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COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 2, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-1412-M
v.	:	A.C. No. 24-02140-220439 Q031
SKYLINE DREDGING AND EXCAVATING, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 13, 2011, the Commission received from Skyline Dredging and Excavating, Inc. ("Skyline") a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On March 18, 2011, Chief Judge Lesnick issued an Order to Show Cause and Order of Default in response to Skyline's failure to answer the Secretary's August 6, 2010 Petition for Assessment of Civil Penalty. The judge ordered the operator to file its answer within 30 days or it would be in default. The Commission did not receive Skyline's answer within 30 days, so the order of default became effective on April 18, 2011.

Skyline asserts that it did not receive the Order to Show Cause or the Secretary's previously filed Petition for Assessment of Civil Penalty because they were sent to the wrong mailing address. The Secretary does not oppose the motion to reopen, but notes that Skyline changed its address of record on April 6, 2011, after the petition and order were sent to the previous address.

Having reviewed Skyline's request and the Secretary's response, in the interest of justice, we conclude that the Order of Default has not become a final order of the Commission because the Order to Show Cause was never received by Skyline. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Skyline shall file an Answer to the Show Cause Order within 30 days of the date of this order.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

March 2, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-760-M
v.	:	A.C. No. 03-00256-217706
MMR CONSTRUCTORS, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 5, 2011, the Commission received from MMR Constructors, Inc. ("MMR") a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On May 3, 2011, Chief Judge Lesnick issued an Order to Show Cause which by its terms became an Order of Default if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to MMR's failure to answer the Secretary's October 21, 2010 Petition for Assessment of Civil Penalty.

MMR asserts that it did not receive the Show Cause Order until October 5, 2011, and that it was in the process of negotiating a settlement agreement with MSHA. The Secretary originally opposed the motion. However, the Secretary subsequently withdrew her opposition, and requested that this case be reopened for the limited purpose of allowing the parties to submit their settlement agreement for approval pursuant to section 110(k) of the Mine Act, 30 U.S.C. § 820(k).

Having reviewed MMR's request and the Secretary's response, in the interest of justice, we grant MMR's motion and remand this case to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ Robert F. Cohen, Jr.
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/s/ Patrick K. Nakamura
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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March 7, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. LAKE 2010-128-M
v.	: :	
BILL SIMOLA, employed by UNITED TACONITE LLC	: :	

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

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"), Administrative Law Judge Jerold Feldman determined that Bill Simola, an agent of a limited liability company ("LLC"), could be liable under Mine Act section 110(c).[1] 32 FMSHRC 421, 424 (Apr. 2010) (ALJ). Pursuant to 29 C.F.R. § 2700.76, Simola sought interlocutory review of the judge's determination. The judge certified the matter for interlocutory review, 32 FMSHRC 707, 708 (May 2010) (ALJ), which the Commission granted. For the reasons that follow, we affirm the judge's determination.

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[1] Section 110(c) of the Mine Act provides, in pertinent part:

> Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation, . . . shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

30 U.S.C. § 820(c).

I.

Factual and Procedural Background

United Taconite, LLC ("United Taconite") operates the United Plant in Minnesota. United Taconite is an LLC organized under the laws of the state of Delaware. 32 FMSHRC at 422.

On October 1, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation and an order to United Taconite under Mine Act section 104(d)(1), 30 U.S.C. § 814(d)(1). Citation No. 6407901 ("the citation") was issued for an alleged significant and substantial ("S&S")[2] violation of 30 C.F.R. § 56.11001, which requires that a safe means of access shall be provided and maintained in all working places.[3] Order No. 6407902 ("the order") alleged an S&S violation of 30 C.F.R. § 56.14107(a), which requires that moving machine parts shall be guarded to protect persons from injury.[4] The Secretary alleged

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

[3] Citation No. 6407901 alleged, in pertinent part:

> A safe means of access was not provided to conduct the maintenance project of replacing the #2 roll motor/reducer unit on the line 1 roll feeder. This project required a maintenance mechanic to climb on top of the roll feeder, stand on round smooth parallel rolls which were at about a 15 degree angle and use a pry bar to gain clearance to slide the unit from the shaft. The adjacent #18 reciprocating conveyor was running with the travel rail about 4 feet above the roll feeder surface and with in arms reach of where the maintenance mechanic was standing using the pry bar. Pellet Plant Coordinator Bill Simola engaged in aggravated conduct constituting more than ordinary negligence in that he was standing on a walkway about 10 feet away observing the project and equipment in motion and did not ensure the safety of the miners.

[4] Order No. 6407902 alleged, in pertinent part:

> A guard was not provided for the south side of the #18 reciprocating conveyors travel rail and wheel to protect persons from contact with the moving machine parts. . . . Pellet Plant

(continued...)

that both violations were the result of United Taconite's unwarrantable failure to comply with the standards.[5]

At all relevant times, Bill Simola was the Pellet Plant Coordinator for United Taconite. On December 21, 2009, the Secretary issued a petition for assessment of civil penalties pursuant to section 110(c) of the Mine Act seeking to impose personal liability against Simola, as an agent of United Taconite, for the violations alleged in the citation and order. 32 FMSHRC at 421.

Simola contested the proposed penalty assessment. He subsequently filed a motion for summary decision in which he maintained that section 110(c) does not apply to directors, officers, or agents of an LLC.[6]

On April 6, 2010, the judge issued an order dismissing Simola's motion. 32 FMSHRC 421. Construing the motion for summary decision as a motion to dismiss, the judge determined that the Mine Act was silent on the question of whether agents of LLCs could be held liable under section 110(c) because the "operation of mines as LLC entities occurred after the legislation was adopted." *Id*. at 422-23. Finding the Mine Act silent on the question, he deferred to the Secretary's interpretation of the Mine Act, which treats agents of LLCs the same as agents for corporations. *Id.* at 423. In so doing, the judge determined that since "the purpose of section 110(c) is to pierce corporate-like liability shields, the Secretary's interpretation that the provisions of section 110(c) apply to agents of mine operators as . . . limited liability companies is manifestly reasonable and consistent with the intent of the legislation." *Id.*

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[4](...continued)

> Coordinator, Bill Simola engaged in aggravated conduct constituting [] more than ordinary negligence in that he was standing on a walkway about 10 feet away observing the project and equipment in motion and did not ensure the safety of the miners.

[5] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[6] Throughout this decision, we will refer only to "agents" of LLCs rather than repeating "directors, officers, or agents" in each instance. However, the same principles of liability would apply to directors and officers of LLCs as well.

II.

Disposition

Simola argues that the language of section 110(c) plainly applies only to agents of corporations. He asserts that because the Mine Act is clear and unambiguous on this point, effect must be given to the plain language. Simola relies on *Guess, employed by Pyro Mining Co.*, 15 FMSHRC 2440, 2442-43 (Dec. 1993), *aff'd sub nom. Sec'y of Labor v. Shirel*, 52 F.3d 1123 (D.C. Cir. 1995), which he argues held that the Mine Act provides for individual liability of agents of corporate operators only. He contends that the judge erred because LLCs are not the same as corporations. Simola also disputes the validity of the Secretary's 2006 interpretive rule,[7] which took the position that agents of LLCs should be treated as agents of corporations. Simola also maintains that because Congress has had two chances to revise section 110(c) since the Mine Act's enactment, but has not done so, Congress has in effect validated the present language, which applies only to corporate agents.

The Secretary responds that section 110(c) is silent or ambiguous on the issue of whether it applies to agents of LLCs. She asserts that Congress did not express and "could not have expressed, any intent with respect to agents of LLCs because, when Congress enacted section 110(c), LLCs effectively did not exist." Sec'y Br. at 6, 15. The Secretary maintains that because Congress expressed no intent with respect to agents of LLCs, the question becomes whether her interpretation is reasonable. The Secretary submits that her interpretation is reasonable, claiming that her interpretation is consistent with the history and purpose of section 110(c) and that the terms "corporate operator" and "such corporation" in section 110(c) can reasonably be read to encompass LLCs. Moreover, the Secretary explains that LLCs generally create the same sort of shield against personal liability that led Congress to impose personal liability on the agents of corporations. Accordingly, she argues that the same situations that warrant reaching behind the corporate shield warrant piercing the LLC shield.

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Res. Defense Council*, *Inc*., 467 U.S. 837, 842 (1984). If a statute is clear and unambiguous, effect must be given to its language. *Id.* at 842-43. Deference to an agency's interpretation of the statute may not be applied "to alter the clearly expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a statute's text and legislative history, may be employed to determine whether "Congress had an intention on the precise question at issue," which must be given effect. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (citations omitted). The examination to determine

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[7] MSHA issued an interpretive rule on July 10, 2006, providing that "agents of LLCs may be held personally liable under Section 110(c) of the Mine Act." 71 Fed. Reg. 38902, 38903 (July 10, 2006).

whether there is a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *Id.; see Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996); *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *See Joy Technologies, Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

A. Whether Congress directly addressed the question of whether agents of LLCs can be liable under section 110(c) of the Mine Act.

Section 110(c) of the Mine Act states in relevant part:

> Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation, . . . shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) [of this section.]

30 U.S.C. § 820(c).

The initial step under a *Chevron I* analysis is to decide whether Congress directly addressed the question of whether an agent of an LLC can be held liable under section 110(c). That provision states that agents of corporations can be held personally liable, but does not mention agents of LLCs. However, it is important to recognize that Congress could not have been expected to expressly mention LLCs in section 110(c) because LLCs did not effectively exist in 1977 when Congress passed the Mine Act.[8] Although the legislative history of section

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[8] The Secretary's interpretive rule provides the following background on LLCs:

> The LLC is a hybrid business entity first recognized in 1977 by the State of Wyoming. LLCs did not attain any significant popularity until 1988, however, when the Internal Revenue Service announced that LLCs could be taxed as partnerships despite their

(continued...)

110(c) provides valuable guidance as to Congressional intent in passing the provision, the legislative history likewise does not directly address liability for agents of LLCs.

Simola articulates the issue differently, asking "whether Congress expressed the intent that section 110(c) be limited to agents of corporations?" Sim. Br. at 10; Reply Br. at 2-3. By positing the question in this manner, and defining "corporation" pursuant to Delaware state law,[9] Simola attempts to persuade us that the clear language of section 110(c) applies only to agents of typical corporations and not to agents of business entities that share corporate attributes such as an LLC. Sim. Br. at 6. Relying on the Commission's decision in *Guess*, Simola argues that "[t]he inapplicability of section 110(c) to agents of business entities other than corporations is well settled," *id*. at 4, and since under Delaware law, corporations are clearly distinguished from limited liability companies, the plain meaning of section 110(c) would preclude application to agents of LLCs. *Id*. at 5. However, even if we were to frame the question in the manner that Simola suggests, we cannot agree that the use of the word "corporation" in this section of the Mine Act may only be read one way – that is, consistent with the definition of "corporation" as codified by one state.[10]

The terms "corporate officer" and "corporation" are not defined in the Mine Act. In the absence of a statutory or regulatory definition of a term, the Commission applies the ordinary meaning of that term. *E.g., Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006). In *Webster's Third New International Dictionary* 510 (1993) "corporation" is defined as "a group of persons or objects treated by the law as an individual or unity having rights or liabilities distinct from those of the persons or objects composing it." This definition also applies to LLCs (but not to partnerships), because of the limited liability shield. Thus, the term "corporate officer" in the Mine Act can be read to include operators of entities which are corporate in nature. Stated differently, the text of section 110(c) does not preclude the inclusion of LLCs in the definition of the word "corporation."

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[8](...continued)

> corporation-like liability shield. When the IRS announced in 1997 that LLCs could elect pass-through taxation without regard to the number of corporation-like characteristics they possessed, the number of LLCs grew dramatically.

71 Fed. Reg. at 38904.

[9] As noted by Judge Feldman, United Taconite is a limited liability company organized under the laws of the state of Delaware. 32 FMSHRC at 707.

[10] Business entities, such as corporations and LLCs, are normally chartered and defined by the laws of the various states. It would be illogical to allow a state's definition to control application of a comprehensive federal law, such as the Mine Act, and to provide a safe haven from its reach. Accordingly, it is important to examine the actual characteristics of a business entity rather than just relying on the state-derived definition.

