skills counted as one additional point. Tr. 81. Wayne Cooper, the local HR manager familiar with the workforce, and Boon Miller the general manager and former superintendent, also worked on the evaluations. Tr. 81, 82. They made the evaluations and completed them by assigning scores to each employee including Ratliff. Tr. 82, 83. All three had input on each employee and the score was based on combined knowledge. Tr. 83. Positive and negative traits and work history were discussed. Tr. 83. In early 2012, Cobra utilized the services of contract miners at Mountaineer mine, usually between 15 and 30 miners. Tr. 83, 84. They did not evaluate those employees, only Cobra employees. Tr. 84.

RX-B are the evaluations of Cobra employees at the mine. Tr. 85. It has the scores for each category for each employee and the time the score was entered, most being entered on March 23 or 30. Tr. 85. The three evaluators actually met on March 21st. Tr. 85, 86. Ratliff’s score was posted on March 30 at 10:47 a.m., roughly seven months before the alleged protected activity. Tr. 86. Ratliff is listed as a face operative (an employee who works on the face, usually with equipment, including a shuttle car, scoop, or miner operator) and his score is accurate. Tr. 86, 87. The running right category considered an employee’s safety consciousness, adherence to procedure, attitude, respect for others, ability to work with others, and participation in safety processes (including speaking up on safety). Tr. 87, 88. In that category, Ratliff scored a 12, meaning that he had the second lowest score of the 41 face operatives. Tr. 88. He had the third lowest score of the 106 employees in the mine in March. Tr. 88, 89. These scores were not changed after March 2012. Tr. 89.

Eventually, Cook learned there would be lay offs from business unit president Frank Matras. Tr. 89. Matras told Cook they would be cutting back at Mountaineer mine from two section to one (or six total shifts to three). Tr. 89, 90. Other parts of Cobra, like Blackberry Prep Plant, were also reduced after the same sorts of review as at Mountaineer. Tr. 90, 91. Matras asked Cook, Miller, and Brian Chandler to work on who would be affected and sent the list to legal for review and discrimination testing. Tr. 91. Some employees were sent to other Alpha companies and some were laid off. Tr. 91. Matras and Miller determined the number of employees that needed to be retained and after the deciding they applied the numbers from March. Tr. 92. Seniority and family relationship were not considered. Tr. 92.

RX-D is a letter Cook prepared for Matras' signature that explained that there was going to be a reduction in force and it was sent to all Cobra employees whether or not they would be laid off. Tr. 92, 93. The reduction in force was effective on November 16, 2012. Tr. 93.

RX-E is the Notice Regarding Wages and Work Schedule and RX-F is Health, Welfare, and Retirement FAQs for Hourly Employees Being Terminated January 15, 2013. Tr. 93. RX-E and F were not sent to all employees, just those being terminated. Tr. 93, 94. RX-E says that employees could work as late as January 15, 2013 or receive pay in lieu of work through that time. Tr. 94. No employees affected worked past the announcement on November 16, 2012. Tr. 94. They simply were paid the normal wage at 40 hours a week. Tr. 94, 95. RX-F states that employees would receive benefits through the end of January. Tr. 95.

RX-G is a summary prepared by Cook of the number of employees at Cobra affected by the layoff. Tr. 95. This documents shows that there were initially 186 non-contract employees at Cobra, that 42 were laid-off and that 140 remained in addition to contractors and four people out on workers comp. Tr. 96. Mountaineer mine maintained 86 active employees, the number targeted by Miller in his evaluation. Tr. 96, 97. There were 14 miners and 16 contract miners affected by the lay off at Mountaineer. Tr. 97. Of those 14, nine transferred to other Alpha companies and five were laid off entirely. Tr. 97.

RX-H is a spreadsheet prepared by Cook that identifies miners affected by the reduction in force. Tr. 97. The five employees listed in red are the employees that did not receive another job. Tr. 97, 98. They were selected for lay-off in March and include three electricians (Spears, Lewis, and Blackburn). Tr. 98. Blackburn received a score lower than Ratliff and the other employee with a lower score, Gooslin, quit before the lay off. Tr. 98. Lewis got the same score as Mr. Ratliff, Spears scored a 34 (four points higher than Ratliff), Jonathan Baranth scored a 31 and Larry Jewell received a 32. Tr. 98, 99. The employees in yellow were those transferred to other Alpha companies and all of those employees scored higher than Ratliff, including the four face operatives. Tr. 99, 100. All of these decisions were made based on the March 2012 evaluations. Tr. 100. If Ratliff had stayed on until November 16, 2012 he would have been laid off, as would Mr. Gooslin. Tr. 100, 101. Because they left earlier, the number of positions that needed to be eliminated was lessened. Tr. 101. If he had stayed he would have been entitled to pay through January 15 and benefits through January 31, but nothing else. Tr. 101.

b. Cross Examination

Five employees were laid off but it would have been six if Ratliff had stayed. Tr. 101, 102. Cook has never worked underground but he knows that a mine is not a delicate work environment. Tr. 102. He is not aware of anyone being fired for using profanity. Tr. 102.

In evaluating employees under RX-A on March 21, Cobra did not use an employment psychologist or other outside people to help. Tr. 102, 103. There were no revisions after March 21 for any reason. Tr. 103. The dates on the spreadsheet were added automatically but Cook

did add the date of review, March 21. Tr. 103. People reviewed later were new hires or transfers from other locations. Tr. 103. Cook is not aware of any relatives of management that were laid off entirely. Tr. 104.

Looking at RX-A and the Running Right category, safe behavior counted but no specific points were given for speaking up at safety meetings. Tr. 104. There was just an overall score based on behavior. Tr. 104. Speaking up in a would be safe behavior if the goal was to make the mine safer. Tr. 104, 105. Points were not granted for specific actions; it was a global analysis. Tr. 105. The scores were determined by Cook, Cooper, and Miller and the exact number determined by consensus. Tr. 105. Cook never saw any of the miners work directly and has no personal knowledge of their behavior. Tr. 105. Management provided the information. Tr. 106.

Following the mine plan would constitute following policy and procedure for the purposes of that category, but it is not given a specific point value. Tr. 106. Submitting “Running Right” cards would also be positive, but not give specific points. Tr. 106. Cook was not present to see who followed the mine plan. Tr. 106. Participating in an EIG meeting would be a good example of participation, but would not give specific points. Tr. 106, 107. These evaluators would not say something like “I’m giving two points for attending the EIG meetings.” Tr. 107. With respect to job efficiency, sometimes it is important to go slow to act safely, and that is not necessarily inefficient. Tr. 107, 108. That would not be counted against a miner. Tr. 108. It would depend on the conditions in the mine if working slower was inefficient or if it were safe. Tr. 108. Cook did not talk to the other evaluators to determine how they counted efficiency and safety together. Tr. 110. Under initiative, someone would be given positive scores for trying to solve safety deficiencies at the mine. Tr. 110. Again, he did not discuss how this would be evaluated with the others. Tr. 110. The category that says “doing the right thing” includes treating others with dignity and respect. Tr. 110, 111. Doing the right thing means doing the right thing each day, behaving in a positive manner and trying to create the best work environment for you and your co-workers. Tr. 111. Trying to operate safely is doing the right thing, even if creates a little friction. Tr. 111.

Cook said that the company went from two sections down to one, but the one section was a super section. Tr. 111. This means that the section operates using two miners. Tr. 112.

c. Re-Direct Examination

Of the people on the evaluation team, Cook was the one who did not see the miners daily. Tr. 112. He had less personal knowledge than Cooper or Miller and largely deferred to them on these issues. Tr. 112. But as an HR person he was aware of the performance issues with Ratliff that had arisen before and could weigh in personally. Tr. 112, 113.

d. Re-Cross Examination

Cook was aware of these previous performance issues because he was told, but he had not observed them personally. Tr. 113.

Findings and conclusions

Protected activity

On October 9, 2012 Ratliff spoke out at a daily safety meeting in support of another miner, Jon Lewis. Tr. 16. In combination, Ratliff and Lewis stated that mining was not being conducted in accordance with the cut cycle plan and that Respondent was mining into intake air. Tr. 18. They said the conditions at the mine were embarrassing when the day before a federal inspector was present. Tr. 16. Ratliff stated that the conditions had gotten worse since management had changed on his shift six weeks earlier. Tr. 18. The major concerns related to these conditions were dust inhalation and explosion. He claims that several members of management were present to hear him make these comments. In addition, Ratliff submitted at least 10 “Running Right” cards that described safety conditions at the mine.

Section 105(c)(1) states, in relevant part:

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

30 USC § 815(c)(1).

Respondent argues that Ratliff was not engaged in protected activity because there was no objective evidence that Ratliff spoke at the safety meeting or turned in “Running Right” cards. Ratliff testified that he took those actions but also stated that he could not remember who was standing with him at the meeting, that no one said “I heard you talk about safety at the meeting,” and that he did not share the contents of his cards with anyone. Tr. 52, 53. The fact that Ratliff does not remember who was standing with him at the meeting and no one confirmed they heard him does not mean he did not speak. Similarly, the fact that no one saw Ratliff deposit the cards does not mean it did not happen. But even if this constitutes a conflict in testimony or somehow impeach Ratliff’s credibility, those considerations are beyond the scope of this hearing. *CAM Mining, LLC*, 31 FMSHRC at 1085. Ratliff presented substantial evidence in the form of testimony that he engaged in protected activity. He also provided documentary evidence by marking the cards he filled out. Therefore, Ratliff’s claim that he was engaged in protected activity is not frivolous. Considering the record as a whole, I find that Ratliff engaged in protected activity both in speaking at the meeting and in submitting “Running Right” cards.

Nexus between the protected activity and the alleged discrimination

Having concluded that Ratliff engaged in protected activity, the examination now turns to whether that activity has a connection, or nexus to the subsequent adverse action, namely the October 17, 2012 termination. The Commission recognizes that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See, e.g., CAM Mining, LLC*, 31 FMSHRC at 1089; *see also, Phelps Dodge Corp.*, 3 FMSHRC at 2510.

Hostility or animus towards the protected activity

In *Sec'y of Labor on behalf of Turner v. National Cement Company of California*, the Commission discussed some actions that could be considered animus or hostility to protected activity. 33 FMSHRC 1059 (May 2011). Specifically, the Commission remanded the case because, among other reasons, the ALJ failed to consider Respondent's animus in ignoring or denigrating an employee's safety suggestions. *Id.* at 1069. Also, the judge failed to consider the degree to which an employee's reputation for being "difficult" may have represented animus to his safety concerns. *Id.* citing *CAM Mining, LLC* 31 FMSHRC at 1185-86.

In this case, Ratliff stated that the cut cycle was not being following and that every cut was into intake air. Tr. 18. Despite this complaint, nothing was done to correct the problem the following week. Tr. 21. Ratliff could not speak to what happened after that week because he was terminated. In addition, Ratliff had a reputation at the mine of being "difficult." Tr. 71. However, he also stated he had a reputation for being a stickler on safety rules to the point that his actions could cause "friction." Ratliff filled out many "Running Right" cards at Cobra. Tr. 71. He also stated that he was one of very few miners to regularly participate in the safety meetings. Tr. 71. There is substantial evidence suggesting that, to a certain degree, Ratliff's reputation for being difficult was caused by his insistence on safety matters. This evidence of animus is bolstered by the fact that another employee that participated in the October 9 safety meeting, Jon Lewis, was among the five employees permanently laid off a month later. RX-H. Considering the record as a whole, I find that Respondent had hostility or animus towards Ratliff's protected activity.

Knowledge of the protected activity

According to the Commission, "the Secretary need not prove that the operator has knowledge of the complainant's activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge." *CAM Mining, LLC*, 31 FMSHRC at 1090 *citing Chicopee Coal Co.*, 21 FMSHRC at 719. Ratliff spoke about safety issues in this case at the safety meeting. He remembers several members of management including Phil Alford and his

foreman Todd. As a foreman, Todd was a representative of the operator. Thus, the Respondent was aware of the safety complaint made on October 9, 2012.

With respect to the “Running Right” cards, Ratliff asserts that he could be identified as the source of the complaints from his handwriting and the fact that the cards reveal detailed information regarding the shift and location where the safety concern was witnessed. Tr. 35, 36. The fact that he had a reputation as someone who often made complaints further pinpointed Ratliff as the source of the cards. Respondent claims that that it would be impossible, given the high volume of cards and the fact that the drop box is not monitored, to determine who deposited the cards. I have reasonable cause to believe Respondent determined that Ratliff was the source of the “Running Right” cards. Respondent had samples of Ratliff’s handwriting and, more importantly, it knew that he complained about the same issues at the earlier safety meeting. Ratliff was known to complain about safety issues and it is a fair inference to draw given all the other factors, Respondent had constructive knowledge that he was the source of the cards. There is a non-frivolous issue as to the issue of knowledge regarding the “Running Right cards”

Considering both Ratliff’s statements at the safety meeting attended by management officials and the fact that it is possible that Respondent believed Ratliff submitted the “Running Right” cards, I find sufficient evidence exists that Respondent had knowledge of Ratliff’s protected activity.

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. See e.g. *CAM Mining, LLC*, 31 FMSHRC at 1090 (three weeks) and *Sec’y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miners’ contact with MSHA and the operator’s failure to recall miners from a layoff; however, only one month separated MSHA’s issuance of a penalty resulting from the miners’ notification of a violation and that recall failure). 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)). In the present matter, the time between the protected activity and the termination was two days. Ratliff submitted most of the “Running Right” cards on October 15 and was informed that he would be terminated on October 17. Some of the “Running Right” cards were actually submitted on October 17. Even if Respondent was not aware that Ratliff had submitted the cards, the time between Ratliff’s participation at the safety meeting and his discharge was only eight days. This easily meets the Commission’s requirements. Thus, I find that the time span between the protected activities and the adverse action is sufficient to establish a nexus.

Disparate Treatment

Respondent claims that Ratliff was discharged for alleged insubordination and complaints from co-workers about his attitude and work performance. Ratliff has a history of being difficult to work with including a warning for insubordination and a verbal altercation with another employee. However, the ultimate action that led to his discharge was an altercation with Otto Bryant in the bathhouse. Ratliff described Bryant walking into the bathhouse and, while Ratliff was disrobed, angrily berating him for failure to complete a task to which he had not been assigned. Ratliff admitted to using profanity in seeking to end Bryant's tirade. While the use of profanity is not protected activity, the fact that an employee who engaged in protected activity suffered more severe punishment for use of profanity than other employees that did not engage in protected activity can be disparate treatment. *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Company*, 22 FMSHRC 298, 304 (Mar. 2000). Ratliff noted that two or three other people had verbal altercations with Bryant and one, K.J. Phillips even used the same or similar language, a little over two year ago. Tr. 72, 73. Perhaps more importantly, Cook admitted that a coal mine is not a delicate place and that other miners had spoken profanely to a boss in the past without being discharged. Tr. 74.

Ratliff also described Respondent's protocol when a member of management sought to discipline an employee. Tr. 41, 42. A manager is supposed to take an employee aside and discuss work-related issues in a respectful manner. Tr. 41, 42. Respondent did not refute that this was the protocol. I think that it is beyond question that a supervisor yelling at a naked employee after a shift in front of an entire room of co-workers fails to meet Respondent's disciplinary policy. I would also note that this is likely adequate provocation for the response, however salty, provided by Ratliff.⁵ Accordingly, I find Respondent disparately treated Ratliff, both because he was discharged for behavior that did not result in discharge to other employees and because he was treated differently than provided for by the Respondent's disciplinary policy.

Having considered the four factors above, I find that the Secretary has established a nexus between Ratliff's protected activity and the Respondent's subsequent adverse action.

Tolling the Reinstatement

While Respondent does not explicitly argue that the Ratliff's reinstatement should be tolled as a result of the January 15, 2013 lay-offs, it does argue that Ratliff would have been included in that lay-off. It also noted his pay and benefits would have ceased this month. The Commission dealt with the issue of tolling temporary reinstatements in *Sec'y of Labor on behalf of Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050 (Oct. 2009). In that case, the Commission noted "that the occurrence of events, such as a layoff for economic reasons, may

⁵ The Commission has held that employers cannot provoke an employee into engaging in profanity in order to use the outburst as a pretext for an unlawful discharge. *Reading Anthracite Company*, 22 FMSHRC at 305-306.

toll an operator's reinstatement obligation or the time for which an operator is required to pay back pay for a discriminatee." *KenAmerican Resources, Inc.*, 31 FMSHRC at 1054 (citations omitted). In order to toll reinstatement, Respondent must show by a preponderance of the evidence that work is not available for the discriminatee whether through layoff, business contractions, or similar conditions. *Id.* at 1054-1055 citing *Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 770, 779 (May 1989). A tolling claim acts as an affirmative defense to reinstatement and backpay. *Id.* In evaluating a tolling claim, a judge must consider, among other things, whether the lay-off properly included the discriminatee. *Id.* at 1055. The Judge has a responsibility to look at the process used to determine lay-offs and determine how Respondent actually made the decision, including determining whether it actually followed the process it stated. *Id.* at FN 5.

I believe that Respondent misunderstands the nature of *KenAmerican Resources, Inc.* In that case, Respondent laid-off 290 of its 370 employees, including the discriminatee, when the mine was idled. *KenAmerican Resources, Inc.*, 31 FMSHRC at 1051. The Secretary's memo noted that the employee's position had been eliminated. *Id.* The purpose of *KenAmerican Resources, Inc.* was to ensure operators were not forced to retain employees with no possible productive role. It only applies when "work is no longer available," not when the operator believes the alleged discriminatee is among its' less productive workers. Consider Judge Feldman's decision in *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Company, Inc. and Armstrong Fabricators, Inc.*, 2012 WL 2870661 (June 2012). In that case, the operator claimed that it could not temporarily re-instate an employee because it eliminated the position of welder at its fabrication shops. *Id.* at *7. However, the operator admitted that it had eleven welders assigned to other locations but claimed that it could not reinstate the employee to that position because all those positions are filled. *Id.* The Judge determined that accepting the assertion that the employee could not be reinstated because the positions were filled "would eviscerate the anti-discrimination provisions of the Act." *Id.* citing *Sec'y of Labor v. Akzo Nobel Salt*, 19 FMSHRC 1254, 1259 (July 1997). The Judge also decided that because a position existed with the same or similar duties, "it is unnecessary to address whether the reported layoff...tolls the Respondents' reinstatement obligation." *Id.* at *8.

It is my opinion that Judge Feldman's findings accurately describe the application of *KenAmerican Resources, Inc.* Applying those principles in this case, a mere 14 employees were laid off out of a total of 106 and only five employees were permanently severed from service. Cook admitted on the stand that a super-section featuring two miners is still operating at Mountaineer Mine. Tr. 111. As Ratliff noted, the super-section is still using shuttle cars and other equipment he might run (regardless of whether those positions are already filled). Tr. 43. I find that because work is still available for shuttle car operators, Respondent's reinstatement obligation is not tolled.⁶

⁶ Respondent spent considerable time and effort at the hearing showing that the decision to lay off Ratliff's was the result of an objective analysis. I do not think that it is necessary to discuss this issue because 1.) Ratliff's discrimination claim is not frivolous and 2.) there is work available for shuttle car operators at Cobra.

Conclusion

In concluding that Ratliff's complaint herein was not frivolously brought, I give weight to the evidence of record that he had a history of and engaged in a number of protected activities including noting safety hazards and failure to follow plan at the safety meeting and anonymously reporting safety conditions through the "Running Right" program. I also conclude that Respondent was aware of Ratliff's actions, that Respondent showed animus toward Ratliff's alleged protected activities, and that there was a close connection in time between his alleged protected activity and his October 17, 2012 discharge. Finally, I conclude that there was disparate treatment between the way Ratliff and other employees.

Respondent asserts that its discharge of Ratliff was based on his unprotected activities, most notably being insubordinate and using profanity to a member of management. Although Respondent may, in any subsequent proceedings, prevail on the merits, I find that Respondent's evidence on this record is not sufficient to demonstrate that Ratliff's complaint of discrimination was frivolously brought. To the contrary, since the allegations of discrimination have not been shown to be lacking in merit, I find they are not frivolous. Furthermore, I find that work is available at Cobra and therefore, the duty to reinstate is not tolled.

ORDER

Based on the above findings, the Secretary's Application for Temporary Reinstatement is granted. Accordingly, Respondent is **ORDERED** to provide immediate reinstatement to Ratliff, at the same rate of pay for the same number of hours worked, and with the same benefits, as at the time of his discharge.

/s/ William S. Steele
William S. Steele
Administrative Law Judge

Distribution: (Certified Mail)

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Willow Fort, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
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January 15, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2010-1761-M
Petitioner	:	A.C. No.45-03628-227511
	:	
v.	:	
	:	
RONALD SAND & GRAVEL	:	Mine: Ronald Sand & Gravel
Respondent	:	

DECISION

Appearances: Donald Horn, U.S. Department of Labor, Vacaville, California;
Patricia Drummond, Esq., U.S. Department of Labor, Seattle, Washington, on behalf of the Petitioner

Louie Gibson, President of Ronald Sand & Gravel, Ellensburg, Washington, on behalf of the Respondent

Before: Judge Barbour

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration (MSHA) against Ronald Sand & Gravel pursuant to section 105(d) and 100 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(d), 820. The Secretary alleges that Ronald Sand & Gravel is liable for four violations of the Secretary’s mandatory safety standards for surface metal and nonmetal mines, and proposes the imposition of civil penalties in the amount of \$5,204.00. A hearing was held in Ellensburg, Washington, and before going on the record, the parties asked for one last chance to resolve the case. After conferring, the parties informed me that a settlement agreement had been reached. The terms of the settlement were read into the record and are stated below. The settlement motion was granted on the record. Tr. 7. Ronald Sand & Gravel shall pay penalties in the total amount of \$2,100.00 for the violations.

SETTLEMENT TERMS

The terms of the settlement are as follows:

Citation No. 856148

1. The Secretary agreed to reduce the level of negligence from “high” to “low.” Tr. 5.
2. The Secretary agreed to reduce the penalty from \$1,795.00 to \$250.00. Tr. 6.

Citation No. 8565149

1. The Secretary agreed to reduce the level of negligence from “high” to “low.” Tr. 5.
2. The Secretary agreed to reduce the penalty from \$1,795.00 to \$250.00. Tr. 6.

Citation No. 8565151

1. The Secretary agreed to reduce the penalty from \$807.00 to \$800.00. Tr. 6.

Citation No. 8565152

1. The Secretary agreed to reduce the penalty from \$807.00 to \$800.00. Tr. 6.

As stated at the hearing, I have considered the representations and documentation submitted in this matter, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Tr. 7. **WHEREFORE**, the motion for approval of settlement **IS GRANTED**.

ORDER

It **IS ORDERED** that Citation Nos. 8565148 and 8565149 be **MODIFIED** to “low” negligence.

It **IS ORDERED** that Ronald Sand & Gravel shall pay a total penalty of \$2,100.00 in 12 consecutive monthly installments of \$175.00 each, with the first payment due within 30 days of the date of this decision and each subsequent payment due on the first of each month thereafter. Should Respondent fail to timely make a payment, the balance of the total penalty will become due immediately. Upon timely receipt of the final payment, this case **IS DISMISSED**.

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

Distribution (Certified Mail):

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

January 16, 2013

DICKENSON-RUSSELL	:	CONTEST PROCEEDING
COAL COMPANY, LLC	:	
Contestant,	:	Docket No. VA 2009-393-R
	:	Citation No. 8164344; 07/16/2009
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. VA 2009-430
Petitioner	:	A.C. No. 44-07146-195598
	:	
v.	:	
	:	
DICKENSON-RUSSELL	:	
COAL COMPANY, LLC,	:	Mine: Roaring Fork No. 4
Respondent	:	

SUMMARY DECISION

Appearances: Ronald E. Gurka, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of the Petitioner;
R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, Pennsylvania, on behalf of the Respondent.

Before: Judge Feldman

These consolidated contest and civil penalty matters concern a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor (“the Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d), against the Respondent, Dickenson-Russell Coal Company, LLC (“Dickenson”). The petition seeks to impose a civil penalty of \$127.00 for Citation No. 8164344 that alleges a non-

significant and substantial (non-S&S) violation¹ of the accident, injury and illness reporting requirements in section 50.20(a) of the Secretary's regulations for underground coal mines.² The Secretary attributes the alleged violation to a high degree of negligence. The reportable injury was sustained by Charlie Wood, an employee of Bates Contracting and Construction ("Bates"), a temporary employment agency contracted to supply miners to work, under the supervision of Dickenson, at Dickenson's Roaring Fork No. 4 Mine facility.³

Citation No. 8164344 states, in pertinent part:

The mine operator failed to complete, review and submit a 7000-1 accident and injury form for Charlie Wood who was injured on 05/09/2009 while operating a roof bolting machine working on the active working section. Mr. Wood received an injury from dislodged roof [material] while performing roof bolting activities at Dickenson Russell Coal Co. LLC, Roaring Fork No. 4 Mine, Mine I.D. 4407146. This is a traditional mining position that requires regular and routine work at the mine. The injured miner incurred lost time due to this injury and at this time has not returned to work as indicated by the Contractor records. The 7000-1 form was submitted by the contractor on 05/12/2009, under the contractor 3 digit Identification number, thus it was attributed to the Contractor's accident and injury history. . .

(Joint Stip. 12, Gov. Ex. 2).

¹ A violation is non-S&S if it is not reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

² Section 50.20(a) provides, in relevant part:

. . . Each operator shall report each accident, occupational injury, or occupational illness at the mine [within ten days]. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs . . . shall complete or review [MSHA's Form 7000-1].

30 C.F.R. § 50.20(a).

³ The reportable incident at issue resulted in an "occupational injury" as defined in 30 C.F.R. § 50.2(e) because it required medical treatment and/or resulted in a temporary inability to perform job duties. (Joint Stip. 7).

Citation No. 8164344 was abated after Dickenson amended a copy of the 7000-1 form filed by Bates by substituting Dickenson as the "Company Name." Bates' original 7000-1 form identified "Roaring Fork 4" as the "Mine Name," as well as Dickenson's "MSHA ID Number" 44-07146. (Gov. Exs. 1, 3).

I. Procedural Framework

Dickenson asserts that a citation against a production mine operator for failure to abide by the Part 50 reporting requirements is inappropriate if an injury that occurred at its mine site has already been reported by the temporary employment contractor who employed the injured victim. *Letter from R. Henry Moore to ALJ Feldman* (August 22, 2011). The only dispositive issue is whether the provisions of section 50.20 require a mine operator to file an injury report involving a contract employee when the victim's contractor employer has already filed a timely Accident, Injury and Illness Report on Form 7000-1. Dickenson asserts that it "did not report this occupational injury to MSHA because Bates had reported it." (Resp. Opp. at 2). Significantly, the Secretary does not contend that Dickenson was unaware that Bates had reported the injury within ten days by submitting the official Form 7000-1.

Disposition by summary decision is appropriate provided (1) the entire record establishes that there is no genuine issue as to any material fact; and (2) the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b). *See Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). After it became clear that the parties were prepared to stipulate to all relevant material facts, a filing schedule for the Secretary's motion for summary decision and Dickenson's opposition was established during a March 8, 2012, telephone conference. The Secretary's motion was filed on May 2, 2012. The motion was opposed by Dickenson on May 30, 2012.

II. Stipulated Facts

The parties' stipulated facts are contained in the Secretary's memorandum in support of her summary decision motion:

1. The Roaring Fork No. 4 mine, located in Dickenson County, Virginia, is an underground coal mine that meets the definition of "mine" set forth in Section 3(h) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802(h)(1) ("Mine Act"), and 30 C.F.R. § 50.2(a).
2. The products of the Roaring Fork No. 4 mine enter commerce, or the operations or products of this mine affect commerce, within the meaning of 30 U.S.C. § 803. The operator of this mine, and every miner at this mine, are therefore subject to the provisions of the Mine Act.

3. Dickenson-Russell Coal Co., LLC (“Dickenson-Russell”) was an owner, lessee, or other person who operated, controlled, or supervised the Roaring Fork No. 4 mine on May 9, 2009, when the incident referenced in Citation [No.] 8164344 occurred, and on July 16, 2009, when Citation No. 8164344 was issued.
4. Administrative Law Judge Jerold Feldman has jurisdiction to hear and decide this case.
5. Bates Contracting and Construction (“Bates”) is a temporary employment agency contractor that supplied miners to work at the Roaring Fork No. 4 mine.
6. An employee of Bates, Charlie Wood, was operating a roof bolter and installing cable bolts at the Roaring Fork No. 4 mine on May 9, 2009, when a portion of the roof dislodged and struck Mr. Wood on his left elbow, causing a small cut.
7. The injury that occurred to Charlie Wood on May 9, 2009 meets the definition of “occupational injury” as set forth in 30 C.F.R. § 50.2(e) because it required medical treatment to be administered, or because it resulted in inability to perform all job duties on any day after the injury, temporary assignment to other duties, or transfer to another job.
8. Dickenson-Russell controlled and supervised the work being performed by Charlie Wood at the Roaring Fork No. 4 mine on May 9, 2009.
9. Bates did not have a supervisor or any other person at the Roaring Fork No. 4 mine on May 9, 2009, who could have directed or controlled the work performed by Charlie Wood.
10. On May 12, 2009 Bates reported the injury that occurred to Charlie Wood on May 9, 2009, to MSHA by completing and submitting the MSHA Mine Accident, Injury and Illness Report Form 7000-1 (“7000-1 Form”). A true and accurate copy of the 7000-1 Form submitted by Bates is attached hereto as Government Exhibit 1.
11. Dickenson-Russell did not submit a 7000-1 Form to MSHA regarding the injury that occurred to Charlie Wood at its mine on May 9, 2009. It is Dickenson Russell’s position that it did not need to submit a 7000-1 form for an injury to a contractor’s employee.

12. Ernie D. Sexton was acting in his official capacity as a federal mine inspector on July 9, 2009 when he issued Citation No. 8164344 to Dickenson-Russell for an alleged violation of 30 C.F.R. § 50.20 for failing to timely report the injury that occurred to Charlie Wood on May 9, 2009 at the Roaring Fork No. 4 mine. A true and accurate copy of Citation No. 8164344 that was served on Dickenson-Russell or its agent(s) as required by the Federal Mine Safety & Health Act of 1977 is attached hereto as Government Exhibit 2.

13. The gravity of the violation alleged in [Citation No.] 8164344 is very low and is not “significant and substantial” because there is no likelihood that the alleged violation would result in an injury.

14. The Proposed Assessment form marked as Exhibit A attached to the Secretary’s petition in Docket No. VA 2009-430 accurately reflects that the size of the operator’s business, based on annual tonnage of coal produced in the previous calendar year, results in 12 out of a possible 15 points for the mine size, and 10 out of a possible 10 points for controller size, under MSHA’s regular assessment formula at 30 C.F.R. § 100.3. Therefore, the size of the operator’s business is large for the purpose of assessing a penalty pursuant to sections 105(b) and 820(i).

15. The Proposed Assessment form marked as Exhibit A attached to the Secretary’s petition in Docket No. [VA 2009-]430 accurately reflects that as of the date the penalty was proposed, 110 assessed violations were issued and were paid, finally adjudicated, or became final orders of the Commission, on 214 inspection days at the Roaring Fork No. 4 mine in the 15-month period preceding the issuance of the citation at issue in this case, resulting in 5 out of a possible 25 penalty points for history of previous violations under MSHA’s regular assessment formula at 30 C.F.R. § 100.3. There were no repeat violations of the mandatory safety standards at issue [in] this case during this period. Therefore, Dickenson-Russell has a low history of previous violations for the purpose of assessing a penalty pursuant to sections 105(b) and 110(i) of the Federal Mine Safety & Health Act of 1977, as amended, 30 U.S.C. §§ 815(b) and 820(i).

16. Dickenson-Russell timely abated Citation No. 8164344 in good faith by completing and submitting a 7000-1 Form regarding the injury to Charlie Wood that occurred on May 12, 2009. A copy of such form is attached hereto as Government Exhibit 3.

17. The proposed penalty of \$127.00 will not adversely affect the ability of Dickenson-Russell to continue in business.

18. Government Exhibit 4 is a true and accurate copy of MSHA Program Policy Letter (PPL) No. P09-V-02 that was issued on January 16, 2009.

19. Government Exhibit 5 is a true and accurate copy of a letter that MSHA's District Manager sent to all coal mine operators and temporary employment agency contractors in MSHA Coal District 5 on July 27, 2009.

20. Government Exhibits 1 through 5 can be admitted into the record of this proceeding without objection.

(Sec'y Mem. at 3-6).

III. Findings and Conclusions

A. Fact of Violation

The parties disagree as to whether Bates' timely notification of the injury relieved Dickenson of its obligation to file Form 7000-1 as required by section 50.20(a). Citing a long-standing line of case law, the Secretary relies in part on her unfettered discretion to cite the operator, independent contractor, or both, for violations of the Mine Act.⁴ (Sec'y Memo. at 8, citing *Speed Mining v. FMSHRC*, 528 F.3d 310 (4th Cir. 2008); *Sec'y of Labor v. Twentymile Coal Co.* 456 F.3d 151 (D.C. Cir 2006)). As the contractor, mine operator, or both, can be held liable for the same violation, the Secretary asserts that Dickenson was required to comply with the section 50.20 notification requirement regardless of Bates' notification of the injury. *Id.* at 8-9.

Dickenson argues that the Secretary's reliance on *Speed Mining* and *Twentymile Coal* is misplaced, because those cases involved violations by a contractor for which the production operator was also cited. In contrast, Dickenson contends that the Secretary has no authority to cite both the mine operator and contractor because no violation has occurred, by virtue of Bates' timely filing of Form 7000-1. (Resp. Opp. at 10). However, Dickenson's contention begs the question because it assumes either the contractor or the mine operator can satisfy the reporting requirements. Moreover, Dickenson's position ignores the question of whether the contractor supervised the injured victim. In any event, the principles in *Speed Mining* and *Twentymile Coal* that allow joint or several liability are not dispositive of the central question.

⁴ The Mine Act defines an "operator" as any person or entity "who operates, controls, or supervises a coal mine or other mine or any independent contractor performing services or construction at the mine." 30 U.S.C. § 802(d).

Rather, the relevant provisions of Part 50 plainly resolve the question of Dickenson's filing responsibility in this case. Section 50.2(c)(1) defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal mine." 30 C.F.R. § 50.2(c)(1). The relevant provisions of section 50.20(a) require that:

Each *operator* shall report each accident, occupational injury, or occupational illness at the mine [within ten days]. The principal *officer in charge* of health and safety at the mine or the *supervisor of the mine area* in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review [MSHA Form 7000-1]

30 C.F.R. § 50.20(a) (emphasis added).

It is axiomatic that the language of specific regulatory provisions is the starting point for their interpretation. *See, e.g., Jim Walter Resources*, 28 FMSHRC 983, 987 (Dec. 2006) (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987)). In this regard, regulations must be read in concert to understand and effectuate their intended purpose. *See, e.g., American Coal Co.*, 29 FMSHRC 941, 949 (Dec. 2007); *RAG Cumberland Res., LP*, 26 FMSHRC 639, 647-48 (Aug. 2004); *Fluor Daniel, Inc.*, 18 FMSHRC 1143, 1145-46 (July 1996); *Mettiki Coal Corp.*, 13 FMSHRC 760, 768 (May 1991).

A fundamental purpose of the Mine Act is to promote the safety of miners by minimizing their exposure to unsafe or otherwise hazardous working conditions. 30 U.S.C. § 801. Obviously, to effectuate this goal, the timely notification of MSHA regarding mine accidents and injuries is essential to enable MSHA to ensure that any hazardous conditions that contributed to the accident or injury are eliminated.

Clearly, the party responsible for maintaining a safe working environment is the entity that "operates, controls, or supervises a coal mine." 30 C.F.R. § 50.2(c)(1). It is this "operator" in section 50.20(a) that is responsible for notifying MSHA to ensure that any hazardous conditions cease to exist. Moreover, the supervisor of the mine area where the injury occurred, who is the individual familiar with the circumstances surrounding the reportable incident, is the designated person responsible for completing or reviewing Form 7000-1. Here, that individual is a member of Dickenson management. (Joint Stip. 8, 9). While Bates may be considered an "operator" under the statutory definition, Dickenson's assumption that Bates should also be considered an "operator" under section 50.20(a) is incorrect. (*See Resp. Opp.* at 5; *see also* fn. 4, *infra*). It is clear that Dickenson, the company controlling and supervising the work performed by Wood when he was injured, is the contemplated "operator" that is required to file a timely report pursuant to 50.20(a).

The purpose of the Part 50 reporting requirements is to “utilize information pertaining to accidents, injuries, and illnesses occurring or originating in mines . . . [to] develop rates of injury occurrence.” 30 C.F.R. § 50.1. Once MSHA is notified of a reportable incident by either the temporary employment contractor or the mine operator, the goal of accurately compiling mine statistics may be achieved. Thus, Dickenson asserts, in essence, that requiring it to report an injury previously reported by the temporary employment contractor would result in double reporting that would be counterproductive to the maintenance of accurate reporting statistics. (Resp. Opp. at 5-6, 8-9).

While compiling accurate reportable incident statistics is a goal of the Secretary, the reporting requirements seek to achieve an additional, and arguably more important, purpose. (See Gov. Ex. 2 at 2). Section 50.1 provides that the reporting requirements are also intended “to implement MSHA’s authority to investigate, and to obtain and utilize information pertaining to accidents, injuries and illnesses occurring or originating in mines.” 30 C.F.R. § 50.1. It is true that, as Dickenson contends, once one party has filed the relevant information as to the circumstances, location, and parties involved in an injury, there is no longer any potential for concealment of the accident or injury. (Resp. Opp. at 6). However, as discussed above, it is essential that management personnel familiar with the circumstances of the injury provide the necessary reporting information to enable MSHA to determine what, if any, additional action is necessary to maintain a safe working environment. Thus, it is reasonable that MSHA requires the mine operator to report an injury of a temporary contract employee, as the mine operator is the sole entity supervising that employee.

In the final analysis, the 7000-1 form filed by Bates, the temporary employment agency contractor in this case, which contained all relevant information, such as mine site and Mine ID number, was gratuitous in that it did not relieve Dickenson of its obligations under section 50.20(a). Consequently, the Secretary has demonstrated the section 50.20(a) violation cited in Citation No. 8164344.

The holding that the Secretary has established the fact of the cited violation should be narrowly construed to the facts in this case concerning temporary employment personnel. This decision does not address the reporting responsibility of mine operators and contractors under section 50.20 when an injury is sustained by a contract employee who is under the supervision and control of the contractor.

B. Negligence

The Secretary has attributed Dickenson’s reporting failure to a high degree of negligence. While Commission Judges assess civil penalties *de novo*, it is noteworthy that Part 100 of the Secretary’s regulations containing criteria for proposing civil penalties designates negligence as high when the 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) (Table X).

The Secretary alleges that Dickenson's failure to submit a 7000-1 form was attributable to a high degree of negligence because of Dickenson's apparent disregard of its reporting obligation in an attempt to elevate its safety record. (Sec'y Memo. at 14-15). In support of its assertion that Dickenson's failure to notify was an attempt to mislead, the Secretary relies on a Program Policy Letter ("PPL") issued several months before Wood's May 9, 2009, injury. *PPL No. P09-V-02, Jan. 16, 2009* (Gov. Ex. 4). This PPL requires mine operators to report accidents involving personnel provided by temporary employment agencies.⁵ Specifically, the PPL was concerned that, where operators obtain miners through temporary employment agencies, "some operators are not reporting Part 50 information involving these temporary agency employees." *Id.* at 2.

In support of high negligence, the Secretary also relies on an Administrative Law Judge decision that rejected a mine operator's asserted good faith belief that the duty to report an accident involving a temporary employee rested with the temporary employment agency contractor. *Surface Minerals*, Docket No. VA 2010-184 (Nov. 2011) (ALJ Moran), slip op. at 11. However, in *Surface Minerals*, neither the mine operator nor its contractor reported the accident of the temporary employee. *Id.* at 3. Moreover, to address instances where the requisite reports were not filed, PPL No. P09-V-02 clarified that temporary employment personnel are "miners" covered under the injury reporting requirements of Part 50. Clearly, failures to notify MSHA, such as those discussed in *Surface Minerals* and PPL P09-V-02, despite the mine operator's reporting responsibility under section 50.20, would indeed evidence high negligence.

Turning to the facts of this case, it is significant that the Secretary does not assert that Dickenson was unaware Bates had filed the pertinent 7000-1 form. Thus, it is uncontested that Dickenson knew of Bates' timely filing, and that it presumably relied on it in not filing an injury report of its own. The form filed by Bates provided the relevant MSHA Mine ID Number, and identified the specific mine site where the injury occurred. (Gov. Ex. 1). Therefore, the record evidence does not reflect that Dickenson's failure to also file a report was an effort to conceal the occurrence of the injury from MSHA. Notably, Dickenson concedes that if Bates had not reported the injury, Dickenson could be held liable for the failure to report. (Resp. Opp. at 7). While Dickenson's reliance on Bates' injury report as sufficient notification may have been misplaced, it is not evidence of a high degree of negligence. The facts in this case reflect that Dickenson's reporting failure is attributable to no more than a moderate degree of negligence.

⁵ Subsequent to Woods' injury, MSHA clarified PPL P09-V-02 in a letter issued "To all District 5 Coal Mine Operators and Temporary Employment Agency Contractors" to advise that the employing mine operators, rather than temporary employment agency contractors, must report any accidents or injuries involving temporary personnel. *Letter dated July 27, 2009, from Ray McKinney, District Manager* (Gov. Ex. 5).

C. Civil Penalty

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000):

The principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

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

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

Dickenson has stipulated that imposition of the civil penalty proposed in this case will not adversely affect its ability to continue in business, and that the penalty is not otherwise inappropriate given the size of the Respondent's operations. The Secretary has stipulated that the gravity alleged in Citation No. 8164344 is low in that there is no likelihood that the alleged violation will result in injury. There is no evidence that Dickenson's history of violations is an aggravating factor, and the violative condition was timely abated. (Joint Stips. 13-17).

Although the Secretary initially proposed a civil penalty of \$127.00 for Citation No. 8164344, the Secretary now seeks to increase the proposed penalty to \$2,475.00. The increased proposed penalty is equivalent to the \$2,475.00 imposed by Judge Moran in *Surface Minerals, supra*. However, as previously discussed, as distinguished from this case, *Surface Minerals* involved a situation where neither the mine operator nor the temporary employment agency contractor filed an accident report. Here, there is no evidence that Dickenson was unaware that Bates had filed the requisite 7000-1 form containing the relevant mine site and mine identification number. Consequently, the modification of Citation No. 8164344 to reflect that the violative condition was the result of moderate negligence warrants no more than the \$127.00 civil penalty initially proposed by the Secretary.

ORDER

In view of the above, **IT IS ORDERED** that the Secretary's motion for summary decision **IS GRANTED** with respect to the fact of the cited reporting violation. However, consistent with this decision, **IT IS FURTHER ORDERED** that Citation No. 8164344 **IS MODIFIED** to reflect that a moderate degree of negligence is attributed to Dickenson-Russell Coal Company, rather than the high degree of negligence initially proposed.

IT IS FURTHER ORDERED that Dickenson-Russell Coal Company **SHALL PAY** a civil penalty of \$127.00 in satisfaction of Citation No. 8164344 within 40 days of the date of this decision. Upon receipt of timely payment, the captioned civil penalty and contest proceedings **ARE DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 18, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2010-975
Petitioner	:	A.C. No. 15-18826-213963
	:	
v.	:	Docket No. KENT 2010-1163
	:	A.C. No. 15-18826-219379
HOPKINS COUNTY COAL, LLC,	:	
Respondent	:	Mine: Elk Creek

DECISION

Appearances:

Matt S. Shepherd, Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2440, for Petitioner

Gary D. McCollum, Assistant General Counsel, Hopkins County Coal, LLC, 771 Corporate Drive, Suite 500, Lexington, KY 40503, for Respondent

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

On January 14, 2010 Hopkins County Coal (“HCC”) experienced an ignition in the No. 8 entry of its No. 4 unit at the Elk Creek Mine. Shortly after the ignition, the Mine Safety and Health Administration (“MSHA”) issued a control order that required Respondent to stop production on the No. 4 unit. HCC and MSHA negotiated a revised ventilation plan on January 15, 2010. Both parties negotiated in good faith, but had different theories on the cause of the ignition. Correspondingly, the parties had different views on how changes in the ventilation plan would address the cause of the ignition. HCC requested a technical violation so that it could challenge three revisions to its ventilation plan. MSHA issued the technical violation on January 19, 2010. This litigation ensued.

HCC challenges three revisions requested by MSHA because it believes they bear no rational relationship to the cause of the ignition. The three contested provisions apply only to HCC’s Number 4 unit, as opposed to the entire mine. The first contested item

would change the quantity of air that should be maintained at the end of the line curtain from 7,000 c.f.m. when the scrubber is running and 5,800 c.f.m. when the scrubber is not running to 7,000 c.f.m. at all times when mining is taking place. The second contested item would increase the volume of air over the scrubber from 5,000 c.f.m. to 7,000 c.f.m. The third contested revision would reduce the maximum curtain setback distance from the face from 45 feet to 40 feet. The issues presented are whether MSHA has the discretion to insist upon revisions, and, if so, whether the revisions are arbitrary and capricious. For the reasons set forth below, I find that MSHA has the discretion to require their inclusion in the plan and they are not arbitrary or capricious.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 14, 2010 there was an ignition on the Number 4 unit, MMU 006 and 007 at Elk Creek Mine. Tr. 13, 41. Elk Creek is an underground coal mine in Western Kentucky operated by Respondent, HCC. Tr. 8. Elk Creek was opened in 2005. Tr. 241. At the time of ignition Elk Creek was on a 5-day 103(i)¹ spot inspection series due to the amount of methane it liberated. Tr. 135-37. At the time of ignition Elk Creek was liberating approximately 995,000 cubic feet of methane per 24 hour period. Tr. 139-40.

The ignition at Elk Creek occurred at approximately 5:30 pm while a continuous miner was cutting coal in the No. 8 entry of HCC's No. 4 section. Tr. 13, 247, 362, 437.

¹ A 103(i) spot series draws its name from the Mine Act, Section 103(i), 30 U.S.C. § 813(i). Tr. 135. The section states, "(i) Spot inspections. Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, "liberation of excessive quantities of methane or other explosive gases" shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals. When the Secretary finds that a coal or other mine liberates more than two hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 15 working days at irregular intervals."

One of the bits of the continuous miner made contact with a pyritic inclusion² which caused a spark that precipitated the ignition. Tr. 385-87. The ignition lasted a few seconds and resulted in no injuries. Tr. 13, 388.

At the hearing there was a significant amount of discussion about whether methane played a role in the ignition. The Respondent argued that methane in no way played a part in the ignition and therefore MSHA's additional methane-controlling measures should not be in the revised ventilation plan. MSHA argued that methane played a role in the ignition and such measures must be in the ventilation plan.

Exacerbating the difficulty of determining whether, and in what quantity, methane was present is the fact that the methane monitor was out of calibration. Tr. 290. The methane monitor was located on the miner and allowed the miner operator, car drivers, and anyone else in the vicinity to see the amount of methane present when the head was cutting the face. Tr. 58-59. Prior to ignition, the methane monitor read .8% methane. Tr. 60, 385-86, 424, 475. After ignition, the methane monitor read 1.7% methane. Tr. 58, 60, 387-88. At the time of the inspection the methane monitor read .5% "high." Tr. 290.

Additionally, a reading on the methane monitor does not reflect precisely how much methane is at the face. The "sniffer," which detects methane, is positioned approximately five to six feet away from the face. Tr. 459. Therefore, the amount of methane at the face could be much higher than the reading displays. Tr. 459.

HCC implied that because the methane monitor was reading "high" on this one occasion (during the inspection) that it always read "high." However, two witnesses for the Secretary testified that just because the methane monitor read high on one occasion does not mean that it will read high on all occasions.