Where dictionary definitions are relied upon to establish the meaning of a term, and those definitions show that a term is open to alternative interpretations, the Commission has found the term to be ambiguous. *See Wolf Run Mining Co.,* 32 FMSHRC 1669, 1680 (Dec. 2010)*; Island Creek Coal Co.*, 20 FMSHRC 14, 19 (Jan. 1998). Similarly, in *National Cement Co. of California*, 494 F.3d 1066 (D.C. Cir. 2007), *appeal after remand*, 573 F.3d 788 (D.C. Cir. 2009), the D.C. Circuit rejected the Secretary of Labor's argument that the Mine Act's jurisdictional definition of "mine" was clear and unambiguous because both of the relevant statutory terms used in that section ("private" and "appurtenant to") were ambiguous under their respective dictionary definition. 494 F.3d at 1074-75. Consistent with these precedents, we conclude that a *Chevron I* "plain meaning" analysis does not apply here, due to the different possible interpretations of the dictionary definition of "corporation."

Moreover, Simola reads too much into the Commission's decision in *Guess*. In that case, the Commission rejected the Secretary's attempt to extend section 110(c) to an agent of a partnership. 15 FMSHRC at 2443. We concluded that the entity in question was in fact a partnership, despite its being composed of two corporations. Our acknowledgment of section 110(c)'s application to corporations can hardly be construed as excluding LLCs, since in that case we had no occasion to consider an entity such as an LLC.

The agent of a limited liability company, like the agent of a corporation, (and unlike the agent of a partnership) is shielded from personal liability. Although LLCs are hybrid entities, it is undisputed that LLCs possess the distinctive corporate quality of limited liability, which Congress specifically intended to address when it enacted section 110(c).

It is important to emphasize that Congress could not have been expected to expressly mention LLCs in section 110(c) because LLCs did not effectively exist in 1977 when the Mine Act was enacted. Thus, while it can be said that Congress rejected partnerships from the ambit of section 110(c), it cannot be said that Congress rejected a structure such as a limited liability company.[11] Put another way, the word "corporation," as used in the statute, cannot reasonably be read to include partnerships, but it can reasonably be read to include LLCs.

Hence, examination of the text and legislative history of section 110(c) does not result in a conclusion that narrowing the definitions of "corporate operator" and "corporation" to how those terms were used in the Delaware law of corporations in 1977 is the only required interpretation of the terms. *See Bell Atlantic Telephone Co. v. FCC*, 131 F.3d 1044, 1049 (D.C. Cir. 1997). Accordingly, we conclude that section 110(c) is ambiguous or silent on the issue of whether an agent of an LLC may be held personally liable under the Mine Act.

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[11] The status of LLCs under section 110(c) has become a significant issue under the Mine Act because, in recent years, the number of mine operators organized as LLCs has steadily increased. As of 2006, according to MSHA records, 782 of the nation's 7287 active mine operators – approximately 10 percent – identified themselves as LLCs. A number of the nation's large operators are LLCs. 71 Fed. Reg. at 38904.

B. Whether the Secretary's interpretation of section 110(c) is reasonable and entitled to deference.

As explained above, *supra*, at 5, in cases such as this, where the Mine Act is silent or ambiguous, the Commission must undertake a *Chevron II* analysis to determine whether the Secretary's interpretation is a reasonable and permissible construction of the statute. 467 U.S. at 843; s*ee also NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (providing that courts will give "controlling weight" to the interpretation of the agency charged with enforcement of a statutory provision which "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design"); *Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 115 (4th Cir. 1995) (providing that when the Act is silent on an issue, the Secretary's interpretation which reasonably effectuates the health and safety goals of the Act is controlling).

The Secretary maintains that section 110(c) should be interpreted as providing that an agent of an LLC may be liable for civil penalties under that subsection. Among other things, the Secretary points to her 2006 interpretive rule in which she concluded that agents of LLCs should be personally liable under section 110(c) to the same extent as agents of corporations. 71 Fed. Reg. 38902.

The legislative history underlying section 110(c) supports the Secretary's interpretation. Section 110(c) was carried over without significant change from section 109(c) of the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"). 30 U.S.C. § 819(c) (1969). In passing section 109 of the Coal Act, Congress explained that it wanted to impose liability on individual agents of corporate operators in order to "penetrat[e] the corporate shield," stating:

> The committee expended considerable time in discussing the role of an agent of a corporate operator and the extent to which he should be penalized and punished for his violations of the act . . . . It was ultimately decided to let the agent stand on his own and be personally responsible for any penalties or punishment meted out to him . . . . The committee chose to qualify the agent as one who could be penalized and punished for violations, because it did not want to break the chain of responsibility for such violations after penetrating the corporate shield.

H.R. Rep. No. 91-563, at 11-12 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Part I *Legislative History of the Federal Coal Mine and Health and Safety Act of 1969*, at 1041-42 (1975) ("*Coal Act Leg. Hist.*").

In later passing section 110(c) of the Mine Act, Congress stated that it intended to hold individual officials as well as corporate entities responsible for violations in order to induce greater compliance with the Mine Act:

> "[s]ince the basic business judgments which dictate the method of operation of a coal mine are made directly or indirectly by persons at various levels of corporate structure, [the provision for assessment of civil penalties is] necessary to place the responsibility for compliance with the Act and the regulations, as well as the liability for violations on those who control or supervise the operation of coal mines as well as on those who operate them." In short, the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.

S. Rep. No. 95-181, at 40-41 (1977) (quoting S. Rep. No. 91-411, at 39, *reprinted in Coal Act Leg. Hist.* at 165), *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 Sixth Circuit explained that section 110(c)'s legislative history demonstrated Congressional intent to provide an additional compliance incentive to certain employees working within a corporate structure:

> In a noncorporate structure, the sole proprietor or partners are personally liable as "operators" for violations; they cannot pass off these penalties as a cost of doing business as a corporation can. Therefore, the noncorporate operator has a greater incentive to make certain that his employees do not violate mandatory health or safety standards than does the corporate operator. Subsection [110(c)] attempts to correct this imbalance by giving the corporate employee a direct incentive to comply with the Act.

Richardson v. Sec'y of Labor, 689 F.2d 632, 633-34 (6th Cir. 1982*), aff'g, Kenny Richardson*, 3 FMSHRC 8 (Jan. 1981), *cert. denied*, 461 U.S. 928 (1983). Thus, Congress intended to impose personal liability on corporate agents through section 110(c) because otherwise those agents would generally be protected from liability by the corporate shield and have a reduced incentive to comply with the Act. *Richardson,* 689 F.2d at 633-34.

With regard to the question of whether an agent of an LLC should be treated as an agent of a corporation for purposes of section 110(c), we note that there is universal agreement that an LLC possesses the distinguishing corporate characteristic of limited liability.[12] Moreover, courts

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[12] *See Ruffin v. New Destination, LLC*, 773 F. Supp.2d 34, 40 (D.D.C. 2011) (holding that the general rule that a corporation is regarded as an entity separate and distinct from its shareholders applies to LLCs)*;* Callison, J. William & Sullivan, Maureen A., *Limited Liability Companies: A State-by-State Guide To Law and Practice* § 2:6 (2010) (providing that the

(continued...)

that have addressed the question whether LLCs should be categorized as corporations have concluded that this limited liability characteristic may require an LLC to be treated like a corporation when a statute is silent as to its applicability.

For example, in *Meyer v. Oklahoma Alcoholic Beverage Laws Enforcement Comm.*, 890 P.2d 1361, 1362 (Okla. Ct. App. 1995), the court addressed the issue of whether an LLC was eligible for a liquor license when the Oklahoma Constitution prohibited corporations from obtaining liquor licenses but permitted partnerships to acquire them. Noting that this was an issue of first impression because LLCs had not been in existence at the time of the state constitution's enactment, the court ruled that "limitation of liability" was the substantial characteristic that made the LLC fall under the prohibition against corporate license holders. 890 P.2d at 1363-64. The court reasoned that "business forms that did not ensure such personal responsibility were excluded from eligibility for licensing." *Id.* at 1364. Accordingly, the court treated the LLC like a corporation even though the Oklahoma constitution limited the exclusion to a "corporation." In doing so, the Court stated that the "most important feature" of the LLC is "the limitation of liability of its members." *Id.*

Additionally, "given the similar liability shields that are provided by corporations and LLCs," most courts apply corporate law standards to pierce the liability shields of LLCs. *NetJets Aviation*, 537 F.3d at 176 (applying Delaware law); *see also Ruffin*, 773 F. Supp.2d at 40 (providing that the general rule that a corporation is regarded as an entity separate and distinct from its shareholders applies to LLCs and corporate veil piercing principles apply to the LLC shield). In *McWilliams Ballard, Inc. v. Broadway Mgmt Co.*, 636 F. Supp.2d 1, 8 (D.D.C. 2009), the court determined that members of an LLC could be held liable under the corporate doctrine of piercing the limited liability shield. *Accord Taurus IP, LLC v. DaimlerChrysler Corp*., 534 F. Supp.2d 849, 871 (W.D. Wis. 2008) (providing that the corporate veil of a corporation and of a limited liability company may be pierced when the corporate fiction is used as a means of perpetrating fraud).[13]

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[12](...continued)
limited liability protection, deriving from a corporation's nature as a separate legal entity apart from its members, makes the corporation similar to the LLC). An LLC is an entity that provides "tax benefits akin to a partnership and limited liability akin to the corporate form." *NetJets Aviation, Inc. v. LHC Communications, LLC*, 537 F.3d 168, 176 (2d Cir. 2008) (citations omitted); *In re Wolverine, Proctor & Schwartz, LLC*, 447 B.R. 1, 35 n.26 (Bankr. D. Mass. 2011) (providing that an LLC is a hybrid business entity that offers its members limited liability as if they were shareholders of a corporation, but treats the entity and its members as a partnership for tax purposes).

[13] Simola argues that case law demonstrates that in other contexts, LLCs are not treated as corporations. Sim. Br. at 7. None of the three cases cited by Simola are particularly relevant here, in that they all involve the question of whether an LLC is treated as a corporation for
(continued...)

Because of the clear legislative intent to pierce the corporate veil and reach agents who were shielded by limited liability, it is reasonable to conclude that Congress, if given the opportunity, would have explicitly included LLCs within the scope of section 110(c) as entities that shield their agents from personal liability.[14] Accordingly, it is reasonable to construe section 110(c) as including LLCs within the scope of the liability scheme.

We also note that

> [l]egislation is often written in terms broad enough to cover many situations which could not be anticipated at the time of enactment. . . . So a statute, expressed in general terms and written in the present or future tense, will be applied not only to existing things and conditions, but also prospectively to future things and conditions. . . . The rule that a statute will operate prospectively . . . has received frequent application in situations where automobiles are included in pre-automobile statutes enacted for stage coaches and carriages. Likewise, radio performances have been held to come within the meaning of copyright laws, talking pictures have been held to come within the terms of statutes applying to films, and telephones have been included within statutes applying to the telegraph.

Norman J. Singer & J.D. Shambie Singer, 2A Sutherland Statutory Construction, § 49.2 (7th ed. 2008).

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[13](...continued)
purposes of diversity jurisdiction under 28 U.S.C. § 1332. *General Tech v. Exro LTDA*, 388 F.3d 114, 121 (4th Cir. 2004); *GMAC Commercial Credit, L.L.C., v. Dillard Dept. Stores, Inc*., 357 F. 3d 827 (8th Cir. 2004); *Cosgrove v. Bartolotta*, 150 F.3d 729 (7th Cir. 1998). Diversity jurisdiction cases are inapposite to the situation here, which involves a statute whose purpose is to pierce a corporate shield so as to impose potential personal liability where public safety and health is at stake.

[14] Simola contends that Congress has effectively ratified its position to restrict section 110(c) to corporations after the rise of LLCs because the Mine Act was revised in 1990 and 2006 and nothing was done to amend that section. We disagree. Neither amendment had anything to do with the scope of section 110(c), and we decline to read any significance into Congress' revisions of the Act. *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (holding that when there is no evidence to suggest that Congress was even aware of an issue, the re-enactment of the legislation is without significance)*; see also Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (stating that "[w]e do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.").

An early Florida Supreme Court case, *Taylor v. Roberts*, 84 Fla. 654 (1922), is illustrative of this point. There, the plaintiff challenged an automobile parking violation on the basis that the ordinance that authorized the regulation of parking only dealt with "hackney carriages, carts, omnibuses, wagons and drays." *Id*. at 657. Automobiles were not in use when the ordinance was passed. *Id.* The court ruled, however, that the ordinance evidenced an intent to regulate "all the then known classes of vehicles using the streets, and the subsequent use of the streets by a new and different kind of vehicle warrants the extension . . . to the . . . automobile." *Id*.; *see also Cain v. Bowlby*, 114 F.2d 519, 522 (10th Cir. 1940) (holding that "it is a general rule in the construction of statutes that legislative enactments . . . apply to persons, subjects and businesses within their general purview and scope, though coming into existence after their passage, where the language fairly includes them"). Likewise, because Congress, at the time of the Mine Act enactment, was including within the purview of section 110(c) all known entities that shielded its agents from personal liability, it is logical to extend the reach to LLCs, who share the limited liability shield with corporations.

Similarly, in *People of Puerto Rico v. Shell Co. (P.R.), Limited*, 302 U.S. 253 (1937), the Supreme Court considered whether the phrase "territory of the United States" in section 3 of the Sherman Anti-Trust Act of 1890, 15 U.S.C. § 3, applied to Puerto Rico, an insular dependency, given that insular dependencies of the United States did not exist when the Sherman Act was enacted. In holding that Puerto Rico was a "territory" within the meaning of section 3 of the Sherman Act, the Court said: "Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed." *Id*. at 258. The same principle applies to the Secretary's interpretation of the words "corporate operator" and "corporation" in this case.

In addition, the Secretary's interpretation furthers the safety and remedial goals of the Mine Act by giving operators a "greater incentive" to comply with the Mine Act. *Richardson*, 689 F.2d at 633-34. Congress intended the Act to be liberally construed to achieve its primary purpose, which is to protect the miner. *Cannelton Industries, Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989). In contrast, Simola's interpretation excluding agents of LLCs would result in piecemeal enforcement of responsible agents – allowing some to hide behind a limited liability shield while other can be cited. *See Alcoa Alumina & Chemicals, LLC*, 23 FMSHRC 911, 916 (Sept. 2001) (rejecting operator's interpretation that would have resulted in piecemeal enforcement).

We conclude that the Secretary's interpretation, which holds agents of LLCs personally liable under section 110(c), is consistent with the text of section 110(c) in that section 110(c) applies to corporate operators and the limited liability shield of an LLC is a corporate characteristic. The Secretary's interpretation also is fully consistent with the legislative history, which indicates that Congress sought to pierce the corporate shield to impose personal liability on responsible agents that otherwise would not have a personal incentive to comply with the Mine Act. LLCs share the limited liability shield with corporations and, unlike in partnerships,

the responsible individuals would be able to evade personal liability because of this limited liability. The liability shield of LLCs brings the agents of LLCs within the ambit of section 110(c). In light of the purpose of the Mine Act and the legislative history of section 110(c), the Secretary's interpretation is reasonable and consistent with the safety-promoting goals of the statute. We conclude that agents of LLCs may be personally liable for civil penalties under section 110(c).

III.

Conclusion

For the reasons set forth above, we hereby affirm the judge's order denying Simola's motion to dismiss. We direct that the case proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan.
Mary Lu Jordan, Chairman

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 13, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2009-545
v.	:	A.C. No. 29-02170-188587
SAN JUAN COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 22, 2011, the Commission received from San Juan Coal Co. ("San Juan Coal") a motion submitted by counsel seeking to reopen a penalty assessment proceeding and relieve it from the settlement decision entered against it.

On August 20, 2010, Chief Administrative Law Judge Lesnick issued a Decision approving a partial settlement for citation Nos. 7290226 and 7290228.[1] San Juan Coal asserts that the partial settlement decision was mistakenly applied to the entire case No. 000188587. San Juan Coal further states that it maintains its desire to contest the two remaining citation Nos. 6688822 and 6688825. The Secretary does not oppose the request to reopen, and notes that the settlement agreement only encompassed citation Nos. 7290226 and 7290228.

[1] We note that the judge's decision appears to contain a typographical error on page 2, referring twice to citation No. 7290226. The second reference should read "Citation No. 7290228."

Having reviewed San Juan Coal's request and the Secretary's response, in the interests of justice, we hereby grant the operator's motion and remand this case to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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March 13, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2010-1014
v.	:	A.C. No. 15-18376-217047
BLEDSOE COAL CORPORATION	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 14, 2011, the Commission received from Bledsoe Coal Company ("Bledsoe") a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

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

Bledsoe asserts that it submitted a timely answer to the Secretary's Petition for Assessment on July 1, 2010. The Secretary does not oppose the request to reopen and notes that the operator's answer was timely received by the MSHA District 7, Barbourville, KY Office. However, the answer does not indicate that it was also sent to the Commission, as instructed in the penalty petition.

Having reviewed Bledsoe's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Order of Default. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ Robert F. Cohen, Jr.
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/s/ Patrick K. Nakamura
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March 13, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2010-426
v.	:	A.C. No. 36-09604-213741
RES COAL, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 26, 2011, the Commission received from RES Coal, LLC ("RES") a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

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

RES asserts that it did not receive the Order to Show Cause and that it had timely replied to the Secretary's previously filed Petition for Assessment of Civil Penalty. The Secretary does not oppose the motion to reopen, and notes that the Conference Litigation Representative from MSHA District 2 has indicated that the operator's August 24, 2010 answer was timely received.

Having reviewed RES's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Order of Default. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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March 13, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2010-710-M
v.	:	A.C. No. 08-00956-215059
CENTRAL STATE AGGREGATES, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 17, 2011, the Commission received from Central State Aggregates, LLC ("Central") a motion submitted by counsel seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On March 17, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became an Order of Default if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Central's failure to answer the Secretary's June 16, 2010 Petition for Assessment of Civil Penalty. The Commission did not receive Central's answer within 30 days, so the order of default became effective on April 18, 2011.

Central asserts that it did not receive the Order to Show Cause or the Secretary's previously filed Petition for Assessment of Civil Penalty because they were sent to the mine's physical address, instead of its mailing address. The Secretary does not oppose the motion to reopen, but directs Central to contact the MSHA assessment center to adjust its Legal ID address of record.

Having reviewed Central's request and the Secretary's response, in the interest of justice, we hereby vacate the Order of Default and reopen the proceeding. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Central shall file an Answer to the Show Cause Order within 30 days of the date of this order.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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March 13, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-1633
v.	:	A.C. No. 10-00531-225678
THOMPSON CREEK MINING COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 4, 2011, the Commission received from Thompson Creek Mining Company ("Thompson") a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On May 11, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause and Order of Default in response to Thompson's failure to answer the Secretary's October 7, 2010 Petition for Assessment of Civil Penalty. The judge ordered the operator to file its answer within 30 days or it would be in default. The Commission did not receive Thompson's answer within 30 days, so the order of default became effective on June 10, 2011.

Thompson asserts that it timely responded to the Order to Show Cause. The Secretary does not oppose the request to reopen and notes that the Denver Regional Solicitor's Office indicated that the operator's October 25, 2010 answer is in the case file. However, the answer does not indicate that it was also sent to the Commission, as instructed in the penalty petition.

Having reviewed Thompson's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Order of Default. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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March 13, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 2011-1463-M A.C. No. 04-04075-260974
LEHIGH SOUTHWEST CEMENT COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 14, 2011, the Commission received from Lehigh Southwest Cement Co. ("Lehigh") a motion submitted by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary does not oppose the request to reopen.

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 23, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 2008-562
	:	Docket No. KENT 2008-782
CONSHOR MINING, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006). On January 19, 2012, Administrative Law Judge Jerold Feldman issued a Certification of Interlocutory Ruling pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76(a)(1)(i). In his order, the judge certified for interlocutory review by the Commission his ruling in his Order of November 28, 2011, that a violation that is not attributable to reckless conduct may not be deemed flagrant under 30 U.S.C. § 820(b)(2) based on the operator's history of prior similar violations. Unpublished Order at 2-3 (Jan. 19, 2012). On February 15, 2012, we issued an order granting review of the Judge's order of November 28, 2011, with regard to that issue and ordered briefing.

On March 6, 2012, the Commission received from the Secretary of Labor a motion to vacate the Commission's February 15 order. As grounds for the motion, the Secretary states that she no longer seeks assessment of the three violations at issue as "flagrant" violations. The Secretary submits that, consequently, the issue directed for review by the Commission is moot. The Commission has received no opposition from Conshor Mining, LLC.

Upon consideration of the Secretary's motion, it is granted. We hereby vacate our February 15 order granting review. This case is remanded to Judge Feldman for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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March 29, 2012

SECRETARY OF LABOR,	:	Docket No. KENT 2011-906
MINE SAFETY AND HEALTH	:	A.C. No. 15-02057-215805
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2011-907
v.	:	A.C. No. 15-02057-215828
	:	
SAPPHIRE COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On April 18, 2011, the Commission received from Sapphire Coal Company ("Sapphire") two motions[1] seeking to reopen two penalty assessments that may have become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[2]

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

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

[1] The Commission inadvertently assigned new docket numbers to these motions. These cases were previously assigned docket numbers KENT 2011-171 and KENT 2011-172.

[2] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2011-906 and KENT 2011-907, both captioned *Sapphire Coal Company*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

Federal Rules of Civil Procedure. *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 Sapphire's requests and the Secretary's responses, we find that the proposed penalty assessments were timely contested, and therefore, did not become final orders of the Commission. Accordingly, these cases are remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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

ADMINISTRATIVE LAW JUDGE DECISIONS

Federal Mine Safety and Health Review Commission
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

March 5, 2012

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 2010-341-M
Petitioner,	:	A.C. No. 08-00088-205943-01
	:	
v.	:	
	:	
HATCH ENTERPRISES, INC.,	:	HATCH ENTERPRISES INC.
Respondent.	:	

DECISION

Appearances: Jonathan Hoffmeister, Esq., Office of the Solicitor, U.S. Department of Labor,61 Forsyth St., S.W., Room 7T10, Atlanta, GA 30303, for Petitioner;

W. Randolph Hatch, President, Hatch Enterprises, Inc., P.O. Box 238, Branford, FL32008, for Respondent

Before: Judge Rae

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Hatch Enterprises, Inc. pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act").

Prior to hearing, Petitioner filed a motion for leave to file the petition out of time. In response, Respondent filed an objection thereto. On December 2, 2011, I granted Petitioner's motion. At issue for hearing was one section 104(d)(1) citation.[1] The proposed penalty is

[1] Section 104(d)(1) provides:

If upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the condition created by such violation do not cause imminent danger, such violations is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or

(continued...)

$2000.00. The hearing was held on February 15, 2012 in Gainesville, FL. The parties presented evidence and made arguments. The record was held open for ten days for Hatch to submit financial information which was received on February 22, 2012.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Hatch Enterprises, Inc. ("Hatch") operates a family- run crushed limestone surface mine in Suwannee County, FL. At the time of this inspection, the mine employed three miners who worked one shift per day, five days per week. (Ex. S-7 at pg. 3.)The annual man hours worked was 20,000 to 30,000. (Ex. S-10.)

On October 20, 2009, the mine was inspected by an MSHA certified inspector who issued a number of citations and an oral imminent danger order. The following violation was adjudicated at hearing.

The Violation

The narrative portion of the citation with the later amendment reads as follows:

> A miner was observed using a cutting torch to cut a piece of metal without the use of proper eye protection. When observed, the employee had just started cutting the metal material. Eye protection is provided to employee's (sic) by the operator but was not being worn at this time. The miner in question was the operator's leadman. Mr. Lambert, leadman, engaged in aggravated conduct constituting more than ordinary negligence in that he knew that eye protection was required and needed, but failed to wear it. This is unwarrantable failure to comply with a mandatory standard.
>
> After review of information and the facts, it is determined that the leadman is an agent of the operator, therefore, this citation is modified to a 104(d)(1) citation.

(Ex. S-1.)

The standard provides: "Protective clothing or equipment and face shields, or goggles shall be worn when welding, cutting, or working with molten metal."30 C.F.R. §56.15007.

Billy Handshoe started his career with MSHA as a certified inspector in 2003 and remained until 2008 when health issues prevented him from completing his duties. He then worked for CEMEX as the safety and health supervisor where he conducted approximately 50 to

---

(...continued)
safety standards, he shall include such finding in any citation given to the operator under this Act.
30 U.S.C.§814(d).

100 safety audits and accompanied MSHA inspectors on approximately 14 regular inspections in the year he was there. In 2009, he returned to MSHA and worked in the Lexington, KY and Barstow, FL offices until he became the field office supervisor in Knoxville in July 2011. He was also a blaster for 12 years prior to joining MSHA.