The District Manager, Carl Boone, II, responded to questioning...

Q. And you were made aware of the fact that it was out of calibration to the high side; correct?

A. I was made aware that the methane monitor was out of calibration. Whether it's high or low indicates a problem with the methane monitor. It's not always the same.

Tr. 290.

Similarly, MSHA Ventilation Specialist Supervisor, David West, stated...

Q. So at the alarm point at 1 percent, is there really only .5 percent methane around that sniffer head?

A. I can't say for sure. I mean, when it's out of calibration either way, I can't attest to what it's actually picking up even though it's reading to the

² A pyritic inclusion is also known as a "head" or "kettlebottom." It is a form of hard rock. When a miner bit hits a pyritic inclusion, it often causes a spark. Tr. 63.

good side, like this one was reading to the good side, like this one was reading 3.0 instead of 2.5. I can't attest to how it's going to actually affect it.

...

...Q. These methane monitors are sensitive, aren't they?

A. Yes.

Q. And they can be thrown out of calibration by exposure to heat; correct?

A. They can be – a lot of things can change the calibration. I mean, I'm not necessarily saying that heat can. There's a variation of things. We check a lot of monitors.

Q. They can be thrown out of calibration by exposure to water, too; correct?

A. Possibly.

Q. And even though this was reading to the high side, it was a violation; right?

A. Correct.

Q. So you had to write the citation. But the methane monitor after the ignition was showing up to be more sensitive than was required; right?

A. After the ignition, yes.

Q. And you can't speculate to what it was doing before the ignition?

A. No, sir.

Tr. 101-03.

There was also testimony as to the significance of the color of the flame. The eyewitnesses of the flame, Kenneth Myers, a Miner Operator for HCC, and Jason Ipo, a Shuttle Car Operator for HCC, both testified that the flame was orange. Tr. 387, 422-23. Troy Johnson, Safety Technician for HCC, testified that the color of the flame indicates the fuel source: an orange flame indicates coal dust and a blue flame indicates methane. Tr. 444-45. However, his testimony also showed that it is possible that the presence of methane might be undetectable solely on the basis of flame color because the methane could be subsumed or overpowered by a larger quantity of coal dust. Tr. 455-56. Furthermore, Doyle Wayne Sparks, MSHA Ventilation Specialist, testified that the color of a flame is not indicative of its fuel source.

Q. During the course of your accident investigator training, have they ever done any demonstrations of what a methane flame looks like?

A. We have seen tests. I've heard it both ways. I've heard it's blue. I've heard it's orange.

Tr. 96-97.

MSHA was notified of the ignition and issued the 103(j) order at 5:40 pm. Tr. 48. Inspectors went to the mine, interviewed miners and inspected the continuous miner. Inspectors determined that the presence of methane (Tr. 181), the suspension of coal dust

(Tr. 182), the lack of air being directed into the entry (Tr. 183-89), and the malfunctioning water sprays on the continuous miner (Tr. 179) all contributed to the ignition.

After the ignition, MSHA issued a 103(j) control order to cease production in the No. 4 unit to protect the scene, protect evidence, and protect the miners. Tr. 47. MSHA arrived at the scene and conducted their investigation until approximately 4:00 am on January 15, 2010. Tr. 368. Prior to leaving the mine, MSHA issued a 103(k) order to continue the prohibition against production on the No. 4 unit until HCC submitted and received approval of the revised ventilation plan. *See* Tr. 110. On January 15, HCC submitted the revised plan. Tr. 244. The revised plan included attempts to address what HCC saw as the root cause of the ignition: provisions to insure that continuous mining operators would cool and wet-down areas in circumstances where sparks would be created or where miner bits would hit inclusions. Tr. 246, 565-66. HCC also increased the number of checks for miner bits and heads and mandatory examinations of the wet-bed scrubber screen to guarantee a clear scrubber screen under normal mining conditions. Tr. 246, 567. The District Manager denied the submission. Tr. 246. Throughout the day on January 15, MSHA had several conversations with management at HCC regarding the ventilation plan. Tr. 252-53. At the end of the day, although HCC implemented the changes in order to resume production, the parties still disagreed about the need for the three contested provisions in the plan. Tr. 253. HCC requested a technical violation³ pursuant to the Program Policy Manual V.G-4 (Release V-33), so that it could challenge the three revisions, and was issued Citation No. 8498208 on January 19, 2010. Tr. 267-69.

The Secretary's Position

The Secretary argued that MSHA's revisions were not arbitrary and capricious and that HCC did not negotiate in good faith. Regardless of whether the provisions at issue would have prevented the ignition on January 14, 2010, the Secretary argues that they will reduce the likelihood of future ignitions at Elk Creek Mine. Secretary's Post-Hearing Brief at 6, Hopkins County Coal (KENT 2010-974, -1163)(2012).

MSHA alleges a violation of 30 C.F.R. § 75.370(a)(1), which states that an operator must follow a ventilation plan designed to control methane and respirable dust which is approved by the district manager.⁴ The framework for resolving plan disputes is laid out

³ "When the operator and the Secretary are unable to resolve a dispute concerning a plan's provisions, the Secretary may issue a citation alleging a violation for operating without an approved plan, which is sometimes referred to as a "technical citation," so that the matter may be litigated before, and resolved by, the Commission." *Mach Mining*, 2012 WL 4471152 at 27 (Aug. 2012).

⁴ "The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine."

in *Twentymile Coal Co.*, 2008 WL 4287782, 10-11 (August 2008) and *C.W. Mining Co.*, 18 FMSHRC 1740, 1746 (Oct. 1996). “Absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan’s approval.” *C.W. Mining Co.*, 18 FMSHRC at 1746. Furthermore, the Secretary must exercise her own judgment with respect to the content of ventilation plans. *UMWA v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989)(quoting S. Rep. No. 95-181, at 25)(1977).

MSHA’s District Manager, Carl Boone, relied on information obtained during the investigation, the recommendations of his colleagues, and his own experience in the mining industry and determined that the provisions in the ventilation plan should be included.⁵ The Secretary argues that the District Manager did not act arbitrarily when he insisted upon including the provisions in contest. The revisions requested would increase the air flow in the working areas, which would sweep out any methane and dust that had accumulated. The Secretary acknowledges that the provisions in contest may not have prevented the ignition on January 14, but argues that they do lower the likelihood of a future ignition at the mine. Matt Pride, HCC’s Safety Director, conceded at trial that MSHA’s revisions would reduce the likelihood of future ignitions. Tr. 513-15. Brian Kelly, HCC’s Engineering Manager, also agreed that the provisions would improve ventilation. Tr. 547.

The Secretary also argues that HCC did not negotiate in good faith. The Secretary states that the Commission has held that mine operators and MSHA must negotiate in good faith for a reasonable period of time concerning disputed plan provisions. *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371(1985). There are two elements to good faith—notice of a party’s position and adequate discussion of disputed provisions. *C.W. Mining*, 18 FMSHRC at 1747.

The Secretary argues that the Respondent HCC did not negotiate in good faith because it refused to recognize that methane contributed to the ignition, even though it was present before and after the ignition. The Secretary states further that even if there was not any methane present when the ignition occurred, HCC must still yield to MSHA’s plan revisions because the Commission has held that MSHA is not required to prove the hazard addressed by a new plan provision either exists or is reasonably likely to occur. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996). Therefore, the Secretary argues that HCC failed to negotiate in good faith because it refused to recognize the facts and bargain over plan provisions that addressed methane, a fuel source, which was present at the time of ignition.

The Respondent’s Position

HCC believes that the ignition on January 14 was a coal dust ignition, which resulted when the continuous mining unit struck a pyritic inclusion. Tr. 386-87. When the continuous miner hit the inclusion, sparks were generated that resulted in the ignition

⁵ The District Manager is an experienced coal miner, who has worked in the mine industry and in mine safety since 1965.

of an orange flame. The miners in the area at the time reported seeing an orange flame with no hint of blue, and reported hearing no pops, sonic booms, or sounds of any kind. Tr. 386-87, 423. Witnesses testified at the hearing that coal dust flames are typically orange in color and have no noises associated with them, while methane flames are typically blue. These facts led HCC to believe that the ignition was fueled solely by coal dust and that methane played no part in the ignition.

Upon this theory of the cause of the ignition, HCC asserts two bases to challenge MSHA's actions: first, MSHA lacks the authority to make demands for ventilation plan changes for a coal dust ignition, and second, MSHA's demands were arbitrary and capricious.

HCC asserts that the plain language of 30 C.F.R. § 75.370(a)(1) proves that MSHA does not have the authority to regulate ventilation plans after a coal dust ignition. 30 C.F.R. § 75.370(a)(1) states that the operator shall develop and follow a ventilation plan designed to control "methane and respirable dust." HCC argues that respirable dust is not coal dust.⁶ Furthermore, it argues that nothing was offered by the Secretary to suggest that respirable dust concerns were the basis for MSHA demanding HCC change its ventilation plans. It also argues that the cited standard does not give MSHA the authority to regulate hazards posed by coal dust because MSHA's enforcement authority for regulation of coal dust is contained in 30 CFR § 75.401 and that provision does not concern ventilation plans.⁷

"The agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Twentymile Coal*, 2008 WL 4287782 at *16 (Aug. 2008)(Commissioners Jordan and Cohen)(quoting *Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). HCC argues that MSHA did not make a rational connection between the facts found and the provisions included in the revised plan. The District Manager's underlying reasons for the revisions were not targeted to the ignition that occurred, but to ventilation problems generally. HCC alleges the District Manager

⁶ In so arguing, HCC relies on the regulation's definition of coal dust which states, "Respirable Dust. Dust collected with a sampling device approved by the Secretary and the Secretary of Health and Human Services in accordance with part 74- Coal Mine Dust Personal Sampler Units of this title. Sampling device approvals issued by the Secretary of the Interior and Secretary of Health, Education, and Welfare are continued in effect." 30 CFR 75.2.

⁷ 30 C.F.R. § 75.401. Where underground mining operations in active workings create or raise excessive amounts of dust, water or water with a wetting agent added to it, or other no less effective methods approved by the Secretary or his authorized representative shall be used to abate such dust. In working places, particularly in distances less than 40 feet from the face, water, with or without a wetting agent, or other no less effective methods approved by the Secretary or his authorized representative, shall be applied to coal dust on the ribs, roof, and floor to reduce dispersibility and to minimize the explosion hazard."

changed his position to be less stringent during negotiations, which indicates that his position was arbitrary. At the hearing HCC also took issue with the fact that the ventilation plan changes only applied to one mechanized mining unit, as opposed to the entire mine.

ANALYSIS

The first issue raised is whether MSHA had the discretion to demand ventilation plan changes from HCC as a result of a coal dust ignition. I find that they do.

Section 304(a) of the Mine Act, 30 U.S.C. § 864(a), identifies coal dust, float coal dust, loose coal, and other “combustible materials” as combustible.⁸ The purpose of a ventilation plan is to control the accumulation and ignition of combustible materials. The ventilation plan, as described by 30 C.F.R. § 75.370(a)(1), is clearly designed to control *both* methane and respirable dust. Respirable dust is a general term that refers to any dust that can be inhaled and contains small particles of coal dust.⁹ Therefore, assuming the ignition was caused solely by coal dust, MSHA has the authority to regulate it via the ventilation plan.

It is possible that methane was present in the area and contributed to the ignition. The Commission has already found that methane is ignitable at a one to two percent concentration and is explosive at a five to fifteen percent concentration. *Texas Gulf Inc.*, 10 FMSHRC 498, 501 (April 1988); Tr. 151. The methane monitor read .8% methane before the ignition and 1.7% after the ignition. Nothing in evidence can definitively prove that methane was present in a concentration lower than 1%. The vast majority of mine ignitions have a combination of methane and coal dust as a fuel source. Methane levels can spike very quickly. Furthermore, when the sniffer cap gets stopped up the methane monitor will give a false reading. Tr. 179-80. Quite frankly, it is impossible to know how much methane was present at the time of ignition, given the unreliability of the methane monitor and its 5-6 foot distance from the face. It is entirely possible that the ignition was caused by a spike in methane.

In addition, the color of the flame is not dispositive of the ignition source. The witnesses all testified to an orange flame, but the court heard testimony that a methane flame may be blue or orange. Therefore, neither the color of the flame, nor the readings of the methane monitor can definitively prove that methane was not a contributory cause of the ignition.

⁸ “Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.”

⁹ Coal dust is “particles of coal that can pass a No. 20 sieve,” 30 C.F.R. § 75.400-1, which means pieces of coal that can pass through a No. 20 sieve and smaller. Coal dust that is small enough to be inhaled is referred to as respirable coal dust. See Alabama By-Products Corp., 2 FMSHRC 422, 423 (Feb. 1980).

The next issue is whether the changes in the ventilation plan have a rational relationship to the cause of the ignition, in other words, whether MSHA's insistence on the revisions was arbitrary, capricious, or constituted an abuse of discretion. I find MSHA's changes bear a rational relationship to the cause of the ignition.

The standard to be applied to a District Manager's denial of approval of an operator's ventilation plan is "arbitrary, capricious, or abuse of discretion." *Mach Mining, LLC*, 34 FMSHRC __ slip op. at 4-5 No. LAKE 2010-R-1, LAKE 2010-R-2, LAKE 2010-714 (Aug. 9, 2012). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Twentymile Coal Co.*, 30 FMSHRC 736, 754-55 (Aug. 2008) (quoting *Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). MSHA and the operator are not on equal footing when negotiating a ventilation plan. *Mach Mining, LLC*, 2012 WL 4471152 at *6 (Aug. 9, 2012). The Secretary must independently exercise her judgment with respect to the ventilation plan contents. *UMWA v. Dole*, 870 F.2d 662, 669 n. 10 (D.c. Cir. 1989)(quoting S. Rep. No. 95-181, at 25 (1977)).

The issue is whether the Secretary of Labor properly exercised her discretion and judgment in the plan approval process. *Mach Mining*, FMSHRC __ slip op. at 4 No. LAKE 2010-R-1, LAKE 2010-R-2, LAKE 2010-714 (Aug. 9, 2012). The Secretary bears the burden of showing that the actions of the District Manager in his review and decision-making regarding the plan were not arbitrary and capricious. *Id.* This means that the District Manager must examine the relevant data and articulate a satisfactory explanation for the action taken, including a rational connection between the facts and the revisions requested. *Id.* (citing *Twentymile Coal*, 30 FMSHRC at 754, 773-74).

Here, the Secretary proved that the actions of the District Manager were not arbitrary and capricious. MSHA conducted an investigation into the ignition that resulted in strong evidence that coal dust played a role in the ignition and inconclusive evidence as to methane's role in the ignition.

I. Background Information on Ignitions

Q: What causes an ignition in a coal mine?

A: Usually, the lack of ventilation. And the lack of ventilation allows methane to build up; or insufficient amount of ventilation, you get methane, coal dust, and sparks."

Tr. 32.

An ignition in a coal mine happens when you have a fuel source, an ignition source, and oxygen; this is commonly referred to as the "fire triangle." Tr. 94, 133. Methane, coal dust, or a combination of the two can serve as a fuel source and oxygen is

present in an underground coal mine.¹⁰ Tr. 133, 134, Tr. 324. Ignition sources are things that can cause sparks, such as the bits on a continuous miner, or electrical equipment used on the section. Tr. 134-35. When the miner bits hit substances harder than coal, they tend to spark. Tr. 106.

Elk Creek was a gassy mine that had prior ignitions. David West, MSHA Ventilation Specialist Supervisor, and Carl Boone, District Manager, testified that there were two other ignitions at Elk Creek prior to the ignition in question. Tr. 133, 241. He also testified that at the time the ignition occurred, Elk Creek was liberating 995,000 cubic feet of methane in a 24 hour period. Tr. 139. Currently, Elk Creek liberates four and a half million cubic feet of methane in a 24-hour period. Tr. 140. At the time of the ignition, Elk Creek mine was on a five-day 103(i) spot series because of the large quantities of methane it liberated. Tr. 137. David West stated that Elk Creek was probably the gassiest mine in his district. Tr. 137. Carl Boone, MSHA District Manager, said that the mine was “[v]ery gassy.” Tr. 241. When David West was questioned as to the significance of liberating that much methane he stated, “[i]t tells the mine operator that they’re liberating a lot of methane and they need to be staying on top of their safety plan and ventilation plans... You know, it tells us there’s methane there.” Tr. 140. Methane gets into a coal mine when it is liberated from the coal face and coal ribs. Tr. 150-51.

Carl Boone, District Manager, stated in testimony that a methane monitor’s reading after an ignition might not accurately read the amount of methane present, as methane tends to burn off during an ignition...

Q. There was no signs that methane was involved in this ignition, were they [sic]?

A. Yes. We had about eight-tenths, they found methane all day long. After the ignition occurred, the guys turned around and they see 1.7 on the methane monitor. Well, when you’ve had that ignition, be it a dust or methane ignition, it burned out other methane that was in the place, and it got down to 1.7 or 1.25 or 2. If it was there, it got down to that point there. But to me, it burned off methane.

Q. You’re not aware of any facts that support that conclusion; right?

A. I don’t think you can have a fire and not burn off methane. It’s going to burn the fuel that’s in the place. It’s going to burn a lot of the dust, it’s going to burn a lot of methane, but it didn’t burn all of either.”

Tr. 296-97.

Coal dust is a byproduct of the work of mining- it is typically seen when miners cut the face and the bits grind the coal. Tr. 151. David West, MSHA Ventilation

¹⁰ David West, Ventilation Specialist Supervisor for MSHA, also testified that sulfuric gas could act as a fuel source when there are pyritic inclusions in a mine. Tr. 134.

Specialist Supervisor, stated that it's "a fact of the mining industry" that coal mining produces dust. Tr. 151.

Methane and coal dust can ignite in the presence of oxygen and sparks. The presence of coal dust lowers the concentration of methane needed to ignite. Wayne Sparks, MSHA Ventilation Specialist, testified that "you can have a methane and coal dust ignition with less than five percent. Some say two; some say even less than two percent methane. In the presence of coal dust, you can have an ignition." Tr. 120-21. David West, MSHA Ventilation Specialist Supervisor, stated that when miner bits hit pyritic inclusions, "usually, you get a lot of sparks." Tr. 153. There are pyritic inclusions at Elk Creek and David West stated that he found a pyritic inclusion that was cut in half 26 inches from the head of the miner during his investigation. Tr. 153. MSHA Ventilation Specialist Felix Caudill also noticed pyritic inclusions in the section. Tr. 340.

II. The Quantity of Air Maintained at the End of the Line Curtain

The quantity of air maintained at the end of the line curtain affects the amount of methane and coal dust at the face. MSHA requires mine operators to maintain a certain amount of air at the end of their line curtains. Tr. 157. Prior to the ignition HCC's ventilation plan required that 7,000 c.f.m. of air should be maintained at the end of the line curtain while the scrubber was running and 5,800 c.f.m. while the scrubber was not running. MSHA requested HCC to change its ventilation plan so that the quantity of air maintained at the end of the line curtain would be 7,000 c.f.m. at all times. MSHA required other mines to maintain 7,000 c.f.m. at the end of the line curtain without the scrubber running. Tr. 114. David West, MSHA Ventilation Specialist Supervisor, testified that during his investigation of Elk Creek he measured the velocity of air at the end of the line curtain and it was 5,600 c.f.m. Tr. 150. Felix Caudill, an MSHA Ventilation Specialist who was also present at the scene, took a second reading of the velocity of air at the end of the line curtain and found it to be 6,700 c.f.m. He stated that the purpose of ventilating a coal mine – keeping the air flowing at the end of the line curtain at a certain quantity- was to dilute and render harmless the air, and sweep away any poisonous gases and dust. Tr. 150. Carl Boone, MSHA District Manager gave similar testimony. Tr. 265. Air is supposed to deflect from the line curtain, come up to the face, sweep the corners of dust and methane, and flow out of the mine. Tr. 155. If a mine has low air, the air will go into the last open crosscut and deflect from the line curtain in a figure eight pattern, instead of moving to the face and sweeping dust and methane away, testified David West. Tr. 154. He stated that the air does a figure eight pattern because there is not enough pressure to push the air to the face; a figure eight pattern results in a build-up of methane and/or dust at the face. Tr. 154. The quantity of air at the end of the line curtain is related to the amount of air that will get to the face of the mine, testified David West. "The more you have in your line curtain, the more you sweep the corners of the face." Tr. 157. Here, the testimony of David West clarifies the import of the amount of air maintained at the end of the line curtain.

Q: "If a mine operator increases the quantity of air that's traveling behind the line curtain, and if we assume that there's dust and methane that's

present in the entry, would the increase in air behind the line curtain dilute and render harmless the dust and methane that's present at a faster rate than it would otherwise be reduced if the mine operator did not increase the air at the end of the line?

A: Yes, it would....

...

Q:...Can you explain what you mean when you say yes, it would [sic]?

A. Well, if you—say you doubled your air flow, which in this case they didn't double the air flow. But if you doubled your air flow—

Q. We're talking about the air flow at the end of the line curtain?

A. Yes, end of the line curtain. And all that air got to the face, then it would cut your methane in half. I mean, it's a direct relationship, and the same thing with dust.

Tr. 160-61.

Any equipment near the face of the mine, such as a continuous miner, will obstruct the air flow. Tr. 158, 256. Elk Creek used a continuous miner in the No. 8 entry, that was approximately 35 feet long. Tr. 159. Carl Boone, District Manager, stated that an increase in air flow was necessary because at the time of the ignition, Felix Caudill, MSHA Ventilation Specialist, reported 6,700 c.f.m. and “we got 6,700 cubic feet of air up there, and we had an ignition of something.” Tr. 256.

At hearing, MSHA employees testified that they wanted to increase the amount of air at the end of the line curtain to better sweep the face of dust and methane. Wayne Sparks, MSHA Ventilation Specialist, and lead investigator on the investigation stated, “We asked for seven at the line curtain without the scrubber. We were just trying to get more air to the face to render—to dilute the gas.” Tr. 116. David West, MSHA Ventilation Specialist Supervisor, testified that the air at the end of the line curtain at Elk Creek was too low, and contributed to the ignition. Tr. 183. He said, “We're required to maintain enough air at the end of the line curtain to render and carry away harmful gases and dust. In this situation, with everything else that was there, it needed to be increased.” Tr. 183.

Here, the District Manager evaluated the facts gleaned from the investigation of Elk Creek. MSHA determined that HCC had enough air at the end of the line curtain to meet its ventilation plan requirements and still had an ignition; therefore, MSHA determined that the ventilation plan requirements for the end of the line curtain needed to be increased to better sweep away coal dust and methane from the face and to lessen the chance of another ignition. MSHA noted that methane was present before and after the ignition in quantities that may lead to an ignition in combination with coal dust, and increased the amount of air at the end of the line curtain to dilute and render harmless the methane. Therefore, I find that MSHA's action to change the amount of air at the end of the line curtain from 7,000 c.f.m. when the scrubber is running and 5,800 c.f.m. when the scrubber is not running to 7,000 c.f.m. at all times when mining is taking place was rationally related to the facts of the ignition and was not arbitrary and capricious.

III. The Curtain Setback Distance from the Face

The distance that the line curtain is set back from the face affects the ventilation of the face. A curtain is a piece of material that is cut to fit the mine. Tr. 155. It is hung on the mine walls using nails or ties and is supposed to drape from the top of the mine to the floor of the mine. Tr. 155. MSHA requires mine operators to maintain line curtains within a specified distance of the face as part of their ventilation plans, testified David West, MSHA Ventilation Specialist Supervisor. Tr. 161. MSHA does this to “control the methane and respirable dust, coal dust up in the faces [sic].” Tr. 161. Bill Adelman, General Manager of HCC, testified that it is common knowledge that a line curtain closer to the face will do a better job of ventilating the working place. Tr. 587; *see* Testimony of David West, MSHA Ventilation Specialist Supervisor, Tr. 162; *see also* Testimony of Carl Boone, District Manager, Tr. 263.

HCC had a “deep cut plan,” at Elk Creek Mine, which means that HCC made cuts of over 20 feet. Tr. 162. David West testified that a “deep cut plan” harms ventilation because the curtain is farther back from the face, so the amount of air getting to the face is decreased during the cut. Tr. 163. Carl Boone, District Manager, stated that he believed the reason Elk Creek had an ignition was because there was not enough air in the mine and the curtain needed to be closer to the face. Tr. 255-56. David West testified, that he believed that reducing the curtain setback distance from the face to 40 feet and increasing the amount of air maintained at the end of the line curtain to 7,000 c.f.m. at all times would decrease the amount of methane and coal dust at the face, reduce respirable dust, and reduce the occurrence of ignitions and explosions. Tr. 189, 192. He also indicated that he did not believe it would be difficult for a mine operator to maintain these conditions and that they were in place at other mines. Tr. 190-91.

MSHA’s decision to decrease the curtain setback distance from the face from 45 feet to 40 feet was not arbitrary and capricious. As HCC admitted at trial, it is common knowledge that moving the curtain closer to the face does a better job of ventilating the working place. HCC had an ignition at Elk Creek due to coal dust and, arguably, methane. Therefore, the requirement for HCC to reduce its curtain setback distance is a rational plan revision that will better sweep the face of coal dust and methane. I find that MSHA’s requested plan revision to reduce the curtain setback distance from 45 feet from the face to 40 feet from the face was not arbitrary and capricious.

IV. The Volume of Air Over the Scrubber

The volume of air passing over the scrubber affects the ventilation of the working place. MSHA requires that mine operators keep their scrubbers operating at a minimum scrubber capacity, meaning a specified minimum volume of air that should be blown through the scrubber while cutting coal. Tr. 166. The scrubber capacity refers to the quantity of air that is blown through the scrubber. Tr. 166. The wet bed scrubber, or “scrubber” is located inside the continuous miner. Tr. 73, 164. The wet bed scrubber pulls dust away from the face and releases it behind the mining unit to reduce the dust in

the air and pull air and dust away from the face. Tr. 73, Tr. 165. The fan in the scrubber pulls air out of the hood of the miner, away from the face, and takes it through duct work toward a screen. Tr. 73, 164. Then, the air is pulled through a 20-layer pleated screen that is sprayed with water jets to settle the dust that comes through the screen. Tr. 164. David West also testified that the scrubber is also used to help reduce methane. Tr. 165. The scrubber requires a certain quantity of air to be sucked off the cutting drum in order to work properly. Tr. 165. The screen can get dirty, which results in less air being sucked through the scrubber. Tr. 165-66. David West, in his testimony, stated that he was unaware of any manufacturer that says you can operator a scrubber as low as 5,000 c.f.m. Tr. 168. He testified that the manufacturer of the continuous miner used in the incident in question probably recommended a minimum capacity of between 7,000 c.f.m. and 10,000 c.f.m. Tr. 167.

HCC General Manager, Bill Adelman, admitted that it is common knowledge that more air in the working place will better sweep out methane and dust. Tr. 586-87. Carl Boone similarly testified that increasing the minimum scrubber volume would protect miners by providing better ventilation to the face. David West, MSHA Ventilation Specialist Supervisor, testified that the air that is being directed into the entry behind the line curtain can affect the amount of dust that the scrubber is able to pick up off the head of the miner because “if you get the air flow at the end of the line curtain to match more [sic] what the scrubber would pull normally, then there’s a better chance that the air at the end of that line curtain is going to reach up into the face further and sweep that dust out to where that scrubber can pick it up.” Tr. 170. Furthermore, David West testified that “if you don’t have enough line air behind the end of the line, that scrubber exhaust will circulate back up over and under your line curtain and go back into the face.” Tr. 173. If the air recirculates, he explained, the dust and methane in the scrubber exhaust will circle back to the face. Tr. 174. David West testified that he did not think it was difficult to keep a scrubber operating at a capacity of 7,000 c.f.m. and that he thought that the scrubber volume working close to the minimum capacity allowed in the plan contributed to the ignition. Tr. 179-81. He said that the scrubber, “Just wasn’t diluting the methane and the dust that was up in the face” and was not properly pulling it away from the face. Tr. 181. He stated that adjusting the scrubber volume to match the air maintained at the end of the line curtain was necessary for the scrubber to work properly. Tr. 189.

I find that MSHA’s actions were not arbitrary and capricious when MSHA increased the minimum volume of air over the scrubber. MSHA increased the amount of air that should be maintained at the end of the line curtain and testimony showed that it is important for the scrubber volume to mirror that. Increasing the volume of air over the scrubber will also better clean the face of dust and methane and decrease the likelihood of an ignition. Because the ignition was caused by poor ventilation of the face, I find that MSHA’s revision to increase the volume of air over the scrubber from 5,000 c.f.m. to 7,000 c.f.m. was rationally related to the cause of the ignition.

The revised standards required by the District Manager are a part of a comprehensive plan developed through negotiations between MSHA and HCC to address both coal dust and methane. The revisions requested by the District Manager bear a

rational relationship to the facts because the revisions increase the air flow at the face, which dilutes the concentration of methane and accumulated dust, lowering the risk of a methane ignition and propagation of a fire. Since the facts indicate that methane could have played a part in the ignition, I find that the District Manager's explanation for including the contested revisions bears a rational connection to the facts.

Furthermore, I have trouble believing HCC's claim that the Secretary acted in an arbitrary and capricious manner. Bill Adelman, General Manager of HCC, admitted in testimony that HCC's objections to the plan revisions were not because of what MSHA wanted to include in the plan, but because he thought MSHA added the revisions in an underhanded manner. Tr. 589. He testified that the changes did not affect production costs in time, manpower or money; he was objecting on principal alone. *Id.*

The Secretary argues that HCC negotiated in bad faith. I do not find that they did. HCC is entitled to an opinion on whether methane was involved in the ignition. HCC and MSHA exchanged various proposed changes to the plan which HCC ultimately accepted under protest.

Finally, HCC argues that because MSHA's plan revisions apply to only one section of the mine, MSHA's changes were arbitrary and capricious. HCC also feels that MSHA had improper motives because there has never been an ignition on any of the other sections of the mine despite their operating under the original ventilation plan. However, it is apparent from the testimony of MSHA District Manager, Carl Boone, that MSHA was uncomfortable with the fact that the revisions would only apply to one unit. His testimony states that MSHA originally requested that the ventilation plan revisions be applied to all units on the mine, but sacrificed that request in order to further negotiations.

A. So we finally come up with a plan that we're going to agree off [sic] to that's not way far off. It wasn't what I wanted, but I tried to work with them and get to where that we could get a plan that we felt like we could live with and that would absolutely protect the safety of the miners in the Elk Creek mine from a methane or dust ignition, to have that—I wanted it all over the whole mine to start with. But it wasn't going there and everything. And I can remember distinctly—

Q. You said it wasn't going there. Why wasn't it going there?

A. They didn't want it to go there. So I remember distinctly saying, Bill, heaven forbid you have another ignition, because you'll get it on all sections. I'm going to go along with what y'all submit. But heaven forbid you have another one. We're going to do it on all the sections.

.....

Q. Now, there's been much made of this today, that these provisions at issue only apply to the No. 4 unit. Can you explain why that is, why these three provisions were restricted to the No. 4 unit?

A. It's called negotiations... We would rather have had it for the entire mine and what have you, but we didn't get that. We didn't get the 30 feet—there's just a lot of things we didn't get, but it was all in the spirit of

just being cooperative, but yet getting something that would protect the miners and hopefully not have another occurrence like this.”

Tr. 253, 266-67.

Therefore, I find that the revisions requested by the District Manager bear a rational relationship to the facts. They seek to reduce the accumulation of respirable dust and methane by increasing the volume of air at the end of the line curtain to 7,000 c.f.m. at all times when mining is taking place, increasing the volume of air over the scrubber to 7,000 c.f.m., and decreasing the distance that the line curtain should be set back from the fact to 40 feet.

The violation is **AFFIRMED** and the Respondent is **ORDERED** to pay the civil monetary penalty proposed by the Secretary.

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

Distribution:

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/mep

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 22, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner,	:	Docket No. KENT 2011-827
	:	A.C. No. 15-17360-248539
	:	
v.	:	
	:	
PREMIER ELKHORN COAL CO.,	:	Mine: PE Southern Pike Co.
Respondent.	:	

DECISION

Appearances: Matt S. Shepherd, Esq. U.S. Department of Labor, Office of the Solicitor, Nashville, TN
For the Petitioner

Marco Rajkovich, Esq. and Melanie J. Kilpatrick, Esq. Rajkovich, Williams, Kilpatrick & True, Lexington, KY
For the Respondent

Before: Judge Tureck

This case is before me on a *Petition for Assessment of Civil Penalty* filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Premier Elkhorn Coal Co. (“Respondent”), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§815 and 820 (“ Mine Act”). The Secretary assessed penalties against Respondent totaling \$122,500 for two alleged violations of mandatory safety standards at Respondent’s PE Southern Pike County Mine (“Mine”). The Secretary contends that each of these violations was significant and substantial and involved high negligence, and that the condition set out in Citation No. 8230316 was an unwarrantable failure to comply with mandatory standards. Respondent challenges both the occurrence of the violations and the severity of the assessed penalties.

A formal hearing was held in Pikeville, Kentucky on December 14 and 15, 2011. At the hearing, Government Exhibits 1-12, 19-28 and 30, and Respondent’s Exhibits 1, 5-7 and 9 were admitted into evidence,¹ and each party provided testimonial evidence. Both parties then filed post-hearing briefs, the last of which was received on April 2, 2012. Subsequently, Respondent moved to strike the Secretary’s brief because throughout the brief counsel cited excluded

¹ Citations to the record of this proceeding will be abbreviated as follows: GX – Government Exhibit; RX – Respondent Exhibit; JX – Joint Exhibit; - TR Hearing Transcript.

evidence as the support for many proposed findings of fact. Although counsel is forthright when he is citing excluded evidence in the brief, it is nonetheless improper to do so. At best it is confusing; at worst it seems like a back-handed attempt to get around evidentiary rulings that did not go the Secretary's way. The proper action for counsel to have taken would have been to file a post-hearing motion for reconsideration of the evidentiary rulings made at the hearing.

But citing excluded evidence was not the only problem with the Secretary's brief. At least twice in her brief the Secretary refers to GX 29, which was excluded from evidence, as the operator's manual from the truck involved in the accident. *See* Secretary's Post-Hearing Brief ("Sec'y's Br.") at 9 n.7, 12 n.10. However, it is crystal clear that GX 29 was excluded because there was no credible evidence that it was the operator's manual for that truck. TR 166-69, 220. Such a disregard of the facts cannot be tolerated.

I will not exclude the Secretary's brief because, despite these serious defects, it may still have some value. But I will not consider any proposed findings for which excluded evidence is cited as support, and I admonish counsel not only for citing GX 29, an excluded exhibit, but for misrepresenting it.

Findings of Fact and Conclusions of Law

At the start of the hearing, the parties submitted a list of 19 stipulations, which I have marked as Joint Exhibit 1 and admit into evidence. These stipulations are as follows:

1. On December 12, 2009, a fatal accident occurred at the PE Southern Pike County Mine, Mine ID No. 15-17360.
2. Just prior to the accident, the deceased, Steve Johnson, was operating Truck No. P419. Truck No. P419 is a 2006 International, VIN No. 1HTXHAPTX63J233337.
3. At the time of the accident, Steve Johnson was an employee of Trivette Trucking. Mr. Johnson worked as the chief mechanic at Trivette Trucking. Mr. Johnson had approximately thirty (30) years experience as a truck driver and truck mechanic. Trivette Trucking is a contractor for Premier Elkhorn Coal Company.
4. In the two years prior to the accident, Trivette Trucking received a total of four citations from MSHA at the PE Southern Pike County Mine. These citations were issued under Section 104(a) of the Mine Act and were not evaluated as significant and substantial. The citations were issued on April 24, 2008.
5. Mr. Johnson's truck was the fifth truck loaded on the morning of December 12, 2009.
6. After being loaded, Mr. Johnson exited the coal pit and drove to a location on the haul road where another truck driver, Carl Collier, was located. Mr. Johnson parked the truck in the haul road and Mr. Collier helped him look at the steering system. Neither Mr. Johnson nor Mr. Collier detected any leaks in the steering system. Mr. Collier got into the operator's cab and

turned the steering. No leaks were detected and the pump reservoir was full of fluid. Mr. Johnson then proceeded to drive the truck on the haul road.

7. The sixth truck to be loaded on the morning of December 12, 2009 was driven by Tim Bentley. While descending a section of the haul road, Mr. Bentley observed the truck driven by Mr. Johnson overturned in the roadway. Mr. Bentley stopped and parked his truck on the haul road above the accident site and walked down to the scene of the accident. There were no eyewitnesses to the accident.

8. The cab of the truck involved in the accident was not significantly damaged. The doors functioned properly and all the cab glass was intact. A seat belt was provided and was operative when tested.

9. Just prior to the accident, Mr. Johnson attempted to jump from the cab of the truck while it was in motion. He was struck by the left rear tandems, resulting in fatal injuries.

10. MSHA interviewed drivers from Trivette Trucking after the accident. The drivers stated during the interviews that pre-operative examinations were conducted daily and that deficiencies were corrected prior to using the trucks.

11. The documents attached as Exhibit A were created by Premier Elkhorn Coal Company at the Burke Branch Preparation Plant. The documents are business records of Premier Elkhorn. The documents show some of the weight of some of the coal trucks that delivered coal to the Burke Branch Preparation Plant. The coal was hauled from various mines, including the PE Southern Pike County Mine, that are operated by Premier Elkhorn.

12. At all times relevant to this proceeding, Premier Elkhorn Coal Company was the operator of the PE Southern Pike County Mine.

13. The PE Southern Pike County Mine is a "mine" as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).

14. At all times relevant to this proceeding, products of the PE Southern Pike County Mine entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.

15. Premier Elkhorn Coal Company is a large operator.

16. Copies of the violations at issue in this proceeding were served on Premier Elkhorn Coal Company by an authorized representative of the Secretary.

17. Premier Elkhorn Coal Company timely contested the violations.

18. Premier Elkhorn Coal Company 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 regarding this case.

19. The proposed penalties will not affect Premier Elkhorn Coal Company's ability to remain in business.

The PE Southern Pike County Mine is located in Myra, Kentucky, and is a surface coal mine. TR 24. In addition to the Mine, respondent operates several other mines in eastern Kentucky. TR 23. The Respondent also operated the Burke Branch Preparation Plant (“Preparation Plant”). Coal from the Mine was hauled by contractors to the Preparation Plant for processing, but only on Saturdays. TR 24-26. The Preparation Plant was located about six to seven miles from the Mine. TR 27. Steve Johnson was employed by one of these contractors, Trivette Trucking. He was the Chief Mechanic for Trivette (TR 90), and as part of his duties he also drove a coal truck for Trivette.

Early on the morning of Saturday, December 12, 2009, Johnson drove a red 2006 International Paystar coal truck, number P419, from Trivette’s garage to the Mine. TR 90-91. The truck had three axles, with tandem wheels on the two rear axles. Johnson was the only one of the coal truck drivers that morning who drove an International coal truck at the Mine (TR 123-24); the others drove Mack trucks. TR 75-76. At the Mine, Johnson’s truck was loaded with coal by Bobby Warf, who at the time was a front-end loader operator for Respondent (TR 124). After his truck was loaded with coal, Johnson, over the CB radio, told another coal truck driver, Carl Collier, that he was having trouble with his truck’s power steering. TR 110-12; 139-40. Johnson pulled his truck over, and he and Collier then checked out the truck and did not find any leaks in the steering system. JX 1, at ¶6; TR 105; GX 4, at 2-3. In his conversation over the CB radio, Johnson did not report a problem with the truck’s brakes. TR 140. Johnson then proceeded to drive down the Mine’s haul road on the way to the Preparation Plant. It was still dark at the time. TR 34.

The haul road was a gravel road with berms on both sides. TR 28. On the right, there was a hill behind the berm; on the left, the road dropped off. The road had a steep downward grade of 15 to 18 percent for about 1300 feet. About 30 to 40 yards after the site of the crash the haul road crosses an intersection, at which point it becomes level or very slightly upgrade for about two miles. TR 318, 378, 419. According to Respondent’s Manager of Safety, David Lee Wilder, coal trucks generally traveled very slowly – not more than 10 miles per hour - on the haul road. TR 150. At some point Johnson’s truck left the normal travelway and started heading directly toward the left berm. Johnson jumped from the truck and unfortunately “he rolled underneath the back tandems on the left side and was dragged all the way down . . . the hillside. . . . At some point the truck flipped over.” TR 44. Johnson was killed.

MSHA issued two citations following its investigation of the accident. Citation No. 8230316 (GX 1) alleges that:

[T]he driver of the . . . truck, owned by Trivette Trucking . . . , failed to maintain control of the loaded truck as it was descending the mine haul road. Overloading of the truck was a factor in the driver losing control. The estimated weight of the truck was 37,600 pounds over the GVWR [gross vehicle weight rating] recommended by the manufacturer. Premier Elkhorn was aware that the trucks

were routinely overloaded and did nothing to stop this practice. . . . This condition is an unwarrantable failure to comply with a mandatory safety standard.

The citation states that the safety standard violated was 30 C.F.R. §77.1607(b), which states: “Mobile equipment operators shall have full control of the equipment while it is in motion.” It adds that the violation resulted in a fatality, was significant and substantial (“S&S”), and was high negligence. Finally, the violation was alleged to have been an unwarrantable failure to comply with a mandatory safety standard. A \$70,000 penalty was assessed for the violation.

Respondent contends that the Secretary failed to prove that the truck was overloaded and that there is no standard governing truck loads. Even if the Secretary proves that the truck was carrying a load in excess of the GVWR, Respondent contends that there is no evidence that the weight of the truck’s load was hazardous or contributed to the accident.

Citation No. 8230317 (GX 2) alleges that:

The operator of this mine did not assure that the [International Paystar] truck being operated by a contractor was equipped with adequate brakes. [Specifically],

1. Both the left and right side brake drums on the steering axle had deposits of dried grease on the drum lining friction surface. These conditions compromises [*sic*] the braking capacity.
2. The right side brake on the rear tandem axle did not function when tested.
3. Wear on the brake drums in excess of maximum allowable diameter was found on the right front tandem and the [*sic*] both the left and right side of the rear tandem.
4. Bluing was found on the right side drum on the front tandem and the left side drum on the rear axle. Bluing indicates excessive heat. These conditions compromise the braking capacity.

This citation states that the safety standard violated is 30 C.F.R. §77.1605(b), which requires mobile equipment to be equipped with “adequate brakes”. Again, the citation notes that a fatality had already occurred, that the violation was S&S, and that it resulted from high negligence. But it was not alleged to have been an unwarrantable failure. MSHA assessed a \$52,500 penalty for this violation.

Respondent contends that the Secretary has failed to prove that the truck’s brakes were inadequate or that the condition of the brakes caused the accident. Rather, Respondent contends that the evidence shows that the most likely cause of the accident was a steering malfunction, of which it had no knowledge. Further, Respondent alleges that driver error has not been ruled out as a cause of the accident.

Discussion

MSHA mine inspector and accident investigator Debra Howell was the lead investigator of the accident that killed Johnson on December 12, 2009, and she testified at the hearing. She was notified of the accident at home by the MSHA District Manager at 8:30 that morning, and arrived at the Mine sometime between 11:00 and 11:30 a.m. Also at the mine were Hank Bellamy, the head of accident investigations for MSHA for the District; Greg Hall, an engineer; State mine inspectors; Premier's Manager of Safety and Environmental Affairs, Dave Wilder; and several miners. TR 30, 33, 35. Howell talked to some of the miners and found out that there were no witnesses to the accident. TR 33. She then went to the scene of the accident. She saw that there were no skid marks, which led her to conclude that "there were no brakes in operation." TR 45; *see also* TR 33. She also concluded that the truck was overloaded. She based this conclusion on her assumptions that the loaded truck weighed more than its gross vehicle weight rating and that a truck is overloaded if it carries a load in excess of the GVWR. TR 47-48. In fact, Citation 82303126 is premised on MSHA's contention that Johnson lost control of his truck because it was overloaded, *i.e.*, hauling more weight than it could carry safely, and the Secretary's expert witness, Ronald Medina, concluded that Johnson's truck was overloaded solely because its load exceeded the manufacturer's GVWR. GX 25, at 8; *see also* TR 224-26.

But the Secretary has failed to prove that Johnson's truck was overloaded, *i.e.*, that it was carrying a load that was too heavy for the safe operation of the truck. There are several independent grounds for holding that the Secretary has failed to prove her case, any one of which would be reason enough to vacate the citation.

First, the Secretary has failed to prove how much the loaded truck weighed prior to the crash. It is undisputed that Johnson's coal truck was not weighed after it was loaded with coal, for the loaded coal trucks are weighed at the Preparation Plant. Nor was the coal weighed while it was being loaded into the truck, or after the crash. TR 128, 135-36, 331. The Secretary attempted to introduce evidence regarding the weight of the four trucks loaded before Johnson's on the morning of December 12, 2009, but I excluded this evidence. *See* TR 58-70. In any event, since the other four trucks were Mack trucks, not International trucks as Johnson's was, and there is no evidence that these trucks had the same GVWR as Johnson's International truck or the same size bed as Johnson's (*e.g.*, TR 76-77), even if the Mack trucks loaded before Johnson's International truck carried loads of about 120,000 pounds, it would not prove that Johnson's truck had a similar load. Without credible evidence of the truck's weight at the time of the crash, it is impossible for the Secretary to prove that the truck was overloaded.

A second independent reason to vacate this citation is that even assuming the Secretary had proven that Johnson's truck carried a load which exceeded the manufacturer's GVWR, there is no proof that exceeding the manufacturer's GVWR is *per se* hazardous. The Secretary has not pointed to a definition of "overloaded" in the Mine Act, the safety standards promulgated under the Mine Act, or any other Federal or State statute or regulation; nor has the Secretary shown that the GVWR has been adopted

as the weight limit for a truck's safe operation under any such statute or regulation. Yet it is clear from the citation and the evidence presented by the Secretary that in the context of this case she is defining "overloaded" as a load in excess of the manufacturer's GVWR. There is no basis in this record to support the Secretary's reliance on the GVWR as a maximum safe load for a truck to carry. Since MSHA has not formally adopted the GVWR as a standard for determining a truck's safe hauling capacity, nor even promulgated any regulations governing truck load weights (*e.g.*, TR 83-84), the Secretary's bald-faced assertion that a truck carrying a load in excess of the GVWR has violated 30 C.F.R. §77.1607(b) clearly is insufficient to establish a violation of that standard.

In fact, the record contradicts such a conclusion. For one thing, the evidence establishes that Kentucky permits trucks to operate in excess of the manufacturer's GVWR if a fee is paid (TR 87), which indicates that Kentucky does not believe the GVWR is the limit of the weight trucks can haul safely. Rather, the weight limits imposed on trucks by Kentucky relate to the wear trucks cause to the roads, not to how much weight trucks can carry safely. *See, e.g.*, Ky. Rev. Stat. 189.222(1)(2009). Moreover, if the GVWR is intended to be a *per se* limit by the manufacturer on the load a truck may carry safely, and is a reliable measure of that limit, it is reasonable to assume that MSHA would have promulgated a safety standard prohibiting the operation of mining trucks carrying loads in excess of the GVWR. That it has not done so, but has promulgated hundreds of pages of regulations governing mine safety to the *nth* degree including numerous standards governing vehicular safety, speaks volumes regarding the use of the GVWR as a safety standard. In addition, modifications to a truck subsequent to its manufacture can substantially increase the loads it is capable of hauling. Things that can cause a truck's capacity to increase include relatively routine items as changing a truck's tires and springs, and major modifications such as replacing an axle. TR 490-91, 496.²

Accordingly, there is no basis to find that it is inherently unsafe for a truck to haul a load in excess of the manufacturer's GVWR. Since that is the essence of the Secretary's case regarding Citation 8230316, this citation must be vacated due to this factor alone.