Early in the morning of October 20, 2009, Handshoe met with Mr. Randy Hatch, President of Hatch Enterprises, in the shop area. Shortly after meeting with Hatch, Hatch departed and Dewayne Lambert escorted Inspector Handshoe on the inspection. (Tr. 16, 33-34.) During the health and safety survey he conducted in the shop area, he observed a bench grinder that was not equipped with a guard for which he issued a citation. (Tr. 17.)When Handshoe issued the citation on the bench grinder, Lambert responded by commencing to cut a piece of expanded metal from which to fabricate the guard. As he began to cut the metal with a torch, Handshoe saw that Lambert was not wearing protective safety goggles ("PPE") and he immediately issued a verbal imminent danger order. (Tr. 17-18.) Handshoe then issued this citation for the failure to wear proper safety equipment. (Tr. 18.)

Hatch poses several arguments in defense of this citation. They contend, Lambert had only fired up the torch but had not yet begun to cut the metal, therefore the standard was not violated. Further, it asserts that this grinder is 20 years old and had been in service before the passage of the Mine Act. It came without a guard and has never been cited by an MSHA inspector in all the years that it has been in use and therefore the inspector's citing it was arbitrary and unnecessary. (Tr. 28, 52.) It contends that Handshoe came to the mine with something to prove as a new field office supervisor. According to Hatch and Lambert, Handshoe made some sort of remark that he was going to write every citation he possibly could in order to increase the penalties as much as possible. (Tr. 38, 63.) This cited violation was the result of the inspector threatening to order the grinder be taken out of service if the guard was not constructed immediately. (Tr. 53.) Laboring under the exigency of this situation created the unsafe environment, not Lambert's actions. (Tr. 55.) There has not been an accident at this mine in over 20 years and MSHA has acted arbitrarily in its assessment of this citation. (Tr. 55, 75-76.) Hatch challenges the characterization of this violation as S&S, an unwarrantable failure or the result of high negligence. Hatch asserts that Lambert has a standing practice of wearing his safety goggles on his hat which he pulls down as soon as he needs them. (Tr. 76-77.) Had the inspector not threatened to shut down production if the condition was not immediately abated, the proper procedures would have been followed. This unsafe practice was essentially at the direction of the inspector, not Hatch. (Tr. 55.) Further, they disagree with a finding that Lambert was a supervisor of the company.

Despite Hatch's attempts to establish that Lambert had not yet begun cutting when Handshoe issued this citation, the evidence does not support this. Handshoe observed Lambert cutting the expanded metal without putting on proper protective equipment to shield his eyes from sparks. (Tr. 18-19, 70.) Lambert confirmed in his testimony that he had started cutting the metal, and was not merely lighting the torch, when Handshoe issued his verbal order to cease cutting. (Tr. 57, 70) At the Closeout Conference held between Randy Hatch and Handshoe, Hatch stated that Lambert knew better than to use the torch without PPE. (Tr. 36.) Hatch has

had a discussion with him about it. Hatch also told Handshoe that he intended to conference the negligence assessment but not the citation. (Ex. S-9.) The evidence establishes that Lambert was, indeed, in the act of cutting the metal when Handshoe issued the order and the citation. I note also that it would be a reasonable interpretation of the standard to require one to put on the PPE before taking the preparatory step of lighting the torch. Once the torch is lit a flame is present and so too is the danger of sparking.

As for Hatch's other arguments as to why the violation was improperly charged, they too fail. Operators are subject to strict liability for a violation of this mandatory standard, thus the fact that other inspectors did not cite the guard is not a defense to the violation. The Respondent's argument that the grinder was grandfathered in, therefore requiring the guard be constructed immediately was arbitrary and caused this violation is disingenuous. It is the duty of the inspector to enforce the provisions of the Mine Act which was enacted prior to putting this 20 year old grinder into service. Furthermore, the cited condition was a failure to don PPE when using the torch cutter. There was nothing preventing Lambert from putting on his PPE before he started cutting the metal. The Secretary has met her burden of proving the violation was properly cited.

Significant and Substantial

A violation is significant and substantial ("S&S") if the violation is "of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. §814(d)(1). There must be "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). Under the *National Gypsum* definition, "the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard –that is, a measure of danger to safety – contributed to by the violations; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co*., 6 FMSHRC 1, 3-4 (Jan. 1984)(footnote omitted); see also, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-104 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (De. 1987) (approving *Mathies* criteria).

In order to meet the requirements of the third, and most difficult to establish, element of the Mathies formula, the Commission has provided the following guidance:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc*., 6FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc*. 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573- 1574 (July 1984).

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

Handshoe testified that he felt the S&S assessment was appropriate because Lambert acted in reckless disregard for his health and safety in using a cutting torch without eye protection. Based upon his observations, he believed that Lambert had intended to complete the cutting task without PPE.(Tr. 15-16.). To construct the guard, it would have taken Lambert approximately 5 minutes of cutting with the torch. (Tr. 23.)Under these circumstances, it would be highly likely that the sparking of the torch, as well as the glare, could result in a reasonably serious injury to his eyes of a permanently disabling nature. (Tr. 20-21.) He based his opinion on his personal mining experience and as an MSHA inspector, as all mines have torches and welders on site and he is very familiar with this standard. (Tr. 13-15.)

Hatch asserted that the sparks were more likely to hit Handshoe who was standing approximately five feet away rather than Lambert because Lambert was kneeling over the metal facing the floor. (Tr. 17-18.) I defer to the experience of Handshoe and find the violation was S&S.

Agency/Unwarrantable Failure

Handshoe was initially told by Hatch and Lambert that Lambert was a supervisor when he conducted the pre-inspection conference. As he started writing citations, he was then told that Lambert was a lead man, or a rank-and-file miner. Later, Handshoe reviewed his notes and consulted with the district and determined that Lambert was a supervisor. He then amended the citation to a section 104(d) violation charging the company with unwarrantable failure by and through its agent, Lambert. (Tr. 15-16, 26-29 and Ex. S-1.) In order for unwarrantable failure to be imputed to Hatch, it must be established by the Secretary that Lambert was an agent of the operator.

Section 3(e) of the Act defines "agent" as "[a]ny person charged with responsibility for the operation of all or a part of a coal or other mine or the supervisor of the miners in a coal or other mine." 30 U.S.C. § 802(e). In considering whether an employee is an operator's agent, the Commission has relied, not upon the job title or the qualifications of the miner, but upon his function, and whether it is crucial to the mine's operation and involves a level of responsibility normally delegated to management personnel. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-38 (May 2000); *REB Enterprises. Inc*., 20 FMSHRC at 211; *Ambrosia Coal & Constr. Co*., 18 FMSHRC 1552, 1560 (Sept. 1996); *U.S. Coal Inc*., 17 FMSHRC 1684, 1688 (Oct. 1995).

The Commission in *Nelson Quarries, Inc*., 31 FMSHRC 318 (Mar. 2009) looked to the *Ambrosia Coal* query of whether the function of the miner was "crucial to the mine's operations

and involved a level of responsibility normally delegated to management personnel." *Ambrosia Coal* at 1560. In *Nelson*, the Commission upheld the judge's determination that three employees were agents within the meaning of the Act based upon their functions at the mine. Specifically, the Commission focused upon the fact that all three conducted all of the daily examinations, they supervised and directed the work force assigned to them, they addressed problems the work force brought to them in attempting to abate citations, the work force treated them and regarded them as their supervisors, they held themselves out as foremen, and they were designated as the person in charge of health and safety on the legal identity and start-up and closure reports required to be filed with MSHA.

Lambert testified that he is the most experienced employee at the mine and can run everything on site. (Tr. 48-49.) Mr. Hatch is at the mine site for only a short time each day so Lambert takes over running the mine on a regular basis.(Tr. 50.) When Mr. Hatch does issue work orders, he gives them to Lambert and Lambert then delegates the tasks to the proper person(s) to carry them out. Lambert is the one the miners come to for their work assignments. (Tr. 66-69.) His title is Production Supervisor but he stated when the Hatches are not there, everything falls to him to run the business. *Id*. He holds himself out to the other miners as their supervisor and expects them to comply with his orders. (Tr. 66.) The miners come to him first with issues or questions which he will resolve without having to consult with the owners. (Tr. 68-69.) He accompanies the MSHA inspectors on regular inspections and is responsible for ordering whatever work is needed to abate any issued citations.(Tr. 65.)He conducts the pre-shift examination of the loaders and belts, opens up the office and prepares the paperwork. (Tr. 58-59.)When it has been necessary to shut down equipment, he has ordered it himself without direction from the owner.(Tr. 70.)

Mr. Hatch testified that Lambert is his "right hand man" and referred to him as his supervisor.(Tr. 81.) In fact, when Handshoe commenced his inspection, he asked Hatch who from management would accompany him. Hatch responded that Lambert would and said that he was a supervisor.(Tr 24-25.) Hatch had told Handshoe that he was running for political office at the time of the inspection and was only at the mine for short periods of time. In fact, he was not present for days at a time in some instances. When a member of the Hatch family was not there, Lambert would take charge. (Tr. 29, 81.) Handshoe reviewed prior citations and notes taken at the time and found that Lambert had regularly attended both pre-inspection and close-out conferences and had been the company representative joining the MSHA inspector on the inspections. (Tr. 33.)

The testimony of Lambert and Hatch leaves no question in my mind that Lambert is an agent by deliberate designation by Hatch as well as by virtue of his daily functions at the mine which involve a level of responsibility normally delegated to management personnel. Lambert's conduct is properly imputed to Hatch. The issue then is whether the level of negligence rises to the level of unwarrantable failure.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Id. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Id. at 2003-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 194 (Feb. 1991) ("R&P"); [see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co*., 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), rev'd on other grounds, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co*., 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co*., 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coal, Inc*., 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol,* 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB.*, 20 FMSHRC 203, 225 (Mar. 1998).

Handshoe testified that he assessed the violation as unwarrantable failure because Lambert acted recklessly in cutting with a torch without first donning his PPE. Handshoe was certain that although he had only been cutting for about 10 to 15 seconds when told to stop, Lambert would have finished the cutting job, which would have taken about 5 minutes, without wearing goggles. (Tr. 18-19.) The danger posed by his negligence was obvious as sparks were flying a distance of three to five feet from the torch and Lambert was in a kneeling position facing the torch about 18" away from the flame.(Tr. 18-21.) An injury could have occurred instantaneously had a spark hit him in the eye.(Tr. 22.) Handshoe testified that Hatch had proper PPE on hand in the shop but he felt the fact that Lambert commenced cutting the expanded metal without eye protection with Hatch and Handshoe present indicated to him that this was a common practice. (Tr. 36.) He designated the citation as affecting only Lambert.(Ex. S-1.)

I have taken cognizance of Respondent's argument that in order to abate the citation issued for the grinder, Lambert felt compelled to fabricate the guard immediately. There was testimony that normally, this job would have been given to the welder but he was not present at the time. (Tr. 69-70.) The choice for Lambert was either to tag out the grinder or do the cutting

himself then and there. I do not give any credence to the contention that Handshoe directed that the guards be fabricated immediately or that he insisted that the grinder be removed from the premises. I also consider the fact that Hatch and Lambert both testified that there has not been an injury resulting in lost workdays at the mine in over 20 years. (Tr. 64, 75-76.) I have also considered the fact that no one else was exposed to the hazard created by the violation and there appear to be no prior citations for similar violations or any indication that the grinder had ever been cited before putting Respondent on notice of a need for greater efforts at compliance. The lack of injuries at the mine for a substantially long period of time seems to bear out the fact that Hatch has made efforts in employing safe work practices.

I find, with the regard to the aggravating factors enumerated by the Commission, that:(1)the length of time the violation existed was very short – 10-15 seconds;(2) the extent of the violation was minor as it was one discreet action performed by Lambert and affected only him and would have continued for at most, five minutes if not stopped by Handshoe;(3) there are no alleged prior violations or notice of the need for greater compliance with the use of PPE at the mine;(4) the operator had PPE on site which Lambert donned once told to Handshoe to do so;(5) the violation was dangerous to Lambert but not obvious to anyone that he would have commenced cutting without goggles, and; (5) the violation is not of the nature that the operator could have known Lambert would engage in such conduct. As Handshoe described the events, it happened very suddenly and unexpectedly. Otherwise, it would be safe to assume, Handshoe would have forewarned Lambert to use the eye protection if he had any indication that Lambert did not intend to do so. Handshoe testified that for Lambert to have neglected to put on his glasses in the presence of Hatch and an MSHA inspector, it must be a commonly accepted company practice. I find this alone is insufficient evidence to establish a reckless or indifferent pattern of behavior for unwarrantable failure purposes.

Overall, this violation is dissimilar to those considered by the Commission and its ALJs as examples of unwarrantable failure. It was not a continuing situation that management left unabated which posed a danger to miners such as dismantling pumps allowing water to accumulate in travelways in a mine, failing repeatedly to ensure the use of fall protection when working at heights, knowingly allowing unsafe access to workplaces to exist, failing to provide proper training to new miners, etc. Instead, this was stupid and careless conduct by one person that could not have been predicted or prevented in advance. It does not rise above ordinary negligence. It is a serious violation and it is the result of moderate negligence taking into consideration the mitigating factors discussed herein.

II. PENALTIES

The Mine Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§815(a) and 820(a). When an operator challenges the Secretary's proposed penalties, the Secretary petitions the Commission to assess them. 29 C.F.R. §2700.28. Once petitioned to assess the penalties, the Commission delegates to the administrative law judges the authority to assess civil penalties de novo for violations under the Act. Section 110(i), 30 U.S.C. §820(i).

The administrative law judge is required by the Act to consider the following six statutory criteria in her assessment of the appropriate penalty:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6)the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. §820(I).

The penalty assessment for a particular violation is within the sound discretion of the administrative law judge so long as the six statutory criteria and the deterrent purpose of the Act are given due consideration. *Sellersburg Stone Co*., 5 FMSHRC 287, 294 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

I have discussed the gravity and negligence involved in the citation above. I have given the additional statutory criteria consideration as well as the deterrent purpose of the Act in assessing the penalties below.

Respondent has asserted that the proposed penalty of $2000.00 will affect his ability to remain in business. He was provided ten days post-hearing in which to provide financial information to support his position. I have received Ex. R-1 which is a statement of assets and liabilities and a review of expenses for income tax purposes dated December 2011. Although the document is not certified from an accountant, I have considered the information. However, based upon the modification of the citation as set forth above, I find the penalty assessed herein will not affect the Respondent's ability to remain in business.

Having considered the six statutory criteria and the stipulated facts, I assess a penalty of $350.00.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. §820(i), I have modified the citation to a non-unwarrantable failure and have reduced the negligence to moderate and assess a penalty of $350.00.00. Hatch Enterprises Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $350.00 within 30 days of the date of this decision.[2]

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

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

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March 7, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2011-1934 et al.[1] A.C. No. 46-08436-255115-02
v.	:	
PERFORMANCE COAL COMPANY, Respondent.	:	Mine: Upper Big Branch Mine-South
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDINGS Docket No. A.C. No.
v.	:	
NUMEROUS FORMER MASSEY MINES[2] And their successors.	:	Mine:

ORDER LIFTING STAY
ORDER GRANTING MOTION FOR WITHDRAWAL OF CONTESTS
ORDER TO PAY

Appearances: Derek Baxter, Dana Ferguson, Office of the Solicitor, U.S. Department of Labor, for the Secretary of Labor.
David Hardy, Christopher Pence, Eric Silkwood, Guthrie & Thomas, PLLC, for the Respondent.

Before: Judge Margaret A. Miller and Chief Judge Robert J. Lesnick

These cases are before the Federal Mine Safety and Health Review Commission (the "Commission") on petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against multiple mine

[1] Numerous other Performance Coal Company dockets are addressed by this order. The affected dockets are listed in the attached exhibits and specifically exhibit 5.
[2] The mines, along with the docket numbers addressed by this order, are listed in the attached exhibits. Although this order refers to Performance mines, it is intended to dispose of all the subject citations and orders contained in the exhibits.

operators, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The cases include, among other things, 48 penalty dockets, and approximately 928 citations and orders issued at the Upper Big Branch Mine ("UBB," or the "mine") both before and after the April 5, 2010 explosion that resulted in the deaths of 29 miners. In addition, this order addresses more than one thousand other dockets that include citations and orders issued at other former Massey Energy Company ("Massey") controlled mines. The total proposed penalty for the relevant citations and orders is $19,855,483.00.[3] The parties have reached an agreement and Respondent has filed a motion to withdraw the contests of the relevant citations and orders included in the above captioned dockets.[4] A telephone hearing was held on the motion on Wednesday, February 29, 2012.[5] Subsequently, the Secretary of Labor filed a response to the motion and the Respondent filed an amended motion with Exhibit 5 attached.

On April 5, 2010, at approximately 3:00 p.m., an explosion occurred at Performance Coal Company's ("Performance") Upper Big Branch Mine - South, resulting in the deadliest US mine disaster in 40 years. The disaster resulted in the tragic deaths of 29 miners: Carl Acord, Jason Atkins, Christopher Bell, Gregory Steven Brock, Kenneth Allan Chapman, Robert Clark, Charles Timothy Davis, Cory Davis, Michael Lee Elswick, William I. Griffith, Steven Harrah, Edward Dean Jones, Richard K. Lane, William Roosevelt Lynch, Nicholas Darrell McCroskey, Joe Marcum, Ronald Lee Maynor, James E. Mooney, Adam Keith Morgan, Rex L. Mullins, Joshua S. Napper, Howard D. Payne, Dillard Earl Persinger, Joel R. Price, Deward Scott, Gary Quarles, Grover Dale Skeens, Benny Willingham, and Ricky Workman.

The explosion occurred at the longwall section, due to an ignition of methane that was propagated by coal dust. The explosion occurred at the time of a shift change and resulted in the deaths of the above-listed miners who, for the most part, were either at the working face or traveling on mantrips in the mine. Following the retrieval of all 29 victims, MSHA began an investigation of the explosion and its causes. The investigation was conducted jointly by MSHA and the State of West Virginia. At the time of the deadly explosion, Massey was the controlling

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[3] This number does not include the proposed penalty amounts for the "unresolved/still contested" citations orders that are a part of the split dockets. This amount may be changed in the event errors are found in any of the attached exhibits and corrections are necessary.

[4] In addition to the dockets that are completely disposed of by this order, i.e., those included in Exhibit Nos. 1, 2 and 3, Respondent has agreed to withdraw its contest of numerous citations and orders that are included in the dockets that have other "unresolved/still contested" citations and orders in the same docket. The "resolved" citations and orders in the split dockets are listed in Exhibit 4. This order grants the Respondent's motion to withdraw its contest of the citations listed in Exhibit 4. However, the citations and orders listed in Exhibit 4 will not be formally disposed of until the "unresolved/still contested" citations and orders that make up the remainder of the split dockets have been settled and/or adjudicated, at which point the assigned judge can dispose of the entire docket in one decision/order.

[5] At the hearing, the parties agreed that the language in paragraph 13 of Respondent's motion refers only to cases outside of the Mine Act and specifically that the language "may not be considered an adjudication on the merits" is meant to be used only in matters outside the Mine Act and is not binding on the Commission.

entity of Performance Coal. However, in June, 2011, Performance, along with other Massey mines, was purchased by Alpha Natural Resources ("Alpha").

In the wake of the explosion, MSHA issued hundreds of citations and orders at UBB, including citations and orders that cited Performance for interfering with the accident investigation. The citations that were issued as a result of the explosion in April, 2010, contributory to the accident, are not the subject of this proceeding. Performance has agreed to accept those citations and orders as issued and pay the penalties proposed by the Secretary. As a result, the Commission does not have jurisdiction over those citations and orders. However, there are roughly one thousand citations before us that were issued to Performance prior to and after the April explosion, and thousands more issued to other Massey mines.

A disproportionate number of the citations and orders that are pending in this matter are characterized by MSHA as resulting from "high negligence" and are designated as "significant and substantial," "unwarrantable failure" and even "flagrant" violations. There were more than 43 open petitions for assessment of penalty for Performance prior to the devastating explosion, with citations dating as far back as June of 2006. A number of the Performance cases were stayed based upon a joint request by the parties and a letter, dated May 14, 2010, from the United States Attorney for the Southern District of West Virginia requesting such a stay. The stay on all of the subject cases is hereby **LIFTED**.

It is important to note that Massey, the parent company of Performance at the time of the explosion, is the same company that owned and operated Aracoma Coal's Alma #1 Mine, which experienced a deadly fire in 2006. Following the Aracoma fire, Massey contested every single piece of paper issued by MSHA. The Aracoma fire eventually resulted in a settlement that included criminal charges against agents of the mine and an assurance from the mine operator that it would reduce its violations over the years to come. *Aracoma Coal Co.*, 30 FMSHRC 1160 (Dec. 2008) (ALJ). Chief Judge Robert J. Lesnick questioned whether the agreed upon "penalty of $1.7 million was adequate in light of Aracoma's enormous size." Specifically, he noted the compensation of the Chairman, Chief Executive Officer, and President of Massey Energy Company, Aracoma's parent company, who "received in 2007 a compensation package that probably exceeded $23 million." That same CEO received a package from Massey prior to the buy-out by Alpha that included, among other things, a "$12 million golden parachute," potential performance bonuses, and deferred compensation. Howard Berkes, *Former Massey CEO Gets Golden Parachute ... And A Blue Truck*, NPR, Dec. 7, 2012, http://www.npr.org/blogs/thetwo-way/2010/12/08/131891377/former-massey-ceo-gets-golden-parachute-and-a-blue-pickup-truck. Since its purchase of Massey, Alpha has grown significantly larger, and is able to pay a total amount of over $200 million for fines, programs, and restitution, while at the same time continue in business.

In a subsequent Commission decision addressing the Aracoma fire, Commissioner Cohen decried Massey's apparent strategy of contesting every citation and order issued by MSHA as an "outrageous" intentional burdening of the administrative judicial system. *Aracoma Coal Co.,* 32 FMSHRC 1639, 1665 n. 4 (Dec. 2010) (Dissent of Commissioner Cohen). Here, Performance has continued the Massey practice with its contest of every citation and order written by MSHA at the mine after April 5, 2010, by filing a separate notice of contest for each. It would appear to

be a strategy enlisted by the mine to overwork an already overloaded system. Notably, this intentional burdening of the administrative judicial system to avoid responsibility for mine safety was a major finding in the McAteer Report, discussed *infra*. GOVERNOR'S INDEPENDENT INVESTIGATION PANEL, REPORT TO THE GOVERNOR, UPPER BIG BRANCH – THE APRIL 5, 2010, EXPLOSION: A FAILURE OF BASIC COAL MINE SAFETY PRACTICES 99-100, 112. (2011) (hereinafter "McAteer Report"). While Massey contested far more citations and orders after the explosion, it can be said that, given the number of citations and orders pending before the Commission prior to the explosion at the Upper Big Branch mine, the burdening of the judicial system was one of the means Massey employed to avoid responsibility for its actions. Given that the former Massey mines are now owned by Alpha, we are hopeful that such a strategy will be abandoned.

Following the explosion at Upper Big Branch, former West Virginia Governor, Joe Manchin, commissioned an independent investigation into the explosion. In May of 2011, the Investigation Panel's report, referred to as the McAteer Report, was submitted to the current governor, Earl Ray Tomblin. Among other things, the report explored the effect of earlier settlements and consequences in relation to current mine practices and stated that the purpose of the inspections and investigations into disasters such as that which occurred at Upper Big Branch is to ensure "that such tragedies don't happen again." *Id*. at 107. The report expresses "genuine hope," albeit with reservations, that disasters such as the one at the Upper Big Branch can be eliminated. *Id*. Further, the report states that "[t]he disaster at Upper Big Branch was man-made and could have been prevented had Massey Energy followed basic, well-tested and historically proven safety procedures." *Id*. at 109. The purpose of the agreement reached between the Secretary and the mines formerly operated by Massey is to take the next step toward preventing future mine disasters such as the one at UBB.