There is a third independent factor mandating the dismissal of this citation. Even accepting the Secretary's contention that Johnson's truck was hauling a load of around 120,000 pounds at the time of the crash, the evidence establishes that the weight of the load was not hazardous. Both parties' expert witnesses testified that 120,000 pounds was

² In *Clintwood Elkhorn Mining Co. v. Secretary of Labor*, 32 FMSHRC 1880 (ALJ 2010), Judge Gill similarly concluded that the GVWR cannot be used to determine that a truck is overloaded.

not an unsafe load for Johnson's coal truck to haul.³ Ronald Medina is a mechanical engineer employed by MSHA. TR 247. He testified as an expert witness for the Secretary regarding braking and steering systems.⁴ Medina testified that Johnson's truck was capable of hauling a load of 120,000 pounds since he had hauled loads of that weight in that truck previously. TR 313. Respondent's expert, Steve Rasnick, a highly experienced mechanic, also testified that the truck would have been capable of hauling that heavy a load. TR 522. As Rasnick put it, "It's a coal truck. It was built to haul. . . . [T]hat truck was well capable of handling it [a 120,000 pound load]." *Id.* Further, Trivette and Respondent had excellent records regarding safety in 2009, reporting no accidents of any kind resulting in lost work days due to injury that year prior to the one that killed Johnson. TR 102-05. Finally, there does not appear to have been any incentive for Respondent to load Trivette's trucks with more coal than they could haul safely. Respondent pays Trivette by the amount of coal hauled. TR 187. Therefore, it does not appear that Respondent would profit by overloading Trivette's trucks. It would cost Respondent the same whether trucks hauled 82,600 or 120,000 pound loads to get the coal from the Mine to the Preparation Plant. Accordingly, the evidence fails to prove that Johnson's truck was carrying a load that was too heavy for it to haul safely.

Accordingly, the Secretary has failed to prove that the truck which Johnson was driving on the morning of December 12, 2009, was overloaded or was hauling a load that was heavier than it could safely handle. Since that is the crux of Citation No. 8230316, it must be vacated.

Citation 8230317

It is the Secretary's position that the brakes in Johnson's truck were defective and these defective brakes contributed to the accident which resulted in Johnson's death.

Medina testified that the braking system on Johnson's truck was thoroughly inspected as part of the accident investigation. Medina testified that the brake drum on the right of the rear axle did not function, and was in that condition at the time of the accident. TR 285-86. In addition, in his report he stated that he found some dried grease on only the right front brake drum, but the left front brake drum was dry. GX 25, at 7. However, he testified at the hearing that he found grease on the front linings, which would have "greatly reduce[d] the braking capability" TR 287. This discrepancy is not explained. He also found that the three rear brake drums they were able to inspect

³ Had I admitted into evidence the weight records for coal haul trucks that the Secretary proffered, they would have shown that the trucks routinely carried loads of about 120,000 pounds without incident.

⁴ Medina's expertise regarding these subjects – particularly steering systems – was unimpressive. It is unclear why the Secretary chose such a minimally qualified individual to be its expert witness in this case. Respondent's expert, a truck mechanic with only a high school diploma, knew much more about both of these systems than Medina despite Medina's degree in mechanical engineering from Carnegie Mellon.

(one wheel could not be removed from the truck) were all worn past the point where they should have been replaced. TR 288-89; GX 25, at 9. Finally, he found bluing in some of the brake drums, which he stated is symptomatic of the brake drums having gotten very hot at some point. TR 291-92. However, he admitted that once the brakes return to their normal temperature, the bluing is insignificant. TR 295. He stated that all of these defects existed at the time of the accident. TR 295-96.

Medina believes that even if the truck was not overloaded, the condition of the brakes would have created an unsafe situation. TR 322-23. He concluded that the accident occurred because the brake defects caused the driver to lose control of the truck. TR 323-24.

However, Medina admitted that the accident could have been caused by other factors. For one thing, it is possible that the driver missed a gear and accidentally shifted into neutral, which Medina testified is easy to do (TR 321, 336-37). He stated that “I don’t have conclusive evidence of that. Just suggest – the circumstances suggest it.” TR 342. If the truck was in neutral, the truck would pick up speed on the downgrade and the Jake brake (*see infra*) would not operate. TR 319, 321. Medina also posited that Johnson may have been driving too fast (TR 335-37, 403); and it is his opinion that the truck was traveling too fast for the defective brakes to stop it. TR 336-37. He bases this on how far Johnson’s truck slid after it hit the berm. TR 330, 335-36. But even if he is right that the distance the truck slid after it hit the berm shows that it was traveling at excessive speed when it crashed, Medina fails to take an obvious point into account. If he is correct that the truck’s brakes were defective, leading to the accident, Johnson’s truck doubtless would have been traveling overly fast at the time it impacted the berm. That does not mean that the truck was going overly fast when Johnson lost control of it. Further, I find it significant that neither the report prepared by the accident inspector, Debra Howell (GX 4), nor Medina’s report, mention that the truck was being driven at an excessive rate of speed at the time of the accident or that the speed at which the truck was being driven caused the accident. There is no indication in the record of when or why Medina changed his mind to conclude that speed had an impact on the accident. Accordingly, Medina’s testimony that excessive speed played a role in causing the accident is not credible.

Medina also had a change of heart regarding the condition of the parking brake. His report does not note any problems with the parking brake (*see* GX 25, at 8-9), a finding which was echoed by Howell in her accident report. GX 4, at 5. Yet Medina testified at the hearing that 25% of the parking brake system was not functional. Again, there is no explanation for this inconsistency.

Respondent’s expert, Rasnick, disagrees with Medina on several points. For one thing, he believes that the amount of grease Medina found on the brake drum would not have rendered the brake unsafe. He testified that brake drums have to be saturated with oil or grease before they become unsafe. TR 468-69. He also testified that the bluing found on the brake drums was of no significance. He said that what matters is whether there are heat stress cracks inside the drums. Medina admitted there were none. TR 289.

He also stated that the bluing could have occurred months ago. TR 470-71. Next, Rasnick disputed Medina's allegation that excessive truck speed contributed to the accident. He stated that Medina's report (GX 25) indicates that the truck was in fourth gear, and in that gear the truck could not have been going more than 14 miles per hour. TR 472; *see also* GX 25, at 2. But he is incorrect in saying that Medina's report shows that the truck was in fourth gear, as the transmission was found to be in neutral after the crash. GX 25, at 2. However, since Medina pointed out that the gear may have been pushed into neutral as a result of the accident, it could have been in fourth gear before the crash; and Medina concedes as much. TR 340. Regardless, the truck was found to be in "low range and low split." TR 340.

That Johnson's truck was not traveling at an excessive rate of speed at the time it crashed is also the opinion of Respondent's Manager of Safety, David Wilder. Contrary to Medina's testimony, Wilder stated that Johnson's truck did not go very far once it struck the berm and turned over. TR 428-29. Further, Wilder pointed out that the cab of the truck was undamaged, that even the glass and mirrors were intact. TR 426. Based on these factors, he believes the truck was traveling no more than 10 miles per hour when it crashed. TR 432.

Wilder believes that the accident was caused by a problem with the truck's steering, not the brakes. TR 430-31. He stated that he knew Johnson personally, and he "was one of the best drivers on the property." TR 432. He testified that Johnson should have been able to keep his truck in the road even without any brakes if he could have turned the steering wheel the slightest amount. TR 430-31.

I find that the Secretary's assertion that the accident resulted from defective brakes is questionable at best. First, there are three different braking systems that Johnson could have employed to stop or slow down the truck. The truck had six drum brakes, two on each axle. TR 267. The brakes are activated when the driver steps on the brake pedal, which sends air pressure to the brake system. These are the service brakes. Then there are spring brakes on the two rear axles which do not rely on air pressure and function as the parking brake. TR 268-69. Finally, the truck has an engine brake – the Jake brake – which has the ability to slow the truck as long as the truck is in gear. TR 319. Although the Secretary contends that the truck's service brakes were defective, the evidence shows that only one of the six drum brakes was too worn to have functioned. Rasnick testified that if only one of the drum brakes was not functioning, the brakes on the other five wheels would have stopped the truck. TR 522-23, 527-29. Further, no deficiencies were found in either the parking brakes or the Jake brake. GX 25, at 5, 8; GX 4, at 5. Significantly, the only brake drivers generally used on the haul road was the Jake brake. TR 319, 344.

In addition, assuming that Johnson could not stop the truck because his brakes failed, why would he not have attempted to turn the truck so it stayed on the road? He was familiar with the haul road, and had to know that it would very shortly level out, permitting him to eventually stop even with seriously defective brakes. TR 419, 421. Yet the truck did not turn at all – it headed off the normal travelway straight into the berm

from 283 feet away. TR 424. There is no credible evidence that the truck was traveling more than the usual rate of speed of not more than 10 miles per hour at which the coal trucks generally went down the haul road prior to the time Johnson lost control of the truck. But even if the truck was going more than 10 miles per hour – even if it was going much more than 10 miles per hour – Johnson should have been able to at least start turning the truck to try to keep it on the road. TR 430. Yet the truck did not deviate from the path it took directly into the left berm. Also significant is that Johnson drove the truck from Trivette’s location to the Mine on the morning of the accident. If his brakes were as defective as the Secretary alleges, it is hard to believe that a mechanic of his experience would not have noticed that something was wrong with them. But he stopped to check the steering after his truck was loaded, not the brakes.

Moreover, when the truck’s steering mechanism was inspected following the accident, serious problems were found. Of greatest significance, the worm gear inside the steering wheel box was broken. When the worm gear is broken, the driver cannot steer the truck. TR 279-80. A representative of Sheppard, the steering gear manufacturer, was called in to inspect the steering system. He concluded, as might be expected considering Sheppard’s potential liability if the steering mechanism had malfunctioned, that the damage to the worm gear was caused by the accident, not the other way around. *E.g., id* at 2: GX 25, at 5. Medina, who has little expertise in steering systems despite his proffer as a expert (*see* TR 253-55), merely parroted Sheppard’s findings in arriving at his ultimate opinion even though he recognizes that “Sheppard is not going to want to tell me that [Sheppard] built a bad gear box.” TR 259, 257. But his initial impression was that the broken worm gear caused the accident. *Id.* at 255-56. He was going to have the worm gear analyzed to determine whether it broke due to a sudden failure, which would be consistent with it having been caused by the accident, or whether it was a fatigue failure which occurred over time, which would be consistent with the broken worm gear having caused the accident. But he never had this analysis performed because he received Sheppard’s report and relied on it. TR 256-57. Respondent’s expert witness testified that it appears that the worm gear broke as a result of the crash. TR 520-21. Nevertheless, that the Secretary’s expert witness bases his conclusions in this case on a report by an interested party of which he was skeptical and which was contrary to his initial impression significantly devalues his opinion.

Further, it was discovered that several seals in the truck’s steering mechanism had been installed backwards, which resulted in power steering fluid leakage. GX 25, at 3. The power steering fluid was below the “add” line on the power steering dipstick. *Id.* Low power steering fluid could have caused a reduction in the steering performance or “hard” steering, although by itself it would not have caused the steering to fail. *Id.* at 4; GX 26, at 3. Nevertheless, that the seals were installed backwards indicates that maintenance of the steering system was being performed incorrectly, which could have caused the steering system to fail on December 12, 2009.

In her report of the accident investigation, Inspector Howell concedes that deficiencies in the steering could have contributed to the accident. GX 4, at 7. The Secretary has not contended that the alleged overloading affected the truck’s steering,

only the truck's capacity to stop. Yet under the circumstances of this case, the most logical assumption is that the truck crashed due to a steering problem. It is highly significant that just prior to the accident, Johnson was so concerned about his truck's steering that after the truck was loaded with coal he stopped the truck and, with another driver, inspected the steering system as best they could under the circumstances. He did not report any problems with the truck's brakes. Within a very short time after Johnson resumed driving, the truck crashed by going straight into the left side berm without deviating from its course. Moreover, as was just pointed out, subsequent to the accident, the investigators found that there was a major problem with the steering system which could have caused it. In regard to the brakes, although problems were found, the brakes apparently had functioned properly earlier that morning when Johnson drove the truck to the mine and immediately after it was loaded with coal. Further, there is no evidence that the Jake brake, which Johnson most likely would have been relying on to slow the truck at the time he lost control of it, was defective. Attributing the accident to brake failure considering the low rate of speed at which the truck was likely traveling probably would have required three separate braking systems to have failed simultaneously.

To state the salient facts in this case in their simplest, a highly experienced coal truck driver, who is also the trucking company's chief mechanic, complains about a problem with his truck's steering, and minutes later is killed in an accident where the truck travels perfectly straight out of the normal travelway for 283 feet and crashes into a berm. An inspection of the steering gear subsequent to the accident determines that a part of the steering gear which would have rendered the steering inoperable had it broken prior to the crash was, in fact, broken. Yet MSHA determined that the accident was caused by deficient brakes in an overloaded truck, dismissing a problem with the steering as a possible cause.

To give the Secretary her due, the cause of the accident in this case is far from straightforward, and since the truck's brakes were far from perfect it is possible that defective brakes played a role in the accident. But even if the brakes were not working at all, that would not explain why Johnson could not steer the truck away from the berm. Absent proof that the brakes would have been incapable of slowing down the truck enough to permit Johnson to steer it, it is hard to ignore the obvious – that Johnson could not steer the truck. Under these circumstances, attributing the accident solely to defective brakes in an overloaded truck appears illogical.

Adding to the uncertainty, if only the brakes were not functioning, Johnson should have been able to steer the truck so that it would not have crashed into the berm. But the truck did not turn at all; it drove straight into the berm. On the other hand, if only the steering was not working, Johnson should have been able to stop the truck before it reached the berm. The only way this accident makes any sense is if both the steering and the brakes were not applied or stopped functioning simultaneously. In regard to the former, something physically could have happened to Johnson just prior to the crash which caused him to lose control of the vehicle. But there is no medical evidence which

addresses Johnson's medical condition at the time of the crash,⁵ and that he jumped from the truck shows that he was conscious just before the truck struck the berm. In regard to the brakes and steering failing simultaneously, Rasnick proposed a scenario in which both the brakes and the steering would have been rendered ineffective. He believes that Johnson's truck went into what is called limp mode or idle mode. TR 454.

[I]f it's [the truck] in idle mode, you're not going to have the Jake brake, you're going to lose air pressure, or it's not going to run like it should because it's going to be running anywhere from eight [hundred] to 1,000 RPMs a minute [instead of 1400 to 1600]. And if he's used his air pressure up and he's trying to get it into a ditch, you couldn't steer it and try to get into the ditch to stop the truck, probably. TR 482.

Rasnick's testimony on this point is not air-tight. It depends to a significant extent on a printout by a Cummins dealer from the truck's electronic control module, which is somewhat similar to an airliner's black box (TR 382). RX 1. Cummins is the company which manufactured the truck's engine. The significance of this report is disputed by Medina (TR 385-91), and I find Rasnick's testimony regarding this document confusing. Accordingly, I cannot find that the accident resulted from the truck going into idle mode even though it is consistent with the evidence of the accident. Yet it is another possible cause of the accident to consider.

Based on the foregoing, I conclude that the Secretary has failed to prove that that Johnson's truck crashed due to defective brakes.

However, the Secretary has shown that there were defects in the service brakes on Johnson's truck. For one of the drum brakes, it was worn to the point that it was ineffective, and three others were worn below recommended levels. But the regulation in question, 30 C.F.R. §77.1605(b), requires brakes to be "adequate", not perfect. If a truck's brakes are worn, but are still capable of stopping it, are those brakes adequate?

Judge Feldman faced a similar issue in *Nally & Hamilton Enterprises, Inc.*, 31 FMSHRC 689 (June 23, 2009) (ALJ), *rev'd on other grounds*, 33 FMSHRC 1759 (Aug. 11, 2011) (hereinafter "N&H"). As in this case, N&H concerned an alleged violation of §77.1605(b). The truck involved, although not a coal truck, also was a three axle tandem vehicle. The inspector had found that one of the six brake assemblies was not adjusted properly, which allegedly would have a negative impact on the five other brakes. Nevertheless, it appeared that overall, the brakes were working.

⁵ It does not appear that a post-mortem examination was conducted, and the condition of Johnson's remains after the crash may have made such an examination impossible.

In order to determine whether §77.1605(b) had been violated, Judge Feldman turned to the dictionary for guidance:

The applicable meaning of the term adequate is “. . . fully sufficient for a specified or implied requirement. *Webster’s Third New Int’l Dictionary, Unabridged* 25 (2002). An entity is “sufficient” when it is “marked by quantity, scope, power, or quality to meet with the demands, wants, or needs of a situation or of a proposed use or end.” *Id.* at 2284.

The plain use of the terms “adequate” and “sufficient” reflects that section 77.1605(b) is a functional standard. In other words, service brakes can be deemed adequate as contemplated by section 77.1605(b) even if a component part is in need of adjustment. Thus, the dispositive question is whether the braking system on the . . . truck was functioning adequately.

N&H at 694-95.

Since there is no further guidance in 30 C.F.R. Part 77 regarding when brakes in trucks are deemed adequate, Judge Feldman referred to the regulations governing trucks used in surface metal and non-metal mines. Thirty C.F.R. §56.14101(a)(1) states that “self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.” He applied this standard in concluding that the Secretary had failed to prove that the truck’s brakes were inadequate in violation of §77.1605(b), since the evidence indicated that despite the problem with one of the brakes, the truck’s driver believed the brakes were functioning normally. N&H at 695.

Judge Feldman’s discussion of this issue is very well reasoned, and I will apply his analysis to this case. Accordingly, it is not enough for the Secretary to prove that there were problems with the truck’s brakes. Instead, the Secretary must prove that the brakes on Johnson’s truck were not capable of stopping and holding the truck with its typical load on the maximum grade it travels. Specifically, did the Secretary prove that the brakes on Johnson’s truck were incapable of stopping it on the haul road?

There were two ways in which the Secretary could have met this burden. First, she could have proven that the accident was caused by the defects in the brakes. But based on the record before me, the cause of Johnson’s fatal accident is inconclusive. In fact, it is more likely that the accident was caused by a failure of the steering system, or by other problems which caused both the brakes and the steering to fail simultaneously, rather than defective brakes. Second, the Secretary could have proven that the defects with the truck’s brakes were significant enough to cause the brakes to fail in typical usage regardless of whether they caused the accident. In this regard, it is doubtful that Johnson believed the truck’s brakes were not functioning adequately. Johnson frequently, if not routinely, drove this particular truck, and had driven it on at least some occasions in the weeks before the accident. TR 123-24, 432. Further, he had driven the truck that morning from Trivette’s garage to the Mine without pointing out any problems with the brakes. In addition, Rasnick’s testimony that the brakes, in the condition they were in,

were adequate and would still have been able to stop Johnson's truck going down the haul road, is well explained.

In regard to both factors, I give little weight to Medina's opinion due to his lack of expertise, inconsistency between his report and testimony and in his testimony itself, reliance on a report he believes could have been biased, and generally poor reasoning.

Therefore, I find that the Secretary has failed to prove that the brakes on Johnson's truck were not adequate. Accordingly, Citation No. 8230317 must be vacated.

ORDER

IT IS ORDERED that Citation Nos. 8230316 and 8230317 are **VACATED**, and this case is **DISMISSED**.

/s/ Jeffrey Tureck
Jeffrey Tureck
Administrative Law Judge

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January 23, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2010-78
Petitioner,	:	A.C. No. 40-03239-199809
	:	
	:	
v.	:	
	:	
TRIPPLE H COAL, LLC,	:	Mine: Auger #1
Respondent.	:	

SUMMARY DECISION

Before: Judge Gilbert

This case is before me upon a Petition for Assessment of a Civil Penalty under Section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977 (the “Act”). In the petition the Secretary of Labor seeks a penalty of \$100 for one citation issued pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), for an alleged violation of 30 C.F.R. § 62.130(a).¹ The Respondent, Tripple H Coal, LLC, contested the citation and the proposed penalty. The case was subsequently assigned to me by Chief Judge Lesnick. The Secretary filed a motion for summary decision, supported by an affidavit from Inspector Sampsel, requesting that the court uphold Citation No. 8323935 as written and impose the proposed penalty of \$100.

¹ Section 62.130(a) provides:

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

30 C.F.R. § 62.130(a).

The citation at issue arises out of an E16 spot check conducted on August 11, 2009 by MSHA Inspector Stanley Sampsel at Auger #1, a surface coal mine located in Campbell, Tennessee. Sampsel Aff. ¶¶ 2-3, Citation No. 8323935. Prior to the issuance of this citation, Sampsel inspected the Auger #1 mine on several occasions, beginning in February 2009. He found that the Salem 1500 B Coal Auger exposed the auger operator and auger helper to noise levels above the permissible level. Sampsel Aff. ¶ 8, S-1. He issued Citation No. 8323635 for noise exposure for the auger helper above the permissible level. The citation was terminated May 27, 2009. He issued Citation No. 8323636, and a 104(b) order, Order No. 8323912, for noise exposure for the auger operator above the permissible level. Sampsel Aff. ¶ 8, 11. On August 11, 2009 he returned to the mine and conducted a full shift noise sample at Auger #1. Sampsel Aff. ¶ 14.

Inspector Sampsel states that on August 11, 2009, as part of his E16 spot check, he conducted a full shift noise sample using properly calibrated dosimeters, which were worn by both the auger operator and the auger helper for the Salem 1500 B Coal Auger.² Sampsel Aff. ¶14. The sample demonstrated that the level of noise to which the auger operator and auger helper were exposed exceeded the permissible level.³ Sampsel Aff. ¶ 15. The exposure level for the auger helper was 150%. Citation No. 8323935. This exceeded the permissible exposure level of 132%, 100% plus error factor.⁴ *Id.* Consequently, Inspector Sampsel issued Citation No. 8323935 (Sampsel Aff. ¶ 16), which is the only citation at issue in this docket.

Citation No. 8323935 states:

Based on the results of an MSHA full shift noise sample taken on 08/11/2009, the Salem 1500 B coal auger helper (371 occupation) working in the 001 active pit, received a permissible exposure level dose of 150%. This exceeds the permissible level of 100% plus error factor (or 132%). This machine was a Salem 1500 B

² An auger is “any seismic shothole drilling device in which the cuttings are continuously removed mechanically from the bottom of the bore during the drilling operation without the use of fluids.” Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 30 (2d ed. 1997).

³ The Secretary has informed the court that Order No. 8323912, issued for failure to abate Citation No. 8323636, was formally terminated on August 19, 2009. No subsequent citations or orders were issued. Though Paragraph 15 of Sampsel’s affidavit states that both the auger helper and the auger operator were exposed to noise above the permissible level, I infer from the fact that his notes do not reference a continued violation with respect to the auger operator that this was an error.

⁴ In pertinent part, 30 CFR § 62.101 states the permissible exposure level is “a dose of 100% of that permitted by the standard.” 30 CFR § 62.101.

coal auger S/N 25. The [coal auger] helper was wearing a hearing protector. A hearing protector must be worn by the miner, [the coal] auger helper for the Salem 1500 B [C]oal [A]uger machine[,] until exposure is reduced to or below the permissible exposure level.

Citation No. 8323935.

Inspector Sampsel found that the violation was unlikely to result in hearing loss, a permanently disabling injury, to the auger helper, because the auger helper was provided with hearing protection. Sampsel Aff. ¶ 18, 20; Gov. Ex. S-1. He determined that the alleged violation was the result of the operator's moderate negligence "because the operator knew or should have known that the auger was not in compliance with the noise limitations and for the ongoing noise issue[s] with regard to the Salem 1500 B Coal Auger." Sampsel Aff. ¶ 19. Sampsel determined that the violation was not a significant and substantial contribution to a mine safety or health hazard because the auger helper had hearing protection. Sampsel Aff. ¶ 17.⁵ The violation was abated when Tripple H Coal placed rubber bushings under the operator cab and an acoustic board across the engine compartment. Sampsel Aff. ¶ 22.

In her motion for summary decision the Secretary contends that the Respondent did not deny the alleged violation in its answer and that the record contains no evidence disputing the alleged violation or the inspector's findings. Sec'y Mot. Summ. Dec. 5-6. In its answer to the penalty petition, the Respondent stated that "I do not feel that the citation is just, nor the proposed assessment fair." Resp.'s Dec. 03, 2009 Letter to the Comm. After the Respondent failed to timely file a response to the Secretary's motion for summary decision the court gave the Respondent additional time to respond, extending the filing deadline to April 19, 2012. To date, the Respondent has not filed a responsive motion and the Secretary's motion for summary decision remains unopposed.

In her motion for summary decision the Secretary avers the following:

1. Tripple H Coal is a coal mine [,] the products of which enters or affects commerce and is therefore, subject to the Mine Safety and Health Act. (*See* Affidavit of Stanley Sampsel (Aff. Sampsel) at ¶¶ 3 and 4; Secretary's Exhibit 3 (S-3); Secretary's Exhibit 10 (S-10)).
2. At all relevant times, Tripple H Coal was the owner and operator of Auger #1. (Aff. Sampsel ¶ 2; S-3; S-10; Secretary's Exhibit 4 (S-4)).

⁵ Though Citation No. 8323935 does not include a termination date, Sampsel stated in his affidavit that the citation was abated on August 25, 2009. Sampsel Aff. ¶ 21.

3. Stanley Sampsel is a properly licensed and trained Mine Safety and Health Inspector. (Aff. Sampsel ¶ 1).
4. Citation [No.] 8323935 was properly served on Tripple H Coal by MSHA Inspector Sampsel. (Aff. Sampsel ¶ 16; Secretary's Exhibit 1(S-1)).
5. On August 11, 2009[,] Inspector Sampsel traveled to Auger #1 to conduct a follow-up inspection for Order [No.] 8323912. (Aff. Sampsel ¶ 13; S-1; Secretary's Exhibit 2 (S-2); S-4).
6. On August 11, 2009, Inspector Sampsel outfitted the auger operator and the auger helper with dosimeters and conducted a full shift noise sample. (Aff. Sampsel ¶ 14; S-2; S-1; S-4).
7. The dosimeters used on August 11, 2009 at Auger #1 were properly calibrated. (Aff. Sampsel ¶ 14; S-2; S-1; S-4).
8. The full shift noise sample showed that the auger helper was exposed to a noise level of 150%. (Aff. Sampsel ¶ 15; S-2; S-4).
9. The allowable level of noise exposure for the auger helper is 100%. (S-1; S-2).⁶
10. Exposure to noise above the allowable level causes hearing loss. (Aff. Sampsel ¶ 18; S-1; S-2).
11. Hearing loss is a permanently disabling injury. (Aff. Sampsel ¶ 18; S-1; S-2).
12. Tripple H Coal was able to bring the noise level of the auger into compliance through cost effective methods. (Aff. Sampsel ¶ 22).

Sec'y of Labor's Stat. of Undisputed Mat. Facts.

Commission Rule 67, 29 C.F.R. § 2700.67, states in pertinent part:

(b) Grounds. 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

⁶ If the error factor is included the allowable level is 132%. Gov. Ex. S-1.

(2) That the moving party is entitled to summary decision as a matter of law.

(d) Form of opposition. . . . Material facts identified as not in issue by the moving party shall be deemed admitted for purposes of the motion unless controverted by the statement in opposition. If a party does not respond in opposition, summary decision, if appropriate, shall be entered in favor of the moving party.

Since the Respondent has failed to file a motion in opposition to the Secretary's motion for summary decision, pursuant to Commission Rule 67(d), I deem the material facts of this case, as identified by the Secretary, *supra*, to be admitted. These facts having been admitted, I find that there is no genuine issue of material fact. I also find that the Secretary is entitled to summary decision as a matter of law for the reasons that follow.

I. The Violation

Section 62.130(a) requires an operator to "assure that no miner is exposed during any work shift to noise that exceeds the permissible exposure level." 30 C.F.R. § 62.130(a). On August 11, 2009, Inspector Sampsel conducted a full shift noise sample while the coal auger helper was working on the Salem 1500 B Coal Auger. The dosimeter showed that his noise exposure was 150%, exceeding the permissible exposure level of 132%. Accordingly, I find that the Secretary has established a violation of the standard.

II. Negligence

The Secretary contends the violation was the result of the Respondent's moderate negligence. Sampsel believed that Tripple H Coal knew or should have known that the Salem 1500 B Coal Auger was not in compliance with the standard because of the "ongoing noise issue[s]" related to the auger. Sampsel Aff. ¶ 19. However, he believed that the company's negligence was mitigated by the fact that it provided the miner with hearing protection. I, too, find the provided hearing protection to be a mitigating factor and that the facts support a finding of moderate negligence.

III. Number of Persons Affected and Gravity of Injury

Sampsel determined that the violation affected one miner, the auger helper, and exposed him to hearing loss, a permanently disabling injury. However, he believed hearing loss was unlikely to occur because the miner had hearing protection. I concur with his determination and find that if hearing loss did occur such an injury would be permanently disabling.

IV. Size and Effect of the Penalty on the Operator's Ability to Continue in Business

Auger #1 is a small coal mine. The mine produced 12,205 tons of coal and 7,850 hours were worked at the mine in 1999. Gov. Ex. S-10. Absent evidence to the contrary, the Commission assumes that a proposed penalty will not affect the operator's ability to continue in business. *Buffalo Mining Co.*, 2 IBMA 226, 247-48 (Sept. 1973). Further, the penalty of \$100, which also reflects a reduction for good faith abatement, is the minimum that the Mine Safety and Health Administration proposes under the regulations set forth at Part 100, 30 C.F.R. § 100.

V. History of Previous Violations

In the 15 month period preceding the inspection at issue, the company paid civil penalties for four violations, two of which were violations of Section 62.130(a). Gov. Ex. S-3. This is a small history of previous violations.

VI. Good Faith Abatement

The proposed penalty was reduced for good faith abatement. I find the current penalty to be appropriate and that no further reductions need be taken based on this factor.

There are no genuine issues of material fact and I find that the Secretary is entitled to judgment as a matter of law. **ACCORDINGLY**, the Secretary's motion for summary decision is **GRANTED**. The Respondent is **ORDERED** to pay a penalty of \$100 within 30 days of the date of this decision.⁷ Upon receipt of payment this case is **DISMISSED**.

/s/ James G. Gilbert
James G. Gilbert
Administrative Law Judge

⁷ 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.

Distribution:(Certified Mail)

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/ca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 23, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2011-1003-M
Petitioner,	:	A.C. No. 02-00024-248321
	:	
v.	:	
	:	
FREEPORT MCMORAN MORENCI, INC.,	:	
Respondent.	:	Mine: Freeport McMoRan Morenci, Inc.

DECISION

Appearances: Daniel Pietragallo, Office of the Solicitor, U.S. Dept. of Labor, Denver, Colorado for Petitioner;
Michelle Witter and Kristin White, Jackson Kelly PLLC, Denver, Colorado for the Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Freeport McMoRan Morenci, Inc. (“Freeport”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). This docket includes two violations, both of which are related to the maintenance of truck brakes. The parties presented testimony and documentary evidence at a hearing held on November 14, 2012, in Tucson, Arizona.

Freeport McMoran Morenci, Inc. owns and operates an open pit copper and molybdenum mine in Morenci, Arizona. The parties agree that Freeport is an operator as defined by the Act, and is subject to the provisions of the Mine Safety and Health Act. The mine is the largest copper mine in North America and, for purposes of the Act, is considered a large operator. (Tr. 12). The history of assessed violations is admitted as Sec’y Ex. 22.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 8, 2010, Inspector Kelly Hunt issued Citation No. 6587444, pursuant to Section 104(a) of the Mine Act, to Freeport for an alleged violation of Section 56.14101(a)(3) of the Secretary’s regulations. The regulation cited provides, in pertinent part, as follows:

(a) Minimum requirements . . .

(3) All braking systems installed on the equipment shall be maintained in functional conditions.

30 C.F.R. § 56.14101(a)(3). The citation described the alleged violative condition as follows:

The right front braking system installed on the 63 M Lube truck was not being maintained in functional condition. The lube truck operates every day with a different driver. Standard 56.14101a3 was cited 6 times in two years at mine 0200024 (3 to the operator, 3 to a contractor). The S-cam shaft had lost the snap ring and slid into the brake shoe area within approx. 1 in of the Lug bolt heads in the hub. The S-cam actuating lever had slid off of the shaft and was hanging from the canister. The truck travels through-out the mine to service equipment. Should the brakes have locked up in traffic or on a curve, the serious, collision, impact, blunt force, permanently disabling injuries could occur.

Hunt determined that a permanently disabling injury was reasonably likely to occur, that the violation was significant and substantial, that one employee was affected, and that the negligence was moderate. Pursuant to 30 C.F.R. § 100.5, the Secretary proposed a civil penalty in the amount of \$7,300.00 for this alleged violation.

On September 15, 2010, one week after the citation discussed above was issued, Inspector Kelly Hunt issued Citation No. 6587446, pursuant to Section 104(a) of the Mine Act, to Freeport McMoRan for a second alleged violation of Section 56.14101(a)(3) of the Secretary's regulations. The citation described the alleged violative condition as follows:

The braking system installed on the Kenworth SU-106 flatbed was not being maintained in functional condition. Standard 56.14101a3 was cited 7 times in the two years at mine 0200024 (4 to operator, 3 to a contractor). The left front drive axel brake, S-cam Lever had come off of the S-cam shaft. The shaft had an accumulation of dirt and road material to indicate recent operation. The truck was operated on 9-14-2010. Should the shaft, shift into the hub and lug bolt heads to lock up the axle and the driver loose (sic) control, the serious, impact, collision, blunt force injuries could occur.

Hunt determined that a permanently disabling injury was reasonably likely to occur, that the violation was significant and substantial, that one employee was affected, and that the negligence was moderate. Pursuant to 30 C.F.R. § 100.5 the Secretary assessed a civil penalty in the amount of \$8,400.00 for this alleged violation.

The testimony regarding the two citations overlaps and, therefore, the various elements of each citation are discussed together. In each instance the mine operator does not dispute that Hunt observed a broken snap ring on the brakes, rendering those specific brakes non-functional. However, the operator takes issue with the designation of the two citations as significant and substantial and asserts that the violations were not the result of moderate negligence. (Tr. 10). Both citations were issued by mine inspector George Kelly Hunt who has been a mine inspector for five years and, prior to becoming a mine inspector, worked for 30 years in the mining industry. (Tr. 17-18).

On September 8, 2010 Hunt was at the Morenci mine to conduct a regular inspection and as a part of that inspection was assigned to inspect the trucks and equipment at the mine. (Tr.20). Hunt traveled to the western copper area where material was being hauled, and began to flag down trucks to conduct his inspection. After inspecting the lube truck, he issued Citation No. 6587444 for a failure to maintain the brakes. Hunt first asked the truck operator for a copy of the pre-op report and after reviewing the report, began to inspect the truck. He observed that the snap ring on the S-cam front brake was broken. He testified that the right front S-cam actuating lever had slipped off of the shaft and was hanging from the canister brake. The right front brake was, therefore, not functional. (Tr. 25).

The lube truck travels to various locations at the mine to grease and oil other vehicles. On that day, the truck had started operation around 6:30 a.m. and was used until stopped by Hunt four hours later. The lube truck was returning from the pit when it was stopped. Hunt observed mud on the brake system, which indicated to him that the brakes had been operated for some time in the non-functioning condition. (Tr. 27). While the front brake was not functional, the remaining brakes had no visible problems. This particular truck has two tires on the front and four on the back. It has a single line brake on each front tire and a front steering axle. When the right brake is not functional, the left brake will pull to one side, causing the brakes to pull or lock up, thereby indicating to the driver that there is a brake problem. (Tr.30). The truck has a front cab, and is top heavy when it is loaded with grease and oil.

Approximately one week later, Hunt was back at the mine examining trucks and heavy equipment when he observed the identical condition, i.e., a broken snap ring on the S-cam brake, on a brake on a flatbed truck. (Tr. 32). The flatbed truck is a large vehicle used to haul various parts, equipment and water to locations at the mine site. It carries thousands of pounds of weight, often chained down on the bed. (Tr. 33-34). Hunt admits that the condition on the flatbed truck was more difficult to see than the defective brake on the lube truck, and he had to bend down and look underneath the truck, but the condition was the same as that which he observed on the lube truck. This time the S-cam lever that was broken was on the left front drive axle brake.¹ The flatbed has two sets of drive axles, one on the front and one on the back. The truck has one brake pod for each set of wheels. When Hunt inspected the vehicle, it was parked,

¹ There are some references in the testimony to the rear brake on the flatbed truck, but the citation indicates that the S-cam lever was broken off of the left front drive axle. The truck has a drive axle on both rear brakes and the front brakes. The confusion occurs because the inspector was describing the front brakes on the bed of the truck, not the brakes on the cab so the operator referred to the brakes as being located in the rear. (Tr. 52).

ready for use, and not tagged out. He learned from the supervisor that the vehicle had been operated the day before the inspection. Both this truck and the lube truck travel on the dirt haul roads, which contain 8-10 percent grades. Hunt had observed this condition in which the attaching hardware was broken or loose on both trucks. The condition allowed the S-cam actuating lever to come off the shaft, and on the one truck it hung down, and on the other it was flopping. The brakes on these wheels were totally inoperable. Hunt could not tell if the hardware was original to the trucks or had been replaced, but, prior to these inspections, he had not seen such a condition.

Hunt explained that anytime there is a loss of brakes, there is a problem with safe operation. Drivers are accustomed to driving with all brakes functioning and, when all of the brakes are working, the truck functions as it should and as the driver expects it to. In a normal day of mining, driving becomes repetitive and if suddenly brakes lock up as the truck is coming to a stop, or it pulls to one direction, the driver must react quickly and may not be able to stop. If the truck is coming down a hill, if roads are wet, or if there is opposing traffic, a collision is likely. (Tr. 40).

Ronald Medina, testified as a brake expert for the Secretary. Medina has a BA in mechanical engineering and has worked in MSHA's technical support division for 34 years. (Tr. 69-70). He has been involved in many accident investigations involving various types of vehicles, including those with S-cam brakes similar to the ones on the lube and flatbed trucks at issue here. (Tr. 70-72). For the most part, Medina's laborious testimony had little direct relevance to the issues, but he agreed with Hunt that having one inoperable brake diminishes the effectiveness of the stopping capability of the entire braking system. (Tr. 76). Here, the slack adjuster that was disconnected by virtue of the broken ring made the brake nonfunctional. (Tr. 75). The remaining brakes on the vehicle are not affected by this condition, and will function. However, with one brake inoperable, the total stopping capability of truck is diminished. (Tr. 75-76). In Medina's words, with one brake out, "there's even a greater likelihood for all of the tires to go into a skid on a wet road[.]" (Tr. 77). Medina opined that one bad brake may not cause an accident if the driver slows at a stop sign, but, during a hard stop, the stopping distance is longer, and handling would be affected by the uneven pulling of the brakes. (Tr. 76-77, 89-91). Truck drivers are familiar with the trucks and are accustomed to stopping with all brakes working. (Tr. 76). Medina described the possibility of the truck going into a skid and the issue of "brake fade" when operating on a grade, particularly when carrying a heavy load. (Tr. 77-86, 104). An additional hazard associated with the malfunctioning brake is lock up, especially with a front axle like the one on the lube truck. A lock up, or other uneven braking, causes a handling problem in that the truck will pull in one direction unexpectedly. Medina sees a potential for the truck to pull into a berm, or into an oncoming vehicle. Medina explained that the brakes on the lube truck would have about a 25 percent less operational ability with one bad brake, and perhaps slightly less if the problem is with the rear brake as opposed to the front brake. (Tr. 97-100).

Jim Lusk, the superintendent of maintenance at the Morenci mine, has worked at the mine for nearly 37 years. (Tr. 119-120). The mine has 2500 employees and operates 24 hours a day. (Tr. 122). Lusk accompanied Hunt when Hunt observed the violation on the flatbed truck. (Tr. 122). Lusk agrees that the vehicle was parked but ready to use. All trucks at the mine are

on an 84 day preventative maintenance schedule. (Tr. 128). Along with changing the oil and air filter, during the preventative maintenance, the vehicle undergoes an inspection and any safety defects are immediately repaired. (Tr. 129). The truck drivers also perform a pre-op inspection and 7 step inspection of the air brakes and a rolling motion test, prior to driving a truck. (Tr. 125). If the vehicle does not pass the pre-op or brake inspection, it is tagged out and repaired. The mine records show that the flatbed had its last maintenance check in March 2010, about six months prior to the citation issued by Hunt. (Tr. 132-133). Since a brake inspection is a major part of the 84 day maintenance, Lusk would expect mechanics to find a broken snap ring during that time. (Tr. 134-135).

Justin Leigh has worked for five years at the Morenci mine and he routinely drives the lube truck. (Tr. 149-150). He was a tractor trailer mechanic prior to working at Morenci. (Tr. 150). Leigh testified that, on the day of Hunt's inspection, at the beginning of his shift, he felt the truck pull to the right. (Tr. 151). He then looked the brakes over and adjusted them, and had no other problems until stopped by Hunt. (Tr. 151-152). Leigh explained that the lube truck drives from area to area to fuel, oil, and grease the equipment as needed. (Tr. 153). Each stop lasts about 20 minutes. (Tr. 154). Leigh drives the lube truck up and down hills on bermed, bumpy, dirt roads while doing the job. (Tr. 154, 156-157). The speed limit in the areas the truck travels is 35 mph, but he travels slower, about 20 mph, if the roads are dusty or wet. (Tr. 156-157). In Leigh's view the brakes were working as usual during the shift and the truck stopped normally when the inspector stopped him, and there was no pulling to the left or right prior to the time the inspector pulled him over. (Tr. 154). Leigh uses the engine brake when traveling downhill. (Tr. 159). He does not see a missing brake on the truck as a problem on the downhill grades. Leigh has seen the clips on the brakes pop off in the past, but has not seen it result in an accident.

Amanda Bartlett is an hourly employee at the mine. (Tr. 180). She drove the flatbed truck the shift prior to the one during which Hunt issued the citation. (Tr. 179-180). She uses the truck to haul water, engines, and other equipment. (Tr. 180). The flatbed truck is a large truck, but smaller than a haul truck. (Tr. 180). It has ten wheels in total and is a 20 ton truck. (Tr. 180). She believes she was hauling a pump or a motor prior to the citation being issued. (Tr. 180). The speed limit is 20-25 mph but she drives much slower when the truck is fully loaded. (Tr. 180-181). Prior to beginning her shift, she completed the pre-op inspection and the 7 step air brake test. (Tr. 181). She used a form called a "pink card," Sec'y Ex. 30, to record the pre-op. (Tr. 182). One side of the card displays the pre-op procedure for the vehicle and the other side displays the 7 step air brake test. She cannot see brake components by walking around the truck and is not comfortable getting under the truck since she is not a mechanic. (Tr. 185). She didn't notice anything different the day before the inspection, and she noticed no problems with the brakes. (Tr. 185-186). She agrees it would not be safe to drive with the brake not functioning. (Tr. 188).

George Connell has been a safety specialist at the mine for the past five years. (Tr. 189). Connell was present when the citation was issued for the flatbed truck violation. (Tr. 190). He looked at Morenci records going back 7 years and found no accidents related to brakes. (Tr. 191). He explained that truck operators are task trained, and that the mine has a good maintenance program that makes it a safe place to drive. (Tr. 192). The mine maintains all

roads and berms and some roads are separated roads or are barricaded to isolate the traffic. (Tr. 192-193).

a. The Violations

Respondent does not dispute that the condition of the brakes as described in both of the citations did, in fact, exist. Respondent further agrees that the brakes, in the conditions found, were inoperable. Hunt testified that, based on his observation of the conditions of the brakes, the brakes were not being maintained. However, Hunt was not aware of the specific requirements of the mine's maintenance plan. (Tr. 56). While Respondent did present evidence that the mine conducts regular maintenance every 84 days, it presented no relevant evidence that these specific vehicles were properly maintained. Therefore, based upon the testimony of Inspector Hunt, I find that the brakes were not maintained in functional condition and that the violations occurred as set forth in each citation.

b. Significant and Substantial

Hunt designated both violations as significant and substantial. A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

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

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

The Commission has long held that a S&S designation must be based on the particular facts surrounding the violation, and viewed in the context of continued mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission and courts have also observed that an experienced MSHA

inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harland Cumberland Coal Co.*, 20 FMSHRC, 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc.*, 52 F.3d 133, 135 (7th Cir. 1995).

I have found that there is a violation of a mandatory standard. Further, I find that the violation created a discrete safety hazard, i.e., brake failure resulting in an inability to properly control the vehicles and, in turn, a collision. There is no dispute that the cited brakes on both trucks were inoperable. The question is, will that failure likely lead to an accident. Hunt testified that his concern was the loss of the braking capability and "that a vehicle could lose part of its braking and cause an accident." (Tr. 63). If the accident does occur, the truck would likely hit another vehicle or a berm or other stationary object resulting in a reasonably serious injury. The element that is most difficult to demonstrate is the third element of the *Mathies* formula. In order to meet the third element the Secretary must show that the faulty brakes are reasonably likely to lead to an accident. In the instant case, it is close. The mine operator argues that with just one of the brakes inoperable the truck can function adequately and it is unlikely that the trucks will fail to stop. The Secretary, on the other hand, argues that the failure of the one brake on each truck significantly diminishes the operation of the braking system, thereby making it likely that the truck will fail to stop, or that the truck will pull in one direction. In both instances, the Secretary argues that an accident will occur.

Freeport argues that the violation is not S&S for a number of reasons. First, only one of the brakes on each truck was inoperable, and the remaining brakes were in functioning condition and could adequately stop the truck. Second, both trucks drive at a slow speed over roads that have very high berms. Finally, the trucks use the engine brake when traveling downhill, thereby eliminating the need for all service brakes. Freeport argues that the trucks are serviced every 84 days and any condition would be found during that maintenance time. Additionally the drivers do a pre-op safety check of the truck, including a separate check of the air brakes. During the check and operation of the trucks, the drivers of the lube and flatbed trucks did not notice any pull or problem with the brakes as they operated the trucks prior to the citations.

The Secretary argues that, with one brake not functioning on each truck, the entire braking systems of those trucks were compromised. Given the conditions of the two cited brakes, and the fact that the operators of the trucks would be accustomed to the full use of the system when stopping, it is likely that the trucks will be unable to adequately stop at a hard stop or in an emergency. Further the lack of one brake compounds the issue of "brake fade" and the condition of all brakes, which, as observed by Hunt, could lead to the brakes locking up. The trucks, although not as large as a haul truck, carry heavy loads that can slide when the trucks are stopped. The speed limit is 25 to 35 miles per hour, and the mine has a continuum of hills and grades that the trucks travel. The road is shared with haul trucks, dozers, graders and other heavy equipment. As Medina explained, given that the truck operator is accustomed to stopping with the entire brake system functioning, it is likely that, with a hard stop, the truck will go into a skid, affecting the entire braking system. He explained that it is likely that the trucks will skid, or fail to stop within a reasonable distance, thereby resulting in an accident.

The evaluation of the S&S criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The pre-op inspection

conducted by the truck drivers did not and would not have discovered the major defect with the brakes. It would have been discovered, most likely, during the 84 day inspection, but the trucks would have been operated until that time. Since the lube truck had been last inspected in March, 2010, and the citation was issued in September, the inspection occurred less frequently than the 84 days that the mine asserts.² Therefore, the brake defect would not have been discovered for any number of months, unless discovered while in use, at which time it may be too late.