Here, Alpha has filed a motion on behalf of Performance, as well as the former Massey operators and mines captioned above, to withdraw its contest of all citations and orders contained in Exhibits 2 and 4.[6] Alpha has agreed to pay the penalties in full for each of the dockets contained in Exhibit 2, and to pay the penalties in full for the specific citations and orders included in Exhibit 4. Further, as noted above, as a part of the overall settlement, Performance has agreed to pay the penalties in full for all citations and orders related to the explosion at the Upper Big Branch Mine, more than ten million dollars, and pay a total of approximately $209 million as part of the overall settlement. Alpha will pay $46.5 million in restitution to the families of the 29 victims and another $48 million to fund mining research. According to the parties, the restitution and research fund, in conjunction with the civil penalties, serves as an additional deterrent and will encourage future compliance with the Mine Act and its mandatory standards. Furthermore, as a part of the overall settlement, the former Massey controlled mines, now under the ownership of Alpha, will make a renewed effort to go forward with an improved safety record at each mine and, to that end, they have dedicated $80 million dollars to implement new programs in conjunction with the Mine Safety and Health Administration. Finally, the agreement does not remove the possibility that criminal charges may be filed against Massey management.

[6] Exhibit 5 serves as a summary of the docket numbers in which the contests are being withdrawn.

In support of the proposed agreement, and with regard to the penalty criteria set forth at 30 U.S.C. § 110(i), the Respondent acknowledges that the Secretary accurately evaluated the gravity and negligence in proposing a penalty for each docket included in the motion. The mines that are the subject of this order are of the size and have the history as designated in the file for each. Massey was not only large, but it was the parent company of many large mine operators. Many of those operators under the former Massey umbrella have an extensive history of violations. Performance is a large operator on its own, which, even prior to the explosion in April 2010, had an unusually high number of violations, including serious ventilation and roof control violations. *See* Ex. A attached to all penalty petitions. The history of Performance demonstrates that a number of the citations and orders at issue were not abated and the mine was issued a significant number of "failure to abate" orders prior to the citations and orders actually being abated. Respondent asserts that the Secretary considered the unprecedented number of failure to abate orders issued in assessing the penalties in each case. Finally, Respondent agrees that the payment of the proposed penalty amount will not adversely affect any of the above-captioned operators' ability to continue in business.

Based upon a review of the facts and the Secretary's proposed assessment procedures at 30 C.F.R. § 100, the Respondent represents that the agreed upon total civil penalty of $19,855,483.00 for the citations and orders set forth in Exhibits 2 and 4 is reasonable, and that payment of this amount will serve to affect the intent and purpose of the Act. In considering the parties' proposal, we have looked at the penalty criteria in broad terms and considered all of the representations made by the parties, including the payments to the U.S. Attorney and the funds marked for future improvements in safety and health at the former Massey mines. The Commission currently has no jurisdiction over the citations and orders issued as contributing to the explosion of April 2010, but we do consider the penalty payment amount for those citations and orders in addressing the parties' agreement as a whole. We also consider that, by deciding to pay the penalties for the contributory violations, Performance has accepted the violations as established and takes responsibility for those violations.

While we grant the motion proffered by the Respondent, we do so with great caution. We note that Alpha, on behalf of its former Massey mines, seeks to withdraw the notices of contest of all of the subject citations and orders, with few conditions. The Commission has noted that "[i]n determining whether to approve a proposed settlement a judge must consider, *inter alia*, whether the amount proposed will accomplish the underlying purpose of a civil penalty - to encourage and induce compliance with the Mine Act and its standards." *Madison Branch Management*, 17 FMSHRC 859, 867 (June 1995) (citations omitted). In *Wilmot Mining Co.*, the Commission stated that "[s]ettlement of contested issues and Commission oversight of that process are integral parts of dispute resolution under the Mine Act. 30 U.S.C. § 820(k) . . . . A judge's oversight of the settlement process 'is an adjudicative function that necessarily involves wide discretion.'" 9 FMSHRC 684, 686 (1987) (citations omitted). Moreover, in reviewing settlement agreements, Commission judges must "accord due consideration to the entirety of the proposed settlement package, including both its monetary and non-monetary aspects . . . [to] determine whether it is 'fair, adequate and reasonable' . . . [and] 'adequately protects the public interest.'" 17 FMSHRC at 868 (citations omitted). The Commission has emphasized that a judge's approval or rejection of a settlement agreement must "be based on principled reasons." *Id.* at 864 (June 1995) (*quoting Knox County Stone Co.*, 3 FMSHRC 2478, 2480 (Nov. 1981)).

The Commission looks to the penalty assessed in determining the appropriateness of the settlement, and the fact that the Secretary has proposed an assessment based upon the statutory penalty criteria.

The operators associated with the mines captioned above have agreed to pay all of the proposed penalties in full and to withdraw their contests of the subject citations and orders. Under Commission Rule 11 "[a] party may withdraw a pleading at any stage of a proceeding with the approval of the Judge or the Commission." 29 C.F.R. § 2700.11. The Secretary does not object to the payment of proposed penalties and withdrawal of contests and agrees that she has considered all of the penalty criteria in determining the proposed assessment for each citation and order. Based upon all of the facts and information presented by the parties, we agree that the Respondent's request to withdraw its contest of all penalties is appropriate for all of the subject citations and orders contained in these dockets.

The Federal Mine Safety and Health Review Commission exists to provide due process of law to the parties that practice before it. Here, the parties have reached a mutual agreement that, based on the information before us, adequately protects the public interest. Going forward, it is essential that the April 5, 2010 events at the Upper Big Branch Mine not be forgotten. We are sorely aware of the fact that no civil or criminal monetary or other penalty can come close to righting the wrong that those miners suffered, and that the families and friends of those miners continue to suffer. We are hopeful that, by agreeing to pay the proposed penalties in full and withdrawing its notices of contests of the subject citations and orders, Performance Coal Company has taken one step towards holding itself accountable for this terrible tragedy and that the former Massey mines are taking the necessary steps to assure compliance with MSHA regulations, thereby providing a safer working environment for all of their miners. Based on the information before us, the Respondents' motion is granted.

For the foregoing reasons, the Respondents' request for withdrawal of the subject contests is **GRANTED**, and Alpha Natural Resources Inc., on behalf of the former Massey mines named on the attached exhibits, is **ORDERED TO PAY** the Secretary of Labor the total proposed penalty for all subject citations and orders within 30 days of this order. Upon receipt of payment, the contest proceedings listed in Exhibits 1 and 3 are **DISMISSED**.

/s/ Robert J. Lesnick
Robert J. Lesnick
Chief Administrative Law Judge

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

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March 7, 2012

HILDA L. SOLIS, SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	)	CIVIL PENALTY PROCEEDING
Petitioner	)	DOCKET NO. SE 2010 - 1236
	)	A.C. NUMBER: 01-00851-230779
v.	)	
	)	
OAK GROVE RESOURCES, LLC	)	MINE: OAK GROVE
Respondent	)	

DECISION

Before: Judge William Moran

Appearances: Mary Beth Zamer, Esquire
Jennifer Booth-Thomas, Esquire
Office of the Solicitor, United States Department of Labor
Nashville, Tennessee

R. Henry Moore, Esquire, Jackson Kelly, PLLC
Pittsburgh, Pennsylvania

In this proceeding under the Mine Act, Respondent, Oak Grove Resources, LLC, was issued an Order, citing an alleged violation of 30 C.F.R. § 75.364(b)(2) for failing to conduct an exam for hazards in at least one entry of each return air course in its entirety before miners enter the mine. That provision states:

> **(b) Hazardous conditions. At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the operator: . . . (2) In at least one entry of each return air course, in its entirety, so that the entire air course is traveled.**

Section 75.364(b)(2) (emphasis added).

The Order included special findings that the violation was both "significant and substantial" and an "unwarrantable failure." Respondent admits that the exam was not conducted but contends that because there was a prior outstanding citation for the same deficiency, the Order in issue here was "duplicative" and therefore must be vacated. In addition, the Respondent asserts that neither of the special findings should be upheld. A hearing was held in Birmingham, Alabama on July 28, 2011. For the reasons which follow, the Court finds that the violation was not duplicative and that it was both a significant and substantial violation as well as an unwarrantable failure on the Respondent's part.

Findings of fact:

MSHA Inspector Larry McDonald[1] issued the Oak Grove mine Citation No. 8518110 on March 23, 2010.[2] Inspector McDonald was at the mine on that day as a result of a section 103(g) complaint, which alleged that miners had re-entered the mine without it being "made," that is, without being examined or inspected in its entirety, prior to their entry, as required by law. Tr. 78. When Inspector McDonald arrived at the mine, he examined the record books for the "Old Works," and found that it listed, for March 18, 2010, an inability to inspect due to high water. Tr. 25. GX 4, the Old Works fireboss (i.e. weekly) report[3] for the Thursday day shift for the same date, which report is part of the weekly examination books. The Inspector stated that, for March 18th, no air readings were made for the "first east south air courses, 8 south to section one faces."[4] Tr. 26-27. Of concern to McDonald when he examined those records was that the certified examiner listed, under notes, "Hazards, unable to make high water." Tr. 28, GX 4, at the bottom third of the page. As a result of those hazards, the examiner recorded that he wasn't able to enter those areas and consequently could not make readings to enter in the books. Tr. 29. Accordingly, those areas were blank, reflecting that the examiner could not make and record the air nor the air quality readings. For example, there are no readings for the number 4 entry,

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[1] Inspector McDonald is a certified mine foreman and certified electrician with some 22 years of coal mine employment. His MSHA experience has been for the past 2 ½ years. Tr. 21.

[2] Government Exhibit, GX 2 is the citation Inspector McDonald issued to the mine on March 23, 2010, Citation Number 8518110. Tr. 21. The exhibit, consisting of 8 pages, contains the citation, the modifications to it, and the termination. GX 3, is the Inspector's personal notes regarding the citation, and consists of 8 pages for the exhibit, with 24 numbered sheets within those 8 pages.

[3] This report was also referred to as the "Old Works fireboss rounds," which is part of the weekly examinations. Tr. 25.

[4] Within that exhibit, GX 4, for example, the number 273050, represents an air reading. The other numbers in that exhibit also represent air readings. Tr. 27. The second column represents the percentage of oxygen reading. Following the other columns across, relating to 273050, 02 percent oxygen is recorded, and 4 percent methane. The same report lists Nelson Workman as the certified examiner who recorded that information.

1C, nor for the number 4 fan check, nor for the 10 south number 3 entry, first east south of first east north. Tr. 29. The absence of those entries demonstrates that the examiner could not in fact get to those locations to obtain readings. Tr. 30. The same examiner also listed "unable to make, high water hazard."[5] Tr. 30.

Importantly, the fireboss, weekly, report, GX 4, reflects that it was also signed by mine foremen, Miller and Ingle. Tr. 33. Those signatures by management are to be signed right after the certified examiner completes his exam,[6] and any listed hazards are to be corrected immediately. Tr. 33. McDonald affirmed that such mine management individuals have to review the examiner's weekly report. Tr. 79. Such examinations are important to make sure that there is proper air in those areas to keep the methane swept out. Tr. 30. Further underscoring the importance of these examinations, it is typical for methane to build up in areas that have already been mined. Tr. 31. McDonald considered it "crucial" to maintain ventilation in these areas because if there is a methane buildup, that can deplete oxygen levels, presenting significant risks. Tr. 31.

McDonald was cognizant that the cited section, 30 C.F.R. § 364(b)(2) requires a weekly examination for hazardous conditions and that at least one entry of each return air course shall be traveled *in its entirety before miners enter the mine*. Tr. 36. Therefore, upon examining the books and noting the examination shortcomings, the inspector asked mine foreman Ingle if the mine was producing coal. Foreman Ingle informed that they were producing coal. Tr. 31. As reflected in GX 5, there were 83 miners underground that morning, March 23, 2010. Confirming that production was indeed occurring, foreman Ingle asked if the mine needed to stop production, and McDonald advised that was the proper thing to do.[7]

Turning to GX 5, McDonald agreed that the middle column called "pumper fireboss" and the name Archie Wilcoxen appears there. Tr. 91. Wilcoxen is assigned as a pumper at the 8 South but the Inspector informed that he did not encounter Wilcoxen in that area. Tr. 91. Then,

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[5] Specifically, the mine's certified examiner, Mr. Workman, noted that the ten south pump was impassable due to high water, that for the eight south faces, there was high water for all entries going to the faces, and that, for the Number 4 fan, there was high water going to the fan. Another entry, for March 20, 2010, records that the examiner went back and again tried to make the Number 4 fan and faces but that those could not be made due to the high water. Tr. 30.

[6] The certified examiner who makes the weekly examination is not part of management. Rather, he is an individual designated by mine management to conduct that exam. Tr. 79.