A number of ALJ's have found similar violations to be S&S even with a preventive maintenance program in place. In *Reading Anthracite Company*, 32 FMSHRC309 (Apr. 2010) (ALJ), an S&S and unwarrantable failure violation was upheld for a violation of §77.404(a), where a transmission failed due to a hole in a transmission hose, causing the truck to go out of control, killing the driver. The company had an inadequate preventive maintenance program, and standard operating procedure was for truck drivers to operate their rigs and report any problems they encountered. *Id.* ALJs have also found brake violations S&S where "the truck . . . travel[ed] over grades of up to nine to twelve percent . . . [,] often . . . with a load of rock." *Nelson Quarries Inc.*, 30 FMSHRC 254 (Apr. 2008) (ALJ), rev. granted (May 16, 2008). Another ALJ has found that defective service brakes on a Euclid dump truck at a sand and gravel operation constituted an S&S violation of §56.14101(a)(1). *Higman Sand & Gravel Inc.*, 25 FMSHRC 175 (Apr. 2003) (ALJ). The operator's defense, that the heavy truck traveled slowly on soft ground and stopped quickly when power was not applied, was rejected. *Id.* The violation was S&S because the truck traveled where there were other vehicles and there was a "reasonable possibility" of serious injury. *Id.* Finally, the Commission upheld a finding of S&S for faulty brakes on a grader because the grader was operated on a hilly, curved road and the equipment operator was killed after he unsuccessfully attempted to stop the grader. *Steele Branch Mining*, 18 FMSHRC 6 (Jan.1996).

The lube truck and flatbed truck traveled on the roadway with large haul trucks as well as other heavy equipment, including graders and dozers. (Tr. 40, 48). The roads were wet, at least during the first inspection, and the flow of traffic was constant. The trucks are most often heavily loaded and travel throughout the large area of the mine. Given that there are large haul trucks on the mine site, and that the haul trucks may cross paths with, or drive behind, the flatbed truck and the lube truck that were cited, and that the cited trucks travel at speeds of up to 35 mph on gravel roads with grades of up to 10 percent, I find that the lack of a part of the braking capacity is likely to lead to an accident. When the accident occurs, it will be serious and the resulting injury will be serious or fatal. (Tr. 45-46). Based upon the credible evidence, I find the violation is significant and substantial.

c. Negligence

Hunt designated both violations as being the result of moderate negligence. Freeport argues that the negligence should have been designated as "none" or "low." The argument is

² If the 84 days is determined by the number of days the truck is operated, the timing for the maintenance may have been correct. However, the testimony does not indicate how the 84 days was counted by the mine.

based upon evidence that the condition could not be readily seen by the truck drivers, that neither driver noted a problem, and that the mine had a maintenance plan in place which would have discovered the defective brakes.

Part 100 of the Secretary's regulations sets forth the "criteria and procedures for proposing civil penalties[.]" 30 C.R.F. § 100.1. Section 100.3(d) provides, in pertinent part as follows:

Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.R.F. § 100.3(d). When MSHA assesses a penalty, it "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.* Table X of the regulation explains the definitions used by MSHA for each level of negligence. *Id.* No negligence is defined as "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.* Low negligence is defined as "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances," while moderate negligence is defined as "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* If there are no mitigating circumstances, the citation is designated as high negligence. *Id.*

Contrary to Freeport's argument, I do not agree that the violations at issue should be designated as "none" or "low" negligence. As explained above, the operator is held to a high standard of care in conducting its mining operations. The brake problems should have been known to the mine operator. I credit Hunt's testimony that the conditions had existed for some time and were easily identifiable. While the brakes' conditions may not have been noticeable when one conducted the mine's standard pre-op check, the conditions were plainly recognizable via a simple visual inspection if one looked under the trucks while the brakes were pumped. The condition was only "hidden" to the extent that the mine's pre-op check ignores conditions that can't be observed when walking around the perimeter of the truck. As to mine's argument that the scheduled 84 day program of maintenance is a mitigating circumstance, I note that, given the time between the issuance of the citation and the last recorded maintenance of the flatbed truck, there is some question as to whether this program was even being followed. Finally, the fact that neither driver observed a problem with handling of the truck is not sufficient to mitigate the negligence. I find that Leigh was not credible in his assessment of the brake condition and while Bartlett was a credible witness, it is not shown that she drove the truck with the brakes in the condition observed by Hunt. Accordingly, it would be a stretch to label these mitigating circumstances "considerable." As such, I cannot agree that the negligence in either of these citations was "low." The mine should consider a more frequent maintenance program or a

broader pre-op brake check. In addition, the drivers should have recognized a problem with the brakes and asked for further brake inspections on these particular trucks. Having considered all of the testimony and the facts presented, I find that the negligence in both instances was moderate.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges “authority to assess all civil penalties provide in [the] Act.” 30 U.S.C. § 820(i). The Mine Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Mine Act requires, that “in assessing civil monetary penalties, the Commission [ALJ] shall consider” six statutory penalty criteria:

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

30 U.S.C. § 820(i). The history of assessed violations, Sec’y Ex. 22, shows that Freeport has been cited for similar violations six times in the fifteen months preceding the two citations at issue. Freeport is a large operator and the mine has not alleged that payment of the penalty as assessed will inhibit its ability to remain in business. The gravity and negligence of each violation is discussed above and each violation was abated immediately and in good faith. For some reason, not addressed by the Secretary, the proposed penalties were not subject to the penalty criteria but were specially assessed. While the Secretary addressed the penalty criteria to some extent, it was not addressed in a manner that would lead me to believe that the penalty should be anything above the normal standard. While the citations on their face address a history of brake violations, the exhibits and the testimony do not bear out that allegation. I therefore, do not agree with the Secretary’s proposed penalties and reduce and assess the penalties as summarized below:

Citation No. 6587444	\$5,000.00
Citation No. 6587446	\$5,000.00

III. ORDER

The two citations included in this decision are affirmed as issued. Freeport McMoRan Morenci, Inc. is hereby **ORDERED** to pay the Secretary of Labor the sum of \$10,000.00 within 30 days of the date of this decision.

/s/ Margaret Miller
Margaret Miller
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 Pennsylvania Ave. NW, Ste. 520N
WASHINGTON, D.C. 20004-1720
(202) 434-9950

January 28, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2009-1241
Petitioner,	:	A.C. No. 15-02709-187706
	:	
v.	:	
	:	
HIGHLAND MINING COMPANY, LLC,	:	Mine: Highland 9 Mine
Respondent.	:	
	:	

DECISION

Appearances: Elizabeth L. Friary, Esq., and Alisha I. Wyatt, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, on behalf of the Petitioner; Jeffrey K. Phillips, Esq., Steptoe & Johnson, PLLC, Lexington, KY; on behalf of the Respondent.

Before: Judge Rae

This case comes before me upon a petition for civil penalties filed by the Secretary of Labor pursuant to section 105 (d) of the Federal Mine Safety and Health Act of 1977, 30 U. S. C. §75.801 et seq., the "Act," charging Highland Mining Company, LLC, (Highland) with violations of the mandatory standards. Of the violations charged, the parties settled 58 prior to hearing. A partial settlement was approved by me on October 16, 2012 leaving eight violations for hearing with proposed civil penalties of \$19,880. The general issue before me is whether Highland violated the cited standards and, if so, what the appropriate civil penalty is to be assessed in accordance with section 110 (i) of the Act.

A hearing was held in Henderson, Kentucky at which time the parties presented evidence. Subsequent to the hearing the parties submitted post-trial memorandum which have also considered in making this decision.¹

¹ The Secretary's exhibits will be designated as "Ex. S-#." Due to the partial settlement, the exhibits are not in numerical order; however, all exhibits offered at hearing are made part of this record. The Respondent's exhibits will be designated "Ex. R-#."

I. STATEMENT OF THE CASE

The parties entered into the following stipulations: 1) Highland is subject to the Federal Mine Safety and Health Act of 1977, and 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; 2) Highland has affected interstate commerce within the meaning of the Act; 3) Highland operates the Highland #9 Mine,, I.D. No. 15-02790; 4) Highland #9 Mine produced 3,870,295 tons of coal in 2008, worked 920,199 hours in 2008; 5) A reasonable penalty will not affect Highland's ability to remain in business; 6) Highland abated the violations it was cited in a timely manner and in good faith; 7) The Secretary's proposed exhibits, as set forth in the Secretary's Prehearing Statement have been reviewed by Respondent's representative. Respondent stipulates to the authenticity and admissibility of the Secretary's exhibits at hearing; and 8) Each of the citations at issue in these proceedings was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Highland. JE-1.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of Testimony Relating to Inspector Barnwell's citations of April 16, 2009

William Barnwell became an MSHA inspector in 2005 and is currently Assistant District Manager in District 10 located in Madisonville, KY. In 2009, he was a roof control specialist responsible for reviewing roof control plans and investigating roof falls. He is a graduate of the University of Kentucky with a civil engineering degree. He was employed as an engineer with Peabody Coal for 23 years before joining MSHA. He is familiar with ventilation and roof control plans and has worked as a face boss, shift foreman, assistant mine foreman and assistant superintendent. Tr. 15-19.

On April 16, 2009, MSHA inspectors Art Gore and Jim Preece were conducting an inspection of the #9 Mine. Preece and Gore traveled underground with Highland's safety director Randy Duncan at approximately 11am. They entered by way of the belt entry and went as far as the number four unit where the inspectors requested a roof bolting team located nearby to install a pin in the area. The bolters were not installing bolts in their normal cycle at the time. The inspectors directed the bolters to install a six foot grouted bolt in the belt entry. When the inspectors did not see a return of resin, they told Duncan to shut down the unit. Tr. 344-45. At approximately 5:30pm Barnwell was called in to the #9 Mine and met with Preece and Gore who sought Barnwell's expertise as they were unfamiliar with this mine. Tr. 22, 343-45. Barnwell traveled underground to the number four unit at 7:20pm but issued his first citation for failure to test for torque on fully grouted bolts at approximately 5:50pm, as his notes indicate. Tr. 53-54, Ex. S-26. Ex. S-3. He explained that the time on the citation is when the alleged violation was reported to him by Preece and Gore but that he did not inform the operator that he had cited them until later. Tr. 54. He issued the second citation for not following the approved roof control plan by not ensuring a return of resin on the grouted roof bolts at 8pm. Ex. S-5.

Barnwell explained that when installing grouted bolts, the hole that is drilled must be very close to the length of the bolt being used. Resin that comes from the manufacturer in premeasured tubes is inserted into the drilled hole, the bolt is then inserted through the resin which sets and forms a bond between the strata of the roof for support. After the resin has set the bolt is tested by applying 150 foot pounds of torque to ensure it has set properly. Tr. 22, 28-29. Barnwell testified that he issued one citation because after the grouted bolt was installed at the behest of Preece and Gore, they stuck a wire up in the hole and could not find any resin. Tr. 28. He issued a second citation for not conducting torque tests during normal bolting cycles. He explained the torque test can be done using either a torque wrench or a pressure gauge that is installed on the roof bolting machine. Tr. 30. When Barnwell spoke with two unidentified bolter operators, they could not explain to him how they checked the torque. When Barnwell inspected the roof bolting machine, he found the pressure gauge was difficult to see and it was upside down. Tr. 32. He drew the conclusion therefrom that the roof bolters were not checking for torque during their normal bolting cycles and that they were not properly task trained. He issued this final citation at 9:30pm for failure to properly task train the bolt operators on the #4 unit in testing for torque and return of resin. Ex. G-6.

Barnwell stated that he is extremely familiar with Highland from the many inspections he has conducted there. He has observed regular roof bolting cycles being done on each of his inspections. On each of these occasions he checked to ensure that the bolting was being done in a lawful and correct manner to include checking for return of resin and torque. He has never issued a citation to Highland for failure to do either. Tr. 55-56. He also confirmed that no one on the day of this inspection observed a normal cycle of roof bolting being done. Tr. 60. Upon questioning by the Secretary regarding the training violation, Barnwell stated, "Highland does a good job with their training program as far as numbers of classes, and I don't know that they have any issues with their training plans or having people in classes for required hours." Tr. 51.

Randy Duncan, the safety manager at Highland, testified that the mine has a task training program in place. Tr. 333. The mine started a Safe Way of Life program which turned into the Star program which requires all foremen to observe the miners and turn in a weekly observation report. Once a month, management makes the rounds to personally observe miners performing their jobs. Tr. 334. Additionally, they provide 16 hours of retraining each year which addresses roof control among other subjects. Tr. 340. The foremen have a meeting every day at which different topics such as roof bolting are brought up for the foremen to discuss with their unit. Tr. 340. All of the bolters on the #4 unit at the time this citation was written had been task trained. All of them were experienced at the time they were hired as Highland is a union mine which requires they hire from the panel of experienced miners. Tr. 335. Duncan questioned the bolters on the unit, McGregor and McGuire, one of whom Duncan believes may have been the bolter Barnwell spoke with during his inspection on the #4 unit. The miner stated that he was nervous and didn't say everything he should have in response to the inspector's questions. Duncan stated that McGuire has many years of experience and McGregor has been bolting for

five or six years. The number #4 unit is the FTC unit which moves at a faster pace and uses the more experienced bolters on it. Tr. 362-63.

Duncan's description of the level of training provided by Highland was echoed by other witnesses. Travis Little has worked at Highland since 2008 after thirteen years in other mines. He was a section foreman for several years before transitioning into the safety department. Little testified that as a section foreman he attended daily staff meetings at which safety topics were discussed and the information was related to the miners in the units. He maintained a notebook containing notes from those meetings. Tr. 279-80. Ex. R-2. The topic of properly torquing bolts was one of the topics raised and discussed with the roof bolters. Tr. 282. He characterized the bolters as highly experienced. In fact, when he reported to Highland, he learned one of his bolters had been doing his job longer than Little had been alive. As the section foreman, Little watched the bolters daily to ensure they were doing their jobs properly and tested the bolts with a hammer to see that they were solid and tight. Tr. 289.

In April 2009, Slade Kuykendall was the #4 unit section foreman on the third shift at Highland. Tr. 259. He testified that during the five years he was in that position, the roof bolters were highly experienced and had been with him for years. Tr. 262. He described the safety observations required by the company which would include watching each individual miner to ensure he was performing his job properly. He would watch the bolters install several rows of bolts on a daily basis. Tr. 263-64. Kuykendall also described the pressure gauge used to test torque stating that there is one installed on each bolting machine. It is located directly behind the operator's controls. When the controls are being used, the gauge is visible. Tr. 265. Kuykendall has observed his bolters using the gauges to test the bolts. Tr. 266. In addition to watching his bolters perform their jobs, Kuykendall was certain the bolters were tasked trained because he does the training and completes the documentation himself. Tr. 267.

1. Citation No. 8492568 in violation of 30 C.F.R. §75.204(g)

This citation was issued on April 16, 2009 by William Barnwell. The condition or practice cited reads:

The mine operator is not testing the first non-tensioned grouted roof bolt installed during each roof bolting cycle during or immediately after the first row of bolts has been installed.

This is evident on the #4 unit, 4th Subpanel North, MMU 064.

Ex. S-3.

The violation was assessed as reasonably likely to cause an injury resulting in lost workdays or restricted duty, significant and substantial ("S&S"), affecting four persons and the result of low negligence. The proposed penalty is \$687.00.

The mandatory standard requires that “[t]he first non-tensioned grouted roof bolt installed during each roof bolting cycle shall be tested during or immediately after the first row of bolts has been installed. If the bolt does not withstand at least 150 foot-pounds of torque without rotating in the hole, corrective action must be taken.” 30 C.F.R. §75.204 (g).

The Secretary has failed to meet her burden of proof with regard to this citation. The language of the citation makes it clear that the standard has been violated when the first bolt in a normal bolting cycle has not been tested. It does not apply to test holes drilled at the behest of MSHA inspectors to search for anomalies in the roof strata. Barnwell, who has no experience with roof bolting, testified that he cited a “practice” he was concerned may be occurring at Highland rather than a “condition” when issuing this citation. He did not observe any of Highland’s bolters install a cycle of bolts during this inspection to determine whether they were in fact testing the torque in compliance with the standard. Tr. 60, 68. Although he testified that the basis for this citation was the conversation that he had with two roof bolters, he wrote this citation, as confirmed by his notes, nearly two hours before he travelled underground where he met with the bolters. Tr. S-53-54; S-26. He then testified that he based his citation on the conversations he had with Preece and Gore neither of whom observed a roof bolting cycle being installed either. Tr. 360. Preece and Gore only observed the test bolts they instructed the miners to install to look for a return of resin to assure there were no roof anomalies. The bolts they told them to install were six foot grouted bolts in an area where the roof control plan specified eight foot non-grouted tension bolts were to be used. Tr. 345-46. None of the inspectors went to an area that had been previously bolted to find whether any of the bolts turned in the hole when 150 foot-pounds of pressure was applied. While Preece and Gore were apparently unhappy with some roof control issue which caused them to shut down the unit without explanation, neither of them testified at hearing. Based upon Barnwell’s summary of what was discussed between him and the other two inspectors, there is nothing to suggest either of them had observed any bolting cycles or tested any previously installed bolts to serve as the basis for issuing this citation.

Barnwell’s assertion that the roof bolters could not adequately explain how to perform a torque test also fails to support the conclusion that Highland violated this standard. The #4 unit had been shut down without explanation by Preece and Gore earlier in the day. They had been drilling test holes and installing bolts in various locations as directed by MSHA. It was some hours later when Barnwell arrived and approached the bolter operators to speak with them. At that time, Barnwell, who was unfamiliar with roof bolting, looked around on the bolting machine until he located the pressure gauge. He then asked the operators a question regarding performing a torque test although Barnwell did not state exactly what his question was. The operators gave some answer that did not satisfy him but, again, Barnwell did not testify to or record in his notes what their answers were. Whatever it was, he was dissatisfied with the answer although he testified with regard to this conversation that, “I made the observation he either didn’t know how to or...his incentive wasn’t there. You know, I can’t really determine that.” Tr. 49. And although this conversation was allegedly important enough to base a citation upon, Barnwell did

not bother to identify the individuals or write their names down. He had no idea who they were nor would he recognize them if he saw them again. Tr. 49.

In contrast to this vague assertion that Highland was engaging in a “condition” of unsafe bolting, Barnwell admitted that he had inspected this mine numerous times in the past and had watched normal bolting cycles to ensure torque testing was being performed as required without incident. He also offered that Highland engages in a comprehensive training program of its miners. This testimony was confirmed by Highland’s witnesses who described in greater detail the experience level of the bolters they employ from the union list and the constant training they promote. Little and Kuykendall both testified that they train and observe their roof bolters consistently and are of the opinion that every one of them on the #4 unit is highly skilled. Duncan ascertained that one of the bolter operators, when questioned by Barnwell, made a comment that he did not respond as he should have. As Duncan surmised, it could have been a nervous reaction.

Regardless of why the bolters gave Barnwell a response that led him to believe they either didn’t know their job or lacked the incentive to provide him with a more erudite explanation of how they torque test, I find the evidence fails to support a finding that this standard has been violated. There is simply no evidence of what was done (or not done) when any of the roof bolts were installed during a normal roof bolting cycle. It is a giant leap by the Secretary to suggest that two unidentified bolters’ unrecorded and imprecise answers to an undocumented question could rise to the level of a preponderance of credible evidence that when bolts were installed at some unknown time in the past by unidentified bolters they were done improperly. Citation No. 8492568 in violation of 30 C.F.R. §75.204(g) is hereby vacated.

2. Citation No. 8492571 in violation of 30 C.F.R. §75.220(a)(1)

This citation is assessed as S&S, likely to result in lost workdays or restricted duty affecting two persons and the result of low negligence. The proposed penalty is \$687.00. The narrative portion states:

The mine operator is not following its Approved Roof Control Plan dated, November 4, 2008 on the #4 unit, 4th Subpanel North, MMU 064. Page 5 item 30 states when bolting with fully grouted bolts, the first hole drilled for each cut being bolted will be measured to ensure correct depth and to check for abnormal voids in order to provide for return of the resin being used. A test on a bolt with no plate yielded no return of resin in the belt entry #5 entry. Extensive testing proved that some type void (sic) was present in the belt entry. The belt entry is supported with 8’ double lock tension bolts that are not fully grouted.

Ex. S-5.

The standard requires that the operator follow its approved roof control plan suitable to the prevailing geological conditions and the mining system to be used at the mine. 30 C.F.R. §75.220(a)(1). The provision in Highland's roof control plan cited by Barnwell applies **when** grouting with fully grouted bolts. (Emphasis added.) Item 31 goes on to state that where roof conditions include slips or faults, additional support consisting of one foot longer bolts, cable bolts and/or metal straps shall be used. Item 21 states "additional precautions for all FCT panels shall include 8 foot long Double Lock bolts installed as the primary bolt in the belt entry." Ex. S-41 at pg. 3- 4.

Highland takes the position that only eight foot tension bolts, not six foot grouted bolts are used in the belt entry. The test bolts installed at the direction of the inspectors were six foot grouted bolts installed in the belt entry and therefore cannot support a finding that this standard has been violated. It also argues that, as in the previous citation, MSHA did not observe the installation of six foot grouted bolts anywhere in the mine during normal mining operations and it is now impossible for the Secretary to prove that Highland did not follow this practice in accordance with its roof control plan.

Secretary's theory of this violation is that a geologic anomaly was present in the form a void, or crack, in the mine roof in which the resin was being diverted resulting in the lack of resin returning to the opening of the drill hole. She asserts that the void was found in several entries, not just the belt entry. The citation, however, charges only a violation in the #5 (belt) entry. Neither the inspector nor the Secretary sought to amend the citation during the many months that have elapsed from its issuance in April 2009 until now. I decline to do so as well. I therefore hold the Secretary to her burden of proving that the operator violated its roof control plan by not checking for return of resin on fully grouted six foot bolts in the belt entry.

Randy Duncan, Highland's safety manager, testified that only eight foot non-grouted double lock tension bolts are used in the #5 belt entry at the #9 mine. Tr. 359. In fact, when Preece confronted Duncan with the fact that they were getting no return of resin on the six foot test bolts installed in the belt entry, Duncan responded by saying he was not surprised and informed him that Highland does not use six foot grouted bolts in that entry. Tr. 345-46.

Duncan's testimony that eight foot bolts are used in the belt entry is consistent with the requirements of Highland's Approved Roof Control Plan Item 21 as mentioned above. Barnwell also confirmed this on cross-examination, and included a statement to this effect in his written citation. He testified that he thought Highland might use grouted bolts in addition to the eight foot bolts but he was mistaken. Tr. 61-62.

Based upon the evidence, because grouted bolts are not used in the belt entry, Highland is quite right that the Secretary cannot prove this alleged violation as written.

If I were to accept a very broad reading of the citation to apply to any entries on the #4 unit, I would find the Secretary has still failed to meet her burden of proof. First, the evidence

does not support a finding by a preponderance that the lack of return of resin was found in any location other than the belt entry. Secondly, the conditions found on the day of the inspection do not support a finding by a preponderance of the evidence that at the time the entries were mined and bolted, Highland failed to measure the first drilled hole for correct depth and voids.

Barnwell testified that he spoke with Preece and Gore upon his arrival at the mine. Barnwell was told by Preece that when he stuck a wire up into a drilled hole, resin did not return for the last ten or eleven inches. Tr. 40. Preece did not testify and his notes were not submitted into evidence. No information was reflected in Barnwell's notes as to what area(s) were tested by Preece and Gore. From Barnwell's testimony, it appears Preece reported the return of resin issue to be a problem across the entire unit. However, after conducting his own investigation, Barnwell found Preece was wrong. The area affected by the alleged void was far smaller. Tr. 47, 87.

Duncan testified that he had accompanied Preece and Gore on their initial inspection. By his account, he and the inspectors walked up the belt entry on the #4 unit when they came upon a pin man in the crosscut between the return and the belt entry. The inspectors asked him to install a pin in the belt entry. The inspector then took a piece of wire and probed the drill hole for resin and found none. Tr. 344-45. The bolt he instructed the pinner to insert was a six foot fully grouted one. A lengthy discussion between the inspectors and Duncan ensued concerning the lack of return of resin. The inspectors then ordered Duncan to shut down the unit without further explanation and no other bolts were installed or test holes drilled by Gore and Preece. Tr. 345-46.

I find the only credible evidence regarding Preece and Gore's inspection is that they tested six foot bolts in the belt entry based upon Duncan's testimony.

Barnwell arrived on the property and reached the #4 unit at 7:30pm according to his notes and his testimony. His notes, written simultaneously with his inspection, reflect three bolts being installed with no return of resin in an unnamed location and one bore hole driven and scoped. They also reflect three bolts being installed in the #9 entry with good return of resin with no anomalies in the roof. Ex. S-26. When he and Winders re-tested, they found no return of resin in the #5 belt entry on the #4 unit. His final conclusion reflected in his notes was that a void "could be present" reducing the amount of return. Ex. S-27 pg. 9.

Barnwell believed he found this void, or crack, in the roof after two hours or three hours of drilling of bore holes, spraying water, and waiting for cure and then scoping the bore hole. Only then did he see "what [we] thought was a crack." At first Barnwell testified that the crack was in the entry adjacent to the belt. He then said it was in the belt entry and the adjacent belt entry. Tr. 87. When asked the question: "Adjacent which way? The belt entry was what, No 4?" He responded "I guess so. I don't know what – I think in my notes I say No. 4 entry." He went on to say "I'm not sure if it was to the – on the intake side or not, but that's – you know, when Mr. Preece was down there looking at it, he was finding it in some different places he

thought on the entire unit, but that's not what we found." Tr. 87. He further testified that he determined that there was an area with a geologic anomaly, or a crack, in an area of three crosscuts spanning 100 feet. The anomaly spanned three entries that needed to be re-bolted. He then said it was isolated to a couple of entries. Tr. 47.

It appears from the contradictory, vague and rather noncommittal answers given by Barnwell that his memory was dulled by time. He had to concede that the initial information from Preece and Gore that he relied upon was found to be incorrect. Regardless of the reasons why the evidence from Barnwell was vague, it is insufficient to determine that the crack he believed to have been found was located anywhere other than in the belt entry as stated in his written citation. This conclusion is bolstered by the testimony given by Duncan.

According to Duncan, he and Barnwell may have installed another bolt or two in the belt entry before the bolt manufacturer's representative, Reeves, brought in the scope used to explore for roof anomalies. Duncan described the location in which Barnwell drilled his test holes as the belt entry one crosscut in front of the tailpiece and then they moved up the belt entry putting in more test bolts until they obtained a return of resin. Tr. 351. Duncan testified that all of the bore holes and test bolts done by Barnwell in his presence were in the belt entry. Tr. 355. Duncan believes Barnwell had them install some spot bolts one crosscut off the belt entry only in response to his (Duncan's) question regarding what it would take to allow the unit to go back into production and abate the citation. Tr. 358-59.

Barnwell's credibility with respect to the location in which the alleged void was found is lacking. He did not include the entry adjacent to the belt entry in his written citation which he issued after his investigation was completed. At a time when the results of his investigation were clear in his mind, he most logically would have done so. In the alternative, he would have corrected or amended the citation which he reduced to writing some hours later upon review of those notes he testified supported his findings with respect to the adjacent entry. This lends credence to the fact that the testing was done and the results recorded were all in the belt entry as stated in the narrative portion of the citation. I find Duncan's testimony to be more reliable on this point.

With respect to the Secretary's theory that the test results on the day of the inspection prove by a preponderance of the evidence that Highland violated the standard at some unidentified time in the past when some unidentified cut was initially bolted is without merit.

Assuming that a failure of the six foot bolts to yield a return of resin in the entry adjacent to the belt entry was observed on April 14, 2009, and was due to a crack in the roof, there is no evidence of record to support the conclusion that the provisions of the roof control plan were violated when Highland installed the bolts on the #4 unit. There is no evidence of record to establish how long the crack had been in existence. There was also no evidence presented as to when the belt or any other entry on the #4 unit was cut and bolted. I cannot assume that because

Barnwell called what he thought was a crack a “geologic anomaly” that it must have existed since the coal seam was formed millions of years ago and therefore must have been present when Highland bolted the unit.² I, therefore, cannot assume that the crack was present when and where the first hole was drilled for each cut being bolted or that it was not measured to ensure correct depth and to check for abnormal voids in order to provide for return of the resin being used. Barnwell confirmed that neither he nor the other two inspectors observed a cut being bolted. Barnwell testified that while testing a previously installed roof bolt would be difficult to test for a return of resin after the fact, he assumed it would be possible. He, however, did not attempt to do that. Tr. 64.

This citation must be vacated for all of the reasons set forth above.

3. Citation No. 8492572 in violation of 30 C.F.R. §48.7(a)

Barnwell’s final citation alleges a failure to provide new task training to roof bolter operators. Specifically, he alleged that bolter operators were not trained on testing bolts for proper torque and return of resin on the first grouted roof bolt. Ex. S-6. He designated the alleged violation as S&S, expected to result in lost workdays or restricted duty, and low negligence on the part of the operator. The proposed penalty is \$687.00.

The mandatory standard requires that miners assigned to a new task, such as roof bolting operators, must be trained before assuming the new task. The training is not required for previously trained miners who demonstrate safe operating procedures within 12 months of assignment of the new task or for miners who have performed the new task and demonstrated safe operating procedures for such tasks within 12 months of being assigned the task.

As set forth above, Barnwell issued this citation solely on the basis of his dissatisfaction with the answer given by two unidentified bolter operators on how they torque test the grouted

² The following is an excerpt from the Florida Department of Transportation website: “Benson and Yuhr (2002) has shown that borehole densities are commonly inadequate to detect geologic anomalies. For example, ten regularly spaced borings will be required to provide a detection probability of 90% to detect the presence of a target 75-foot diameter within an area of an acre. The target could be a cavity or sinkhole, a burial site, or a contaminant plume. For smaller targets, such as widely spaced joints, 100 to 1,000 borings per acre may be required to achieve a 90% probability of detection. Such detection probabilities make a subsurface investigation for localized isolated targets, such as sinkholes, fractures, or buried channels by a limited number of borings alone, like ‘looking for a needle in a haystack’ and almost assures failure.”

www.dot.state.fl.us/statematerialsofficeofgeotechnical/conference/materials/bensonyuhr.kaufman.pdf. This excerpt is provided merely to point out that one cannot assume that a geologic anomaly is one that has existed since the formation of the surrounding geology due to natural causes alone. It can be the result of sudden shifts in the earth as well as from manmade excavations or constructs.

bolts. However, his testimony established that he harbored only a suspicion at best that the reason for the unsatisfactory response was a lack of training. He stated “the bolter operators either [were] not being properly task trained or whatever.” And that his concern was “maybe” they weren’t instructed properly. Tr. 48. Either that “or, you know his incentive wasn’t there” but he could not really determine that. There was just “a lot of vagueness on their part.” Tr. 49-50. Barnwell could not say who the bolter operators were that he spoke to, when they were hired, how experienced they were, who had trained them or observed their proficiency and he did not pull Highland’s training records. Tr. 81. He did testify that he knows Highland does a good job with their training program and that they did not have any issues with their training plans or putting in classes for the required hours. Tr. 51. He also confirmed that during the numerous inspections he has conducted at the mine, he has observed bolting operations to his satisfaction.

Highland’s comprehensive training program was outlined by several of Highland’s witnesses as stated above. Additionally, it was pointed out that Highland is a union mine requiring them to hire miners who are already experienced and who often times have been mining many, many years.

The credible evidence of record supports a finding that Highland does properly train their roof bolter operators. There is no evidence to find otherwise. The citation is vacated.

4. Citation No 8494294 in violation of 30 C.F.R. §75.202(a)

Paul Hargrove has been an MSHA inspector since February 2006 with 25 years of mining experience. He was certified as a shot firer, a hoisting engineer, foreman, EMT and an electrician. Tr. 90-92. On April 14, 2009, he was involved in a regular inspection of Highland when he wrote this citation for a condition he observed in the Main North travel way. His citation states:

The roof between crosscut # 14 and crosscut #21 on the main north travel way, the secondary escape way, is not being supported or controlled to protect persons from fall of roof or rock. There are thirteen roof bolts that the bolt head is pulling thru the bearing plate. Mine examiners and company official travel thru this area several time (sic) a shift, three shift (sic) a day.

Ex. S-15.

He designated the violation and unlikely to result in lost workday or restricted duty- type injuries affecting 10 persons and the result of moderate negligence. The proposed penalty is \$1203.00.

As Hargrove explained, the plate on the end of the bolt provides the bottom support for the beam formed by the steel bar set in resin. The holes in the bearing plates were drilled too

large by the manufacturer and the bolts were pulling through them. Highland had attempted to resolve the situation by putting washers on the bolts but had not done so on all of them. Some of the plates fall off when the roof starts bearing down on them and in some instances; the bolt pulls up into the roof strata. Either situation leaves the roof unsupported. Tr. 95. Highland had informed MSHA of the problem and had installed additional bolts in some areas and then switched to washers. Tr. 96. The washers also were failing to correct the problem and were pulling through the plate. Tr. 97. In the cited areas, the rock had already fallen out around the bolts exposing four to six inches or more of bolt or the roof sagged pulling the bolt up into the strata. Tr. 98. In an area of approximately 4900 feet, Hargrove found 13 bolts in this condition. Tr. 98-99. As a result of his findings, he wrote this citation in violation of Section 75.202(a) which requires that “the roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from... falls of the roof, face or ribs and coal or rock bursts.”

Negligence/Persons Affected

Highland does not contest the violation but contests the negligence level and the number of persons affected. It argues that they substantially mitigated their negligence by informing MSHA of the oversized drill holes, installed additional bolts, washers and Ker-thobs in an attempt to control the situation and that the condition in this particular area was unknown to management. Negligence should have been marked as none. With regard to the number of persons affected, it argues Hargrove found the roof to be safe and the method used by the inspector to calculate the number affected was incorrect.

The Secretary conceded that indeed Highland did notify MSHA of the incorrectly drilled holes and did install additional bolts, washers and Ker-thobs in an attempt to overcome the problem. Tr. 96, 138. Hargrove also confirmed the absence of cracks or draw rock in the area and felt the roof was safe. Tr. 100. He opined the negligence was moderate because not all of the areas had been corrected. Highland could have re-bolted or installed timbers in this area. Tr. 101. There was no evidence that Highland had taken such precautionary measures where these 13 bolts were found. Tr. 102. It was Hargrove’s belief that this area had been mined between 2000 and 2003. Tr. 97. The entry served as the main travelway and is heavily trafficked each day. Tr. 99, 130. The condition was easily seen therefore management should have known the condition existed. Tr. 132. Hargrove did not inspect every bolt in the area on this inspection but did so during subsequent inspections finding them to be in the same condition as these 13. Tr. 133-34.

I find that Highland did engage in remedial efforts with regard to these incorrectly-sized plates constituting mitigating circumstances. However, I find that based upon the fact that they were aware of the issue and had installed the defective bolts several years before this inspection in an area frequently travelled and inspected, they should have known of this violation and corrected it in a timely manner. I find moderate negligence is appropriate.

Hargrove determined ten persons would be affected by this violation because usually ten miners travel through this area in a fourteen-man mine trip twice per day. Tr. 101. Hargrove testified that the inferior plates were located in various areas of this 4900 foot travelway but he did not diagram them. He confirmed, however, that they were spread out among the rows of the 3920 bolts in the travelway. Tr. 133, 144. He also confirmed that some of the mantrips are canopied as well but men travel across the entire 20' entry as evidenced by tracks throughout. Tr. 145.

Based upon this evidence, and the fact that the roof was in good condition in this area, I find that the number of persons affected by a fall of roof would likely be less than ten persons. I therefore modify this factor to four persons.

5. Citation No. 8494330 in violation of 30 C.F.R. §75.400.

Inspector Winders became an authorized representative for MSHA in October 2007 after 23 years in the mining industry. He received his mine foreman's certification for Kentucky as well as a state inspector's certification. Tr. 199-202. During a regular inspection in April 27, 2009, he issued this citation. The narrative section charges:

Loose coal was allowed to accumulate on the travel road side of the outby end of the tail-piece for the 2nd North belt located in the #6 entry at spad 99+84 on the 061 MMU. The bottom roller attached to the outby end of the tail was running in coal. The coal spill measured 15' long, 4' wide, and from 4" to 16" in depth.

Ex. S-9.

The citation was marked as reasonably likely to result in a lost workday or restricted duty-type injuries, S&S, affecting seven persons and the result of moderate negligence. The Secretary proposes a penalty of \$7578.00.

The mandatory standard at issue requires that combustible materials such as coal dust and float coal dust as well as loose coal be cleaned up and not allowed to accumulate in active workings or on diesel-powered or electrical equipment. 30 C.F.R. §75.400.

Winders testified that the accumulation was caused by a low spill that had occurred over the course of the shift. Tr. 206, 219. He observed the tail roller turning in the loose coal and although the coal was still damp from the water spray located at the feeder, he believed the condition posed a hazard of fire due to the combination of the proximity of an open airlock door and the friction of the roller turning in the coal. Tr. 124, 181, 207-09.

Highland challenges the validity of this citation based upon the definition of the word "accumulation." It argues that a "spill" is a normal part of mining and not a violation of this standard. It differs from a violative accumulation based upon the amount of time it has existed. Winders could not say how long this condition had existed but acknowledged that it could not

have been for long. Tr. 218. If it had occurred as a result of a coal car hitting the belt, it could have occurred just minutes before he cited the condition. Tr. 218-20. The wetness of the coal could also provide some evidence that it was a fresh spill. Tr. 178. Taking the position that the condition most likely had just occurred, Highland concludes that the material had not accumulated over the requisite period of time. It cites *Consolidation Coal Co.*, 22 FMSHRC 455, 464 (Mar. 2000) in support of the time factor being dispositive.

The Secretary does not address this issue. However, the U.S. Court of Appeals in its recent decision in *Black Beauty Coal Co. v. FMSHRC*, USCA Case No. 11-1306, Dec. 28, 2012, has addressed the very issue of when a spill becomes an accumulation. The Court stated that “no bright line differentiates the two terms.” *Id.* at 8. Citing *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (1990), *aff’d*, *Utah Power & Light Co. v. Sec’y of Labor*, 951 F.2d 292 (10th Cir. 1991), the Court determined that an accumulation exists “if a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent.” The regulation is designed to prevent combustible materials from propagating an explosion or fire. In so finding, the Court determined that material that had suddenly spilled by the tail roller was an accumulation in violation of this mandatory standard as the standard is directed at the prevention of accumulations rather than allowing a reasonable period of time for cleanup. *Id.* at 9 citing *Old Ben I*, 1 FMSHRC 1954, 1957.

I find Winders acted as a reasonably prudent person familiar with the mining industry, in concluding that the rollers turning in the quantity of coal posed a hazard of fire. Present were all of the factors required for a fire – a fuel source, oxygen and friction. The violation has been proven by a preponderance of the evidence.

S&S

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S, “if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

The violation in this case has been established satisfying the first element of *Mathies*. In the event of a fire, it is unquestionable that resultant injuries would be reasonably likely and those injuries would be reasonably serious. The issue then is whether the condition posed a reasonable likelihood of a fire to satisfy the third element of *Mathies*.

Highland contests the S&S designation because the coal was wet at the time the citation was written. Because wet coal does not burn, it argues, a fire could not have occurred.

The accumulations measured up to 16” in the center but petered out to only 4” at the edges. Tr. 214. Winders testified credibly that it would not have taken long for the coal to dry. The friction from the roller and the open airlock both contributed to the speed at which it would become dry. Tr. 213-14. Under continued normal mining operations, as the coal dried it would be reasonably likely to ignite from the friction of the roller turning in it. Tr. 222.

The Commission has addressed the issue of accumulations and conveyor belts a number of times. In *AmaxCoal Co.*, 19 FMSHRC 846 (May 1997), the Commission upheld an ALJ's finding that a belt running on packed coal was a potential source of ignition for accumulations of loose, dry coal and float coal dust along a belt line, and that the condition presented a reasonable likelihood of an injury causing event. In addition, in *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994), the Commission held that accumulation violations may properly be designated as S&S where frictional contact between belt rollers and the accumulations, or between the belt and frame, results in a potential ignition source for the accumulations. The Commission in *Mid-Continent* found that it was immaterial that there was no identifiable hot spot in the accumulations because continued normal mining operations must be taken into account when evaluating the circumstances. In the present case, if the violative condition had been allowed to persist, it would have reasonably led to smoke, fire and, potentially, an explosion. Further, an additional potential ignition source was present in the form of the belt rubbing the structure, which could generate a spark. Had the coal near the damaged rollers and misaligned belt been wet, the Commission has recognized that wet coal can dry out and ignite. See *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985).

I find that the accumulations were extensive. Winders' scenario of the friction from the rollers plus the increased ventilation from the airlock drying the coal relatively quickly creating an ignition source is reasonable and credible. An ignition source was present; fuel was present

as was oxygen providing all the necessary elements for a fire or explosion. This violation was serious and I affirm it as S&S.

Negligence

The accumulations were extensive and obvious and would have been visible to anyone working near the face which would include the three ram car operators, two roof bolters and two miner operators as well as the belt examiner and the section foreman. Tr. 210, 212-13. The coal was still spilling when the citation was written. Tr. 206. The belt examiner had made the area at 8:10 am, just two hours prior to the inspection which took place during the day shift. Tr. 212. Management had to have been aware of its presence. In spite of number of persons working in the area and the extensiveness of the accumulations, no one was in the process of cleaning the material. This standard mandates prompt cleanup. *Utah Power & Light Co. v. Sec'y of Labor*, 917 F.2d. 292, 295 n 11 (10th Cir. 1991). For this reason, I find moderate negligence is appropriate.

6. Citation No. 8494665 in violation of 30 C.F.R. §75.203(e)(2).

Inspector Hargrove issued this citation at 6:10pm on April 23, 2009 as S&S, resulting in lost workdays or restricted duty affecting one person and the result of high negligence. The proposed penalty is \$3405.00. The “Condition or Practice” is:

The approved Roof Control Plan dated, Nov. 13, 2008, entry width of 20 feet, is not being followed on the # 5 unit, mmu-066-0 #8 entry. The # 8 entry measured 22 feet 1 inch for a distance of 13 feet.

Ex. S-17.

The mandatory standard requires, in relevant part, that “[a]dditional roof support shall be installed where [t]he distance over which the excessive width exists is more than 5 feet.” 30 C.F.R. §75.203(e)(2).

Hargrove observed this wide cut in the #8 entry while conducting respirable dust testing on MMU-066. Tr. 113. Highland’s roof control plan limits entry widths to 20 feet. When measured, this entry exceeded that width by 13 to 24 inches for a distance of 13 feet. Tr. 104; Exs. S-41, S- 17 and S-34. There were no additional supports in the entry and he observed draw rock and cracks along the ribs. Tr. 107-09. Rather than cite the condition as a violation of the roof control plan, he cited it under this more forgiving standard which allows for wide entries of up to twelve feet in width and five feet in length sans additional roof support. Tr. 107.

Highland accepts the violation but contends it should not be S&S or high negligence.

S&S

Hargrove identified this condition as a hazard because as he explained, the coal pillars provide the best form of roof support. When their width is decreased by a wide cut, the pillar is weakened and the roof support is compromised permanently. Tr. 108-09. The presence of adverse roof conditions coupled with Highland's history of roof falls made it reasonably likely, in his opinion, that the wide entry contributed to the hazard of a roof fall in this area and which would be reasonably likely to occur. Tr. 109. The resultant injuries would be broken bones and even fatal injuries. *Id.* The section foreman, mine examiner, miner operator, roof bolter or anyone else working in the area could be affected by this condition. Tr. 110.

Highland's first argument is that Section 75.203(e)(1) provides only when the width specified by the roof control plan is exceeded by more than 12 inches is supplemental support required. The cited subsection of the standard also allows for an excessive cut of up to five feet in length before supplemental support is required. Using this "grace" area calculation, the excessive cut then measured at most from one inch to twelve inches too wide for five feet. Because the inspector could not say how much of the 13 feet in length was 21'1" wide as opposed to 22' wide, it could be that almost the entire entry was only one inch too wide which would not be S&S. Tr. 152. I find the logic behind this assertion to be faulty. Even if the width exceeded the "grace" area by only one inch in width for a distance of five feet, it does not necessarily follow that it could not be S&S. The entire distance that was not properly supported must still be considered in determining whether the condition posed a significant safety hazard. Hargrove stated the condition of the roof had deteriorated. The pillar was reduced in strength by the excessive width of the cut in the entry. Taking into account these factors, the violation posed a discrete safety hazard and a roof fall was reasonably likely.

Highland's second argument is that Hargrove confirmed the bolts present were spaced properly for the width of the entry. Tr. 155-56. This is a mischaracterization of Hargrove's testimony, however. He was asked whether the bolts were spaced the proper distance from the rib according to the roof control plan. He answered in the affirmative. However, he went on to clarify that the bolts were spaced properly on the left side of the entry, not the right side where he cited this violation. Tr. 156-57. Although he did not measure the distance, he observed that there were no bolts in the area which he memorialized in a drawing made in his notes. Tr. 157; Ex. S-34 pg. 18. I find that he has sufficient experience to be able to recognize when the distance between the rib and the bolt is wider than that required. The difference would be especially obvious when compared with the spacing of the other bolts in the area which can be seen on his diagram. Also supporting this is the fact that he was able to determine that the bolts were the proper distance on the left side although he did not need to measure it to make that determination. Highland had no argument with that. Highland's argument is not persuasive.

Lastly, Highland argues that Hargrove's notes do not indicate adverse roof conditions and he could not recollect why he marked it S&S. Again, this is a misstatement of the evidence.

Hargrove testified that he put in his notes “same conditions cited last week” besides his “reasonably likely” notation. Tr. 155. As he testified this was just to let him know what the reason was. It served as a memory jogger. With regard to the adverse roof conditions not being in his notes, he testified that as is his practice, if the roof conditions were good, he would not have marked this citation as S&S. Only when he finds draw rock, cracks and the like does he mark this type of violation as S&S. Tr. 157-58. I find this explanation to be reasonable and credible.

Travis Little testified that the area did not have adverse roof conditions. However, his testimony was cursory and vague. He did not testify that there were no cracks or draw rock present. Tr. 291-92. I find his unsupported opinion is unconvincing.

I find this violation to be serious and I affirm it as S&S based upon a preponderance of the evidence.

Negligence

This violation was the result of high negligence in Hargrove’s opinion based upon several factors. He determined that the condition had existed for at least two shifts and would have been seen during one pre-shift and one on-shift examination, it was easily seen and he had spoken to company officials five or six times during that quarter about excessive cuts. Tr. 110.

Travis Little testified that the cited area was near the face and was not obvious because there was a curtain hanging there blocking the wide area. In his opinion, it would be difficult for the section foreman to see this violation. Tr. 292-93. The curtain is attached to the end of the roof bolter and advances as the bolter moves forward. Tr. 319.

Hargrove agreed that there was a curtain, however, he stated “[i]f you walk across that crosscut, like everybody does, when you look up in that entry, you are looking past that line curtain. You can see it.” Tr. 153. In fact, Hargrove found it without much difficulty.

Not only was the wide entry easily seen even taking into account the presence of the line curtain, it is untenable to think that those persons in management responsible for detecting and correcting hazards such as this could claim ignorance by hiding behind a curtain. This is especially so in the face of having been put on notice regarding excessive cuts; a fact Highland did not dispute.

I concur with Hargrove’s finding of high negligence.

7. Citation No. 8494670 in violation of 30 C.F.R. §75.370(a)(1).

This violation was designated as S&S, reasonably likely to result in lost workdays or restricted duty injuries to seven persons and the result of moderate negligence. The proposed penalty is \$4329.00. The “Condition or Practice” states:

The approved ventilation plan, dated Oct. 24, 2008, page #3, item #3, is not being followed on the # 1 unit, mmu-061-0, air lock is not adequately installed in the belt entry and supply road, air on the belt and neutral travel way is traveling in by to the working section.

Ex. S-18.

Hargrove testified that on April 27, 2009, he observed an airlock curtain in the belt entry and supply road that had an opening at the top and sides. Tr. 114-15. He spent approximately one hour in the cited area examining the feeder and the tailpiece and then conducted a smoke test at the brattice line, at the crosscut which showed air was traveling through the gaps towards the face located approximately 150 to 200 feet away. Tr. 115, 163-64. Not only is the curtain designed to prevent belt air from reaching the face, but it is also to prevent coal dust and diesel exhaust as well as smoke in the event of a fire from reaching the miners working at the face. Tr. 115, 117. When installed properly, air and contaminants are directed to a regulator outby the airlock away from the face. Tr. 116-17. Hargrove found no other regulators inby the curtain to serve this purpose despite Highland's assertion that there was one between entries 2 and 3. Tr. 197-98; Exs R-1 and R-3.

The cited regulation requires the operator to submit a ventilation plan for the district manager's approval which controls methane and respirable dust. 30 C.F.R. §75.370(a)(1).

Highland concedes this violation but contests the S&S and negligence assessments.

S&S

The third element of *Mathies* is at issue here. Highland disagrees with the Secretary's position that a fire or explosion was likely to occur because there were no accumulations, ignition sources or methane in the area.

In order to establish a fire or explosion is reasonably likely to occur, a confluence of factors must exist. Those factors include accumulations, ignition sources, equipment and methane. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997). The Secretary's evidence with regard to this element is that Highland used diesel equipment in the cited area. Inspector Winders had issued two citations for accumulations in the same area just 20 minutes before this citation was issued. One of those citations was for the belt tailpiece roller turning in the loose coal. The other was for accumulations of oil, grease, coal dust and fine coal on the ratio feeder which dumps directly onto the tailpiece. Tr. 117, 211.

I have found that the accumulations at the tailpiece cited in citation number 8494330 were S&S because they were extensive and posed a reasonable likelihood of causing an ignition or fire due to the friction from the roller turning in the coal. For the same reason, I find this violation to be S&S. The accumulated coal was very close to this cited area. Should it ignite, it is

reasonably likely that smoke would then be directed through this airlock towards the face exposing miners in the area to inhalation and burn injuries. I find these injuries would be reasonably likely to be serious. The elements of *Mathies* have been satisfied.

I also find seven people would be affected by this violation. Hargrove testified that when he issued this citation he saw seven miners in by the airlock. Tr. 166. Although Highland places significance on the fact that there was a backup curtain near the face protecting several of the miners, Hargrove testified that the backup curtain is split so that equipment can move back and forth from the face. This curtain would not stop smoke from passing through to the face. Tr. 167. Highland argues that their witness testified that the gap in the curtain was small, and their ventilation system made it unlikely that any miners would be affected. Tr. 298-302. Having found this violation is S&S, meaning it is reasonably likely that a fire would occur and that smoke inhalation and burns would be reasonably likely to be sustained; this argument does nothing to persuade me that no miners would be affected. I find the fact that this violation occurred in the working section of the mine near the face and that Hargrove observed seven persons in the area when he issued this citation establishes by a preponderance of the evidence that he assessed this citation properly.

Negligence

I find the negligence was properly assessed at moderate. Hargrove stated that the condition had likely existed for several shifts judging by the accumulations present and the dirty condition of the feeder and the curtain. Tr. 119-120. Although Hargrove conceded that the curtain could have been pulled down by passing equipment or a falling rock and may not have been in that condition at the time the belt examiner made his morning run, the gaps were readily apparent. This was located in an active area of the mine just two crosscuts away from the face where examiners and foremen should have been on alert for such occurrences. They should have been aware of the condition and corrected it.

8. Citation No. 8494674 in violation of 30 C.F.R. §75.1731(a).

This S&S citation was issued by Inspector Hargrove on April 28, 2009. In his opinion, it was reasonably likely that this alleged violation would result in lost workday and restricted duty type injuries affecting three miners and was the result of moderate negligence. The proposed penalty is \$1304.00. The alleged violation is stated as follows:

The 5A belt line one crosscut out by the 5B Head roller transfer point has 2 damaged bottom roller. (sic.) The conveyor belt is rubbing the bottom roller metal frames and the frames are hot to the touch. The 5A belt was in operation prior to the inspection.

Ex. S-20.

The cited standard states “[d]amaged rollers, or other damaged belt conveyor components, which pose a fire hazard must be immediately repaired or replaced. All other damaged rollers, or other damaged conveyor components, must be repaired or replaced.” 30 C.F.R. §75.1731(a).

Highland challenges the S&S, the number of persons affected and the moderate negligence assessments but not the violation.

S&S

Travis Little testified that the area in which the damaged roller was located was wet. He stated that there was so much standing water that he and Hargrove had to exit the golf cart and approach on foot. He further stated that the area remains wet constantly even to this day. As a result, there is no danger of a fire even taking into consideration the friction from the damaged rollers. Tr. 305-06. Highland also contends that there was a fire suppression system, hoses and outlets in the immediate area reducing the likelihood of fire.

Hargrove testified that he believed this condition to be S&S because the outer barrel of the roller had broken in half and was banging against the metal shaft. In addition to this metal to metal contact, the belt was rubbing against the frame due to a misalignment. When the belt was shut down Hargrove found the frame hot to the touch. Tr. 121-23. The rollers were located in the same area as accumulations found by Hargrove. Tr. 123-24. The rollers were turning in the coal creating a source of friction and a fuel source which the inspector reasonably believed would cause a fire. As he stated, “You had the heat source, you had the fuel, you had the oxygen. You had everything you needed for a fire.” Tr. 124. In the event of fire, he believed that the three miners he saw traveling in the area would sustain serious injuries. Tr. 125-26. Hargrove stated that to his recollection the accumulated coal was dark and dull signifying that it was dry. Tr. 127.

On cross-examination Hargrove stated that he checked the belt examination book from the morning and found nothing noted about the damaged rollers or the cited accumulations. Tr. 177. However, the belt examiner on that day shift had not yet come to the surface to inscribe his findings in the belt book. He did not check the belt book entries for the previous shift. Tr. 184-85. He confirmed that there is a swag area at the tailpiece that had water in it but the damaged rollers and the accumulations were about thirty feet from this swag area. Tr. 178. Hargrove stated that the water was not deep; it was not over ones boots and was just enough to leave an impression of the shoe when walking in it. Tr. 179. The wet area measured about fifteen feet in length and eighteen in length. The total measurement of the coal near the damaged rollers was fifty feet in length, twenty-four feet in width and eight inches in depth. Tr. 123-24. Hargrove insisted that the damaged rollers and the bottom stand of the belt frame were touching the coal fines. The part of the frame that he found hot to the touch was making contact with the coal. Tr. 181. Hargrove also confirmed that he saw shovel marks further down the belt line evidencing

some cleanup efforts that had been abandoned about fifty feet short of the cited area. It was clear to him that the shoveling had not been done on that day shift due to the size of the affected area. Tr. 185.

I find Inspector Hargrove's testimony to be credible based upon his recollection of the condition, the consistency between his recollections and his notes as well as based upon the amount of detail in his testimony coupled with his overall demeanor.

I reject Highland's contention that this violation is non-S&S due to an absence of a fuel source because some of the accumulations were wet. First, Hargrove very clearly pointed out that based upon his recollection of the condition and his recorded notes, the wet area was located about thirty feet from the damaged rollers and misaligned belt which were both touching coal where he felt a hot spot. I also reject this argument for the same reasons set forth in the *AmaxCoal Co., Mid-Continent Resources, Inc.* and *Black Diamond Coal Mining Co.* decisions as discussed above.

I also reject Highland's argument that the other protections required by the Mine Act were properly in place at the time of the order, reduced the possibility of an injury producing event, thereby rendering it non-S&S. The Courts and the Commission have found to the contrary. In *Buck Creek Coal*, 52 F.3d 133,136(7th Cir. 1995), the mine operator argued that carbon monoxide detectors, a fire-retardant belt, a fire suppression system, a fire brigade team, a rescue team, firefighting equipment and ventilation all undermined the likelihood of a serious injury that would result from a coal accumulation violation. The Seventh Circuit, in upholding the decision of the ALJ regarding the serious nature of the accumulations, determined that the fact that there were other safety measures to deal with a fire does not mean that fires are not a serious safety hazard and, rather, the precautions are in place because of the "significant dangers associated with coalmine fires." While extra precautions may help to reduce some risks, they do not *de facto* make accumulations violations non-S&S.

I conclude that the preponderance of the evidence establishes that it was reasonably likely that the friction from the damaged rollers running in coal accumulations would result in injury causing events to three persons, and that the injuries would be serious or fatal. I find that the Secretary has satisfied the four *Mathies* criteria and established the violation as S&S.

Negligence

Hargrove assessed this violation as the result of moderate negligence because he testified that the broken barrel hitting the roller could be heard from two cross-cuts away in this heavily traveled and inspected area. Tr. 126-27, Ex. G-20. Little testified that there was no noise to be heard and therefore there is no reason for management to have known about the condition. Tr. 302-04. Highland is correct that Hargrove's notes do not reflect that the rollers were audible. In fact, his notes reflect that it was unknown as to who was aware of this condition or how long it had existed. However, he also found the operator should have known of this condition. Ex. S-36 pg.7.

I agree with Hargrove's opinion that due to the location of this condition being in a heavily traveled and inspected area, management should have known of this condition and corrected it. Moderate negligence is appropriate for this violation.

III. PENALITIES

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of the violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. The parties have stipulated that the mine is a large mine and that the proposed penalties would not affect the operator's ability to continue in business. There is no dispute that the conditions were abated in good faith or that the mine has a significant history of violations. The findings with regard to the gravity and negligence involved in each citation are set forth above. I find that the following penalties are appropriate:

Citation No. 8492568	Vacated
Citation No. 8492571	Vacated
Citation No. 8492572	Vacated
Citation No. 8494294	\$436.00
Citation No. 8494330	\$7578.00
Citation No. 8494665	\$3405.00
Citation No. 8494670	\$4329.00
Citation No. 8494674	\$1304.00

IV. ORDER

Citation numbers 8492568, 8492571 and 8492572 are VACATED; citation number 8494294 is modified to affecting four persons with a reduction in penalty; citation numbers 8494330, 8494665, 8494670 and 8494674 are affirmed as written with the penalties proposed by the Secretary. It is hereby ORDERED that Respondent pay penalties on the citations adjudicated herein in the amount of \$17,052 within 30 days of this order.³

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

³ Payment is to be made to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

1331 Pennsylvania Avenue, NW, Suite 520N

Washington, D.C. 20004

January 29, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2010-228-M
Petitioner,	:	AC No. 15-07101-201421
	:	
v.	:	
	:	
CARMEUSE LIME & STONE, INC.,	:	Mine: MAYSVILLE MINE
Respondent.	:	
	:	
	:	

DECISION

Appearances:

Willow E. Fort, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary

Arthur M. Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, on behalf of Carmeuse Lime & Stone, Inc.

Before: Judge David F. Barbour

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) acting through the Mine Safety and Health Administration (“MSHA”) against Carmeuse Lime & Stone (“Carmeuse”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (“the Mine Act”). The Secretary seeks the assessment of a civil penalty of \$14,700 against Carmeuse for a single violation of the mandatory safety standard 30 C.F.R. § 57.14205. The violation is alleged in Citation No. 6510324 which was issued on July 16, 2009, pursuant to section 104(d)(1) of the Mine Act. 30 U.S.C. § 814(d)(1).

The Secretary asserts that Carmeuse violated 30 C.F.R. § 57.14205; that the violation was correctly characterized as a significant and substantial contribution to a mine safety hazard; that the violation was the result of Carmeuse’s high negligence and unwarrantable failure to comply with the cited standard; and that the proposed penalty is appropriate. Carmeuse argues

that it did not violate 30 C.F.R. § 57.14205; that even if a violation is found, the MSHA Inspector wrongly characterized the violation as significant and substantial and as the result of its high negligence and unwarrantable failure; and that the proposed penalty is not appropriate. The case was heard in Lexington, Kentucky.

STIPULATIONS

The parties entered the following stipulations prior to hearing:

1. During all times relevant to this matter, Carmeuse was the operator of the Maysville Mine, Mine ID No. 15-07101
2. The Maysville Mine is a “mine” as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802 (h).
3. At all material times involved in this case, the products of the subject mine entered commerce or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.
4. The proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.
5. MSHA Inspector [Richard L.] Jones, whose signature appears in Block 22 of Citation No. 6510324, was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.
6. True copies of the citation were served on Carmeuse as required by the Mine Act.
7. The total proposed penalty for the citation will not affect Carmeuse’s ability to continue in business.
8. The alleged violation was abated in good faith.

BACKGROUND

The Maysville Mine is an underground limestone mine which produces chemical grade limestone for industrial use. Tr. 34-35. After being mined, the limestone is crushed into the desirable size underground and is carried to the surface via a series of conveyor belts. Tr. 36. One of the conveyor belts at the mine is the M-29 conveyor belt. The M-29 belt is kept taut along its rollers while transporting crushed limestone, a heavy product, by a 10,000 lb. counterweight which is suspended from the underside of the belt. Gov't. Br. 8 n.5.¹

The Link Belt RTC-8035 Crane is the only underground crane at the Maysville Mine. Tr. 208-209. It is designed to lift heavy loads to different heights and locations. Gov't. Br. 5. The crane's maximum rated lifting capacity, under ideal circumstances and working conditions, is 35 tons (77,000 lbs). Tr. 213. The hoist mechanism is located behind the hoist operator's cab. A hoist line runs along the length of the crane's boom from the crane's hoist mechanism. At the end of the boom the hoist line is attached to a hook. When a load is lifted, the hook is attached to the load, the hoist mechanism reels in the hoist line, and the load is raised. Gov't. Ex. 8. The crane's boom has a computerized "boom angle indicator" which calculates the angle of the boom in relation to the body of the crane. Tr. 58-59. The crane is mounted on an undercarriage with four tires which are used to transport the crane to its designated location. Tr. 60. Once at the designated location, the individual acting as the crane operator must decide whether to let the crane remain on its tires, or to utilize the crane's outriggers.

There are four outriggers, one on each corner. Their purpose is to level and stabilize the crane. Each outrigger has three components.² The first is a horizontal outrigger beam, an arm-like steel beam structure which may be adjusted outward from the center of the crane to provide the crane with a wider base. Gov't. Ex. 8. The second is a vertical shaft located at the end of the outrigger beam, which extends downward at a 90 degree angle from the outrigger beam. *Id.* The third is a pontoon or float which is located at the end of the vertical shaft and rests on the ground. *Id.* The float is attached to the vertical shaft with a ball and socket joint which allows the float to be located on slightly un-level ground. *Id.* When the crane is used on outriggers, each of the four floats functions as a foot of the crane with each float spreading out the weight of the crane upon the ground. Gov't. Br. 6. The outriggers can be used in three configurations - the outriggers may be fully extended (the maximum length of the outriggers), intermediately extended, or fully

¹ References to the Secretary of Labor's brief and exhibits are designated Gov't. Br. and Gov't. Ex. respectively. References to Carmeuse's brief and exhibits are designated Resp't. Br. and Resp't. Ex. respectively.

² Gov't. Ex. 8 presents two diagrams of the crane with its various components being labeled. The diagram on the right depicts the entire crane while the diagram at the left depicts the crane's outrigger in detail.

retracted (the minimum length of the outriggers).³ Resp't. Ex. 2, at 5. The length to which the outriggers are extended is a factor in determining the rated lifting capacity of the crane. Resp't. Ex. 2.

SECRETARY'S WITNESS

Richard L. Jones

MSHA Inspector Richard L. Jones was the only witness called by the Secretary. Tr. 3-5. Inspector Jones has been employed with MSHA for 25 years. Tr. 16-17. During his employment with MSHA, he has regularly inspected cranes used on mine property. Tr. 18. Prior to working for MSHA, Jones spent five years working in Kentucky coal mines and three years working in the State Mine Inspector's Office in Arizona; he came in contact with cranes in both these positions. Tr. 29-30. Jones has a degree in mine inspection from Marshall University and between 1988 and 2011, he completed five crane safety classes. Tr. 18, 32. However, Jones conceded that he did not sufficiently understand crane operation to fully operate a crane. Tr. 22-23. Prior to the July 16, 2009 inspection, Jones had frequently inspected Carmeuse's Maysville Mine. Tr. 32-33.

On July 16, 2009, during his inspection of the Maysville Mine, Jones came across an area beneath the M-29 conveyor belt where he observed the Link Belt RTC-8035 Crane. Gov't. Ex. 1, at 1-2. The crane operator had set up the crane the prior day, on July 15, 2009, to repair the M-29 belt which had broken and dropped its 10,000 lb. counterweight. To repair the belt, Carmeuse had to lift the counterweight and secure it to the belt frame, repair the belt by placing a saddle (belt splice) across the torn section, and then place the counterweight back into position under the belt. Gov't. Br. 8.

After he arrived at the crane's location, Jones testified that he noticed that the float of the right front outrigger was located on unstable ground. Half of the float was sitting on a solid surface and half had sunk into wet unstable ground. The unstable ground was a foot deep and had the appearance of wet concrete. Tr. 92-94. Jones testified that the sunken part of the float caused the float to tilt at a severe angle away from the body of the crane. Tr. 80., Gov't. Br. 9. The hydraulic cylinder (the vertical shaft of the outrigger) was 3.5 degrees out of plumb and the float was 7.5 degrees out of level, sloping away from the crane based on measurements taken by Jones with his iPhone. Tr. 194.

³ The distance between a fully extended outrigger and the center of the crane is approximately 10 feet 3 inches, the distance between an intermediately extended outrigger and the center is 7 feet 4 inches, and the distance between a fully retracted outrigger and the center is approximately 4 feet 4 inches. Resp't. Ex. 2, at 5.

Wooden cribbing had been placed under the portion of the float located in the wet material, but Jones testified that the cribbing failed to effectively widen the footprint of the float since it was of uneven thickness, was not anchored together to prevent the float from shifting, and was smaller than the float. Tr. 99, 101. He testified that the ball and socket joint which attached the float to the vertical shaft permitted the float to be placed on un-level ground, but not on unstable ground. Tr. 113. In addition, the load was being lifted over the right front outrigger thus placing immense pressure on this outrigger. Tr. 128. Jones alleged that if the right front outrigger stayed sunken in the unstable ground, the pressure on the outrigger could pull the entire crane over causing the crane to topple and severely injure nearby miners including the crane operator. Tr. 131.

While conversing with Carmeuse's employees, Jones determined that the maintenance supervisor, Gerald Fields, on July 15 (the day prior to the inspection) observed the crane lift a 10,000 lb. counterweight while the float was sunk into the unstable ground. Jones testified that Fields allowed the lift even though he was aware that the ground was unstable (in his notes, Jones wrote that Fields admitted to him that the condition of the right front outrigger was unsafe). Gov't. Ex. 2., Tr. 178. As a result of his observations and conversations, Jones issued Citation No. 6510324 to Carmeuse for a violation of 30 C.F.R. § 57.14205, which states that "[m]achinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer, where such use may create a hazard to persons." Gov't. Ex. 1, at 1-2. He alleged that on July 15, by operating the crane while its right front outrigger was sunk in unstable ground, Carmeuse violated the design capacity of the crane, as intended by the manufacturer. He testified that his understanding of the manufacturer's intended design capacity was based on a provision of the crane operator's manual which states that:

The outrigger pontoons [floats] must set on a smooth, solid surface flush with ground with no hills or valleys under them, or they may be damaged or destroyed. If there is any doubt as to the ground condition, use mass under pontoons. Check pontoons before and during operations. If they are allowed to settle, they may lose their effectiveness and make continued operation unsafe.

Gov't. Ex. 4-22, Tr. 90

Prior to issuing the citation, Jones only read the crane operator's manual, not the crane ratings manual. Tr. 185-186. As a result, Jones conceded that he did not check the charts in the crane ratings manual to determine the crane's rated lifting capacity.⁴ Tr. 78. He stated that his

⁴ The crane operator's manual contains instructions for safe operation of the crane and incorporates by reference the crane ratings manual. Gov't. Ex. 4-13. It was provided to Carmeuse by Link-Belt, the crane manufacturer. Gov't. Br. 11. The crane ratings manual
(continued...)

main concern was the unstable ground, not the charts. Tr. 182-186. Jones asserted that the violation was easily remedied by drawing in the right outriggers, which were fully extended, to an intermediately extended position. Tr. 137. After drawing in the right outriggers, all the outriggers were on stable ground (and all the outriggers were equidistant from the body of the crane).

CARMEUSE'S WITNESSES

Carmeuse's witnesses consisted of five employees who worked at the Maysville Mine between July 15 and July 16, 2009. Three of the witnesses - Donald Cooper, Jack Stafford and Darren Payne - set up the crane for operation on July 15. A fourth witness - Gerald Fields - observed the crane on July 15 and talked with Inspector Jones during the inspection of the crane on July 16. The fifth witness, Edward Reinders, accompanied Inspector Jones on his inspection of the crane.

Donald Cooper

In July 2009 Donald Cooper was employed as a mine maintenance employee at the Maysville Mine. Tr. 207. As part of his job, he personally used the Link Belt RTC-8035 crane once a month. Tr. 209. Prior to the issuance of Citation No. 6510324, Cooper had received eight hours of training on the use of the crane from Link Belt, the crane manufacturer. Tr. 209-210. Cooper testified that on July 15, 2009, he, Jack Stafford and Darren Payne set up the crane for lifting the counterweight. Tr. 215-216. Cooper, the crane operator, operated the crane from the crane cab while Stafford and Payne were on the ground checking to make sure the crane was stable. Tr. 214-215. Cooper testified that during set up, he first lowered all four of the crane's outriggers onto the ground. He was able to fully extend the two right outriggers, but not the two left outriggers because of a rib (underground wall) on the left side of the crane. Tr. 217.

Three of the outriggers were lowered onto solid rock from the outset, but the fourth - the right front outrigger - was initially lowered onto wet and unstable ground. Cooper then raised the right front outrigger after which Stafford and Payne installed cribbing underneath the float of the outrigger. Tr. 217-218. Cooper then lowered the outrigger for a second time, and the outrigger's float again sank into the ground. *Id.* For a second time, Cooper raised the outrigger after which Stafford and Payne shoveled some of the unstable ground underneath the outrigger and installed additional cribbing. *Id.* Cooper then lowered the outrigger for a third time. *Id.* Cooper testified that the third time he lowered the right front outrigger, he was satisfied that the outrigger was on solid ground. *Id.*

⁴(...continued)

contains a series of charts that list the rated lifting capacity of the crane based on the extended length of the outriggers, the boom mode, the boom angle, and the boom length. Resp't. Ex. 2.

Cooper determined that the crane was level using a device within the cab.⁵ Tr. 222-223. He also conducted a test lift in which the counterweight was lifted a couple feet before being lowered. During the test lift, the right front outrigger remained stationary indicating that the ground below it was stable. 227-230. After determining that the crane was level and that the outriggers were stable, he used the crane to lift the counterweight and attach it to the belt frame. Tr. 230. Cooper noted that the rated lifting capacity of the crane according to the crane monitor was 24,000 lbs., much greater than the weight of the load (the 10,000 lb. counterweight). Tr. 223.

The crane computer inside the crane cab determines whether the crane is safe for use based on a number of factors including the lengths of the extended outriggers, the boom angle, the length of the boom, and the weight of the load. Gov't Br. 7. In this regard Cooper conceded that on July 15, prior to the crane's lift of the counterweight, he entered inaccurate data into the crane computer. Cooper input into the computer that all four outriggers were fully extended when in fact only the two right outriggers were fully extended (the two left outriggers were intermediately extended). Tr. 251.⁶ However, Cooper explained that the non-equidistant outriggers on July 15 did not render the crane unsafe. He testified that the outriggers were fully extended on the right side for the purpose of stability since the load would be lifted over the right side. Tr. 219-221. Having the right outriggers fully extended while the left outriggers were intermediately extended was preferable to the alternative of having all outriggers intermediately extended. Tr. 249-250.

Jack Stafford

In July 2009, Jack Stafford was employed as a mechanic at the Maysville Mine. Tr. 253. As part of his job he used cranes three to four times a week. *Id.* He had 15 years of mining experience. Prior to his mining career, he had 15 years of experience with cranes during his time working on bridges. Tr. 254-255. Stafford corroborated Cooper's testimony that the crane's right front outrigger rested on stable ground prior to lifting the counterweight. Tr. 262-263.

⁵ The device, which Cooper called a bubble, indicated whether the body of the crane was level, but not whether the outriggers were level. 242.

⁶ Cooper failed to explain why he entered inaccurate outrigger lengths into the computer. This issue of inaccurate data entered into the crane computer is further discussed in Footnote 11.

Stafford estimated the crane's rated lifting capacity based on the chart for fully extended outriggers in the crane rating manual as 19,900 lbs. (the calculation was based on fully extended outriggers, boom mode B, boom angle of 55 to 60 degrees and boom length of 60 feet).⁷ Tr. 275, Resp't. Ex. 2, at 11. Alternatively, the rated lifting capacity based on the chart for intermediately extended outriggers would be 13,400 lbs. Resp't. Br. 11-12, Resp't. Ex. 2, at 23. Both rated lifting capacities are greater than the 10,000 lb. weight of the counterweight. However, Stafford conceded that his estimate of the length and angle of the crane was based on a photograph of the crane taken on July 16, 2009, not on actual measurements of the crane. Tr. 269-270, Gov't. Br. 3, Gov't. Ex. 3-10.

Darren Payne

In July 2009, Darren Payne was employed as a mechanic at the Maysville Mine. Tr. 289. He had 16 years of mining experience. Tr. 290. Payne corroborated Cooper's testimony that the crane's right front outrigger rested on stable ground prior to lifting the counterweight. Tr. 294.

Gerald Fields

In July 2009, Gerald Fields was employed as a maintenance supervisor at the Maysville Mine where he has worked for 30 years. Tr. 302-303. On July 15, he assigned Donald Cooper, Jack Stafford and Darren Payne to use the crane to lift the counterweight back to the belt frame. Tr. 304-305. Fields testified that he was asked by Stafford to watch the right front outrigger for any movement during the test lift, and that he observed that the outrigger was stationary during the test lift. Tr. 307-308. He denied admitting to Inspector Jones that the condition of the right front outrigger was unsafe, claiming that if he thought the crane was unsafe, the crane would not have been operated. Tr. 313-314. Fields corroborated Cooper's testimony that the crane's right front outrigger rested on stable ground prior to lifting the counterweight. Tr. 308.

Edward Reinders

In July 2009, Edward Reinders was the Health and Safety Manager at the Maysville Mine. He has a Bachelor of Science in occupational safety from Iowa State University, and has spent 15 years in the mining industry. Tr. 317-318. Reinders corroborated Cooper's testimony that the crane's right front outrigger rested on stable ground prior to lifting the counterweight. Tr. 339.

⁷ Respondent's brief explains that the discrepancy between this estimate and the 24,000 lb. figure Cooper saw on a monitor in the crane cab is due to the fact that Stafford's estimate is very conservative. Since the height of the mine is 60 feet, the length of the boom was probably lower than 60 feet. If Stafford had used a 50 foot boom length (50 feet was the next lowest boom length for which chart data was available), the rated lifting capacity would have been 24,900 lbs., a similar figure to that on the crane monitor. Resp't Br. 11 n.7

ANALYSIS

Citation No. 6510324

Section 57.14205 states that “[m]achinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer, where such use may create a hazard to persons.” Gov’t. Ex. 1, at 1-2. The Secretary bears the burden of establishing all elements of a violation by a preponderance of the evidence. *Jim Walter Resources, Inc.*, 28 FMSHRC 983, 992 (Dec. 2006). The Secretary, relying on Inspector Jones’s testimony, first alleges that on July 15, 2009, while the crane was in operation, 1) the ground underneath the float of the right front outrigger was unstable and 2) the crane’s outriggers were non-equidistant from the body of the crane (the left outriggers were intermediately extended while the right outriggers were fully extended). Gov’t. Br. 11-13. Second, the Secretary alleges that the combination of these adverse work conditions caused the crane to be used beyond the design capacity intended by the manufacturer under 30 C.F.R. § 57.14205.⁸ Gov’t. Br. 10-13. Since the court concludes that the application of the standard to the facts of the case required the Secretary to prove the quantitative rated lifting capacity of the crane when used as cited, and since the Secretary failed in that regard, the court, as set forth below, holds that the Secretary failed to meet her burden of proof.

The Secretary assumes that the design capacity intended by the manufacturer can be found by perusing the operator’s manual and the crane ratings manual. Therefore, if a crane violates a provision in the manual, it violates the governing standard. Gov’t. Br. 11-13. Regarding the provisions in the manuals, Inspector Jones testified that certain provisions in the operator’s manual (hereinafter referred to as “general prohibitions”) prohibit outrigger floats from resting on unstable ground and prohibit non-equidistant outriggers. Tr. 90, 118-119. The general prohibitions in the operator’s manual hold that “outrigger pontoons [floats] must be on a smooth, solid surface” and that “when operating on outriggers, all beams must be equally

⁸ The Secretary’s argument that the failure of Carmeuse’s employees and management to read or understand the operator’s manual made the crane categorically unsafe for use will not be considered in detail. Gov’t. Br. 10-11. The Secretary’s evidence in this regard is inconclusive. Inspector Jones conceded that his belief that employees were not familiar with the operator’s manual was pure speculation and was based on the fact that employees were not initially able to locate the operator’s manual. Tr. 97-98. Moreover, the employees and members of management who testified at trial simply stated that they had not read the operator’s entire manual from front to back, not that they had not read the manual at all. Tr. 246, 341. Lastly Cooper provided uncontradicted testimony that employees were trained by the manufacturer on how to use the crane safely, and Jones conceded that training by the manufacturer is a good way to learn how to safely operate a crane. Tr. 169-170, 209-210.

extended.” Gov’t. Ex. 4-9, 4-22.⁹ The Secretary interprets these two provisions of the operator’s manual to categorically prohibit outriggers from resting on unstable ground and non-equidistant outriggers. The Secretary argues that under the operator’s manual, if an outrigger rests on unstable ground or if the outriggers are non-equidistant, the crane is unsafe for lifting any load. Tr. 202-206.

Regarding unstable ground, Jones testified on the basis of his own knowledge that if the ground below the float of an outrigger is unstable, the crane cannot safely lift any load since “just the weight of the machine itself could cause . . . the thing to topple over with no load on at all.” Tr. 77. However, he conceded that he did not know the crane’s rated lifting capacity as it was currently set up stating that “I nor anyone else would . . . have the capacity to understand what it’s [crane’s] capable of doing unless its set up right.” Tr. 78. He also conceded that he did not look at the charts in the crane rating manual to determine the rated lifting capacity of the crane stating that when he cited Carmeuse, he “wasn’t concerned about the 10,000 lbs. [weight of counterweight],” but was simply concerned about the unstable ground. Tr. 183-185.

Regarding non-equidistant outriggers, the Secretary claims outriggers which are extended to different lengths from the crane’s body are categorically prohibited by the crane computer. In other words, if the crane computer determines that the outriggers are non-equidistant, the computer will immediately shut down to prevent unsafe use. Gov’t. Br. 9-10, 12. Cooper conceded that he entered equidistant lengths for all four outriggers into the computer, thus entering inaccurate data into the computer. Tr. 251. The Secretary alleges that Cooper purposely bypassed the crane computer’s safety mechanism since he knew that the computer would automatically shut down if he entered non-equidistant lengths for outriggers. Gov’t. Br. 9-10, 12.¹⁰

⁹ Jones only cited general prohibitions in the operator’s manual since he failed to look at the crane ratings manual prior to issuing the citation. Tr. 185-186. However, the crane ratings manual also contains similar general prohibitions against unstable ground and non-equidistant outriggers stating that “crane shall be leveled on a firm supporting surface” and “all outrigger beams must be extended to the same length; fully retracted, intermediate extended, or fully extended.” Resp’t. Ex. 2 at 3.

¹⁰ The Secretary’s evidence that non-equidistant outriggers are categorically prohibited by the crane computer is highly speculative. Gov’t. Br. 13. Inspector Jones testified that in general, a crane computer would shut down if it determined that the crane was being used unsafely. Tr. 79. However, Jones conceded that he did not have significant experience with crane computers, and that he did not sufficiently understand crane operation to fully operate a crane. Tr. 22-23, 122-123. Therefore, the evidence that the crane computer would automatically shut down if a crane operator entered non-equidistant outrigger lengths is inconclusive. Moreover, even if the computer categorically prohibited the crane operator from entering non-equidistant outrigger lengths, the Secretary failed to show that such a prohibition was intended by the manufacturer and not merely a technical glitch. The Secretary also failed to reconcile the computer’s

(continued...)

Carmeuse first argues that the crane was operated safely. Resp't. Br. 13-14. Cooper testified that the right front outrigger's float was placed on stable ground. Tr. 218. This testimony was corroborated by Stafford, Payne, Fields and Reinders. Tr. 262-263, 294, 308, 339. Cooper conceded that the outriggers were non-equidistant, but claimed that since the load would be lifted over the right side, fully extending the right outriggers would increase stability even if the left outriggers were only intermediately extended. Tr. 219-221. Therefore, the non-equidistant outriggers provided for greater crane stability than if all the outriggers were intermediately extended. Tr. 249-250.

Alternatively, Carmeuse argues that the Secretary failed to meet her burden to prove a violation since the Secretary, when citing the provisions in the operator's manual prohibiting unstable ground and non-equidistant outriggers, ignored another provision in the operator's manual (hereinafter referred to as a "compensatory provision"). Resp't Br. 12. This compensatory provision allows Carmeuse to continue operating the crane even in the presence of adverse work conditions such as unstable ground as long as Carmeuse compensates for such adverse conditions by reducing the rated lifting capacity of the crane, based on Carmeuse's judgment and experience. Gov't. Ex. 4-13. The full compensatory provision in the operator's manual reads as follows:

When such [ideal] conditions cannot be attained, loads being handled must be reduced to compensate. The amount loads are reduced depends upon how good or how poor actual operating conditions are. It is a matter of judgment and experience. Some factors which may require reduction of capacities are:

- a. Soft or unpredictable supporting surfaces.
- b. Wind.
- c. Hazardous surroundings.
- d. Inexperienced personnel.
- e. Poor visibility.
- f. Fragile loads.
- g. Crane in poor condition.
- h. Condition and inflation of tires.

When in doubt, do not take a chance. Reduce ratings more than you think you need.

Gov't. Ex. 4-13, Resp't. Br. 12.

¹⁰(...continued)

categorical prohibition of non-equidistant outriggers with the compensatory provisions in each manual.

A similar compensatory provision is present in the crane ratings manual stating that:

The user shall operate at reduced ratings to allow for adverse job conditions, such as: soft or uneven ground, out of level conditions, wind, side loads, pendulum action, jerking or sudden stopping of loads, hazardous conditions, experience of personnel, traveling with loads, electrical wires, etc. Side load on boom or fly is dangerous and shall be avoided.

Resp't. Ex. 2, at 4, Resp't. Br. 12. Carmeuse argues that these compensatory provisions clearly indicate that there is no categorical prohibition against adverse work conditions such as unstable ground and non-equidistant outriggers. At trial Carmeuse cited the text of the compensatory provision in the crane ratings manual. Tr. 272-273. However, both at trial and in arguing her case, the Secretary ignored the existence of these compensatory provisions. Therefore, the validity of these compensatory provisions is not disputed in this proceeding.

As will be seen below, the court finds that this case can be resolved solely on the text of the compensatory provisions whose validity and applicability to this matter is not disputed. In light of these compensatory provisions, it is unnecessary to resolve certain factual and legal disputes between the Secretary and Carmeuse. Even if some facts alleged by the Secretary are taken as true (*i.e.*, the ground underneath the right front outrigger was unstable, non-equidistant outriggers harm crane stability), the court would still find that the design capacity of the crane does not include categorical prohibitions against unstable ground and non-equidistant outriggers. Further, even if a legal argument presented by the Secretary is taken as true (*i.e.*, the text of the manuals provide the crane's design capacity), the court would still find that the design capacity of the crane does not include categorical prohibitions against unstable ground and non-equidistant outriggers.¹¹

While both manuals contain general prohibitions proscribing unstable ground and non-equidistant outriggers, they also contain compensatory provisions allowing Carmeuse flexibility

¹¹ In contrast to the Secretary, Carmeuse asserts that the text of the manuals may not always provide the crane's design capacity. Specifically, Carmeuse alleges that the text of the standard (§ 57.14205), even in the absence of the compensatory provisions of the manuals, rejects an interpretation of design capacity which would categorically prohibit use of the crane in certain adverse work conditions. In other words, Carmeuse argues that even in the absence of the compensatory provisions, the general prohibitions in the manual would be inconsistent with, and would be superseded by, the text of the governing standard. Gov't. Br. 7-9. Such hypothetical issues in textual interpretation need not be decided at this time.

to operate the crane in less than ideal conditions.¹² Gov't. Ex. 4-13, Resp't. Ex. 2, at 4. The compensatory provisions in each manual simply require that Carmeuse, in light of its judgment and experience, reduce the crane's rated lifting capacity by incorporating the impact of adverse work conditions. Gov't. Ex. 4-13. The flexible language of the compensatory provisions is in stark contrast to a genuine categorical prohibition in the crane ratings manual which defines the term No Load Stability Limit as "the radius or boom angle beyond which it is not permitted to position the boom because the crane can overturn without any load on the hook." Resp't. Ex. 2, at 4. Therefore, the court notes that there are no categorical prohibitions against operating the crane in the adverse work conditions at issue.

In the context of these compensatory provisions, the Secretary needs to prove a quantitative element to meet her burden of proof. The Secretary needs to show that despite the flexibility of the compensatory provisions, the combined adverse work conditions reduced the crane's rated lifting capacity below the weight of the counterweight. In other words, the Secretary must show that on July 15, 2009, despite Carmeuse's ability to compensate for adverse work conditions, the unstable ground and the non-equidistant outriggers quantifiably reduced the rated lifting capacity of the crane below 10,000 lbs. In light of Carmeuse's evidence that the rated lifting capacity was between 13,400 lbs. and 24,000 lbs., at a minimum the Secretary would need to prove that the rated lifting capacity was 13,400 lbs. and that the unstable ground and non-equidistant outriggers reduced the lifting capacity by more than 3,400 lbs. Resp't. Br. 11-12, Tr. 223, Resp't. Ex. 2 at 23. While Carmeuse's data (which was based on photographs instead of actual measurements) is not as reliable as could be desired, in the absence of any data proffered by the Secretary, it is the only data available. Tr. 269-270, Gov't. Br. 3, Gov't. Ex. 3-10.

The court recognizes that such a showing is difficult for the Secretary since neither the operator's manual nor the crane ratings manual quantified the impact of unstable ground or non-equidistant outriggers on rated lifting capacity. Gov't. Ex. 4-13, Resp't. Ex. 2, at 4. Such a showing is also rendered difficult by the fact that Inspector Jones made no attempt to calculate the rated lifting capacity of the crane instead citing the crane solely on the basis of unstable ground beneath an outrigger. Tr. 182-186. However, the text of the manuals clearly requires the Secretary to provide quantitative data, and in the absence of quantitative data supporting the Secretary's argument, the court must hold that the Secretary failed to meet her burden of proof.

¹² The court notes that the compensatory provisions in both manuals do not explicitly refer to the adverse work condition of non-equidistant outriggers. However, the terminology of the manuals indicates that the list of factors in the compensatory provision of each manual is not exhaustive. Specifically, the phrase "some factors" in the compensatory provision of the operator's manual and the phrase "adverse job conditions such as" in the compensatory provision of the crane ratings manual indicate that the subsequent lists of factors in each provision may include job conditions not explicitly listed. Gov't. Ex. 4-13, Resp't. Ex. 2, at 4.

ORDER

IT IS ORDERED that Citation 6510324 be vacated, the proposed penalty is **DENIED**, and this case is **DISMISSED**.¹³

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

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/DM

¹³ Since the Secretary failed to prove a violation, it is unnecessary to consider whether a violation would have been deemed significant and substantial, a result of high negligence and unwarrantable failure, and the appropriateness of the penalty.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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Washington, DC 20004-1710

Telephone No.: 202-434-9933

January 30, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. KENT 2011-97
	:	A.C. No. 15-02709-234779
	:	
v.	:	
	:	
HIGHLAND MINING COMPANY, LLC	:	Mine Name: Highland #9 Mine
Respondent	:	

DECISION

Appearances: Brian D. Mauk, Esq., Rachel E. Levinson, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner
Jeffrey K. Phillips, Esq., Steptoe & Johnson, Lexington, Kentucky for the Respondent

Before: Judge Moran

Introduction.

This docket, which originally involved 12 citations, was reduced to four disputed matters.¹ Highland admits two of the violations, but challenges associated findings, such as the “significant and substantial” allegations. For the remaining two, it contests the fact of violation itself and, in the alternative, the findings associated with those, should the violations be affirmed. For the reasons which follow, the Court affirms each of the citations and the associate findings.

¹ In a joint motion to approve settlement, which motion was granted, eight of the 12 citations were settled. These were citation numbers 8501074, 8498630, 8501121, 8501122, 8507969, 8507970, 8501125, and 8501130.

The Significant and Substantial designation.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained that “In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard;² (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation;³ (3) a reasonable likelihood that the hazard contributed to will result in an injury;⁴ and (4) a reasonable likelihood that the injury in question

² The first requirement, a violation of a standard *or* a violation of the Mine Act itself, is straightforward. Inclusion of violations of the Act itself, not simply safety and health standards promulgated under it, makes sense because the Act has its own safety and health provisions established in its text.

³ The second requirement, the identification of a discrete safety hazard, means that there is a measure of danger to safety contributed to by the violation. For each violation alleged to be “significant and substantial,” the relevant hazard associated with the violation must be identified. Accordingly, to provide a few illustrative examples, in a case involving a violation for the lack of berms on a roadway, the judge cited the hazard of a vehicle veering off the roadway and rolling or falling down the incline. *Black Beauty Coal*, 2012 WL 3255590, (Aug. 2012). So too, in *Cumberland Coal*, 33 FMSHRC 2357, 2366 (Oct. 2011), the Commission held that an operator’s failure to install lifelines that could not be used effectively contributed to *the hazard* of miners not being able to escape quickly. Accordingly, in *Cumberland Coal* the Commission made a point of emphasizing that the Secretary need not show a reasonable likelihood that the violation itself will cause injury. Therefore, one does not analyze whether *the violation* will cause injury, because the violation is distinct from the hazard. This means that one is to determine if there is a reasonable likelihood that the hazard would cause injury. As applied in that case, that meant that an analysis of the likelihood of a mine emergency actually occurring is not part of the analytical equation. Thus, it is not the absence of a berm or the improper positioning of hooks along a lifeline that is the focus. Rather, for the second element, it is *the hazard* associated with the absence of those devices that is the subject for this part of the S&S analysis. Accordingly, an inspector, in determining if a matter is S&S would, upon finding a violation, identify the hazard associated with that violation by articulating the underlying hazard that was the genesis for the standard’s creation and then inquiring whether there is a *reasonable* likelihood, given the violation’s contribution to the risk, that the hazard will occur and cause injury and, if so, whether it would be a reasonably serious injury.

⁴ As for the third element, the Mine Act itself requires only that the violation of a
(continued...)

will be of a reasonably serious nature.⁵ Id. at 3-4 In *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (“PBS”), affirming an S&S violation for using an inaccurate mine map, the Commission held that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury. . . . the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” It also observed that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” Id. at 1281.

Finally, the fourth element, that the injury must be a reasonably serious one, has not been difficult to apply.⁶ Another way to express this is that negligible mining mishaps, such as

⁴(...continued)

standard make a significant and substantial *contribution* to the cause and effect of the identified mine hazard. It therefore may be thought of as a violation which has the effect of advancing matters towards the creation of a hazard and therefore moving events towards a hazard’s emergence. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). While this third element, that there be a reasonable likelihood that the hazard contributed to will result in an injury seems, in practice, to be the most difficult to apply, the applicable test, that there be “a reasonable likelihood” that an injury will result, is not as complex as it seems. It also may be helpful when viewed from the perspective of what is not required. Thus, the test does not require that it be demonstrated that it is more probable than not that an injury will result. Instead, only a reasonable likelihood is required to be shown. Whether that reasonable likelihood of an injury occurring has been shown is evaluated in the context of assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

⁵ Regarding the “continued normal mining reference” for S&S determinations, the evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. See *U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984). The determination of “significant and substantial” must be based on the facts existing at the time the citation is issued but also in the context of continued normal mining operations without any assumptions as to abatement, *Secretary of Labor v. U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574 (July 1984). Thus, it cannot be inferred that the violative condition will cease. *Secretary of Labor v. Gatliff Coal Company*, 14 FMSHRC 1982, 1986 (December 1992).

⁶ As noted in *Topper Coal* there may be circumstances when it is impossible to determine the particular hazard contributed to by the violation. *Sec. v. Topper Coal* 20 FMSHRC 344, 1998 WL 210949 (1998). *Topper* focused on the applicability of an S&S finding in the context of an MSHA spot inspection where mine management alerted a working section that the inspectors were present. Thus, one could not tell, because of the warning, what violations the inspectors might have uncovered had there been no advance warning given. It is noted that although three Commissioners agreed that the violation was S&S, only two of them
(continued...)

bumps, bruises and small cuts, do not constitute reasonably serious injuries. It's important to appreciate that when a standard is violated, the absence of an injury producing event actually occurring does not mean that the violation was not S&S. Restated, no injury need occur for the violation to be S&S. *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005).

The inspector's opinion in determining S&S.

The Commission and courts have observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995).

The S&S determination where health standards are involved.

Where health standard violations are in issue, the *Mathies* test applies upon finding, (1) the underlying violation of a mandatory health standard; (2) a discrete health hazard--a measure of danger to health--contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness;⁷ and (4) a reasonable likelihood that the illness in

⁶(...continued)

did so on a "presumption theory," that is, some violations may be deemed "presumptively" S&S. Those two Commissioners then cited other examples in which such a presumption had previously been applied in S&S matters. For example, those Commissioners noted that all violations of the respirable dust standard are presumed to be S&S, *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986) *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987) and that an S&S presumption has been applied to the preshift standard. *Manalapan Mining Co.*, 18 FMSHRC 1375, 1394-95 (Aug. 1996).

⁷ Where respirable dust is the health hazard, the Commission has stated: [G]iven the nature of the health hazard at issue [i.e., respirable dust induced disease], the potentially devastating consequences for affected miners, and strong concern expressed by Congress for eliminating respiratory illnesses in miners, ... if the Secretary proves an overexposure to respirable dust in violation of § 70.100(a), based upon designated occupational samples, has occurred, a presumption arises that the third element of the "significant and substantial" test - - a reasonable likelihood that the health hazard contribute or will result in an illness - - *KDVEHQ HMEOKHG* *Consolidation Coal* at 899. In *Secretary v. U.S. Steel Mining & R*, *QF* FMSHRC 1274 (September 1986), the Commission applied the analysis used in *Consol* to a case involving the respirable dust standard when quartz is present. After considering the legislative history which discussed the Congressional intent to prevent respirable diseases induced by silica-bearing dust, the Commission held that any overexposure to respirable dust based upon designated occupation sampling results giving rise to a violation of 30 C.F.R. Section 70.101 presents a discrete health hazard. See *Id.* at 1279-1280.

question will be of a reasonably serious nature.⁸ *Consolidation Coal Co.*, 8 FMSHRC 890, 897 (June 1986), aff'd 824 F.2d 1071 (D.C. Cir. 1987). The Commission elaborated: “[G]iven the nature of the health hazard at issue [i.e., respirable dust induced disease], the potentially devastating consequences for affected miners, and strong concern expressed by Congress for eliminating respiratory illnesses in miners, . . . if the Secretary proves an overexposure to respirable dust in violation of § 70.100(a), based upon designated occupational samples, has occurred, a presumption arises that the third element of the “significant and substantial” test - - a reasonable likelihood that the health hazard contribute or will result in an illness - - has been established.” *Id.* at 899.

Citation No. 8501110.