[7] McDonald was challenged about his advice by Mr. Shortt, who inquired if the inspector was "fixin" to have the miners withdrawn. McDonald advised that it was *advice* at that point because he had to go underground and personally examine the area before any order could be issued. Tr. 34.

referring to GX 4, the Inspector agreed that it reflects that the areas were attempted to be made on March 18th and again on March 20th. Tr. 92. The mine's certified examiner, Mr. Workman, made it to the 1B point but couldn't make the 1C. Tr. 92. The Inspector acknowledged that Workman's notes reflect that all pumps were running, that some progress was being made and that water was no longer running over into the intake.[8] In any event, Workman's notes indicate that the mine was trying to deal with the problem. Despite these distractions,[9] it is clear that the the miners should not have entered the mine.

McDonald then proceeded to go underground to see the area firsthand. With him were Keith Miller, mine foreman and Randy King, a miners' representative. Both men were with the

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[8] Progress or not, such distractions do not diminish from the conditions found by Inspector McDonald, a week after the exam was to have been made. Other distractions raised by Respondent's Counsel included that miner examiner Kilgore, whom McDonald met when underground on the 23rd, and who traveled with the Inspector, was down there trying to do an examination. Tr. 94. As Respondent's Counsel put it "somebody told them to go down to the area where [the Inspector was] going to do an exam." Tr. 96. It is fair to assume that this was not purely coincidental. The Inspector agreed that the *next* exam was due to be performed on the 25th but the Court notes that the important time frame is the amount of time that had elapsed without each weekly exam being conducted. Tr. 95. Respondent's Counsel's observation makes the Court's point that exams are a *weekly obligation* and that *each new weekly failure creates a new, not a duplicative,* violation.

[9] Counsel for Respondent continued to raise aspects which the Court considered to be of no consequence to the gravity or negligence in this matter and which avoid the central point that the required examination had not been made. Yet, miners were underground and producing coal despite the fact they should not have been in the mine. These included interesting, *but irrelevant pieces of information*, such as that the fault pump, sitting on the surface, is at a higher level because the coal seam is displaced there. Tr. 93. Although not material, the Respondent's Counsel's point was that, while the Inspector stated that the area was "roofed out," that area is lower than where he was standing because of the fault at that location. Responding to questions about the mine height, the Inspector stated that the 1B was about 55 to 56 inches, that the 1C was inaccessible, but that in the area on his way to the 1C, it was about 55 to 58 inches and at the fault pump area it was about 8 feet. The Inspector also agreed that weekly examinations are often performed through water, and that, at another mine, Shoal Creek, a boat had been used in making the examination. Tr. 97-99. Other non-points were raised by Respondent's Counsel, such as that the inspector who terminated this order had to walk through water and Inspector McDonald agreement that a preshift exam had been done everywhere that miners were going to work and travel that day. Tr. 101. Simply stated, this matter is not about a failure to preshift, nor is it about how conditions had subsequently changed, eventually making it possible to do the required exam completely. Rather, it is about failure to examine one entry of each return air course in its entirety and the propriety of the attendant findings.

inspector the entire time of his inspection.[10] Tr. 35. There was awareness that certified examiner Workman had noted an inability to examine the entirety of the return air course and that Workman had noted in that regard that he was unable to "make," i.e. unable to get to, in order to take readings, the first east south air courses, 8 south of the section 1 faces, the number 4 entry air station 1 C and the number 4 fan.[11] At that number 4 fan, as there are 4 approaches, (north, south, east and west), and the examiner was to have taken four readings there.[12] Tr. 38.

The Inspector found that he couldn't get to the 1C. Still, while Respondent's Counsel inquired whether there was airflow *in the direction* of 1C, McDonald informed that he was approaching it from the side. He could not get to the point even to see where the 1C was located. Tr. 89. Using Joint Exhibit 1, a map of the Oak Grove mine, Inspector McDonald made various markings on it, which were associated with his testimony.[13] He marked his arrival point as "A" on the joint exhibit. Tr. 42. He then traveled the north track to the first east track, marking "B" at that location. Tr. 42. McDonald's intention was to reach the number 4 fan at the number 4 intake shaft area. Tr. 43. He then traveled down the first east to point "C." At that point he could travel no further on the man bus. He then entered 8 north, traveling down the 8 north entry inby. Tr. 44. From there, at point "D," the party turned left at the 8 south, number 1 section area. It took about an hour to travel from point "C" to "D" because the mine height is low, ranging from 42 to 48 inches. Tr. 45. McDonald, who is six feet tall, obviously had to travel "bent over" in those restricted mine heights. At point "D" the group went to 8 south and then to point "E," the 4 intake shaft. Tr. 46. At "E" the inspector intended to take air readings because it was part of the route in issue. This was an area where examiner Workman had recorded an inability to make his examination. Tr. 47. At the 4 intake shaft, McDonald took three intake air readings. Tr. 47.

McDonald then traveled from point "E" to air station 1D where he was able to make additional air readings. Tr. 47-48. He then traveled to air station 1A, where he took velocity and air quality readings. Water was present at 1D and 1A, but not so much as to prevent his ability to take readings those locations. Next he went to 1 B. Along his way there he encountered murky water and stumbling and tripping hazards, as the 1B is actually an old track and the track had never been removed. Tr. 49. He also had to deal with 24 inches of water in that area. Tr. 50. McDonald, feeling his way through the water with his feet, stated that he did stumble as he

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[10] Later, listed as point "C" on the map, mine examiner Chris Kilgore joined McDonald on his route. Kilgore traveled with the others for the rest of the inspector's trip. Tr. 44.

[11] As the Inspector explained to the Court, the distance between the 1A and 1B and 1C are about 100 feet apart. To the Court, these seemed like short distances between readings, but the Inspector explained that each entry location has to have an air station. Tr. 64.

[12] Inspector McDonald, using a red marker, traced his travel route on the Oak Grove mine map. Joint Exhibit 1. Tr. 40.

[13] For example, the Inspector marked on Joint Exhibit 1 the location of the bleeder fan.

proceeded, as did others with him. Tr. 50. At the 1B, he was unable to take air readings because there were too many stumbling and tripping hazards. The examiner, Chris Kilgore, who was with him, advised that the water would be getting deeper. Tr. 51. The 1B is one of the areas within the Old Works 10 South for which there is to be a weekly examination. Tr. 51. McDonald also stated that when he stopped as he was heading to the 1 B point, the water was 24 inches deep and that he did not go further because examiner Kilgore told him that the water would become waist deep. Tr. 101, 103. McDonald reiterated that the mine manager told him that the water would be getting deeper toward the 8 south faces. Tr. 102.[14]

The inspector then traveled to the air station at 1C, where he was also unable to take readings because of excessive water height. Tr. 52. At that location the water was about waist deep. Tr. 52. 1C is another location where weekly readings are required. He then traveled to the 3 West cut-through, where he was able to take a velocity and air quality reading. Tr. 52. Next, his travel took him to the 4 east cut-through, where he could take readings. Essentially, the inspector was trying to take readings at each air station. Those stations are marked on the map as air station 1A, 1B, etc. and, underground, there is a sign indicating each location. Tr. 53.

McDonald then traveled in the number 1 entry toward the base area. This was marked with an "F" on the map. Tr. 54. The faces that the Inspector marked on Exhibit 1 as "F" are known as the 8 south faces or "South 1 face." Tr. 90. At that location, he was able to take the necessary readings at the number 2 regulator. Tr. 55. However he encountered water at that location, as he walked about 100 feet inby, with a depth of about 32 inches. The inspector was stumbling at that point and the water was up to his thighs, so he was unable to make that base area. Tr. 55-56. He then traveled to the location marked as "G," which is where the fault pump is located." Tr. 57. At that location, on the left side of the entry, the water was "roofed," meaning that water went all the way up to the mine's roof. Tr. 57. That meant that the water was at a depth of 6 to 8 feet in that fault pump area. Tr. 57. McDonald informed that the air was restricted at the fault pump area, where airflow was minimal, but that he otherwise did not find ventilation problems but the important point is that an air reading is required to be taken *at the fault pump.* Tr. 89. This is another area where a weekly examination is required. Tr. 57. Thus, McDonald was unable to make any of the return entries past the fault line from that location. Tr. 58.

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[14] Respondent's Counsel also asked if the Inspector knew what the water depth would be if one got to the other side of the dip where the actual faces were and the Inspector replied he did not know. Tr. 102. Putting aside these additional distractions for the moment and the Inspector's testimony concerning his *firsthand experience* upon encountering the water, it needs to be recalled that *the mine's own examiner couldn't examine the entire area*. Apparently, this point was made in an attempt to show that the water wasn't so deep, but the Court accepts McDonald's testimony about the depth of the water he encountered as well as the tripping, slipping and falling hazards which accompanied his unsuccessful attempt to travel the entirety of the return air course.

From there, the Inspector attempted to go to "H," where the number 4 fan is located, traveling form the G location, toward the D location and the number 4 fan, but he again encountered water. He was traveling in an area with a 48 inch roof and dealing with 24 inches of water at that location. In addition he faced tripping and slipping hazards as he proceeded. He traveled for three crosscuts, a distance of about 300 feet, under these conditions. Tr. 60. McDonald was unable to get to the Number 4 fan to take readings because of these conditions. This is yet another area where readings are required. Tr. 60-61. As there are four approaches at that location, four readings are required, but the Inspector could not take any of them. Tr. 61. It was at that point that McDonald issued his Order to Keith Miller. He then retreated, taking the same path he used to enter the areas, then returning to the elevator and exiting the mine. Tr. 61-62. No one who accompanied the Inspector voiced any disagreement over the issuance of his order. Tr. 63. Upon cross-examination, McDonald stated that the number 4 fan services the bottom half of the bleeder. The three active sections as marked on Ex. 1, 12 east, 13 east and the long wall, are located in that area and they are serviced by two different fans. Tr. 87. Although, upon cross-examination, McDonald acknowledged that he could have gone to the number 4 fan on the surface to check the airflow on March 23rd and that he did not do that, the Court notes that the standard does not talk in terms surface checks as an alternative means of compliance with that requirement. Rather, the standard requires an examination for hazardous conditions in at least one entry of each return air course, *in its entirety*, *so that the entire air course is traveled*.

McDonald expressed that his Order, citing the violation of 75.364 (b)(2) was based on the inability to travel all the entries in their entirety, which therefore precluded taking the required velocity and air quality readings. Tr. 65-66. The last prior complete examination to that had been at least seven days prior. Tr. 67. The Inspector considered the gravity of the violation as "highly likely," because ventilation carries away the methane gas. At this multi-fan mine, each fan plays a role in that task, for effective mine ventilation. If one fan is not working properly it impacts the other mine fans. Tr. 67. In this instance the Number 4 fan was compromised by the restrictions put on it by the water. Tr. 67. The Inspector also believed that other hazards made the violation highly likely to cause an injury or illness, by virtue of the water's depth, its murkiness and the tripping hazards, including slickness and the uneven terrain one had to travel in that area which were made more difficult by that water's presence and depth. Tr. 67. McDonald also marked on the Order that lost workdays or restricted duty were the likely results by those conditions, exposing the examiner to "getting entangled in stuff, getting tangled up on a track, breaking his leg down there and possibly striking his head." Tr. 68. As the mine examiner customarily travels solo, no one would know of such an injury until he was noted to be missing at the end of the shift. Tr. 68.

Associated with Inspector Freeman's earlier citation (i.e. Number 6699704) is GX 7, which consists of that inspector's handwritten notes and the Old Works fireboss rounds connected with that. Tr. 73. Freeman issued his citation at 7:40 that morning, a little more than an hour after his arrival at the mine. A difference, Inspector Freeman, stating that there were no known conditions that could cause an ignition, listed the violation as *non*-S&S. However, unlike McDonald, Freeman did not go underground to personally view the situation. Tr. 75. Thus, while Freeman's violation was based strictly on not entering the weekly routes being made on

March 4th and 5th, 2010, Inspector McDonald's citation was a physical examination of the route coupled with the hazardous conditions that he observed. Tr. 75. Although Inspector McDonald originally listed on GX 2 the number of persons affected as six, in his testimony on direct at the hearing he revised that number to two, because the mine would only send two miners down to deal with the pumps. Tr. 77. When asked if his concern was an inability *to get* to a particular location to take air readings or not knowing if the air itself was not moving as intended, the Inspector advised that he had no way of knowing how much the fan had been jeopardized. His concern was also the water. He added that as this was an old area of the mine, it had "squeezed" so that in areas where the mine height had, in the past, allowed one to stand, now in some locations one would need to crawl. When added to that, one has water and an uneven mine floor and old, left-behind, materials such as rail and belt lines, the area is full of tripping and entangling hazards. Tr. 80.