This citation, involving an admitted violation of 30 C.F.R. § 75.1731(b), states: “[t]he 4-C belt line was not being maintained in proper alignment. The belt was out of alignment allowing the belt to rub 6 belt frames between crosscut 42 and 43. [T]he belt frames were beginning to get warm to the touch and had started to cut into the belt frames.” Citation No. 8501110. The cited provision, entitled, “Maintenance of belt conveyors and belt conveyor entries,” provides in relevant part: “(b) Conveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components”

Highland admits the violation, but it disputes the S&S and moderate negligence designations, and that it affected four miners.

⁸ In a similar fashion, regarding the fourth element of *Mathies* in the context of health violations, the Commission held that there is a reasonable likelihood that illness resulting from overexposure to respirable dust will be of a reasonably serious nature. On appeal, the DC Circuit affirmed the Commission's decision and rejected Consol's argument that the presumption adopted by the Commission lacks a rational basis because short-term exposure to respirable dust can never result in a significant and substantial violation. It observed: “Consol's argument fails to consider the inherent difficulties in enforcing a health standard designed to prevent diseases caused by the cumulative effects of repeated overexposure to a harmful substance. The harmful effect of any one incident of exposure to excessive concentrations of respirable dust is negligible - - as the ALJ phrased it, a “drop in the bucket.” Thus, acceptance of Consol's argument would mean that no violation of the respirable dust could ever be designated as significant and substantial.” *Consolidation Coal*, 824 F.2d at 1085, at 1086.

MSHA Inspector Archie Coburn,⁹ the issuing inspector, stated that he issued the citation to Highland employee Tommy Witherspoon,¹⁰ while he was traveling through the number 4 unit, upon smelling smoke in the air and investigating its source. Shown Exhibit P 3, which reflects Citation Number 8501110, it was issued by him on August 12, 2010. Exhibit P 4, are his notes related to that Citation. The smell prompted him to travel over to the 4C belt where he saw that the belt was out of alignment and rubbing against the belt frame.¹¹ Tr. 131, 141.

Inspector Coburn noted on his citation that the belt was “rub[bing] 6 belt frames.” That is, for the belt, which is on a stand, or framing, and has top and bottom rollers, six of the belt frames had the belt out of alignment where the belt was rubbing the belt frames. Tr. 136. With the sections being 10 feet between each one, the affected area covered a distance of 60 feet. Tr. 137. Coburn found that the belt frames were beginning to become warm to the touch. He later described that it was *starting to get warm*, that is, warm to the touch. Tr. 182. Thus, he agreed it was not yet hot. He knew this by touching it with the back of his gloved hand. Tr. 138. Coburn added that belt was cutting into the frame. Though he did not take measurements, he observed that it had cut in a quarter to a half-inch and this was present at all six rubbing locations. Tr. 139. He estimated that the belt had been out of line for “at least 48 hours,” based on the location of the face and crosscut 43. That is, his time estimate was made upon considering the location where he found the problems as compared to where the unit’s mining had progressed to that point in time. Persons would travel the 4C belt line. For example, the belt examiner would see it twice a day and miners assigned to shoveling and cleaning that belt line would also see it. Tr. 141.

Coburn marked the “gravity” of the violation as reasonably likely to result in an injury or illness, based upon mining continuing without the problem being corrected and then considering, if an accident were to occur, that miners would be exposed to smoke inhalation and also the possibility of a belt fire. Again, his concern was focused upon the belt continuing to rub into the frame and with that, the frame would continue to become hotter. The Court notes that this is the

⁹ Mr. Coburn has been an MSHA Inspector for more than 22 years. Tr. 126. He is also the senior accident investigator for District 10. Tr. 126. His experience also includes private employment with mining companies and he has both Kentucky mine foreman papers and his “electric card,” meaning he holds the title “mechanic, electric.” Tr. 128.

¹⁰ Keith Bellman (or “Bellmer”), the miners’ representative, was also with them, although traveling on a separate golf cart. Tr. 134. Coburn was at the mine on that day to terminate another citation he issued in connection with his E01 inspection.

¹¹ It was the smell that first caught his attention, and the Inspector advised that he was quite familiar with that particular odor, as he has encountered it before and therefore he recognized it from his experience. Tr. 132. Having notice the odor, Coburn stopped the golf cart style ride they were using during his inspection, and began to “hunt for the cause of the belt rubbing.” Tr. 133.

implicit concern addressed by the cited safety standard. Thus, the Inspector's and the safety standard's concern is the risk of a belt fire or belt ignition. With such rubbing, eventually shavings or, as they were also described, "ravelings" would come off the belt at the locations where it was rubbing against the frame. They would then fall to the mine floor and their heat could cause them to catch on fire. Tr. 144. The belt itself was fire retardant but not *flame* retardant. Tr. 144 .

Placing this citation in context, there was some recent history with similar belt issues at this mine. Inspector Coburn, who has lengthy experience inspecting this mine, has seen a belt fire at this mine, the Highland 9. Tr. 144. In fact, Coburn saw a belt fire about 3 days prior to the citation in issue. Tr. 145. At that time he had traveled up the *same belt line*, about 18 crosscuts¹² inby from the location of the citation in issue presently, where he observed smoke in the supply road, and discovered a fire in a "crossover."¹³ The scoop operator was trying to locate the source of the fire at that same moment. Tr. 1541. Coburn located the fire underneath the bottom belt in the crossover. Tr. 147. An accumulation had built up at that location, where he found a locked-up roller and a fire. Tr. 145. In using the term "fire," Coburn meant observing coal fines underneath the belt which were on fire, that is, burning. In fact, he found a 3 inch by 4 inch hole in the belt and he saw flames underneath the roller. Tr. 147. Analogizing the condition to a fireplace, he observed both "embers" and a "short flame." Tr. 148. Tommy Witherspoon was also with Coburn on that earlier occasion and, at Coburn's instruction, he went back to tell others that a fire hose was needed. Tr. 148. Forty minutes elapsed from the time of the detection of the smell and smoke to the time of extinguishing the fire. Tr. 151. Coburn's citation for this was marked "S&S," but not as an unwarrantable failure. Tr. 173-174. Thus, in neither the present instance, nor the instance three days' earlier, did he mark the violations as unwarrantable failures.

Having encountered the fire three days earlier, Coburn had a similar concern that the most recent event could also develop into the same problem. Tr. 152. He marked the citation as an injury or illness expected to result in lost work days or restricted duty because, if a fire were to occur, miners inby would be affected by the smoke off the belt line. Also, if miners were evacuating, as the secondary escapeway is only one crosscut over from the belt line, Coburn stated that they would be exposed to smoke inhalation. Tr. 152. This is because there is common air between the belt line and the escapeway. Tr. 154. Further, those arriving to deal with such a fire would also be exposed to smoke inhalation. Tr. 153. Coburn listed that four miners could be affected because some smoke would make its way to the face. This is so since not all the smoke would go to the return regulator, as that is not a completely airtight device.¹⁴

¹² The crosscuts here were on 72.5 centers.

¹³ A crossover is a metal frame allowing miners to cross over the moving belt. In effect, it is a bridge to allow them to cross the belt. Tr. 145.

¹⁴ The regulator or "air lock" is not air tight because the belt has to pass through it and the
(continued...)

Therefore, in addition to those who would need to fight the fire, there would be the miner operator or pinner, and the FCT¹⁵ operator exposed. Coburn explained further that miners on the left side would be exposed to smoke from such a fire.¹⁶ Tr. 155.

Coburn marked the violation as “moderate negligence” because the belt line is to be checked frequently,¹⁷ including each time the belt is moved up.¹⁸ The rubbing here was on the supply side road, which is the right side of the belt. Tr. 157. Although both sides of the belt are to be examined, the right side is more easily viewed because the belt examiner travels on that side. Tr. 158. When Coburn issued his citation, the belt would have last been examined on the second shift, (4 p.m. to 1:30 a.m.), the night before. That would mean an examination occurred at a time some 8 to 12 hours before the citation.¹⁹ Tr. 159. Coburn did state that it was difficult to rely upon the extent to which the belt had cut into the frame as a guide to assessing how long the belt had been rubbing, because a mine may be using old framing and the cut may have been from a prior occasion. Tr. 160. In any event, the Inspector could only note with certainty that the belt was passing through cuts in the framing. He could not assess whether the frame cuts themselves were old or new, as that would be difficult to determine. Tr. 161-162. Besides, old

¹⁴(...continued)
action of that belt movement can pull smoke in that direction. Tr. 156.

¹⁵ “FCT” refers to the Flexible Conveyor Train, and as its name implies, it is machinery that literally has a, snake-like, flexible conveyor line trailing from the machine’s coal entry point. It is part of the continuous haulage equipment and it allows coal to be conveyed, even while the machine is being trammed. Tr. 914. The FCT is part of the continuous haulage unit that actually dumps coal onto the low framing. From there, coal goes to the main belt. Tr. 329-330.

¹⁶ By comparison, those on the right side of the unit, because that is on the intake side, get fresh air until they get over to the belt entry. Tr. 155.

¹⁷ The belt is not required to be examined during the third shift because coal is not run then. Tr. 159.

¹⁸ The Inspector did not mark the violation as an “unwarrantable failure” because he took into consideration that the belt examiner made an examination during the second shift, the night before. It was possible that the unit was moved up after that exam and that the misalignment occurred after that. Thus, it was possible that the misalignment was fairly recent, occurring after the second shift belt exam. Tr. 172.

¹⁹ At this mine, miners go underground at 7 a.m. and coal production will typically start around an hour later. Therefore, at the time Coburn issued his citation coal had been running for about an hour. Tr. 166. Given this relatively short period of time since the belt was reactivated, Coburn found the framing to be warm, but stated that it would have progressed to being hot as the rubbing continued. Tr. 167.

frame cuts or new, Coburn's concern was the fact of the rubbing and the attendant friction and heat. Tr. 163. Coburn did consider it to be a mitigating circumstance that the mine has personnel that are to exam the belt line as a full-time duty.

Upon cross-examination, Coburn stated that he takes his notes at the time he encounters a problem underground.²⁰ These notes reflect the conditions he observes. Tr. 177. He agreed that he puts important matters in his notes.²¹ Tr. 177. However, Respondent's Counsel pointed out that the notes do not mention that the inspector smelled the burning odor nor do the notes reflect seeing smoke. Tr. 177-178. Coburn's explanation was that if he included *everything* that he observed or smelled, all his time would be spent on note taking and not on conducting his examination. Tr. 178. He added that in this instance the smoke was not of a degree that it was filling up the belt entry or the supply road with smoke. Tr. 179. If the latter were to have occurred, he would have marked it in his notes. Tr. 179-180. Further regarding his notes, Coburn did not claim to have a perfect memory, nor that his note taking was perfect. Tr. 216-

²⁰ Inspector Coburn had not at that time examined the books, in which hazards such as belt rubbing are to be reported, because he had planned to "make," that is, to examine, the return air courses later that day after terminating his earlier issued citation for insufficient fire outlets. Tr. 168. It was while on his way to do those tasks that he came upon the belt smell and smoke issue connected with this citation. The problem was abated by having a scoop move the framing so that it was put back in alignment. This effort took about 20 minutes to perform. Tr. 169- 170. In determining whether a violation of this nature is "S&S," Coburn includes consideration of the amount of shavings or ravelings he finds on the ground near the rubbing and from that, makes inferences about how long the problem has continued. Tr. 175.

²¹ The Inspector was directed to Exhibits P 34 and 35, pertaining to Citation 8501142, wherein he noted at page 5 of P 35 that smoke could be seen and smelled in the belt entry. Tr. 180. Thus, he *did* include that information in what arguably was a similar situation. Tr. 181. Speaking to the apparent inconsistency that the Inspector's notes mentioned smoke and odor in one citation, but did not do so in this instance, he stated it was a matter of degree. In the present situation he could smell the odor caused by the rubbing, but there was not enough smoke in the air going towards the unit. In the other situation, there was enough smoke in the air and the supply road and belt line. Tr. 209-211. Thus, noting it or not is dependent on the amount of smoke he encounters; if it's a small amount he will not note it, but if it's more significant, he will. Tr. 211. Because it was raised at length during cross-examination, the Court inquired of Inspector Coburn if he was absolutely sure that there was smoke and odor connected with this citation, despite the fact that his notes failed to record those, and the Inspector confirmed that both were present. Tr. 220. Coburn noted that, if he hadn't detected the smell, he never would have gone up to the belt at all. He simply would have gone to the unit, terminated the citation on the fire nozzle problem and proceeded to the return. Tr. 220. This explanation make sense. The Court also comments that while Coburn's notes were not perfect, it considers the credibility of the Inspector's testimony to be the critical determinant, not his note taking "grade." Here, the Court finds that Inspector Coburn was a credible witness.

217. However, even if not recorded in his notes, reading the notes will jog his memory as to other facts associated with his citations and orders. The Court finds that the Inspector was credible in these assertions.

Given that Coburn's admitted concern was an ignition and his agreement that one needs oxygen, a heat source and fuel for that to happen, he was questioned about those elements. He agreed there were no accumulations present around the cited area. He could not recall the ignition temperature of loose or fine coal or coal dust. Tr. 185. Nor did he take the temperature of the belt stand. Accordingly, Coburn was not contending that there was a likely ignition *at that time*. However, he added that "*if normal mining would have continued* [with] the belt being out of alignment, the temperature would increase along with the possibility of a fire." Tr. 185. (emphasis added). Coburn stated that the fuel source would be the belt itself, that is, the ravelings as they came off the rubbing belt. Tr. 186. He stated that they would become hot enough to start a fire upon falling on the mine floor. Tr. 186. However, he agreed that at the time of the citation there were not yet belt shavings²² present. Tr. 186.

Typically, Coburn informed, the belt structure is advanced twice a shift. Tr. 190. That is a general statement, as many variables can affect advancement. In some instances the third shift may advance the belt for the day shift. Therefore, if the belt were moved on the third shift, the day shift would not become aware of any misalignment until they started work that morning, around 7 to 8 a.m. Tr. 191. The last time a belt examiner would have performed his job prior to the citation in issue would have been on the 2nd shift on August 11th sometime in that afternoon, between 4 p.m. to 12:00 a.m. Tr. 192. This does not tell the whole story however, as the Inspector pointed out that the belt was out of alignment *at the time they installed the frames*. Accordingly, its misaligned state could have been recognized at that time.

Referring to Coburn's prior experience with a belt fire at this mine, as discussed earlier in his testimony, the Inspector agreed that, per 30 C.F. R. § 50.2(h)(6), an "accident" includes an unplanned fire, not extinguished within 10 minutes of its discovery. Such an event requires reporting of the event to MSHA. Coburn agreed that earlier incident was not reported to MSHA, nor was Highland cited for any such failure regarding that. Tr. 195-196.²³ However, the

²² Coburn described shavings as "part of the belt, part of the rubber" whereas the ravelings "is actually out of the belt." Ravelings come off the belt itself, though some may become wrapped around the rollers or stay on the belt. Tr. 187. That the problem had not reached the point that a fire was imminent at that time, does not mean a serious problem would not have developed.

²³ Trying to show the relative lack of seriousness of that event, Respondent's Counsel obtained the Inspector's agreement that no miners were escaping the mine because of a belt fire. Tr. 196. However, Inspector Coburn did not retreat from his assertion that four miners could have been affected. The particular individuals affected would vary, depending on the circumstances at the time a fire started. For example, if a fire were on the return side, there

(continued...)

Inspector did not agree that the entire incident was resolved by the time he arrived at the scene of the event. He added that MSHA has encountered mine fires that have gone back against the intake air for thousands of feet.²⁴ Tr. 201.

Coburn stated that the belt's ignition temperature would be lower if it became unraveled or had shavings coming off it. Tr. 202. As noted, the belt, being flame retardant, provides less protection than the newer, flame resistant belts. Tr. 203. The "ravelings" are cords that are within the belt. Tr. 203. Those cords are made of nylon thread. The Inspector added that he has seen belt shavings and belt ravelings catch fire. Tr. 204. Any smoke that did make it past the regulator would travel up to the three entries. Tr. 208. From there, it would continue to the last open crosscut. In terms of the approximate 20 percent that will get past the regulator, Coburn expressed that such an amount *is* a sufficient amount to cause concern because, with any smoke going up to the unit, there will be carbon monoxide traveling with it. Tr. 213. However, Coburn agreed that, at the time of his citation, no CO monitor had alarmed. Tr. 214.

Thomas Witherspoon testified for the Respondent regarding on this matter. He has been working in coal mining for some 21 years. Tr. 957. He has his mine foreman papers and is familiar with the way belt exams are performed. Tr. 958. Shown Ex. P 3, Citation No. 8501110, Witherspoon stated that he remembered the event and that he was with Inspector Coburn on that day. Tr. 959. They traveled to the mouth of the unit and then were in the belt line, having traveled some 2000 feet or so before arriving at the No. 4 C belt entry. Tr. 962. Once in the belt entry, they traveled some 50 crosscuts before reaching the section. Tr. 963. Thus, Witherspoon contended that he and Inspector Coburn were traveling down the belt entry so that the Inspector could examine the 4C belt entry. Tr. 963. This examination is done by walking or using a golf cart. Tr. 963. He stated that no smell or odor caused them to use that

²³(...continued)

would be the roof bolter, the flexible conveyor train ("FCT") operator, and the scoop man. In the event the FCT were on the right side, there would be the section foreman and a mechanic exposed. Tr. 197. Coburn summed up that the minimum number exposed would be the roof bolt operators, the miner operator and the FCT operator. Tr. 198. They would be located about 800 to 900 feet away from the condition cited. Tr. 198. The smoke from such a fire would be going inby to the unit. Tr. 198. While, in theory, all smoke should be directed to the return air lock, that device does not stop all smoke, as there must be an opening sufficient for the coal laden belt to pass. Tr. 199. Coburn could only make a guess as to the amount of smoke that would make its way through the return air lock, but it was his view that somewhere in the neighborhood of 20 percent of the smoke would make it past the air lock. Tr. 200.

²⁴ He acknowledged that in this instance he did not find any problem with the air lock, that the area was rock dusted, and that he found no noxious gases with his spotter device, nor methane problems. Tr. 201.

belt entry. Tr. 964. Shown Inspector Coburn's notes from that August 12th event, Witherspoon²⁵ agreed that the Inspector's notes do not reflect anything about being in another entry and then going over to the 4C belt because of any smell or smoke. Tr. 965. Accordingly, Respondent disputes Inspector Coburn's version of the events leading to the discovery of the admitted violation.

As the two proceeded down the belt line, Witherspoon stated that the Inspector saw an area where the belt was running out of alignment and he noted that condition as well. Tr. 966. However, Witherspoon stated there was no smoke, nor smell, present. Tr. 966-967. Nor did he, Witherspoon, see any accumulations of combustible material, nor belt fraying, nor belt shavings, or coal dust or coal accumulations. Further, he stated that the area was well rock-dusted. Tr. 967.

Witherspoon did acknowledge that the roller in issue was "a little warm, you know." Tr. 968. Still, he expressed that one could hold it bare-handed without receiving a burn. Tr. 968. In fact, Witherspoon stated that he touched the belt framing while the belt was moving and it was not even hot at that time. Tr. 970. He did not disagree that there was a violation. Rather, his dispute was with the S&S designation. While he admitted that the framing was warm, as just noted, he reiterated that the area was well rock-dusted and there was no fuel for the "fire triangle" of fuel, oxygen and heat. Tr. 971. Mr. Witherspoon also stated that no belt examiner had yet been through the area at the time the violation was discovered.²⁶ Tr. 973. Based on his familiarity with the belt examiner inspections, he figured no examiner would be there until "at least around 10:00." Tr. 974. Witherspoon believed that the examiner would have spotted the problem. Tr. 974. Such an exam occurs once per shift. Tr. 982.

Mr. Witherspoon also took issue with the idea that four persons would be affected, believing that only one person, the belt examiner, would be affected. Tr. 975. Witherspoon agreed that four persons would be on the left side, but that they would be towards the middle of the unit. Tr. 976. He did not believe that smoke would make its way to the unit because of the air lock and the return brattice line and intake brattice line. With those devices, air that is

²⁵ Witherspoon stated that Inspector Coburn mistakenly referred to him as Watkins, because both have the given name of Tommy. Tr. 964.

²⁶ Witherspoon stated that he knew this because, "once you get in on the belt line, there's examination pads, like pieces of belt that they will have hanging every so often, and they will put their 'DTIs', dates, times and initials on it, you know, proving that they have been down the belt." Tr. 973. At first, Witherspoon stated that distance for these examination pads would vary from mine to mine. When asked about Highland's practice, he said it would be every 10 to 15 crosscuts. Tr. 993. Witherspoon then stated that there could be instances when one would put up additional DTI boards, such as if there were a "bad area." Tr. 994. He then retreated from that admission, stating that *he* would not put up an additional board, *but others* might do so. Tr. 994-995.

coming down the belt line travels to the regulator. Tr. 976-977. Nor did Mr. Witherspoon believe that the negligence should be marked as moderate for this violation.²⁷ This was because the belt examiner had not been to that area yet. While the belts are started up around 6:00 a.m., coal is not dumped on them until around 8:00. Tr. 978.

Witherspoon agreed that the 4C belt line is adjacent to the supply road and that they run parallel to one another. Tr. 979. As to whether the two have common air, Witherspoon stated “they are both moving in the same area,” a response meaning “yes.” Tr. 979. He agreed that there would be at least four people traveling in the supply road. Tr. 979. When asked if 100% of the air goes through the regulator, Witherspoon said it is *supposed to work that way*. Tr. 979. Thus, he contended that air will not make its way through the gap in the regulator where the coal moves along the belt, nor did he agree that the gap is about four feet wide. Tr. 980.

Mr. Witherspoon also did admit that the frames, which are about 10 feet apart, were being rubbed in about six different locations. Tr. 982. When asked if he saw that the belt had begun to cut into the belt frames, Witherspoon responded that “I observed where the belt was rubbing into the frames is what I observed.” Tr. 982. However, noting that such frames are reused, he maintained this was occurring in an area where there had been cutting from earlier times. As he had earlier in his testimony referred to rust as an indicator that belt cutting into the frame was old, rather than new, the Court inquired whether he saw rust around the areas of belt cutting here. To that query, Witherspoon responded “*I don’t recall*.” Tr. 992 (emphasis added).²⁸ Tr. 982. He also maintained that if the rubbing had continued, it might not necessarily grow hotter, as the belt may ease back over to its correct position. Tr. 983. As to whether he has *ever* seen a belt cutting into the belt framing, Witherspoon informed, “*Not that I can recall*.” Tr. 984 (emphasis added). He did acknowledge that he has seen a belt worn and seen shavings that fall off it where it has been rubbing. Tr. 984.

It would be fair to state that Mr. Witherspoon had several areas of disagreement with Inspector Coburn’s recounting. For example, while he admitted that Coburn called an event which occurred three days earlier, a “belt fire,” he did not agree with that description because he

²⁷ On the subject of moderate negligence, Witherspoon’s view was this meant “You should - - might have should have known about it.” Tr. 988.

²⁸ The Court would note that in the 2 ½ years it has been hearing cases, it is routinely asserted by mine operators, when belts are observed to be cutting into frames, that these cuts were from *earlier* events, as the stands are reused. But there must be *some* occasions when belts cutting into frames is a first occurrence. As it comes up so often, it may be helpful for Inspectors to take note of signs as to whether the cuts show indications of being new, or not, as the case may be. In this instance, the issues can be resolved apart from this.

never saw flames, or a fire.²⁹ Tr. 987. In response to questions from the Court, Witherspoon admitted that when one comes upon a warm roller “you need to take care of it.” However, his first expression of the motivation to take care of it was that *it can impact production* if the belt then pulls apart. Tr. 989. In fact, apart from his concerns over the impact upon production, Witherspoon then advised, “*Well, I wouldn’t have been afraid to walk off from it.*” Tr. 990. In fact, if he never got around to fixing the problem that day and went home without correcting it, it “[w]ouldn’t bother me.” Tr. 991. The Court considers these responses to be informative on both the S&S and negligence issues.

Respondent’s Contentions.

As noted, Highland concedes that the standard was violated here. However, it disputes the significant and substantial (“S&S”) designation, that four miners would be affected by it, and that the violation resulted from “moderate negligence.” R’s Br. at 3. In support of its position, Highland points out that the Inspector’s notes do not mention smelling a rubbing belt, nor observing smoke, though his testimony described those conditions.³⁰ As for the Inspector’s testimony that the belt stands had half-inch cuts, the Inspector agreed that those cuts could have occurred from earlier damage, as the stands are moved and reused. Even if the cuts were new, Respondent maintains that belt and structure rubbing contacts were “well beyond where any combustible material may accumulate.” R’s Br. at 3-4. The Respondent also asserts that the Inspector’s estimate of the length of time the belt had been misaligned, 48 hours, is suspect. Respondent maintains that, as the belt is examined every production shift, and as the belt books did not note such an issue, the condition would not have been present for such an extended period, as the Inspector suggested. Further, as the temperature of the stand was only starting to become warm, the condition was likely a new development. When the Inspector found the problem, the belt examiner had not yet been to that area, but was scheduled to arrive not long after the citation was issued. R’s Br. at 6.

Respondent also notes that the Inspector referred to the *possibility* that a belt fire could ensue if the condition remained uncorrected and it contends that does not satisfy the S&S standard, as that description means a fire was not “reasonably likely to occur.” R’s Br. at 8. The Inspector agreed that there were no accumulations of combustible material, such as coal or belt shavings, at the time of the Citation’s issuance. In addition, the Respondent challenges Inspector Coburn’s listing that four persons could be affected, because the citation refers to the number affected, not “the number that ‘could’, ‘may’ or ‘might’ be affected.” R’s Br. at 8. Those individuals were some 800 to 900 feet away and the air lock was between their location and the cited condition. Accordingly, Respondent maintains that the air lock would have directed any smoke from a belt event to the return.

²⁹ Mr. Witherspoon was with Inspector Coburn when that citation was issued. Tr. 987.

³⁰ The Court has already commented upon this putative deficiency. Inspector Coburn was credible.

The Secretary's Contentions.

The Secretary notes that the Inspector's findings were based upon the assumption of continued normal mining operations and assuming that the condition was not corrected. The Inspector believed that a belt fire was possible, as the frame continued to heat up, and with belt shavings igniting, from the frictional heat. The Inspector's concern was not simply anecdotal; upon observing smoke in a supply road at this mine just three days prior to this matter, he investigated further and found a belt fire.

The Secretary also points out that there is no dispute that the belt was out of alignment and that it was rubbing the belt frame at six different locations. Just as in the previous belt rubbing condition he had observed three days prior, the belt was both out of alignment and rubbing against the belt framing. In time, that friction would create belt shavings, those shavings would accumulate and, as the shavings are combustible, at some point they would ignite. It adds that it must not be forgotten that at the time the condition was observed, the belt was running coal.

As to the number of miners potentially affected, the Inspector did identify the four miners on the return side but he also named the miners who would be called to deal with any belt fire and miners escaping through the adjacent supply road, which also served as a secondary escapeway. Although the Secretary acknowledges that Highland's Witherspoon testified to the absence of accumulations of combustible materials and that the area was well rockdusted and had no bad rollers, the same witness conceded that the shavings are themselves a combustion source. Further, the Secretary observes that the belt frame had already started to heat up at the time it was cited and this had developed even though coal had been running for only about an hour. Sec. Br. at 14-15. As for the contention that the regulator would whisk any smoke from a fire into the return, the Secretary notes that the Inspector advised that not all of such smoke is so directed and accordingly some smoke would find its way to the working section. *Id.* at 15. Further, the Inspector noted that miners escaping on the adjacent supply road and any fire fighting crew would also be affected, if there were a belt fire. In terms of negligence, it was the Inspector's view that the problem had existed for at least 48 hours and therefore the operator should have been aware of the issue. Still, as the operator was conducting exams in the area and because he believed the mine was not ignoring the problem, he assessed the violation to be moderate.

Based on these considerations, the Secretary's position is that its proposed assessment of \$1,304.00 is reasonable and serves as an effective deterrent, although a higher penalty could be supported. Sec. Br. at 16.

The Court's Conclusions regarding Citation No. 8501110.

The Court concludes that this violation was S&S and that the negligence was moderate. The Respondent has referred to the Inspector's statement of the *possibility* that a belt fire could ensue if the condition remained uncorrected, and that such a statement does not satisfy the S&S standard, as that description means a fire was not "reasonably likely to occur." R's Br. at 8. The Court views that as an inaccurate characterization of the law and the Inspector's expression. Given that the violation was conceded and the discrete safety hazard of a belt related fire is not disputed, it is the third *Mathies* element that is in issue: whether it was established that there was a reasonable likelihood that the hazard contributed to will result in an injury.³¹ The Court adopts Inspector Coburn's recounting of the events, including the circumstances leading up to the discovery of the problem. It also takes into account, the Inspector's view as to whether the condition was S&S. Even if it declines³² to find that the belt had been out of line for "at least 48 hours," the condition was S&S. Inspector Coburn was not contending that there was a likely ignition *at the time* he found the violation. However, he added that "*if normal mining would have continued* [with] the belt being out of alignment, the temperature would increase along with the possibility of a fire." Tr. 185. Also, as the Inspector pointed out, the belt was out of alignment *at the time they installed the frames*. Tr. 193. That assertion was not disputed.

The Court finds the third element present because the condition was already warm at the time the violation was discovered and there was no certain time established when the next examiner would arrive at the location nor whether it would be noticed, or at least attended to, during that examination. Recall that Mr. Witherspoon stated that he would have had no problem with *to walk off from it*, even if that meant never getting around to fixing the problem that day and he went home without correcting it. As he said, it wouldn't bother him. Therefore, the continuation of "normal mining operations" might be to continue running coal. Last, the fact that they were running coal at the time the violation was established, along with the fact that the condition was already warm when discovered, must be borne in mind. In the Court's view, Respondent's position comes too close to applying, in effect, an imminent danger test to sustain

³¹ The fourth *Mathies* element was not really in dispute here either. The arguments surrounding that element were over the number of miners who would be affected. Persons would travel the 4C belt line. For example, the belt examiner would see it twice a day and miners assigned to shoveling and cleaning that belt line would also see it. Tr. 141. Even if it were only one miner, that would satisfy the last element because there is no genuine dispute that a reasonably serious injury could result, if a fire were to have occurred.

³² This is not to state that the Court declines to adopt the Inspector's view, which as noted was based on the location of the face and crosscut 43, that is, the location where he found the problems as compared to where the unit's mining had progressed to at that point in time. It is simply not necessary to find that the condition existed for 48 hours in order to determine if the violation was S&S.

an S&S finding. Nor were the expressed concerns of the Inspector purely hypothetical. It was only *three* days prior to this citation that Inspector Coburn encountered a belt fire *at this mine*. Understandably, the Inspector had a similar concern that this violation could develop into the same problem.

Accordingly, the admitted violation is found to be S&S, of moderate negligence and a civil penalty of \$1,304.00 is assessed.

Citation No. 8501126.

Inspector Coburn's testimony also involved Citation Number 8501126, issued August 21, 2010. Tr. 221, Exhibit P-7, and Exhibit 8. The citation was issued for exceeding the permissible noise exposure level. Respondent contests the fact of violation and, alternatively, the S&S finding, the negligence determination, and the number of miners affected.

On the date of the citation's issuance, Coburn was doing a noise survey at the number 4 unit, as part of a diesel survey on the equipment outby. Such a survey is, as one would expect, conducted to measure the amount of noise miners are exposed to, and it is made, once a year, on a portal-to-portal basis. Tr. 223. In this instance, Coburn was surveying noise for all the personnel on the unit. A total of 7 miners were surveyed then. Upon opening the noise meters, the Inspector found that one miner, the continuous miner operator, as reflected in his dosimeter's readings, was exposed to 149 percent that day.³³ Tr. 225. In contrast, the maximum permitted exposure is 132 percent. Noise recorded on the noise dosimeter is calculated on a time-weighted average, meaning that the calculation is based on the exposure over the time of the whole shift. Tr. 225.

With that finding, Coburn cited Highland for a violation of 30 C.F.R. § 62.130(a), which is entitled "Permissible exposure level," and which provides: "(a) The mine operator must assure that no miner is exposed during any work shift to noise that exceeds the permissible exposure level. If during any work shift a miner's noise exposure exceeds the permissible exposure level, the mine operator must use all feasible engineering and administrative controls to reduce the miner's noise exposure to the permissible exposure level, and enroll the miner in a hearing conservation program that complies with § 62.150 of this part. When a mine operator uses administrative controls to reduce a miner's exposure, the mine operator must post the procedures for such controls on the mine bulletin board and provide a copy to the affected miner."

Even if a given miner is wearing ear protection which reduces exposure to noise, if the maximum amount is exceeded, there is still a violation. Tr. 231. Thus, in terms of whether there

³³ The devices, of which the Inspector brought eight of them to the mine that day, were calibrated by him prior to the day of testing. A sound level meter calibrator advises him if a machine passed the calibration. Tr. 228-229. Highland does not challenge the accuracy of the noise level readings.

is a violation, the fact that a miner is wearing some noise reduction device, such as ear plugs, does not affect the determination of whether there is a violation. Tr. 232. However, wearing such plugs can impact the inspector's finding of whether it is S&S. Tr. 232. In this instance, to abate the noise violation, Coburn required that the continuous miner operator wear ear plugs, even though he *was* wearing them anyway.³⁴ Tr. 234. But, the mine *also* had to determine the source of the excessive noise and fix the equipment itself to make it compliant again. In this instance the mine learned that the defect was a loose conveyor chain on the continuous miner that was the cause of the noise problem. Tr. 234. Accordingly, once a violation occurs, the operator must determine its source and make corrective action. MSHA then returns and retests the individual. Tr. 238. In this instance the mine's corrective action brought the noise level down to 125 percent. Tr. 239.

Coburn stated that he marked the violation as being "reasonably likely" because, even where a miner is wearing ear plugs, the noise vibrations are still impacting him through his bone structure and hearing loss will result.³⁵ Coburn also marked the violation as "permanently disabling" because the loss of hearing is permanent. Tr. 237. The Inspector had no information to allow him to determine how long the excessive noise problem had existed prior to the issuance of his citation. Tr. 240. He listed the number of miners affected as 2 because the equipment would be used on two shifts.³⁶ Tr. 241.

³⁴ The overexposed miner was identified as Allen Rigney. Tr. 245. The Court finds as fact that the device was correctly attached on that miner. Tr. 247-248. Coburn also checks periodically during a test to make sure that the device remains correctly attached. Tr. 249. Inspector Coburn agreed that miner Rigney does routinely wear hearing protection. Tr. 251.

³⁵ Respondent's Counsel objected to Coburn's claim about vibration still causing hearing loss, regardless of the wearing of ear plugs, on the basis that there was no foundation of the basis for that claim. Tr. 235. While tentatively allowed, a ruling on that objection was deferred, pending development of the record on that objection and subject to cross-examination. Tr. 235. As it developed in his further testimony, Coburn stated that he learned about the effect of vibrations on hearing loss from his MSHA training and also from his becoming a licensed hearing aid dealer in Kentucky. Tr. 236. The Court finds that it is not necessary to rule on the vibration claim and that delving into that would simply muddle the issues to be resolved.

³⁶ On cross-examination, Coburn stated that he did review the mine file, looking at dust and noise, before the start of his inspection. Tr. 243. This review was not made on the day of his conducting the noise tests, but rather before that day. Tr. 243. He believed that review occurred in the first part of June of that year. Tr. 244. He could not recall from that review noting any prior noise problems being recorded. That is, he could not recall reading of any history of noise problems. Tr. 244. Given that, Respondent's Counsel suggested that the violation could be characterized as a "one time event," but Coburn's perspective was somewhat at odds with that description, noting that injury from noise accumulates over time, not from a single overexposure. Tr. 244. However, he conceded that he had no knowledge of prior noise
(continued...)

Questioned about MSHA's policy manual regarding noise violations, (Exhibit R-1, page 15 from MSHA's Program Policy Manual, Volume III, question 3, Section 62.13) and also about the agency's determination of whether such a violation is "S&S," Respondent's Counsel read into the record from that source that "if miners are overexposed to the PEL, a citation will not be S&S if [the mine operator] provide[s] miners with proper hearing protection and it is being worn." Tr. 252-253. The Court noted that the document Respondent's Counsel offered was dated February 12, 2012. Therefore, among other considerations in determining if a violation is S&S, it was not clear if that language was in effect at the time the citation was issued, in 2010.

On other aspects of the cross-examination, counsel questioned why *the Inspector's* dosimeter didn't record a violation, as he was in close proximity to the miner operator. The Inspector explained that he was only taking a sound level meter reading, not a time-weighted average. Thus, his sound check was only an "instant" check. He did several such "instant" checks. Tr. 256-257. Some of those instant checks were done for the continuous miner. For example, one check recorded 100 DBA. Four such checks of the continuous miner were made on August 21, 2010 and each of those recorded results that were within acceptable parameters. Tr. 259. In terms of how long the source of the excessive noise had been continuing, Coburn did not know. It could have been a recent development or it might have been that way for two months. Tr. 266. A loose conveyor chain, the source of the excessive noise in this case, is active when cutting is occurring. Tr. 266. Coburn did not investigate whether Highland had used all feasible engineering controls to reduce the miner's exposure to noise, but the Court notes that this is beside the point because the noise level was exceeded and the source of the noise was later determined. Tr. 269-271.

On the issue of whether MSHA's policy is that a violation should not be listed as "S&S" if the miner is wearing hearing protection, Coburn stated that, at least in 2003, the policy was that all hearing citations were to be cited as S&S. Tr. 273. Ultimately, Coburn stated that the decision to list a violation as "S&S" or not, is up to the issuing inspector's discretion. Tr. 274. Coburn's explanation for listing the violation as "S&S" was that he looks "at the overall bigger picture." From his perspective, even though the miner operator was wearing ear plugs, he was still exposed to the continuous vibration from it. Thus, he was motivated by the long term ill effects from the noise vibration, a result which occurs whether ear plugs are being worn or not. Tr. 275. The Court commented that its evaluation of the gravity would not consider what might have happened, noise-wise, to the person operating the miner on the next shift. Tr. 278.

Regarding the MSHA policy manual referenced by Respondent's Counsel, and its reference that a violation should not be deemed S&S if the miner has proper hearing protection, Coburn stated that this requires protection which has been properly fitted by an audiologist or some other individual fitting. The problem is that the plugs used by the miner in this instance were not custom fitted. Tr. 283. Therefore, Coburn could not opine whether the miner in fact

³⁶(...continued)
problems at Highland mine and he agreed that only one of the seven miners tested had results exceeding the maximum permitted exposure level. Tr. 245.

had *proper* hearing protection on that day, but only that he had hearing protection. Tr. 284. However, Coburn conceded that he could not cite any official source for his view of what “properly fitted” means. Tr. 285. Next, Coburn was asked about another document which Counsel for the Respondent retrieved from the internet. Consisting of 8 pages, and printed out by Counsel on February 9, 2012, it is entitled “Compliance guide to MSHA’s Occupational Noise Exposure Standard.” Referring to that, Counsel noted the statement at page 8 involving how MSHA will determine if all feasible controls have been implemented. However, the Court views this as immaterial to this citation as there was no claim by MSHA that such controls were not in place. This case is much simpler: the continuous miner operator was exposed to excessive noise levels because a loose chain on that machine elevated the noise to violative levels. In support of this perspective of the Court, Coburn expressed his view that if he came upon a continuous miner that was running, as this one was, with a loose chain, Highland should have tightened the chain before running coal and for that reason he believed that not all feasible engineering controls had been used. Tr. 291. The Court agrees with the Inspector’s rationale; not all feasible engineering controls were being properly utilized. A properly adjusted chain is a noise engineering control.

Allen Rigney was called by the Respondent on this matter. Mr. Rigney has long experience as a coal miner and mainly this experience has been as a continuous miner operator. Tr. 543. Rigney is also a union member and was not part of Highland management. Tr. 543. Shown Exhibit P 7 and P 8, regarding Citation No. 8501126, Rigney recalled the instance when he wore a noise dosimeter that day. Tr. 544. Rigney’s recollection was that he attached the dosimeter on his suspenders, just below his shoulder on the right hand side. Tr. 545. He stated that he was wearing ear plugs that day and that it was his practice to regularly do so. Tr. 546. Before he begins operating his continuous miner he does “preop checks,” checking the lights, panic switches, water pressure, the screen, water sprays and the cable. Tr. 547. Those on the third shift do any needed maintenance. Tr. 547. Rigney knew what the conveyor chain is on a continuous miner and added that, if it becomes loose, maintenance people would tighten it. Tr. 548. He stated that one can see if a chain is loose or has slack in it and that he has experienced loose conveyor chains. Tr. 548. If that occurs, Rigney maintained that they shut down the miner and a mechanic would come to tighten it. Tr. 548. If the view was that it was loose enough to break it, they would shut it down immediately. Tr. 549. He also agreed that there is louder noise associated with a loose conveyor chain. Tr. 549.

On cross-examination, Rigney stated that the ear plugs he uses are not professionally fitted. Tr. 551. Of importance, in the Court’s estimation, when Mr. Rigney was asked when he last shut down a miner because of a loose conveyor chain, he informed, “We normally don’t have to shut it down [but] if it comes to that, we do.” Tr. 552. Thus, it was clear that his decision to shut down was not about noise concerns, but rather if the chain was about to break. This is because ultimately it saves the mine production time to fix it then rather than waiting until it breaks. Tr. 553. When asked by the Court, Rigney agreed that it is *not* noise that will cause him to shut down the miner. Rather, it is the concern that the chain might break that causes him to act and shut it down. Tr. 554.

Respondent's Contentions.

Respondent notes that only one miner, continuous miner operator Allen Rigney, tested above the acceptable noise exposure level. This is true, but the point is also irrelevant to the issues to be decided. Respondent asserts that the Citation should be vacated. Referring to MSHA's "Compliance Guide to Occupational Noise Exposure Standard,"³⁷ and relying upon that document, Respondent contends that, as it was in compliance with it, MSHA assured that it would not issue citations if its requirements were followed. Specifically that Guide, in a Q & A section, advised that a mine which employed all feasible engineering controls, had enrolled affected miners in a hearing conservation plan and which provides those miners with personal hearing protectors, would not be issued a citation, even if the noise exposure exceeded the exposure limit. Respondent contends that it either met the exemption requirements or that, as to feasible controls, the government failed to show that Highland did not employ all means available.

The Court notes that there is no dispute that the source of the excess noise arose from a loose conveyor chain on the continuous miner. However, Highland describes the Inspector's testimony that the chain was loose *before* the shift started as speculation and therefore not a basis for the government to claim that feasible controls were available to reduce the noise. R's Br. at 11. To support that argument, Highland notes that the Inspector did not cite Highland for an inadequate exam and that such an exam isn't an "engineering control" in any event. Admitting that the loose chain could be viewed as an "administrative control," it asserts that Inspector Coburn never stated what Highland failed to do in pre-operation exam of the continuous miner. Further, Highland points to the testimony of Allen Rigney, the miner operator, who suggested that he would have fixed a loose chain or called for maintenance, if it had been present at the shift's start. However, as the Court's recounting of that testimony reflects, that is not a full statement of Mr. Rigney's testimony. In any event, the thrust of that the Respondent's argument is that the government failed to meet its burden of proof to establish a violation. The Court does not concur. The continuous miner operator was exposed to noise above the permissible exposure level and the violation was established. Given the loose chain, not all feasible engineering controls were applied.

Alternatively, if the citation is upheld, Respondent contends that it was not "S&S." For this, it refers to a 1996 MSHA program policy manual, which, in a "Q & A" format, states that noise overexposure will not be considered as S&S if the miners are wearing proper hearing protection. Here, it notes that the miner operator was wearing hearing protection.³⁸ Highland also challenges the Inspector's assertion that MSHA no longer "credits" an operator where a

³⁷ www.msha.gov/regs/compliance/guides/noise R's Br. at 10.

³⁸ Highland notes that the Inspector asserted that proper protection means "ear plugs properly fitted for that person's individual ear canal." R's Br. at 13, citing Tr. at 283. Highland adds that the definition of hearing protector makes no mention of an individualized fitting or doctor involvement. R's Br. at 13, citing 30 C.F.R. § 62.101. In fact, Respondent contends that other standards allow earplug devices. 30 C.F.R. § 160 and § 140.

miner is wearing hearing protection in deciding whether a noise exceedance is S&S. R's Br. at 14-15, MSHA Noise workshop, www.msha.gov/1999noise/Enforcement, Workshops/Longview.pdf and MSHA's coal inspection procedures handbook, PH89-V-1(15), at 3-22 and 3-23, August 2008.

Highland also contends that a permanently disabling injury was not likely to occur in this instance because, as the Inspector admitted, the mine's prior noise tests showed no long term noise issues. Accordingly, Highland views the overexposure as properly characterized as a "one-time event," attributable to the loose chain. R's Br. at 15. Given that the miner machine is regularly maintained, the loose chain would not remain in that condition for long. When that is considered along with the Inspector's admission that he did not know how long the problem had existed and the fact that the miner operator was wearing protection, Highland concludes that the citation should not have been deemed "permanently disabling."

Last, Highland asserts that the negligence should be considered "low," and only one person, not two, would be affected. Based on the assertion that a conveyor chain will become loose periodically as part of normal wear and tear and the Respondent's characterization of the statement of the miner operator that he will immediately turn off that machine when a conveyor chain becomes loose, Respondent submits that this condition would only have existed for a short time. Respondent also submits that the Inspector only found the excessive noise later in his inspection, suggesting that if it had been loose earlier his dosimeter results would have reflected the noise issue. R's Br. at 16. Respondent adds further that, as the mine is vigilant in these matters, the problem would have been taken care of before the second shift miner operator began to use the machine and therefore only one person would have been affected by the noise. In the Court's view, the testimony of Mr. Rigney suggests that would not be the case.

From the government's perspective it notes that the results of the noise survey in issue show that the miner operator here was exposed to 149 percent. This compares to the maximum allowable 132 percent at the 90 dBA personal exposure level. Respondent does not challenge the accuracy of the results on any theory of improper calibration. It notes that there was agreement that the source of the excess noise was the loose conveyor chain and the Inspector testified that the continuous miner would be noticeably louder and that the continuous miner operator agreed that is the case.

The Secretary contends that the "all feasible engineering controls" provision comes into play *if* the noise exposure exceeds the PEL. Noting this, the Secretary emphasizes that a violation exists once a miner is exposed to noise exceeding the permissible exposure level and it is only then that the feasible controls provisions of the standard is applied. Sec. Br. at 18-19. The Secretary also asserts that although Highland provides its miners with hearing protectors, such as ear plugs, it does not *require* that they be worn and therefore Highland did not satisfy the "Compliance Guide to MSHA's Occupational Noise Exposure Standards."

As to the S&S designation, the Secretary notes that the Inspector's finding was based on the continued long-term effect, even when one wears ear plugs, of excessive noise and that

damaging vibrations occur over the long term. Further, once damaged, hearing loss is permanent. The Secretary notes that as the loose chain was not repaired until a later date, both operators were exposed to the excessive noise levels. In fact, miner operator Rigney admitted that a loose chain will only get repaired immediately if it is about to break, not merely loose. Sec. Br. at 19, citing Tr. II at 553. The Secretary also notes that the claim such noise issues are rare must take into account that MSHA's noise surveys only occur once a year and during a single shift. Sec. Br. at 20. The Secretary discounts that the miner operator was wearing ear plugs because they were not professionally fitted. She notes that this view is consistent with the proper respirable dust protection provision which requires a mask designed for the individual wearing it. Last, the Secretary notes that the MSHA Inspector Handbook advises that an S&S designation is a matter within an inspector's discretion. The Court does not concur that such a finding can simply be a matter of a particular inspector's discretion.

Addressing the negligence, which Inspector Coburn listed as moderate, while the Secretary notes that the Inspector could not say how long the loose chain had been in that condition, it points out that the noise produced by that condition is loud and therefore quite noticeable. Based on its view of these factors, the Secretary views the proposed penalty of \$1,304.00 to be appropriate.

Discussion.

Based on the evidence of record, the Court concludes that the violation was S&S and of moderate negligence. The statutory criteria having been considered, it imposes a civil penalty of \$1,304.00. An extended discussion is unnecessary. The evidence is conclusive that the noise limit was breached. Nor is there any doubt that the source of this was the loose chain, a problem which could have been rectified immediately. The Court has already commented upon the awareness of this excessive noise and the considerations which prompt action to address it. The mine acts, not out of concern of noise exceedance, but rather whether production will be interrupted. In terms of the S&S finding, the violation having been established and the discrete hazard, hearing loss, being obvious, and that such loss would clearly be a reasonably serious injury, only the third *Mathies* element need be discussed further. That there is a reasonable likelihood that the health hazard contributed to by the violation will result in illness, in this case, hearing loss is also present. Just as a presumption arises for dust overexposure, the same principle applies for noise overexposure. No one can state, nor demonstrate, what a particular overexposure will do to a given miner on a particular occasion. What is known, however, is that in most instances, both noise and dust overexposure work their harm over time, cumulatively. Here, the presumption was not rebutted by the Respondent.

The Court, based on the testimony of the continuous miner operator, and the testimony of the issuing Inspector considers the mine's negligence to have been moderate here. The condition was obvious and should have been corrected. Instead, production concerns, not excessive noise, was the determinative factor for whether action would be taken to deal with a loose chain.

Citation Nos. 8498633 and 8498634.

These two citations, being closely related, will be discussed together. **Citation No. 8498633**, Ex. P 13, asserting a violation of 30 C.F.R. § 75.1731(a), involved allegations of a damaged roller which posed a fire hazard. Highland concedes the violation listed in that citation, but challenges the attendant S&S and moderate negligence assertions. **Citation No. 8498634**, Ex. P 15, is related to 8498633 because it cites Highland's failure to note that damaged roller in its pre/onshift examinations. This latter citation originally alleged a violation of 30 C.F.R. § 75.360(f), but was amended at the hearing to cite 30 C.F.R. 75.360(b)(1), as the more applicable provision. Highland's position for **Citation No. 8498634** is that, even as amended, the Citation should be vacated, and if not, it should be deemed non-S&S and "unlikely."

For the admitted violation in Citation No. 8498633, the cited provision provides: "**Maintenance of belt conveyors and belt conveyor entries.** (a) Damaged rollers, or other damaged belt conveyor components, which pose a fire hazard must be immediately repaired or replaced. All other damaged rollers, or other damaged belt conveyor components, must be repaired or replaced."

Inspector Rodney Adamson, an MSHA electrical supervisor for District 8, Vincennes, Indiana, testified.³⁹ Inspector Adamson issued Citation No. 8498633 on August 17, 2010. Tr. 317. Ex. P 14 are his notes associated with that citation. While then conducting an E01 inspection, the Inspector was at the mine on the evening of the 17th, during the third shift.⁴⁰

³⁹ At the time of the citations in issue, Adamson was an electrical engineer but in District 10, Madisonville, KY. Tr. 314. He has an electrical engineering bachelor's degree. His work experience also includes 3 years performing various jobs in underground coal mines. Tr. 315.

⁴⁰ The mine's maintenance foreman, John Rich, was with the Inspector at that time, as was miner's representative Clarence Powell.

Upon arriving on the No. 4 unit, Adamson smelled heating⁴¹ associated with the conveyor belt running. As the shift continued, that smell became more pronounced, prompting him to investigate further. He found the problem at the tailpiece, where he saw that the “snub roller”⁴² was damaged to the point that the belt has cut into the snub roller, producing heat. Tr. 321. The machinery was taken out of service. Tr. 321. In Adamson’s citation he noted that the “load framing structure was warm to the touch” and he reaffirmed the smell of burning in the immediate vicinity. Tr. 323. It was actually more than “warm,” since the Inspector could not keep his gloved hand on the load framing structure, as it was too hot. Tr. 323. The roller itself was also “hot to the touch.” Tr. 323. This was hotter than the framing because it was closer to the heat source, that is, closer to where the belt was rubbing. Tr. 323. The Citation further noted that the damaged roller was “gobbed out,” meaning that there was material between the snub roller. In this instance, the material was so thick that it kept the roller from moving freely. Tr. 325. That is, the material had become wedged between the roller, preventing it from moving freely. Tr. 325.

An additional reason for concern, the Inspector included in his citation that a “wedge board”⁴³ was found lodged between the low framing and the belt. Tr. 325. He found the wedge board underneath the damaged roller and in close proximity to it. Tr. 327. It was the Inspector’s opinion that, as a means to deal with the damaged rollers, the board could serve to keep the belt off the metal framing, so that the belt would rub on the wood instead of the framing. Tr. 326. He could think of no other purpose for the board’s presence. Tr. 328. The inspector advised that use of wedge board in this manner is never consistent with good mining practices. Tr. 326. Being made of wood, the wedge board is combustible. Tr. 327.

Reading from his citation notes at P 14, pages 14-15, the Inspector related that “the damaged snub roller or alignment roller was damaged in that the roller was froze and not rotating

⁴¹ There was an attempt to diminish the Inspector’s testimony because of his references to “smelling heat.” As heat refers to a temperature and smell refers to odors detected through olfactory nerves, “smelling heat” sounds incongruous. That said, everyone fully understood what the inspector was conveying; based upon his experience, his nose recognized an odor which he associated with smells associated with burning material. In time Inspector Adamson found the source of the smell he had detected, a frozen (i.e. non-rotating) and hot snub roller that alerted his sense of smell. Later, the Inspector acknowledged that his “smell heat” description was imprecise and that he meant to express that he could smell rubber burning, that is, the odor of a belt burning. Tr. 426. It was his view that, as the examiner had just done his exam, he should have detected the odor, just as the Inspector noticed it. Tr. 426.

⁴² The snub roller is also called an “alignment roller.” It is designed to keep the belt on the tailpiece continually.

⁴³ The term “wedge board” was also variously called a “cap board” and “cap wedge,” but each term refers to the same thing.

as designed on the most inby end of the low framing on the number 4 unit. The damaged roller presented a fire hazard and the operator removed the equipment from service immediately and began repairing and replacing the roller. . . . the roller was very hot to touch. The metal surface was warm. I smelled the smoldering and heating that had occurred. . . . I had smelt heating at the start of the shift. The section foreman walked the right side of the snake [FCT], [but] the stuck roller was on the left side of the low framing. P 14 and Tr. 329-330. The low framing is installed on the far left hand side of the belt entry. Tr. 330. The FCT arrangement means there is a lot of space on the right side of the entry. Tr. 331. In sum, the Inspector identified two problems. The roller was not maintained properly to roll, as it should, with the consequence that it could not do its function of keeping the belt aligned. In addition, the stuck roller was coming into contact with the belt, causing heating. Tr. 332. The Inspector clarified that the belt *was not* aligned when he first came upon the problem. Tr. 333.

Reading further from his notes, the Inspector restated that the stuck roller was on the left side of the framing. Ex. P 14, at page 15. The section foreman told him that he did not smell anything and that he had come by the area around 10:10 p.m. The Inspector noted that the foreman should check the tailpiece thoroughly. The Inspector also learned that the foreman was unaware of the fire that occurred at the mine on the low framing the prior Monday, August 9th. Tr. 334. The Inspector expressed that the continuous miner operator would be affected by the hazard, as the ventilation there traveled inby, towards the section. He noted that this heat would not take long to generate. Also, the FCT operator would be affected, as would two roof bolt operators. The latter were on the return side of that section. Tr. 335. Thus, they were inby the tailpiece of the hazardous area. When questioned by the Inspector, he learned that the miners also were unaware of the mine's fire on the low framing the previous week. Tr. 335. The Inspector was of the view that, as he had issued two citations in the last quarter, dealing with the fire hazard of low framing, the miners should have had increased awareness of the problem. Tr. The citation involved here pertained to the number 4 unit and the earlier fire occurred on a belt in the same unit, also involving a FCT. Tr. 336-337.

The Court expressed that the subject violation was pretty serious in its own right, regardless of whether the prior violation was in the same section or not. Tr. 337. Thus, the fact that the same violation was cited a week earlier, in the Court's view, is sufficient without demonstrating that it occurred in the same area. Tr. 337. In that earlier instance, there were several stuck rollers. This prior event occurred in the prior quarter's inspection. Tr. 338. Given that recent history, the Inspector's larger concern was that the mine personnel were essentially ignoring checking the left side of the belt. Examining the right side only, as demonstrated by this violation, is insufficient. Tr. 341. According to the Inspector, the foreman agreed that having a DTI board placed on the left side of the belt would be a good idea, to insure that side was also being examined. Tr. 342.

Citing 30 C.F.R 75.1731(a), and its requirement that the belt be maintained in safe operating condition, the Inspector marked the gravity as "highly likely." Tr. 343. This assessment was based upon the Inspector's mining experience and his awareness that a belt fire killed two miners at a Kentucky mine. That belt fire arose from frictional sources. Tr. 343. He

expressed the importance of frictional sources being removed from belt travelways and belt lines. While he couldn't predict the precise time it would take for the frictional contact source he found to start a fire, the larger point was that it needed to be addressed immediately. Tr. 343. Thus, his knowledge, including mine fires being spawned from such circumstances, were part of his gravity assessment. However, the Inspector agreed that, history and experience aside, the situation he came upon was serious in its own right. Tr. 344. He confirmed that, even without that history, he would have marked the gravity the same. Tr. 345.

Still, the Inspector did not mark the violation as an unwarrantable failure because, as he understood it, an agent of the operator, such as a belt examiner or management personnel, has to know of the condition. Tr. 346. In this instance the person with the Inspector admitted that he hadn't examined *that side of the belt* and therefore he didn't observe the problem. Tr. 346. Somewhat at odds with that view, was the Inspector's noting that examiners are held to a higher degree of care, as their job must be done diligently in order to observe such hazards. Tr. 346. Weighing the factors, the Inspector decided to give the foreman the benefit of the doubt, marking the negligence as moderate. Tr. 346. In the Court's view this was more than fair on the inspector's part.

Continuing with his assessment, the Inspector marked that lost work days or restricted duty would result because "there was no doubt that this would indeed cause a fire" and, with people in the immediate vicinity, they would be affected by smoke inhalation and high carbon monoxide (CO) concentrations. CO can have a rapid impact; with sometimes as little as one breath bringing a person down. Tr. 347. The smell informed him that some heating had started, but the Inspector could not pinpoint the number of hours since the heating had started. Tr. 348. The belt is to be examined both pre-shift and during the shift. Tr. 349. The violation was abated by taking the belt out of service and replacing the roller. Tr. 349. In addition, the gobbled material had to be cleaned out before the roller could be removed. Tr. 350.

Upon cross-examination, the Inspector agreed that the area he cited is on the active working section. He approached that area by coming down the belt entry and the cited roller was in the belt entry. As noted earlier, while one cannot smell "heat" the Inspector was expressing that his nose alerted him to the rubber smell he detected. The exact location of a smell's origination can be difficult to immediately ascertain. In any event, he was referring to "frictional heating" as the smell he was detecting. Tr. 353. The Inspector, understandably, could not recall his exact route of travel on that day but if he had traveled to the tailpiece, the cited area would have been about 10 to 15 feet from that. Tr. 355. He approximated, because Respondent's Counsel inquired about it, that the furthest he could have been away from the area cited was about 90 feet, before he left the belt entry. Tr. 354-355. Again, it was his nose that first alerted him to the smell when he traveled down the belt entry and arrived on the section. Tr. 356. He estimated he was about a crosscut away when he noticed the smell. Tr. 356. He listed the violation as highly likely because the hazard was "reasonably likely" to occur and "highly likely" to cause an injury. Tr. 356.

When he noticed the smell, the Inspector and John Rich, who was with him, were trying to figure out the source of the smell. Stuck rollers were one of possibilities he was considering as the culprit for the odor. Tr. 357-358. The Inspector confirmed that the citation was written about four hours after he was on the section.⁴⁴

Returning to the citation itself, the Inspector in response to questions about the cited snub roller, agreed that there are certain rollers that are under the belt but that the roller he cited was on the side of the belt, that is, on the vertical plane of the belt. Tr. 365-366. The Inspector agreed that such snub rollers do not rotate all of the time. In fact, they will not rotate if the belt is running exactly true. Thus, such a roller, not rolling, does not by that fact alone, indicate that it is frozen or stuck. Tr. 367. The Court views this as an interesting, but ultimately irrelevant fact, for the matters that are to be decided here. The Inspector also agreed that the mine was not cited for an accumulation violation. Tr. 367. However, while the Inspector did not claim that there was an accumulation of *coal*, in noting that the snub roller was “gobbed out,” his concern continued to be with the heat caused by the stuck roller on the belt and the attendant risk of a fire. Tr. 368.

Admitting that one needs an ignition and fuel for a fire to develop, the Inspector advised that *the belt itself* is a fuel for the fire. Tr. 370. He added that simply because he did not cite the area for an accumulation of coal does not mean that coal was not present. After all, as the Inspector noted, it is a coal mine. Tr. 370. Elaborating upon the basis for his concern that the belt could be a fire source, the Inspector stated that as friction continues on a belt, slivers of belt will get shaved off of it. The belt itself will burn, as being “flame resistant” does not mean that

⁴⁴ These questions were posed in an attempt to show that the problem could not have been so urgent or the inspector would have more diligently sought the source of the odor. Additional questions posed by Counsel for the Respondent had the same goal of showing that the problem must not have been of a pressing nature. For example, the Inspector stated that he did not detect the smell when he was issuing a different citation in a different location. Later, he issued yet another citation, that time regarding a roof bolter. Tr. 361. The Inspector could not recall the proximity of these two other citations to the location where the smell was noticed and whether in his travels underground he passed by the belt entry where the smell was eventually located. Tr. 361. Still later that evening, he issued a citation pertaining to caps on nozzles and again he could not recall exactly where the scoop he cited was located on the section. The Inspector also stated that when he first noted the smell when he came on the section, John Rich, a member of mine management was with him and that *they discussed the smell*. Tr. 444. The Inspector confirmed that the two of them did not detect the smell again until the Inspector noted it again, several hours later into his inspection. Given that history of the odor, the Inspector believed that the smell existed at the time the pre-shift exam had been done. Tr. 445. Upon consideration of all the evidence on this, the Court finds that the Inspector’s testimony concerning when he first detected the smell, and the events thereafter were credible.

the belt will not burn. Tr. 371. The Inspector did concede that, as the belt moves from the heat source, it will cool some. Tr. 373. However, he countered that, when a small piece of the belt separates, such a small piece is easier to ignite than a large piece of belt, much like a small piece of paper will ignite more readily than a large piece of wood. Tr. 373. This can happen as the belt cuts into the metal framing and small pieces of belt are severed from it. Tr. 373. The Inspector agreed with the Court's suggested analogy that small pieces of belt are akin to kindling wood. Tr. 374. The Inspector agreed that his notes made no remark about frays of belt material, as he saw none. However, he added that the belt had already cut into the metal roller although no fraying of the belt was yet present. Tr. 375.⁴⁵

Asked about the wedge board he found, the Inspector rejected Respondent Counsel's suggestion that it could have been placed there *after* the belt was removed from service. He also rejected the idea that it came to be there inadvertently. Rather, he expressed that it was placed there. Tr. 382. While he could not tell exactly where it had been placed, it could have been in the area below the cited snub roller. Tr. 382. However, the board, which was sometimes referred to as the "cap board," was not, when discovered by the Inspector, in direct contact with the cited snub roller. Tr. 383. In the Court's view this distracts from the more serious fact that the board should not have been there at all and that there was no innocent or legitimate purpose offered for its purpose. The Court concludes that, on this record, the wedge board was put there as an inappropriate means to deal with the roller that had gone bad. Tr. 390.

On redirect, the Inspector agreed that it was not simply the heat smell he detected that caused him concerns, it was the attending factors; the belt out of alignment, the damaged snub roller, the wooden wedge board, and the gobbled out material. Those factors impacted his determination that the hazard was highly likely to result in an injury. Tr. 393. Further, the entire

⁴⁵ The Inspector did agree that his citation and his concern involved that one roller he cited. Tr. 379. Adding to that was his observation that the roller was in continuous contact with the belt. Tr. 380. He did not measure the roller's temperature though, such as by using a heat stick. Tr. 380. Tending to show that the roller was not exceptionally hot, it was replaced in a short period of time after the condition was noted. Tr. 386. As to the Inspector's statement about Highland's belt fire the week before, he agreed that he did not investigate the particulars surrounding that, although he did speak with one of the Inspectors who had been at the mine when the fire occurred. Tr. 386. Once the belt was turned off, he did feel it, with the back of his gloved hand, and found that it was "hot to the touch." Tr. 380. The Inspector added that the term "fire retardant" does not mean that it will not burn. Rather, it refers to the quality of the material that, once the flame is removed and if the fire then goes out within a certain period after that, it can have that label, as fire retardant. Tr. 377. The Inspector did not know the temperature at which a belt can ignite, though he thought it was around 200 degrees. Tr. 376. The Inspector also agreed that he found no CO readings of concern when he cited the roller problem. Tr. 378. The Court does not view these aspects as determinative of the S&S and negligence findings. At its heart, the basis for the Inspector's concern was that "the source of heat and the flammable belt that's there during some short period of time would cause a fire hazard." Tr. 379.

length of the belt was rubbing on the troublesome roller. Tr. 394. That is, the belt was in continuous contact with that roller. Tr. 394. Therefore the roller itself would continue to get hotter as the belt continued to rub against it. Tr. 394. Further, the roller is fixed to the belt framing and that belt framing was found by the Inspector to also be warm. Tr. 394. Then, there was wedge board found too. Tr. 394. In terms of ignition sources for this citation, the Inspector confirmed that all of the factors were present; an ignition source, a fuel source and oxygen. Tr. 395. The gobbled up material was an ignition source, as was the wedge board and the belt itself. Tr. 395. The shavings from the belt can both fly off and fall down in the area where they are created and the wedge board is in the area underneath this, that is below the snub roller. Thus, the shavings could land on the wedge board, in the Inspector's estimation. Tr. 396. Further, the shavings would be created in the course of continued, normal, mining operations, if the defective roller were not corrected. Tr. 396.

In terms of the Inspector Adamson's concerns about CO, should a fire occur, he expressed that four miners could be affected by such gas, as the belt line involved travels inby and those miners would be downwind of that area. Tr. 396. This means, of course, that if a fire occurred, the smoke would travel inby towards those miners. Tr. 397. Nor would a regulator divert all of such air with CO; some such air would make it past the regulator. Tr. 397. The Secretary seeks a \$2,901.00 civil penalty for this violation.

Citation No. 8498634.

As noted, this citation, which is related to the just discussed Citation No. 8498633, originally invoked 30 C.F.R. § 75.360(f) but, at hearing, § 75.360(b)(1) was cited in its place. That initially cited section, from § 75.360 is entitled, "**Preshift examination at fixed Intervals,**" and provides at subsection (a)(1) that "[e]xcept as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. Subsection (f) of that provision entitled "*Certification,*" provides "[a]t each working place examined, the person doing the preshift examination shall certify by initials, date, and the time, that the examination was made. In areas required to be examined outby a working section, the certified person shall certify by initials, date, and the time at enough locations to show that the entire area has been examined."

The citation is related to the stuck roller condition in that it cited Highland for an inadequate examination of that area of the belt. Tr. 400. When Inspector Adamson issued the citation, the mine's maintenance foreman, John Rich, was with him, as was the miner's representative, Clarence Powell. Tr. 401. Upon performing such an exam, the fact that it was done is initially noted at enough locations to show that the entire area has been examined by recording the date, and the time of the exam, along with the initials of the person doing it. In this instance, the mine's examiner, while he did an exam of the belt, admitted to the Inspector that it was deficient in that he had not examined the left side of the belt. Tr. 402. The examiner had only traveled on the right side of the belt. Tr. 402.

Two preliminary matters: the amendment to the Citation; and a matter that is immaterial to the issues associated with the cited standard.

The Amendment

At the hearing, the Secretary moved to amend the citation, citing in its place 30 C.F.R. § 75.360(b)(1). That subsection provides: “(b) The person conducting the preshift examination *shall examine for hazardous conditions*, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations: (1) Roadways, travelways and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift.” (emphasis added). Implicit in that standard is a requirement that the examination be thorough, noting all existing, recognizable, hazardous conditions.⁴⁶

In the usual arrangement, which was not the arrangement here, the belt framing for the belt structures will stay in place and this is true whether it is on a unit section or a mainline belt. Once installed, those things stay there until the mining for that area is completed. Tr. 409. That period, where things remain static, may last for a month. Tr. 410. Here, in contrast, there was the low framing that dumps on to the belt and it is closer to the section. Furthermore, the low framing is directly attached to the FCT. Thus, for this citation, the location of the belt structure is mobile, so it moves throughout the section and it makes up the belt line too. Tr. 410.

⁴⁶ The amendment came about after the Court inquired whether, when citing the violation, and invoking 30 C.F.R. Section 75.360(f), the Inspector was referring to the first sentence of that section, or to its second sentence, or to both those provisions within Section 75.360. The Inspector explained that he was not focusing on a particular sentence, but rather on the concern that someone conducting an exam observe *all* areas of hazardous conditions present on a section. Tr. 408. Apart from the standard’s reference to “outby” in the second part of 75.360(f), the Inspector considered the dumping point to be part of the section and therefore it would not be deemed outby. Tr. 408. Based upon the Inspector’s response, the Court stated that the cited condition had to be directed towards the first sentence of 75.360(f). Tr. 409. The Inspector added that the section where the violation was found was not typical because it did not have the common dumping point that a regular continuous mining station would have. Instead there was a low frame area that is considered to be part of the belt line because it dumps on to the main belt structure. Tr. 409.

The government then moved to amend the citation⁴⁷ to cite a violation of section 75.360(b)(1), for an inadequate exam, instead of the previously cited provision at 75.360(f). Tr. 446. From the Secretary's perspective regarding Citation No. 8498634, it notes that both this Citation and Citation No. 8498633 are based upon essentially the same conditions. This is not in dispute. The Secretary points out that both subpart provisions address pre-shift exam responsibilities, though it acknowledges that 75.360(f) "deals specifically with dates, times, and initials of examinations being posted," while subsection (b)(1) "deals more generally with identifying hazardous conditions during the examination." It notes that the first sentence of Inspector Adamson's citation asserted that "[a]n inadequate exam was conducted on the No. 4 working unit section and areas where miners are required to work." Sec. Br. at 28, citing Ex. P 15.

Regarding the initially cited subsection, §75.360(f), Highland, relying on the Inspector's statement that he was citing the area as a "working section," contends that its employee, Mr. Branson, did examine the entire working section and that this encompassed noting dates, times and initials, including a location on the low framing, which was part of the area cited. Accordingly, with no dispute that Mr. Branson "created documentation" of his pre-shift exam, and certified such on nearby initial boards, Highland argues that it complied with the standard's provision. Highland Br. at 23. Much as it argued in another citation heard during the same proceedings, and previously discussed in the Court's decision in KENT 2010 1632, in which Highland took the position that if a *means* to direct exhaust gas was present, it mattered not if parts of it were improperly connected, Highland contends here that if the dates, times and initials are recorded, that is the end of the story, regardless of whether in so making such markings, they were consistent with recording whether problems were present. The Court rejected that strained interpretation of the exhaust standard requirement as at odds with the remedial nature of the Mine Act and it rejects that narrow reading here as well.

As stated, the motion to amend the provision cited was granted. Absent certain findings, that is the usual result. *See, Wyoming Fuel*, 14 FMSHRC 1282, 1290 (Aug. 1992). Consequently, the issue of establishing whether 30 C.F.R. § 75.360(f) was violated became moot because, at hearing, the Court allowed the Secretary to argue that a different section should be applied, 75.360(b)(1). Although such amendments may refer to an entirely different safety standard, it is noted that the amended cited provision in this instance appears *within the same standard*, being merely a different subpart. In ruling that it was both appropriate and entirely fair for the Secretary to be able to amend the standard relied upon, the Court notes that there was no confusion at work here. Inspector Adamson's notes described the matter as an "*inadequate*

⁴⁷ While the Secretary moved to amend Citation No. 8498634 to cite 30 C.F.R. § 75.360(b)(1), it also argued that the original basis, citing §75.360(f), can also be established. As the Court has sustained the amended basis for the violation, it need not decide the applicability of the original basis.

exam” citation, and Respondent’s own witnesses, Mr. Hawkins and Mr. Rich, described it the same way, as an inadequate exam.

A matter that is immaterial to the cited standard

In the course of Inspector Adamson’s testimony, and related to the original subsection cited by him, the Inspector straddled his concerns between the inadequate examination and his ideas of the remedy to prevent recurrences. It was his view that installing additional board(s) to mark date, time and initials, would prevent such problems. While the Court respects the Inspector’s good faith suggestions to ensure that both sides of a belt are examined, it also views the whole discussion of board placements and the number of boards needed as a distraction from the issue to be decided. Bearing in mind that Highland conceded that the roller was defective, admitting the violation alleged in Citation No. 8498633, the issue for Citation No. 8498634 is whether that admitted violation should have been detected if there had been an adequate exam. Therefore, while Adamson’s idea of having initial boards on the left side of the tailpiece was a plausible remedy to the problem of missing hazards on that side during a preshift, the question is whether, given Highland’s failures regarding the conditions cited in Citation Number 8498633, it ran afoul of 30 C.F.R. 75.360 (b)(1). The Court finds that it did violate the standard.

The Inadequate Examination Citation

In a sense, forgetting that the provision cited was amended at the hearing, Respondent’s Counsel argued that the Inspector’s concern had been about dates, times and initials and that the Secretary changed the charge, upon realizing that the original basis was not sustainable.⁴⁸ Tr. 446. Referred to Exhibit P 15, Citation No. 8498634, which the Inspector served upon Highland’s Les Hawkins, Respondent’s Counsel spent much attention upon the Inspector’s view that a board be placed in the cited area. This was the basis for its view that the actual motivation for his citation did not pertain to an inadequate exam.⁴⁹ The Court has already expressed that

⁴⁸ There was much discussion, back and forth, about the Inspector’s concern that he did not observe a date, time and initial board at the tailpiece location. He considered that board’s absence to be part of the problem. He could not recall the location of the closest such board. With no board, there was no way to document that the examiner had been in that area where the hazard existed. Tr. 404-406. The Inspector did discuss with the section foreman the issue of placing a board in that area to record the dates, times and initials of exams. The Inspector believed that, with a board in that area, the examiner would be more likely to examine both sides of the belt. Tr. 406. As stated, with the amended charge, all this became immaterial.

⁴⁹ Undaunted, Respondent’s Counsel continued with the theme of the Inspector’s true intent in issuing the citation. Thus, Respondent asked the Inspector if he told Hawkins that he didn’t care if he lost the case, and that he just wanted a date, time and initial board at the tailpiece. Tr. 450. The Inspector could not recall, but he stated that Mr. Hawkins asked him not to write the citation. Tr. 450. The Court’s point is that the Inspector could have had *both*
(continued...)

this whole subject is a distraction from the central issue of whether an adequate exam was performed.

Not to be forgotten, the Inspector confirmed that the area for which he cited the mine for the belt and rollers *is* part of Highland's pre-shift examination for the section. Tr. 411. The Inspector's understanding was that the section foreman made his pre-shift exam just hours before, on that shift. This was that same foreman who told the Inspector that he did not examine the left side of that belt. Tr. 413.

As noted, although it is true that the Inspector was concerned about date, time and initial boards, that does not undercut the appropriateness of the amended provision cited by the Secretary as having been violated. While the Inspector listed the incorrect subsection provision at the time the citation was issued, this was understandable because he was focused upon avoiding a recurrence of an inadequate inspection. It was in that context that he expressed that installing another date, time and initial board in that area could eliminate the problem of an examiner failing to examine the left side of the belt. While unhappy about the amendment not coming about until the hearing was underway, Highland conceded that the Secretary can make such amendments to conform to the facts and it admits it suffered no prejudice from that action. Whether an additional board is present or not, the inspection responsibility involves examining both sides and here the examiner admitted to the Inspector that he did not examine both sides. The Inspector's observations of the conditions cited in Citation No. 8498633, as augmented by his testimony and the examiner's admission to him of his incomplete exam, all establish the violation for Citation No. 8498634. Clearly, under the amended provision cited, the violation was established.

In trying to cast doubt upon the accuracy of the Inspector's recounting of the events, Respondent's Counsel had the Inspector agree that four hours elapsed from the time he first noticed the burning smell to the time when he found the violation. Tr. 427. By this admission, Counsel for Respondent was suggesting that, in truth, there was no smell that continued throughout the time that the Inspector was doing his inspection. Tr. 431. Further, the question suggested that the gravity could not have been "highly likely" because he would have continued to investigate the smell, had it continued to have been perceived. It is true, and the Inspector acknowledged, that when he first noticed the odor, he didn't then drop everything he was doing and investigate the source. However, when he returned to that area and the odor was still present, he then found its source and the citations were then issued.⁵⁰ Tr. 432.

⁴⁹(...continued)

intentions: citing an inadequate exam and trying to have Highland take steps to prevent recurrences.

⁵⁰ Respondent's Counsel inquired whether the standard specifically requires that both sides of a belt have to be traveled, as part of a pre-shift or on-shift exam. In the same vein, Counsel tried to challenge the need to inspect both sides of the belt by pointing out that, for
(continued...)

The Court addressed the issue raised by Counsel for the Respondent that the Inspector should have looked more expansively around the area where he found the problem with the roller, such as whether there was a board near the power center or some other nearby location to determine if in fact the issue had been noted after all. Tr. 434. The Inspector's response was that his concern was that no exam was being made on the left side of the conveyor where the hazard was found. Tr. 436. The Inspector clarified that he was not contending that one would need to mark on a board for each and every roller along the conveyor. He added that one does not document the condition on the board anyway; instead they document the date, time and add their initials, all to document that they were there. Tr. 436. Hazards found are documented in the record exam book, which is located on the surface. Tr. 436. Thus, the Inspector did not contend that *no* exam had been done. Rather, his concern was the lack of an exam being made on the left side of the belt. Tr. 437. The Inspector's view was that a board on the right side would not have satisfied him as to the snub roller on the left side, but really all of this is beside the point the Inspector was making because his concern was the examiner's admission that he did not examine the left side of the belt. Tr. 438. The Court noted that two matters were being discussed. One, the only issue that mattered, was where the examiner looked and where he did not look. The other issue, a distraction in the Court's view, was where one is required to mark and date and initial on a board about the examination having been done. Tr. 438. The latter issue was Respondent's Counsel's point that one could mark on a board *near* where the problem was to indicate that the exam had been made. Counsel may be correct, or possibly not, but this decision does not involve a determination about that issue.

Upon further questioning, the Inspector stated that his concern was the way the exam had been conducted. He acknowledged that for most of the belt it can be examined adequately from the right side. However, when one arrives at the tailpiece, there are moving parts and equipment that need to be examined on *both sides* of the belt. Tr. 443. And, bringing the issue back to the real point, the Inspector cited the Respondent for an *inadequate exam* on the number 4 unit working section and the areas where miners are required to work. Tr. 443. Thus, the Inspector's primary concern was not about the presence of date, time and initial boards, rather it was that an exam had not been conducted on the left side. Tr. 444. With that failure, a violation was established. Thus, even if the Inspector had seen dates, times and initials, it still would have been

⁵⁰(...continued)

many belts, only one side is traveled. The Inspector's response was that the important thing was to find out if the hazardous area was examined or not, and then to determine if a date board would help further that exam so that the area would not be overlooked again. Tr. 423. As the Inspector aptly noted, examining the power center would not tell him whether the area over by the tailpiece had been examined. Tr. 423. Still, Respondent's Counsel continued to inquire as to how much of the area the Inspector examined to see if there were date, time and initial boards. The Inspector reiterated that he spoke with the section foreman who verified that he did not travel down the left side of the tailpiece where the hazardous area was observed. Tr. 425. Thus, the Inspector's key point was that there was a hazardous condition which wasn't picked up by the examiner. Tr. 426.

his position that the exam of the tailpiece had been inadequate. Tr. 448. In this regard it is noted that the citation itself it refers to an *inadequate exam* having been conducted. Tr. 449.

Bryan Branson was called by the Respondent as a witness concerning these two matters. Mr. Branson has been in coal mining since 1993. He was certified as a foreman in 2001. Tr. 557. He does pre-shift and on-shift exams. At the time in issue, he was a face boss. Tr. 558. Shown the Citations in issue, Nos. 8498633 and 8498634, he identified Exhibits R 3 and R 4. R 3 records the pre-shift notes he took that night and R 4 reflects additional notes, reflecting where he made the tailpiece during his preshift. Tr. 559. On August 17, 2010, he was aware there was a MSHA inspector on his section and he met with Inspector Adamson and the Inspector began examining water sprays and making sure everything was working. Tr. 561. The Inspector then shut down the FCT, asserting they had the wrong type of sprays. Tr. 562. After that issue, Branson started his pre-shift.⁵¹

However, when asked the critical question as to whether there was any roller stuck or gobbled up at that time, the witness responded: “No, not that I’m aware of. But the roller that’s written in [the] citation is an alignment roller.” Tr. 570. It is located about knee high and if the belt is running in the center, the roller won’t turn.” Tr. 571. It was the witness’ contention that he was only a foot and a half away from the cited roller when he did his exam and that he noted no problem. Accordingly he saw no misalignment, nor any gobbing up, at least, as he said, none he was aware of and he smelled nothing either. Tr. 572. In fact, the witness stated that he walked by the area twice and detected none of the above. Nor, it should be added, did he see any wedge board.

Accordingly, with such variant versions of the conditions, the Court must make credibility determinations. To the suggestion from Respondent’s Counsel that a roller can gob up in a short time, the witness responded that “I don’t know how you would answer that question . . . [i]t could happen any time. . .” Tr. 575. However, he repeated that it was not gobbled or frozen at 10:00 or 10:05. Tr. 575. Essentially, it was the witness’ testimony that all was well when he examined the area during his preshift and then two hours later he learned that the roller had locked up in the tailpiece and needed to be changed. Tr. 577. In fact, even after his preshift, the witness was back in the area around 11:15 or so, but noticed nothing then in terms of smell or seeing anything awry. Tr. 578. For his later walk by, the witness stated that he was simply doing that, *walking by* the area, as opposed to examining the area. Tr. 579. Following the Inspector’s direction that the roller needed to be changed, the witness and John Rich performed that task. Tr. 579. Branson described the roller as “warm” but he picked it up barehanded and only about 15 minutes had elapsed between the time of the shut down and his handling the roller. Tr. 580.

⁵¹ In great detail of his travels, Branson explained that he would then go to the tailpiece and examine it and the FCT. The last place he would examine is the power box. At that point his exam was finished. Tr. 569. The power box was about 70 to 80 feet from the cited roller. The cited condition was marked with a red circle on R 6. Tr. 569. This occurred around 10:00 and the belt was in operation at that time. Tr. 570.

Regarding the second, related, citation, No. 8498634, for an inadequate preshift exam, Branson did not agree that there was a violation. Tr. 580. Branson's view was that he performed a thorough and complete exam. Tr. 581. Nor did he view it as "S&S," as he did not feel there was a violation to begin with. Tr. 582. Nor did he view it as highly likely to result in an injury. In this regard he noted that the roller doesn't turn all the time and its purpose is as a precaution to keep the belt from rubbing the tailpiece. Tr. 582.

In response to questions from the Court, Mr. Branson affirmed that there was a damaged roller, but equivocated about it, stating, "I don't deny that there was a possibility that [the roller] was damaged. Tr. 596. He did concede that it was replaced. Tr. 596. As to the fact that the roller was, by his account, warm, Branson stated that simply having the belt running against it will cause it to get warm. Tr. 596. In connection with this assertion, that Mr. Branson expressed that he didn't believe the roller was actually damaged, he added that he mentioned this to the Inspector. This was surprising to for the Court to hear, as Mr. Branson did not make that claim in his direct testimony. Branson stated that he remembered the Inspector telling him that he could "smell heat" and that it was the assertion from the Inspector that prompted his challenge to the claim that the roller had a problem. Tr. 597. Branson also disputed that there was any wedge board present, adding that the Inspector did not point out any wedge board's presence to him. Tr. 598. Although Mr. Branson said that he first learned of the wedge board matter when he arrived on the surface, he did not go back and look for one. Thus he made no further investigation about the issue. Tr. 598.

When asked by the Court that if he assumed that he missed the defective roller and that he missed the wedge board, whether it would reflect badly upon him as certified mine foreman, the witness agreed that it would. Tr. 599. The witness added that one can't put a wedge board in that area anyway, in that one can't stop the roller from turning. Tr. 599. However, he conceded that, if used, a wedge board would be improper to use there. Tr. 599. The witness maintained that a wedge board is used to put a header on top of a timber, in order to hold pressure on it. Tr. 600. Thus, he maintained that a wedge board can't wedge a roller out. Tr. 600.

Leslie Hawkins was also called by the Respondent about both these citations. Mr. Hawkins has been working in coal mines since 1995. Tr. 911. Presently he is employed by Highland as an outby supervisor. Tr. 912. Regarding these matters, he first testified about "low framing," which he described as "[b]asically [] a belt structure for the belt on an FCT unit." Tr. 913. Hawkins stated that he has experience in doing inspections of low framing. As for noting such examinations, that is to say, marking the date, time and examiner's initials, Hawkins stated that the "whole general area was always notated over at the power center" and not at a board right at the low framing. That is to say, marking was not done at the tailpiece. Tr. 914. Hawkins knew of no instance where MSHA inspectors criticized this marking location practice. Tr. 915. The Court would comment again that the swirl of testimony relating to the marking location issue only serves to distract from the issues at hand. Highland was not cited for an inadequate number or improper placement of such marking boards. As noted, that issue arose in the context of the Inspector's offering a remedy to the problem of the mine missing problems which are present on the other side of a conveyor from the side being walked. While both sides do not have to be

walked, both sides must be examined, and the suggestion of an additional board was simply an offering of a method to ensure that examiners would in fact examine both sides of the conveyor.

Mr. Hawkins arrived just as they were changing the roller. Tr. 917. At that time he was also the mine's outby foreman. Tr. 917. He observed the completion of the roller change out. He stated he did not see any wedge board Tr. 925. Mr. Hawkins described such a board as a small piece of wood, in a wedge shape, roughly 8 inches in length, which tapers from 3/4 of an inch down to a point. Tr. 918. Thus, Hawkins certainly knew of such things and that they exist in mining. Later, when outside the mine, he had a conversation with Inspector Adamson about the citation regarding the roller, with most of their conversation pertaining to the citation for the claimed inadequate examination. It bothered Hawkins that the citation was issued only two hours after his section foreman had done the mine's examination of the area. Tr. 920. Hawkins' position was that "a lot of things can go wrong or happen or change" in the span of two hours and he maintained that the Inspector didn't disagree with that viewpoint. Tr. 921. Rather, as already noted several times, Hawkins stated that the Inspector's main concern was having signage, that is, a board, for DTI's in the location of the violation, meaning at the end of the low framing tailpiece. Tr. 922.

Although Mr. Hawkins stated that one can walk on both sides of low framing, that is, he maintained that one can walk on the return side, as well as the travel or walk-by side, he agreed that one would normally walk the travelway on the return side of the belt. Tr. 926-927. Hawkins also stated that he has inspected the tailpiece on the number 4 unit and that he would check both sides of the belt, and check the rollers on the return side and the rollers on the intake side too. Tr. 927. However, he conceded that the intake side is harder to get to because there is the bridge and the "snake" (i.e. the "FTC") is on that side. However, he repeated that both sides *can* be examined. Tr. 927. Mr. Hawkins agreed that Bryan Branson did the preshift exam on the day in issue and *that he spoke with him about the matter*. However, when asked if Branson mentioned his conversation with the Inspector, Hawkins offered "*Not that I can remember.*" Tr. 928. (emphasis added). Along that line, Hawkins agreed that if Branson admitted to the Inspector that he only walked the intake side, he would have no basis to disagree with that assertion. Tr. 929.

Highland also called John Rich about these matters. Mr. Rich accompanied Inspector Adamson on that day. Mr. Rich stated he was a rotation blue crew maintenance foreman at that time.⁵² As to whether Rich then smelled any rubber or anything like that as they passed the air lock and moved towards the power center, he first responded, "Not that I recall."⁵³ Tr. 939.

⁵² Mr. Rich marked on an exhibit where he and the Inspector went that day and where the violation was cited. Exhibits R 9 and R 10 were lost and no duplicate was made. The Respondent took responsibility for not having another copy of those exhibits.

⁵³ Making a second run at the question, Respondent's Counsel then got Rich to state that he did not smell anything like a rubbery smell. Tr. 939. However, shortly thereafter he again reverted to his "not that I recall" mode. Tr. 941.

As between the Inspector, who *did* recall, and Mr. Rich who could not recall, the Court ascribes greater credit to the Inspector's recollection. When Respondent's Counsel revisited the smell issue for a fourth time, this time inquiring if the Inspector remarked about it, Rich again stated "Not that I recall." Tr. 941. Rich did say that none of the others around the power center remarked about any smell. Tr. 942.

Rich and the Inspector then went to the faces. Again, he detected no smell and no one mentioned the subject. Tr. 945. They then returned to the power center. From there, they went to the scoop charger and Rich recounted the route he took for that destination too, noting that there was a crossover, located in the number 5 entry, which they traveled across to arrive at the location for the scoop charger. Tr. 946. They traveled outby in the number 6 entry and then to the number 5 entry. Tr. 947. It was in the number 5 entry, where the low framing and the belt were present, that Inspector Adamson cited. Tr. 947. In traveling from the 6 to the 5 crosscut and when in the number 5 entry, Rich again stated that he smelled nothing. Tr. 947. Nor, when in the number 5 entry, did they then investigate any smell. Tr. 948. When at the scoop charger, the two spent about 30 minutes there dealing with a couple of issues. Tr. 948. They then went to the number 4 entry. The number 4 entry was one entry over from the number 5 and at that point, Rich stated that they did smell something on the return side of the tailpiece. Tr. 949. Immediately, Rich knew that it was a belt smell and they then went directly to the tailpiece. Tr. 949-950. Accordingly, Respondent's overarching point was that this testimony demonstrates that while traveling all over the area, no smell was detected until the last point of Mr. Rich's travel description, with the further point being that either there was no smell emanating up to that point in time or that it was very faint, as Rich did not smell anything until that time. Respondent's other contention is that the smell just arose when Rich detected it and that they were then at the source of the problem within a minute at the most. Tr. 951. The Court considered this testimony, but ultimately this is a credibility determination. The Court finds the Inspector's recounting to be more credible.

Mr. Rich then described their actions upon arriving at the smell source at the low framing. This consisted of shutting the belt down and changing the roller. Tr. 950. As with other Highland testimony, Rich stated that he was touching the roller within 10 minutes of having shut down the belt and that the roller was warm only and that he was able to hold it with a gloved hand. Tr. 952. When asked if ever saw a cap wedge there, Mr. Rich responded, "*Not that I recall.*" Tr. 952. (*italics added*). The Court would note that he certainly had the opportunity to see one if it was present, as he was involved along with Bryan Branson and mechanic Phillip Blanford, in changing the roller. Yet, he could not recall about the cap wedge.

Unlike an earlier Highland witness, Mr. Rich agreed that the roller had to be changed because its bearings had locked up. He then agreed that the roller would have continued to get hot, if it were not replaced. Tr. 954-955. He also agreed that, in the ten minutes which elapsed since the belt was shut down, the roller was still warm when he touched it with his gloved hand. Tr. 955. Rich also admitted that, if the condition had continued to exist, "we could possibly have a belt fire." Tr. 955. In fact, he acknowledged then learning from the Inspector that the mine had

a belt fire a few days earlier, yet he did not know of that until the Inspector so informed him. Tr. 956.

Penalty Criteria.

In marking that the violation was reasonably likely to result in an injury or illness, the Inspector stated that he believed the hazard could be expected to cause an injury and that such injury would be reasonably serious. Tr. 414. He noted the source, the oxygen, the heat being present, the fuel being there and the roller continuing to be in contact with that frictional source. To that, he added that the temperature would get hotter as the belt continued to operate. Tr. 414. As for his Citation, number 8498634, the Inspector marked that violation as likely to result in lost workdays or restricted duty injuries, attributable to smoke inhalation and burns from a fire. Tr. 414. He expressed that, had a proper exam been done, the hazard would have been resolved before he found the problem. Tr. 415. For negligence, the Inspector marked his finding as “moderate,” because the examiner admitted that he didn’t examine the left side of the belt and he should have done so. Tr. 415. The mitigation was the Inspector’s conclusion that the examiner did do the pre-shift, albeit that he failed to examine the left side of the belt. Tr. 415. One could not see the stuck snub roller by merely examining the right side of the belt; one must also view the belt from the left side to see such things. Tr. 416. The condition was abated, after conversation with mine management, and their agreement to put a board on the left side of the belt. This was coupled with instructions to the examiners that they need to examine both sides of the belt in that area. Tr. 416. So, at least where the FCT unit was involved, it was a bit more difficult to examine both sides of the belt. Tr. 417. To ensure that both sides would be examined, the operator in fact had date books installed at all the low framing. Tr. 417. This citation was assessed at \$1,203.00.

The Parties’ Contentions.

The Inspector marked citation No. 8498634 as “S&S” and of “moderate negligence.” While Highland concedes the violation for No. 8498633, it argues that this matter should be vacated, that the Secretary’s alternate theory of liability, citing section 75.360(b)(1), which speaks to inadequate exams, should be denied, and failing those arguments, that the matter should be deemed “non S&S.”

Speaking to both citations, Respondent maintains that the roller violation was not S&S, nor of moderate negligence. It questions the inspector’s account that he “smelled heat” some four hours before he found the admittedly stuck roller because he didn’t mention that smell to others when he first noticed it and because he did not set about finding the source of the smell immediately. It adds that neither Mr. Rich, who accompanied the inspector, nor Mr. Branson, who did the pre-shift of the area about two hours before the stuck roller was located, noticed any such smell. R’s Br. at 18. Similarly, addressing Inspector Adamson’s testimony that he found the tail piece of the belt to be “gobbed out” and found rock, coal, and similar material stuck between the damaged alignment roller and the belt, as well as a wooden wedge board lodged between the belt’s low framing and the belt, it notes that its witness, Mr. Branson saw none of that.

Respondent contends that, as the sole basis for the Inspector's S&S designation was the risk of a fire, and the evidence failed to show that a fire was reasonably likely, that designation was incorrect. It notes that while the Inspector spoke of the risk of belt fraying and that such fraying would create shavings which would serve as a kindling source for a fire, he admitted there was no fraying present or cutting of the belt when he issued the citation. Respondent also questions the suggestion that friction with the belt itself could be a likely source of fuel for a fire as the belt is fire resistant and the alignment rollers don't run continually, as they are intended to roll when a belt is misaligned. Respondent adds that even where such friction occurs the belt will cool as it moves past the friction point. It notes that when Mr. Branson and Mr. Rich changed the roller, they advised that it was merely warm.

As for the wooden wedge board the Inspector stated he observed, Respondent notes that it was not in direct contact with the stuck roller and as there were no belt shavings, there was no risk that such material could ignite the board. Consistent with its view, Respondent also maintains that an injury was not highly likely, especially considering that only one roller was involved, that the belt did not contact the roller continuously, and that there were no coal accumulations or other flammable materials touching the non-rotating roller.

Respondent also believes that the violation was of "low negligence," given that its witnesses, Mr. Branson, Mr. Hawkins and Mr. Rich, did not detect the smell that the Inspector asserted to be present. Especially considering that the inspector didn't act to locate the smell until hours after he first stated noticing it, Respondent contends that in fact the problem did not arise until "shortly before the citation was issued," and therefore the negligence should be deemed to be "low." R's Br. at 22.

Addressing the related citation, although Highland has conceded that, in acknowledging that the Secretary can, at the time of the hearing, cite another safety standard, and that it would *not* suffer "undue prejudice" from that change, it argues that it met this provision as well, based upon Mr. Branson's testimony that he found no evidence of any problem when he did his exam. R's Br. at 25. Mr. Branson testified that there was no problem with the roller, nor any smell of rubber, nor anything "gobbed up," when he did his exam. Highland offers that it is entirely plausible that all of the things found by Inspector Adamson could have occurred in the two hours which ensued following his pre-shift and the Inspector's discovery of the problem. Last, Highland contends in the alternative that this citation should be viewed as "non-S&S" on the basis of the arguments it presented in the related citation, Number 8498633, and which have already been discussed above.

From the Secretary's viewpoint, it notes that Inspector Adamson testified that he detected an odor that "smelled like there was heating involved with the running of the belt conveyor," and that he noticed this first when he arrived on the unit to conduct his E 01 inspection. The Inspector considered when he initially detected the smell, that it could simply be a rubber tire burning but, as he stated, later that smell grew and then he found the snub roller at the tailpiece, found that it was damaged, and that the belt had cut into that roller. Sec. Br. at 22. The problems he found included the snub roller being hot to touch and hotter than the framing and that material had

accumulated in and around the roller so that it could not rotate freely. Further, the conveyor itself was out of alignment and rubbing against that snub roller. The Inspector also testified that there was no innocent explanation for the wedge board's presence and he believed it was there to keep the belt from rubbing on the framing. Moreover, the Inspector questioned the foreman who did the belt exam and was told that he walked only on the right side, whereas the stuck roller was on the left side of the belt. Sec. Br. at 23.

Addressing the attendant gravity, the Secretary urges that the Inspector's designation that it was "highly likely" should be upheld based on the conditions he found and that assessment is supported by the record, even without taking into account the mine's history of similar problems in the recent past. Significantly, the Inspector found the snub roller to be hot even though the belt had not been running continuously during the period of his inspection. As for Highland testimony that the roller was not hot, the Secretary points out that the belt had been off for several minutes, allowing time for it to cool down. Further, a belt can itself catch fire. Clearly there was a risk of a belt fire or an ignition and in this regard the Secretary notes that Highland's John Rich conceded that if the problem had continued there was the possibility of a fire. Sec. Br. at 25. Indeed, the Secretary reminds, this mine had a recent belt fire.

Asserting that its proposed penalty of \$2,901.00 is an appropriate civil penalty for Citation No. 8498633, the Secretary concludes that the negligence was properly marked as "moderate." This is attributable to the failure to travel along the belt's left side, as the examiner only used the right, travelway, side. Sec. Br. at 25. By limiting his travel to one side, the examiner could not see the problem. When considered with the fact that this Inspector had issued similar belt-related problems at this mine in its previous inspection quarter and that the mine had a belt fire the week before, the Secretary urges that Highland owed elevated awareness to its belts. The Court agrees with the Secretary's analysis both with regard to the S&S determination, the moderate negligence and the penalty it proposed.

Finally, as did Highland, the Secretary relies upon its arguments for Citation No. 8498633 to support its contention that Citation No. 8498634 was "S&S" and that Highland's negligence was "moderate." It contends that its proposed penalty of \$1,203.00 is appropriate.

Discussion for Citation Nos. 8498633 and 8498634.

In large measure, the Court's findings and comments for these two citations have already been expressed. For the admitted violation in Citation No. 8498633, the Court concludes that the matter was S&S and evinced moderate negligence. A civil penalty of \$2,901. is imposed.

For that violation, the Court notes that the roller was already more than warm when found and that the Inspector did in fact first notice the odor precipitated by the roller when he arrived at the No. 4 unit. The Court credits the Inspector's testimony that the roller was hot to the touch, while the low framing was warm. The other conditions found by the Inspector are also credited. That is, in addition to the stuck roller, there were the aggravating attending conditions of the roller being gobbled out, the presence of the wedge board and the belt being misaligned. Applying

Mathies, with the violation admitted, the second element is the discrete hazard of a belt fire. Certainly a hot roller and warm framing on the belt presented a measure of danger to safety. Considering that the preshift exam was deficient, as discussed above, there was a reasonable likelihood that an injury would result from the condition with the continuation of normal mining operations. The Court also credits the Inspector's opinion that the violation was S&S. Last, there can be no credible argument that, if a fire were to have developed, a reasonably serious injury could have been a consequence from that. Both from the perspective that the condition lasted too long and that the preshift exam, ignoring the left side of the belt, the Court finds that moderate negligence was involved. The mine's recent history regarding the belt related fire and belt framing citations in the previous quarter were additional considerations for the Court.

For the violation in Citation No. 8498634, the Court concludes that the violation was established and that it also was S&S and of moderate negligence. A civil penalty of \$1,203.00 is imposed. As with the related citation, the critical problems here were that the multiple conditions found by Inspector Adamson, that is, the stuck roller and gobbled out roller, the wedge board, and the misaligned belt, were all missed during the preshift. To his credit, the person Highland assigned to examining the belt admitted to the Inspector that had not examined the left side of the belt. With the noted shortcomings, it ineluctably follows that, as the Court has found that the conditions cited in Citation No. 8498633 existed, and to be as Inspector Adamson described that matter, Highland's preshift exam was inadequate. Preshift exams are obviously critical to mine safety. Where such exams are inadequate, as admitted here, with the examiner acknowledging to the Inspector that he examined only one side, the violation is established and it is simultaneously established that it is S&S and of moderate negligence. The *Mathies* elements were plainly established.

Civil Penalty Assessments.

Citation No. 8501110, an admitted violation, was S&S and the associated negligence was moderate. A civil penalty of \$1,304.00 is assessed.

Citation No. 8501126 is upheld as a violation and it was S&S, with the associated negligence being moderate. A civil penalty of \$1,304.00 is assessed.

Citation No. 8498633, an admitted violation, was S&S and Highland's negligence was moderate. A civil penalty of \$2,901.00 is assessed.

Citation No. 8498634 is upheld as a violation and it was S&S, with the associated negligence being moderate. A civil penalty of \$1,203.00 is assessed.

ORDER

Within 40 days of the date of this decision, Highland Mining **IS ORDERED** to pay a civil penalty in the total amount of \$6,712.00 for the violations identified above. Upon payment of the civil penalty imposed, this proceeding is **DISMISSED**.

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

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE N. W., SUITE 520N

WASHINGTON, D.C. 20004-1710

(202) 434-9950

January 2, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2012-260M
Petitioner	:	A.C. No. 31-00055-272960
	:	
v.	:	
	:	
DYNO NOBEL EAST-	:	
CENTRAL REGION,	:	Statesville Quarry
Respondent	:	

**ORDER CONDITIONALLY DENYING
RESPONDENT’S MOTION TO STAY**

This case is before me on a Petition for Assessment of Penalty pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petition seeks imposition of a civil penalty in the amount of \$47,716.00, for a single alleged violation of the Secretary’s Safety and Health Standards for Surface Metal and Nonmetal Mines, charged in a citation issued on June 6, 2011. Following issuance of the citation, the Secretary’s Mine Safety and Health Administration (MSHA) instituted a special investigation pursuant to section 110(c) of the Act, to determine whether enforcement action would be initiated against an individual director, officer or agent of the mine operator. No determination on a possible section 110(c) action has yet been made.

Respondent, Dyno Nobel East-Central Region, the mine operator, filed a motion to stay proceedings pending completion of the section 110(c) investigation, on grounds that any such proceeding could be consolidated with the instant action, thereby avoiding the possibility of duplicitous litigation. The Secretary opposed the motion, arguing that there is no certainty that duplicitous litigation would result, and that the granting of an indefinite stay would run counter to what Congress and the Commission have recognized is an important public interest, i.e., the expeditious resolution of penalty cases.

Both Congress and the Commission have made abundantly clear that the “expeditious resolution of penalty cases” serves an important public interest. *Buck Creek Coal Co.*, 17 FMSHRC 500, 503 (Apr. 1995); *Scotia Coal Mining Co.*, 2 FMSHRC 633, 635 (Mar. 1980) (“Congress has forcefully expressed its desire for the expeditious determination of whether penalties are warranted.”) Under section 105(a) of the Act, the Secretary is to submit a proposed penalty for a cited violation to a mine operator within a “reasonable time.” The operator has 30 days to notify the Secretary that it wishes to contest the penalty, in which case, “the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing.” 30 U.S.C. § 815(d). Commission Rule 28(a) provides that

“within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty.” 29 C.F.R. § 2700.28(a).

The Commission has recently clarified standards for balancing the public and private interests involved when the Secretary seeks to file a penalty petition beyond the time limit established in the rule. The Secretary must predicate such a request upon “adequate cause,” i.e., a “non-frivolous explanation for the delay.” *Long Branch Energy*, 34 FMSHRC _____, _____ (Aug. 30, 2012) (slip opinion at 4). If the Secretary produces evidence sufficient to establish adequate cause for the delay, an “operator must show at least some actual prejudice arising from the delay to secure a dismissal.” *Id.* If both adequate cause and actual prejudice are established, the decision to allow the late filing will depend upon a weighing of “the interest of fairness to the operator against the public interest in upholding the enforcement purpose inherent in section 105(d).” *Id.*

While there are no comparable provisions directly governing the filing and processing of penalty cases against individual agents of operators pursuant to section 110(c) of the Act, several Commission judges have determined that penalty cases against individuals must be processed expeditiously, and that delay in filing of a petition in a section 110(c) case should be analyzed using adequate cause and prejudice considerations similar to those addressed in *Long Branch*. See, e.g., *Wayne Jones*, 20 FMSHRC 1267 (Nov. 1998) (ALJ); *Doyal Morgan*, 20 FMSHRC 38, 40 (Jan. 1998) (ALJ); *Robert Cox*, 19 FMSHRC 1094 (June 1997) (ALJ). The important public interest in expeditious resolution of penalty cases is no less served by the expeditious resolution of enforcement actions against individual respondents.

Here, 18 months have passed since the original citation was issued to the operator. As of September 7, 2012, the special investigation had been initiated and completed, but it was “still pending review” by MSHA’s Technical Compliance and Investigations Office (“TCIO”), which informed the Secretary’s representative that “it could take between six to twelve months” to complete. Sec’y. Op. at 2. It was also represented during the telephonic hearing on the motion, that a subsequent review by the Solicitor might consume a comparable period of time. That the process could take two and one-half years, or more, is all the more remarkable considering that this investigation involves a single violation and one potential individual respondent.

It is arguable that it is more important that section 110(c) investigations be handled expeditiously because a delay in the investigation and assessment process could force either a substantial delay in the resolution of the related penalty case against that mine operator, or, could result in a separate hearing on the violation to adjudicate the liability of the individual respondent. The power to avoid such undesirable results resides solely with the Secretary, who controls virtually all facets of the processes by which penalty proceedings are initiated against mine operators and their agents. In order to avoid substantial delays in the resolution of penalty cases against mine operators or the inefficiency of largely duplicative litigation and the inevitable delay it would force on the resolution of other cases in the backlog of actions pending before the Commission, section 110(c) enforcement actions should be initiated within a reasonable time, considering the nature and complexity of the matters involved. Extensive delays should not be tolerated. Nor should operators charged with significant penalties be forced

to proceed in the face of such investigations and, possibly, be saddled with the cost of defending essentially the same charges at multiple hearings.¹

ORDER

Based upon the foregoing, the motion to stay proceedings is **DENIED**.

By notice entered this date, this case is set for hearing on June 12, 2013, in Charlotte, North Carolina. The hearing date has been set later than it otherwise would have been in order to allow a reasonable amount of time for the Secretary to determine whether to proceed against the potential individual respondent. **In order to avoid further delay and/or the necessity of duplicative proceedings, a motion to dismiss as untimely will be entertained as to any petition for assessment of civil penalty filed pursuant to section 110(c) that is not filed sufficiently in advance of the hearing date to permit consolidation of that proceeding with this case.**²

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge
202-434-9981
mzielinski@fmshrc.gov

¹ Dyno Nobel's counsel has represented the potential individual respondent during the special investigation.

² The legal standards applicable to determining whether a petition under section 110(c) has been timely filed, the adequacy of any required justification for delay, the requirements for a showing of prejudice, and the relative considerations involved in the balancing of the impact of dismissal on the Mine Act's substantive enforcement scheme against concerns of procedural regularity, fair play and prejudice, have not been decided by the Commission. Nor has the time period that could be characterized as delay been conclusively determined. At least one judge has held that whether the Secretary has acted within a reasonable time should be determined from the completion of the section 110(c) investigation. *Stephen Reasor*, 34 FMSHRC 943 (Apr. 2012). However, because there is a potential for substantial delay in the initiation and conduct of a section 110(c) investigations, granting the Secretary carte blanche for that part of the process may well not comport with considerations of fair play and due process for individual respondents. One judge has noted that in cases against individual respondents "concepts of fair play and due process must be even more carefully protected." *Curtis Crick*, 15 FMSHRC 735, 737 (Apr. 1993) (ALJ). *See also Cox*, 19 FMSHRC at 1095.

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of law, that the Secretary need not immediately refer citations issued for failure to update or comply with an approved Emergency Response Plan (“ERP”) to the Commission for expedited proceedings. (Sec’y Opp. at 1, 3–4.) According to the Secretary, “ERP content disputes are necessarily pre-approval.” (*Id.* at 3.)

On January 4, 2013, counsel for Buckingham filed a Motion for Leave to File a Reply Memorandum in Support of its Motion for Summary Decision. Respondent notes that Counsel for the Secretary objects to the motion. Commission Procedural Rule 10, 29 C.F.R. § 2700.10, governs the filing of motions before Commission Judges. Both Rule 10 and Rule 67 allow for a statement in opposition to a written motion, *see* 29 C.F.R. §§ 2700.10(d), 2700.67(d), but neither provides for a reply. Moreover, Respondent’s counsel has failed to establish any other basis entitling Buckingham to submit a reply. Respondent’s January 4, 2013, Motion is **DENIED**.

II. SUMMARY DECISION

A. Factual Background

On July 11, 2011, a Mine Safety and Health Administration (“MSHA”) Inspector issued the five citations at issue to Buckingham alleging a violation of § 316(b)(2)(A) of the Mine Act. (Resp’t Mem. at 2.) Based on the pleadings before me, the Secretary and Buckingham agree that the MSHA Inspector wrote in each citation the following:

The operator failed to update its emergency response plan (ERP) to specify the use of a commercially available post-accident two-way communication and electronic tracking system to provide communication and tracking capability. . . . The currently approved ERP specifies the use of Rajant Technologies wireless mesh “Breadcrumbs” for providing communications and tracking on section, but the “Breadcrumbs” are not available due to technical issues related to network communication problems. Other commercially available and alternative components that are appropriate for use given conditions at the . . . mine are commercially available for installation and use at the mine.

(*Id.* at 2–3.) The Secretary did not refer any of these violations to the Commission for expedited review under Commission Rule 24, 29 C.F.R. § 2700.24. (*Id.* at 3.)

B. Principles of Law

1. Summary Decision

Commission Rule 67 provides that “[a] motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions,

and affidavits, shows: (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 Commission has consistently held that summary decision is an “extraordinary procedure” and analogizes it to Rule 56 of the Federal Rules of Civil Procedure.³ *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate “upon proper showings of the lack of a genuine, triable issue of material fact.” *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also counseled that both the record and “inferences drawn from the underlying facts” are viewed in the light most favorable to the party opposing the motion. *Id.* at 2988 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

2. Section 316 – Communications and Emergency Response Plans

Following a series of mine disasters in 2006, Congress passed the Mine Improvement and New Emergency Response (“MINER”) Act to improve mine safety. S. Rep. No. 109-365, at 1–3 (2006); *see also Twentymile Coal Co.*, 30 FMSHRC 736, 736–737, 747 (Aug. 2008) (discussing the legislative history of the MINER Act). Among other changes, the MINER Act amended § 316 of the Mine Act to require mine operators to develop, implement, and comply with an accident preparedness and emergency response plan at each mine. 30 U.S.C. § 876(b)(2)(A); *see also Twentymile Coal Co.*, 30 FMSHRC at 736–37, 747.

Section 316 outlines plan requirements, provides a detailed framework for plan review and approval, and requires mine operators to periodically update their plans. *Id.* at § 876(b)(2)(A)–(F). The Commission has indicated that Congress, in developing the § 316 drafting and approval framework, “intended that the principles governing the process of formulating ERPs be similar to those governing other mine plans under the Mine Act.” *Twentymile Coal Co.*, 30 FMSHRC at 747 (citations omitted.) Likewise, “good faith” negotiations between MSHA and the affected operator “for a reasonable period of time concerning a disputed plan provision” is “one of the cornerstone principles” of “plan formulation under the Mine Act.” *Id.*

In addition, § 316(b)(2)(G) requires expedited resolution of any ERP content “dispute” between the Secretary and an operator or any “refusal” by the Secretary to approve an ERP. 30 U.S.C. at § 876(b)(2)(G)(i). Where such “a dispute or refusal” occurs, § 316 directs the Secretary to issue a citation and “immediately” refer the citation “to a Commission Administrative Law Judge.” *Id.* § 876(b)(2)(G)(ii).

³ Federal Rule of Civil Procedure 56(a) provides for the filing of motions for summary judgment and states that: “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

C. Conclusions of Law

The factual record upon which Buckingham moves for summary decision is as meager as it is uncertain. Section 316 requires mine operators to develop, implement, update, and comply with an approved ERP. More importantly, the statute requires expedited resolution *only* for plan content disputes and refusals to approve an ERP. Respondent goes to great lengths to describe how the Secretary failed to refer these citations for expedited proceedings. Yet what Respondent fails to submit are any material facts that would establish a plan “dispute” between the parties or a refusal by the Secretary that would trigger an expedited referral under § 316(b)(2)(G).

Indeed, Respondent has provided no facts as to whether MSHA and Buckingham disagreed about the content of its ERP prior to issuance of the citations. Beyond an edited portion of the allegations included in the body of the citations at issue⁴ and the Secretary’s Petitions for Proposed Civil Penalty, Respondent provides no other factual bases for its motion for summary decision—neither an affidavit, a deposition transcript, nor any other evidence was submitted. In fact, Buckingham fails to provide even a copy of its approved ERP—seemingly crucial evidence in any theory Buckingham might put forth to show a plan dispute about which no triable facts exist.

Based on the text of the citations, it is unclear what type of “technical issues” made the “Breadcrumbs” system “unavailable.” (Resp’t Mem. at 2.) Perhaps, the system had not yet become available to the public. Perhaps, Buckingham had failed to properly install it. Or, perhaps, some other technical glitch had caused the system to fail. The text of these citations as quoted, however, is insufficient to establish that no material facts may be shown to exist. The Secretary’s penalty petitions shed no additional light on these technical issues. It is, of course, possible that these facts would be clear with additional evidence. But such fact-finding is the province of a hearing, not a motion for summary decision. In light of the well-known requirements that I must construe the record and inferences in favor of the non-moving party, I therefore determine Buckingham has conclusively failed to demonstrate that no triable, material facts exist.

Arguably, even if I were to view the facts before me in the light most favorable to *Respondent*, Buckingham’s motion would most likely fail as a matter of law. As explained above, the Mine Act provides for plan approval, details plan review, and requires plan compliance; however, only plan disputes and refusals to approve a plan trigger the § 316 expedited review process. Congress’ reliance on the plan approval model suggests § 316

⁴ I note that my case files for Docket Nos. LAKE 2011-1041 and LAKE 2011-1043 do not contain copies of any of the five citations at issue in these cases. Perhaps Buckingham thought providing copies would be duplicative, but the moving party bears the burden of establishing their entitlement to summary decision. *See* 29 C.F.R. § 2700.67(c), (e). Lacking copies of any relevant documentation, I am hard pressed to make factual findings where documentation cited by the parties is not provided to the Court.

expedited review proceedings do not extend to an operator's mere failure to comply with its MSHA-approved plan.

Similarly, the Commission has implied that Rule 24 implements the § 316(b)(2)(G) referral process for dispute or refusal purposes, and not simply non-compliance. *Twentymile Coal Co.*, 30 FMSHRC 736, 744–45 n.4 (Aug. 2008); *see also* Emergency Response Plan Dispute Proceedings and Related Procedural Rules, 72 Fed. Reg. 2,187, 2,187 (2007) (discussing the legislative and regulatory background behind Rule 24). The Commission explained that “if a judge rules in the Secretary’s favor, the disputed provision must be included in the ERP unless the judge or Commission grants a stay.” *Twentymile Coal Co.*, 30 FMSHRC at 744–45 n.4. That the Commission describes the provision to be automatically implemented as “disputed” suggests, at the very least, some back-and-forth negotiation between the Secretary and operator is required; a simple failure to update an ERP provision absent evidence of a “dispute” or “refusal” is likely inadequate to trigger an immediate referral.

What appears to be the case here is that Buckingham simply failed to comply with its ERP and MSHA caught Buckingham out of compliance. As I noted, non-compliance with the statute or an approved plan is likely insufficient to trigger the expedited review envisioned by § 316. *Cf. Orchard Coal Co.*, 32 FMSHRC 371, 380 (Apr. 2010) (ALJ) (describing negotiations between the Secretary and operator prior to referral for failure to update an ERP); *RS&W Coal Co.*, 31 FMSHRC 1440, 1440–1442, 1445–1449 (Dec. 2009) (ALJ) (describing the statutory backdrop and detailing negotiations between the parties). Moreover, none of the facts Buckingham highlighted in its motion—even if accepted as true—suggest any type of dispute or refusal as contemplated by § 316. Respondent, of course, is free to educe evidence to establish a plan dispute or refusal at the scheduled hearing.

Accordingly, Buckingham’s Motion for Summary Decision is **DENIED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
WASHINGTON, DC 20004
TELEPHONE: 202-434-9953 / FAX: 202-434-9949

January 9, 2013

TODD DESCUTNER, : DISCRIMINATION PROCEEDING
Complainant, :
v. : Docket No. WEST 2011-523-DM
: No. WE-MD-2010-18
: Mine: Leeville Mine
NEWMONT USA, : Mine ID: 26-02512
Respondent. :

ORDER AWARDING PARTIAL REMEDIES
ORDER PROVIDING GUIDELINES FOR FURTHER DISCUSSIONS
AND
ORDER TO REPORT

At the close of the initial decision in this matter, the Court ordered counsels to attempt to stipulate to the remedies due Todd Descutner and to the attorney’s fees due to Mr. Descutner’s counsels. *Todd Descutner v. Newmont USA*, 33 FMSHRC ____, WEST 2011-253-DM (Oct. 31, 2012) slip op. 24-25. Pursuant to the order counsels were able to agree on some but not all matters, and counsels have advised the Court where they agree and where they have yet to reach an accord. After receiving counsels’ reports and position statements, the Court enters this Order in which it notes and orders the agreed upon relief, and directs counsels to reopen discussions regarding the relief upon which they have yet to agree. In their discussions, counsels shall follow as closely as possible the guidelines provided by the Court and shall report the results of their discussions to the Court no later than 20 days from the date of this Order.

RELIEF IN EFFECT

1. The Court notes the fact that Newmont has posted at its Leeville Mine a notice that it will not violate the Mine Act.¹ Complainant’s Second Br. 3, para 1.

¹ The Court’s decision finding Newmont in violation of the Mine Act, required the company to post a notice at its Leeville Mine stating its intention to abide by section 105(c) of the Act. *Descutner v. Newmont*, slip op. 24. Counsel for the Respondent states that the company has posted the notice but that it “seeks clarification” as to how long the notice must remain in place. Resp.’s Position Statement 6. As counsel rightly notes, the Court’s order did not specify a time period. It was the Court’s intention that the notice remain posted for 30 days. That time period having come and gone, the notice may come down.

2. The Court notes that effective November 26, 2012 Todd Descutner was reinstated to his former position of haul truck driver. Complainant's Second Br. 3, para 2.

3. The Court notes that Todd Descutner's personnel file has been expunged of all references to events and circumstances associated with his June 9, 2010 termination. Complainant's Second Br. 3, para 3.

**RELIEF ORDERED TO TAKE EFFECT WITHIN 20 DAYS OF THIS ORDER
UNLESS THE RELIEF ALREADY IS IN EFFECT**

1. Newmont shall reimburse Todd Descutner \$3,025.20 for his costs and expenses associated with the litigation of his discrimination complaint. Complainant's Second Br. 3, para 4.

2. Newmont shall reimburse Todd Descutner \$898.30 in medical expenses incurred as a result of his illegal termination. Complainant's Second Br. 3 para 5.

3. Newmont shall reimburse Todd Descutner \$7,914.15 for lost benefits regarding Newmont's 401(k) plan, specifically the 6% match to which Todd Descutner would have been entitled but for his illegal termination. Complainant's Second Br. 3, para 5.

4. Newmont shall fund Todd Descutner's pension in the amount of \$7,134.55. When funded the pension shall reflect Todd Descutner's approximately 7.08 years of service and will be funded as though Todd Descutner had not been illegally terminated. Complainant's Second Br. 3, para 7.

**CONSULTATIVE GUIDELINES
AND
ORDER DIRECTING FURTHER CONSULTATIONS**

OVERTIME

Counsels have been unable to agree on the amount of overtime pay to which Todd Descutner is entitled. An agreement on this issue is necessary because not only is Todd Descutner entitled to overtime pay, but bonuses to which he is entitled may be based on the amount of overtime he would have worked. Complainant's Second Br. 3, para 8 n. 8. Therefore, a final calculation of the total amount of wages (including various bonuses) which he is owed must await a determination of the amount of overtime pay to which he is entitled. Complainant's Second Br. 3, para 8.

The question is how to calculate the overtime pay? Mr. Descutner was illegally terminated by Newmont from his job at Newmont's Leeville Mine on June 9, 2010. Prior to that, he worked at Newmont's Deep Post Mine. He was at the Deep Post Mine from July, 2006 until approximately January 1, 2010. *See* Complainant's Second Br. 5, para III. A. *Id.* Mr. Descutner's counsel asserts that "the most accurate representation of the amount of overtime

[Mr. Descutner] would have worked is to average the amount of overtime he worked in the previous 4 years [– years that include his work at the Deep Post Mine –] and apply the average annual hours worked to his hourly rates for the applicable years.” Complainant’s Second Br. 6, para III A. 2. When calculated this way, counsel contends that Mr. Descutner would be awarded significantly more overtime pay than the Respondent claims it owes. *Id.* 6-7. Finally, counsel for Mr. Descutner asserts that because when he worked at the Leeville Mine, Mr. Descutner was supervised by Gus Friesen, the supervisor involved in Mr. Descutner’s protected activity, a “reasonable inference is [that Mr.] Descutner would have volunteered for more overtime . . . if he was not being discriminated against” and that it is “prejudicial to calculate [Mr.] Descutner’s overtime during the time frame in which the discriminatory action . . . took place.”² *Id.* The Respondent’s counsel counters that “the appropriate method for calculating overtime is to determine the amount of overtime Mr. Descutner worked . . . [during] the entire period of time that he was . . . at the Leeville Mine . . . and then determine the average overtime per pay period.” Resp.’s Position Statement 1. Counsel points out that Deep Post Mine was not comparable in size or work force to the Leeville Mine. *Id.* The Respondent contends therefore that Mr. Descutner is entitled to 1.2 hours of overtime pay per pay period. *Id.*

Having considered the positions of the parties, the Court concludes that counsels should consider and be guided by only the amount of overtime pay accrued by Mr. Descutner during his employment at the Leeville Mine. The purpose of the remedy is to return Mr. Descutner to the status he would have been in but for the discrimination he suffered. This principle makes consideration of his employment at the Deep Post Mine irrelevant.

ATTORNEY’S FEES **THE HOURLY RATE**

Counsels have not been able to agree as to the attorney’s fees that are due and payable to Mr. Descutner’s counsels. Their primary disagreement is on the applicable “lodestar” fee, a fee computed, as counsel for Mr. Descutner points out, by multiplying a reasonable hourly rate by the number of hours reasonably expended. Complainant’s Second Br. 7, para III. B. 1; *See Glenn Munsey v. Smitty Baker Coal Company, Inc.*, 5 FMSHRC 2085 (Dec. 1983) (ALJ). Once that fee is arrived at, it may then be adjusted up or down to reflect a variety of factors. *Id.* (Citing *Randy Cunningham v. Consolidation Coal Co.*, 12 FMSHRC 2067 (Oct. 1990) (ALJ)).

It is necessary for counsels to agree as to a reasonable hourly rate, and in that regard the Court offers the following guidelines. The Court concludes that for Mr. Rempfer a reasonable hourly fee of \$350 would be appropriate and would be approved by the Court. The Court further concludes that for Mr. Welsh a reasonable hourly fee of \$250 would be appropriate and would

² The Court finds this argument too speculative to consider.

be approved by the Court.³ These rates are less than those claimed by Mr. Rempfer and Mr. Welsh (who give billing rates of \$415 per hour and \$295 per hour respectively). However, the rates of \$350 per hour and \$250 per hour are more than that paid by several insurance carriers to State of Nevada to partners and associates for cases involving Employment Practices Liability Insurance in a small to medium market (Resp.'s Position Statement 4, para III. B.) and significantly more than that provided by regulation for proceedings coming before the Commission under the Equal Access to Justice Act. *Id.* However, the Court believes that to effectuate of the purposes of section 105(c) of the Act, counsels must be encouraged to take cases on behalf of otherwise *pro se* litigants. An award based on a substantial but not overly generous rate furthers this purpose.

Counsels also are at odds over the hourly rate to be used when calculating the amount due the paralegal who worked on Mr. Descutner's case. The Court notes that the paralegal bills at \$165 per hour. The Court agrees with counsel for the Respondent that this is excessive for the State of Nevada. The Court notes the 2012 rate survey of the National Association of Legal Assistants indicates that average hourly rates range between \$115 per hour and \$126 per hour depending on the type of paralegal program completed by the paralegal. *See* www.NALA.org/survey.aspx. The Court does not know the type of paralegal program the subject paralegal completed, but it concludes that a rate of \$165 per hour is excessive no matter the program and finds that it would approve a rate of \$120 per hour. This rate is in the mid range of the average rates paid paralegals in 2012. *Id.*

HOURS EXPENDED

Counsels were unable to agree as to the number of hours for which Mr. Descutner's counsels should be paid. The total number of claimed hours is 216.2. The Court finds some of the claimed hours reasonable and some not, and it offers guidelines by which counsels may steer their forthcoming discussions.

PREPARING FOR TRIAL

Of the 216.2 hours, 78.9 hours are claimed to be the hours familiarizing counsels with the case and preparing for trial. Counsel points out that he and Mr. Rempfer were not retained until May 21, 2012 and that June 4, 2012 was the date of the trial. Complainant's Second Br. 9-10, para III. B. 1. b. (1). The Court is of the view that the claim is reasonable given the late date at which Mr. Descutner retained counsels and the fact that the trial date was not postponed. The Court therefore suggests that when considering the number of hours Mr. Descutner's counsel spent preparing for trial, they keep in mind that the Court finds 78.9 hours an overall reasonable number, assuming that counsel for Mr. Descutner establishes the work preparing for trial on his billing or other records.

³ The Court notes that for other employment cases (*e.g.*, Title VII, ADA, ADEA cases), Mr. Rempfer typically charges \$350 per hour and Mr. Welsh typically charges between \$225 and \$250 per hour. Declaration of Andrew L. Rempfer 3; Declaration of Larson A. Welsh 6.

TRIAL

Of the 216.2 hours, 12.2 are claimed to be hours spent in trial. Mr. Descutner's counsel points out that the trial began shortly after 8:00 a.m. and did not conclude until nearly 7:00 p.m. Complainant's Second Br. 10, para III. B. 1. b. (2). He is correct. There is no questions but that his efforts at trial advanced the case and in the Court's view the time claimed is reasonable.

POST-TRIAL BRIEF

Of the 216.2 hours, 69.9 hours are claimed to have been spent on preparing Mr. Descutner's post-trial brief. Counsel states that the time was spent reviewing the transcript (480 pages), that 14 of the 25 pages of the brief required an "in depth factual analysis of the testimony" and that eleven pages of the brief were devoted to establishing "a prima facie case of discrimination and rebutting . . . potential defenses." Complainant's Second Br. 10, para III. B. 1. b. (3). The Court is of the view that the time spent is reasonable assuming that counsel for Mr. Descutner establishes the work on his billing or other records.

SETTLEMENT DISCUSSIONS AND PREPARATION OF 2ND POST-TRIAL BRIEF

Of the 216.2 hours, 55.2 hours are claimed to have been spent reviewing the Court's post-trial order, engaging in discussions to reach an agreement on required remedies (referred to by Mr. Descutner's counsels as "settlement discussions") and preparing a "brief" on remedies. Complainant's 's Second Br. 10, para III. B. 1. b. (4). Counsel for Mr. Descutner states that Mr. Descutner's counsels have engaged in extensive discussions with counsel for the Respondent, have reviewed "dozens of pages of wage records [and] a new personnel file," have prepared at least "six back and forth letters . . . between counsel[s,] as well as [placed] a handful of phone calls." *Id.* The Court is of the opinion that the claim is reasonable assuming that counsel for Mr. Descutner establishes the work on his billing or other records.

RESPONDENT'S SPECIFIC EXCEPTIONS

Counsel for the Respondent takes exception to specific entries in the billing records of Mr. Descutner's counsels. The Court agrees with counsel as to some of the exceptions and would exclude or modify the time when calculating a total amount of attorney's fees. However, on other of the exceptions, the Court agrees with counsel for Mr. Descutner that the time expended is reasonably related to the advancement of the case and would not exclude the time claimed when calculating a total amount of attorney's fees. Finally, there are some exceptions on which the Court has no opinion due to a lack of information. These exceptions must be discussed further by counsels and may require specific disclosures before counsels can resolve their differences.

EXCEPTION 1.

Counsel for the Respondent objects that the work described on the billing records for May 21, 2012 as "Filled out blue sheet and gave fee agreement to Nicole," and for which 1/5

hour is claimed (Resp.'s Position Statement, Exh. B 1), is not reasonably related to the advancement of the case. *Id.*, Exh. C. The Court agrees. In the Court's view the entry describes preliminary clerical work.

EXCEPTION 2.

Counsel for the Respondent objects that 1/5 hour is excessive time for the work described on the billing records for May 23, 2012 as, "Left [voice mail] for opposing counsel re: settlement." Resp.'s Position Statement, Exh. B 2, Exh. C. The Court disagrees and would approve the amount of time claimed.

EXCEPTION 3.

Counsel for the Respondent objects that the work described on the billing records for May 24, 2012 as "Reviewing file, drafted request for prior discovery," is not reasonably related to the advancement of the case. Resp.'s Position Statement, Exh. B 3, Exh. C. The Court disagrees and finds the tasks to be reasonably related to advancement of the case, but the hours claimed – 2 1/6 hours – to be excessive. The Court would approve 1 1/6 hours.

EXCEPTION 4.

Counsel for the Respondent objects that the work described on the billing records for May 28, 2012 as "Reviewed disclosures from EEOC and opposing counsel" is "[e]xcessive time for [the] task." Resp.'s Position Statement, Exh. B 3, Exh. C. Counsel states that there is "no involvement by EEOC in this proceeding." *Id.* The Court is unable to form an opinion on the exception. It is mindful that complainants have at times confused their Mine Act rights with those afforded them by the Equal Employment Opportunity Act and have tried to bring what are essentially Mine Act cases to the Equal Employment Opportunity Commission (EEOC). In so doing they have established records of what they believed transpired, records that can be helpful to their Mine Act attorneys in advancing their cases. If such is the case here, and if Mr. Descutner established a record before the EEOC, the Court would approve compensation for a reasonable amount of time spent by Mr. Descutner's counsels in reviewing such record. If, however, the record consisted solely of the complaint Mr. Descutner filed with the EEOC, the Court would find 2 2/5 hours excessive. The Court would consider 1 2/5 hours more in line with the time considered reasonable.

EXCEPTION 5.

There is work described in billing records for May 29, 2012 as "Reviewed all documents produced by client, reviewed all of judge's previous orders, reviewed all pleadings, read relevant case law . . . discussions with ALR, BET and TO re: strategy. Drafted reviewed and filed Motion to Continue Trial." Resp.'s Position Statement, Exh. B 3, Exh. C. Counsel for the Respondent objects that the work "Applies to Motion for Continuance, when Complainant represented that no continuance would be sought." *Id.* Counsel for Mr. Descutner claims to have expended 8 3/10 hours for the work. Resp.'s Position Statement, Exh. A at 3. The Court is of the

opinion that even if counsel for Mr. Descutner at one time represented that he would not seek a continuance, a continuance can materially advance a case by affording counsels more time to prepare and that counsels can and frequently do change their minds when they deem a continuance is in the best interest of their client. If such is the case here, the Court would award fees for the work involved. However the Court would consider 8 3/10 hours excessive and would consider 5 hours to be more reasonable.

EXCEPTION 6.

Counsel for the Respondent objects that the work described in the billing records for May 30, 2012 as, "Correspondence with Judge's law clerk re: our Motion for a [C]ontinuance" should be excluded from compensation for the same reason as stated in Exception 5. Resp.'s Position Statement, Exh. C. For the reason set forth in the discussion of Exception 5, the Court might disagree, and if so it would find the claimed time of 1/3 hour to be reasonable.

EXCEPTION 7.

Counsel for the Respondent objects that the work described in the billing records for May 31, 2012 as "Discussions with Andrew Rempfer re: outcome of telephonic hearing with the judge and case strategy going forward," should be excluded from compensation for the same reason as stated in Exception 5. Resp.'s Position Statement, Exh B, 4, Exh. C. The court disagrees. It would find that the work materially contributed to the advancement of the case and it would find the time claimed to have been expended (1 1/6 hours) to be reasonable.

EXCEPTION 8.

Counsel for the Respondent objects that the work described in the billing records for May 31, 2012 as "Preparation for and attending telephonic conference call with judge regarding our Motion to Extend Trial Date" and for which 1 1/6 hour is claimed should be excluded from compensation for the same reason as set forth with regard to Exception 5. Resp.'s Position Statement, Exh B. 4, Exh. C. The court disagrees. It would find that the work materially contributed to the advancement of the case but that the time claimed is excessive. The Court would consider a time of 2/3 hour to be reasonable.

EXCEPTION 9.

Counsel for the Respondent objects that 1 1/6 hours claimed for the work described in the billing records for June 1, 2012 as "Reviewed Pleadings" is excessive. Resp.'s Position Statement, Exh B 4, Exh. C. The Court agrees. At this point in the case, the pleadings, which were not that extensive, were known to Mr Descutner's counsel. The Court would consider a time of 3/4 hour more reasonable.

EXCEPTION 10.

Counsel for the Respondent objects that the work described on the billing records for June 20, 2012 as “call to client re: hearing transcript” and for which 1/3 hour is claimed is not reasonably related to the advancement of the case. Resp.’s Position Statement, Exh. B 8, Exh. C. The Court is unable to determine from the billing record description how the claimed activity is related to advancement of the case. Without a more complete description and explanation the Court would not approve the claim.

EXCEPTION 11.

Counsel for the Respondent objects that the work described on the billing records for June 20, 2012 and described as “review the file” and for which 1 1/6 hours are claimed is not reasonably related to the advancement of the case. Resp.’s Position Statement Exh B 8, Exh. C. The Court is unable to determine from the billing record description how the claimed activity is related to advancement of the case. Without a more complete description and explanation the Court would not approve the claim.

EXCEPTION 12.

Counsel for the Respondent objects that the work described on the billing records for July 3, 2012 as “Draft Notice of Change of Address, sent to opposing counsel and trial judge” and for which 2/5 hour is claimed is not reasonably related to the advancement of the case. Resp.’s Position Statement, Exh B 8, Exh. C. The Court agrees. In the Court’s view the entry describes clerical work that is not reasonably related to advancement of the case. The Court would not approve the claim.

EXCEPTION 13.

Counsel for the Respondent objects that the work described on the billing records for July 31, 2012 as “Review LAW draft of Descutner trial brief; discussed formatting” is a duplicate time entry. Resp.’s Position Statement, Exh. C. After reviewing the billing records, the Court cannot locate the entry that duplicates the July 31, 2012 entry. Unless Counsel for the Respondent can point out the alleged “duplication,” the Court would approve the claim but would subtract 1/6 hour for the asserted discussion of formatting, activity the Court deems not to be reasonably related to advancement of the case.

BILLING RECORD REDACTIONS

The parties are further advised that as the matter now stands, the Court would not approve the time claimed for May 18, 2012; May 21, 2012; August 2, 2012; September 5, 2012; September 10, 2012; September 11, 2012; October 4, 2012; October 26, 2012; October 31, 2012; November 1, 2012; November 2, 2012; November 6, 2012; November 7, 2012; November 8, 2012; November 9, 2012; November 11, 2012; November 12, 2012; November 13, 2012; November 14, 2012; November 15, 2012; November 19, 2012; November 23, 2012; November

26, 2012; and November 27, 2012. At each of these entries the descriptions of the work performed has been redacted and there is no way for counsel for the Respondent and for the Court to determine what was done and whether what was done was reasonably related to advancement of the case.

In his further discussions concerning attorney's fees, counsel for Mr. Descutner should provide counsel for the Respondent with a "clean" copy of the pertinent billing records or with other business documents that can support his claims.

ORDER TO REPORT

In view of the above, counsels shall continue their discussions and arrive at an agreement concerning the back pay (including the overtime pay) due to Mr. Descutner and the attorney's fees due to Mr. Descutner's counsel. Counsels shall report the results of their discussions in writing to the Court within 20 calendar days of the date of this order.

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

Distribution: (1st Class Mail)

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/db

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

January 29, 2013

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2013-362-D
on behalf of REUBEN SHEMWELL,	:	MADI CD 2013-01
Complainant,	:	
v.	:	
	:	
ARMSTRONG COAL CO., INC. &	:	
ARMSTRONG FABRICATORS, INC.,	:	Parkway Mine Surface Facilities
Respondents	:	Mine ID 15-19356

ORDER SCHEDULING ORAL ARGUMENT

Before: Judge Feldman

I. Statement of the Case

Reuben Shemwell’s employment as a welder was terminated on September 14, 2011. On January 23, 2012, Shemwell filed his initial complaint with the Mine Safety and Health Administration (“MSHA”), based on the allegation that his termination was motivated, at least in part, by safety related activities protected under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (the “Act”). 30 U.S.C. § 815(c)(1). After an MSHA investigation, the Secretary of Labor (the “Secretary”) declined to bring a discrimination complaint on his behalf. Following the Secretary’s decision not to pursue the discrimination case, on August 22, 2012, Armstrong Coal Company and Armstrong Fabricators (collectively referred to as “Armstrong”) filed suit in the Commonwealth of Kentucky’s Muhlenberg Circuit Court, in the 45th Judicial District (Case No. 12-CI-00397), alleging Shemwell’s January 23, 2012, discrimination complaint warranted a state action for “Wrongful Use of Civil Proceedings.” *Complaint*, Case No. 12-CI-00397, at 7.

Currently before me is a January 8, 2013, discrimination complaint filed by the Secretary on behalf of Shemwell pursuant to section 105(c)(2) of Act. 30 U.S.C. § 815(c)(2). The Secretary asserts that Armstrong’s civil suit constitutes a violation of section 105(c)(1). Section 105(c)(1) provides in pertinent part:

No person shall . . . in any manner discriminate against or otherwise interfere with the exercise of the statutory right of any miner . . . because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . or

because of the exercise by such miner . . . of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

II. Background

Prior to MSHA's completion of its investigation of Shemwell's January 23, 2012, complaint, on March 9, 2012, the Secretary elected to file an application for Shemwell's temporary reinstatement under section 105(c)(2) of the Act. Armstrong was ordered to temporarily reinstate Shemwell following an evidentiary hearing based on a finding that Shemwell's complaint was not frivolously brought. 34 FMSHRC 1464 (June 2012) (ALJ). The reinstatement decision below was affirmed by the Commission. *Sec'y of Labor o/b/o Shemwell v. Armstrong Coal Company, Inc., and Armstrong Fabricators, Inc.* 34 FMSRHC 1580, 1582-83 (July 2012) (holding that the finding that Shemwell's complaint was not frivolously brought is supported by substantial evidence and consistent with applicable law).

On July 27, 2012, MSHA advised Shemwell that its investigation failed to reveal that a violation of section 105(c)(1) had occurred. At that time, Shemwell was advised that:

if [he did] not concur with the determination, [he had] the right under Section 105(c) of the Mine Act to file an action on [his] own behalf within 30 days after receipt of this letter . . .

Letter from Carolyn T. James, Assistant Director, Technical Compliance and Investigation Office, to Reuben Shemwell (July 27, 2012).

Consequently, Shemwell elected to pursue his underlying January 23, 2012, discrimination complaint by timely filing a discrimination complaint on his own behalf on August 25, 2012, pursuant to section 105(c)(3) of the Act. 30 U.S.C. § 815(c)(3). Shemwell's private discrimination proceeding has been docketed as KENT 2012-1497. The hearing in Docket No. KENT 2012-1497 is scheduled for June 18, 2013, in Owensboro, Kentucky.

During a conference call on January 24, 2013, the parties were advised that disposition of the Secretary's complaint with regard to the civil action would be through oral argument and subsequent briefing. The parties were further advised that the oral argument would be conducted at **10:00 a.m. on February 27, 2013**, at the Commission's headquarters in Washington, D.C., at the following address:

Federal Mine Safety and Health Review Commission
Richard V. Backley Hearing Room
Fifth Floor, Room 511N
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

III. Framework

The issue to be addressed is whether the filing of Shemwell's January 23, 2012, discrimination complaint is protected activity under section 105(c)(1) of the Act. In resolving this issue, the parties should be prepared to address, with any relevant case law to support their positions, the following matters:

1. Whether Armstrong's filing of the civil action against Shemwell in the state proceeding is a *per se* violation of the provisions of section 105(c)(1) of the Act.
2. Assuming the civil proceeding brought by Armstrong in the State of Kentucky is not a *per se* violation of the Act, whether the allegation that Shemwell's complaint constitutes a "wrongful use of civil proceeding" is the substantive equivalent of an assertion that Shemwell's complaint was frivolously brought.
3. Whether the doctrines of res judicata and/or collateral estoppel preclude Armstrong from re-litigating in this proceeding whether Shemwell's January 23, 2013, discrimination complaint regarding his termination was frivolously brought, given the Commission's final decision affirming Shemwell's temporary reinstatement. *See* 34 FMSHRC at 1582-83.
4. The relief sought by Armstrong in its civil action against Shemwell includes "compensatory and punitive damages in an amount in excess of the jurisdictional limitations of [the State] Court" in addition to "a reasonable attorney's fee and all costs expended." *Complaint*, Case No. 12-CI-00397, at 9. At oral argument, Armstrong should provide the amount of monetary damages it is seeking to recover from Shemwell.
5. If it is determined that Armstrong's civil suit constitutes a violation of section 105(c)(1) of the Act, in addition to any recovery sought for monetary damages incurred by Shemwell, the Secretary should propose the amount of the civil penalty that is sought in this matter. With respect to the question of the propriety of the amount of the proposed civil penalty, the parties should address whether Armstrong's civil action has a chilling effect on the exercise of statutory rights conferred to miners by the Act. In this regard, the Commission has concluded that determining whether there is objective evidence of a chilling effect depends on whether the adverse action "reasonably tended to discourage miners from engaging in protected activities." *Sec'y of Labor o/b/o Poddey, v Tanglewood Energy, Inc.*, 18 FMSRHC 1315, 1321 (Aug. 1996) (quoting *Sec'y of Labor o/b/o Johnson v. JWR, Inc.* 18 FMSHRC 552, 558 (April 1996)) (citing by analogy authority relating to the enforcement of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1)).

In addition to the above matters, the parties may present any other arguments deemed appropriate in support of their respective positions. A post-oral argument briefing schedule will be established at the oral argument.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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