The inspector agreed that, at the fault bore hole pump,[15] he could have come at that from the north[16] and got "close" to the area where the water was. Tr. 87. It is true that, for the areas the inspector was able to reach, he didn't find any methane in the areas he examined down by the water, nor did he find low oxygen. Tr. 87.

Similarly, Respondent's Counsel's effort to turn to Inspector Freeman's citation, issued on March 9th, and which was written as "non S & S" violation, involves a matter which is *not* in issue here. On that date the mine had been evacuated because of gas in the atmosphere behind the seals. This is because section 75.336 requires such an evacuation upon certain levels of methane and oxygen being present.[17] The mine remained down from March 9th through March 23rd because of that seal issue. Tr. 105.

Respondent's defense began with a subject the Court considers to be irrelevant to the fact of violation as well as to the attendant special findings. Keith Miller, the mine's day shift

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[15] Another distraction, Respondent's Counsel asks about the bore hole pump, which is on the surface and employs a sump at the bottom, delivering water to the surface. Tr. 104.

[16] The inspector approached this area from the south. Tr. 87, 89.

[17] The withdrawal requirement in 75.336 provides: "(c) Except as provided in § 75.336(d), when a sample is taken from the sealed atmosphere with seals of less than 120 psi and the sample indicates that the oxygen concentration is 10 percent or greater and methane is between 4.5 percent and 17 percent, the mine operator shall immediately take an additional sample and then immediately notify the District Manager. When the additional sample indicates that the oxygen concentration is 10 percent or greater and methane is between 4.5 percent and 17 percent, persons shall be withdrawn from the affected area which is the entire mine or other affected area identified by the operator and approved by the District Manager in the ventilation plan, except those persons referred to in § 104(c) of the Act." Accordingly the mine was contending with some serious safety issues at that time. The cited violation in issue here cannot be viewed in ignorance to the nature of this high methane producing mine.

foreman, identified the areas where coal was being mined on the day in issue, with the point being that such mining was a significant distance, some 5 to 6 miles, from the return air course which had not been examined in its entirety. Tr. 114. Miller, who did accompany the Inspector on the day in issue, March 23, 2010, was then directed to R 6, which depicts the area where the Order was issued. The essence of this part of Miller's testimony was apparently to show that two pumps were working on March 23rd to remove the water. Tr. 119. Miller did admit that they had prior problems with the 4 intake but added that, at the time he and Inspector McDonald were down there, they were pumping.[18] Tr. 120.

[18] Miller stated that he and the Inspector were able to get to the 1B point but that was "about as far as we got to." Tr. 121. "C" on R 6. Miller stated that the water was "about 30 inches" at that location. Tr. 121. Miller, referring to "C" on the map, (also described as the 1B point), stating that the water there was "around 30 inches," then adding that "it kept on getting deeper as you went farther, you know." Tr. 123. In fact, Miller advised the Inspector that it would continue to get deeper. Miller advised that he was able to walk the area *two days later*. Tr. 124. He also stated there was no water until one arrived at point "H." Thus, he maintained that there was not water in the rest of the faces. Tr. 124. Miller stated that is the point where the fault exists. Tr. 124. The fault was marked "F" and Miller stated one agreed one could not go through there. Tr. 125. Thus, he agreed that on March 23rd he couldn't get that far, referring to past the area marked "K." Tr. 125. While there was water in the faces, Miller stated it was 12 to 14 inches but on the right side of the face. Tr. 125. Referring to point "H" and the number 6 entry. Miller agreed there was water in the number 5 and 6 entries and there was water in an area identified as "M." Tr. 126. Miller also acknowledged there were "problems" with the fault pump running and they took additional steps to get the water out. This included running a discharge line up to the double overcast and putting additional air pumps and putting electricity in the area. Tr. 127. As described by his attorney and agreed then agreed to by Miller, all of this was in their attempt to lower the water at the fault bore hole pump. Tr. 128. From Miller's perspective, the "main problem was just getting down there, . . . it was so low getting down to that area." Tr. 128. Miller stated the roof was about 40 inches in that area, but that it was six feet in height where they were wading through water. Tr. 129. Miller also stated that using waders when encountering water in the course of making examinations was not an unusual practice. Tr. 129. Essentially Miller expressed that he did not consider the water depth to be daunting at all for him. Tr. 130. Of course, the mine's certified examiner and Inspector McDonald came to a different conclusion about the hazard presented. Miller also stated there was no low oxygen nor high methane and that there was "still [ ] velocity going down toward the faces at that point B." Tr. 130. In terms of considering whether any tripping and falling hazard was "S & S," if that risk were to be considered, it would not be about the relative agility between the Inspector and Mr. Miller. Nor does evidence that air was moving or that it was later determined that oxygen and methane were not a problem, change the evaluation of whether the violation was significant and substantial.

Miller did not dispute that there were "water issues"[19] and that the mine was already "down" at that point in time because of another issue; that is, the previously mentioned methane behind the seals. Because of that problem, only firebosses and certified people were working in the mine then. Tr. 134. Although a good part of Miller's testimony involved the efforts being made to contend with the mine's water issues, when refocusing on the issues involved here, Miller agreed that the examiner could not get to the 10 south faces. Tr. 139. Also, at the number 4 entry, 1-B, and entry 1 C, there are no readings either, Miller agreed. And, all the way down to the number 4 fan shaft, the examiner was unable to get a reading. Tr. 139. Thus, Miller agreed that for at least four areas, there was no reading. Tr. 140.

Miller also conceded that the Old Works, which is in 10 south, requires an examination and readings at certain air stations and that has to be done every seven days. Tr. 141. Miller agreed that, per R's Ex. R 1, there was no reading for the first east south air courses, and all the way down 1C there is no reading and also no reading was made for the Number 4 fan shaft, and the main north, first east. Tr. 141-142. Miller agreed it was again water that precluded those exams. Tr. 142. As he put it, "We had water problems and he did not make those air readings." Tr. 142. Miller therefore agreed that the examiner was not able to examine the area in the seven day period. Tr. 142. He agreed that Inspector McDonald came to the mine on the 23rd and the mine had not been able to examine the Old Works area on that day either. Tr. 142. Further, Miller agreed that the mine was in production: "Yes. We started that day."[20] Tr. 142. Regarding the only genuine issue here, Miller agreed the Old Works had not been examined in its entirety. Tr. 143.

Miller also agreed that GX 5 reflects those miners who were underground on March 23, 2010, and that *he* was the individual who filled out that document. Tr. 143. Miller's handwriting reflects that 83 miners were underground. Those miners began at 7:00 a.m. that day. Tr. 144. When Inspector McDonald arrived that day, production was underway; that is to say, the Respondent was mining coal. Tr. 144. Referring to the second page of the Old Works book, Miller agreed his signature appears there. Tr. 145. Miller stated that, at the time he signed that page, he had read miner Workman's entries and he admitted that at the time he read those entries it noted that Workman was unable to make the examination in areas because of hazards and high water. Tr. 145. Further, Miller agreed that the examiner's notes reflected that the 10 south fault pump was impassable due to high water and that for the 8 south faces all entries going to the faces had high water. Tr. 145- 146. Miller next agreed that miner Workman tried to

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[19] Indeed, a good part of Miller's testimony involved all the water issues the mine was facing at that time. Tr. 134-138. As pointed out on cross examination, there are several blank spaces on R 1's first page. For example, at first east south air course, there are no readings reflected. This, Miller agreed, reflects that no reading was made because of the water. Tr. 140. The water prevented the examiner from reaching those areas. Tr. 140.

[20] Miller agreed that production resumed that day because the mine had solved the seal issues. Tr. 142.

make an examination on March 22, 2010 too. Normally, the exam is done for this area on a Thursday. Tr. 146. Aware of the problem, Miller ordered Workman to try and conduct the exam on a Saturday. Yet, per Mr. Workman's notes for March 23, 2010, even then he still could not make the 4 fan and faces due to the high water. Tr. 147.

Referring to Inspector McDonald's issuance of the violation, Miller agreed he was with the Inspector on the day of the inspection. Miller agreed that the water at 10 south route, located at the air station 1B, the water was 24 inches deep.[21] Tr. 148. Miller also did not dispute the accuracy of the report's statement that "when traveling to the number 2 regulator, accumulations of water started approximately 50 feet outby and 200 feet inby at the number 2 regulator toward the old 8 south faces." Tr. 150. He also agreed that the "water was 32 inches deep and rising inby the number 2 regulator," nor did he take issue with the statement in the report that "[w]hen traveling to the 10 south fault pump, water was roofed on the left side of the entry and approximately 18 inches from the roof on the right side of the entry." Tr. 150. Upon being directed to all the red markings on the Respondent's Exhibit, Miller stated that all the active mining was on the other side of the map, at the top of it, from the area where Miller walked with Inspector McDonald. Tr. 154.

Later, Miller agreed that although he completed a Citation/Order/Review form pertaining to Order number 8518110, the order in issue here, that form, rather than being filled out right after he accompanied the inspector, was only completed about a month before the hearing in this matter. Tr. 169-170. On the form there is a section to address the likelihood of an injury occurring and the only thing listed is the risk of tripping while walking in the water. Despite that listing, Miller asserted that was not an admission on his part of any tripping hazard. Tr. 171. His position did not change though he admitted there were belts, rocks, rails and other objects one could trip over. Further, on the form, while he listed that no one could get hurt, his theory was based on the return air course not being an active area of the mine. Yet, admitting that the

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[21] Miller asserted that he did tell the inspector that he could take a reading at that location, but that the Inspector told him not to worry about it. Tr. 148. When pressed and asked if he in fact attempted to make a reading, Miller stated, "Actually, I can't remember, to be honest with you, if I did or not." Tr. 148-149. While he stated he simply could not remember if he ever actually took a reading at that time, Miller's reasoning was that he told McDonald he *could have* taken a reading on the basis that he did make the area *two days later.* Tr. 149. However, Miller admitted that the situation had changed in those two days, as there had been extensive pumping going on, conceding that they had employed "a couple of air pumps" since the day he was with the Inspector. Even with that, Miller, not helping his position, offered that two days later, "there was - - [even] with the air pumps it was still a fair amount of water down there." Tr. 149. And, of course, after the Inspector issued his order, production was stopped again. Tr. 150. That action, it may be reasonably concluded, made more time and resources available to deal better with the water. Supporting this observation, Miller acknowledged that, once they were closed down, they started pumping more water than they had before the Order had been issued. Tr. 150.

area must be made every seven days, he conceded that it is an "important" part of the mine because one wants to know about the ventilation in that area. Tr. 173-174.

The Respondent also called Gary Shortt, who is currently the senior mining engineer at the mine, a job entailing activities with the surface, the pumps, ventilation and mine planning and design. Tr. 183. Shortt informed that on March 15th, the mine was not producing coal due to atmospheric issues behind the seals but that, around March 22nd, the atmosphere around the seals became acceptable. It was then that Shortt noticed that there were two areas that had not been made; the air course of 1 right extension and the number 4 intake area, and the 1 right extension in the D 5 pump on the 1. Tr. 184-185. Shortt stated he made arrangements to have those areas examined on the evening shift before the 22nd anticipating that waders might be needed. Tr. 185. When he arrived at the mine the next morning he learned that one area had been made but that the number 4 fan area had not. Tr. 185-186. He then instructed that the area be examined immediately. Tr. 186. Like Miller, Shortt also did not consider the use of waders to be a big deal. Nor, it must be said, did the government have an issue about the use of waders when traveling through water during an examination.[22] Again, it is important to keep in mind that McDonald, waders or not, could not make the area, nor could the mine's certified examiner. At any rate, a Mr. Kilgore could not make the area and Shortt maintained that he did not report that failure to anyone. Tr. 187.

Shortt clarified that he did not direct that *Kilgore* do the examination, but rather that he only ordered that *someone* make the area. At any rate, he apparently did order that the area be examined on March 22nd and when he found, the next morning, that no exam had been done, he ordered that it be examined immediately. Tr. 195. With obvious reluctance in his testimony to the admission, he acknowledged that miners began mining on the 23rd at their normal time, stating, "It was a normal start time [for the production miners]. *I didn't tell them not to go, no." Tr.* 197. (emphasis added.) In attempting to mitigate his order that production was to resume, Shortt stated that he "was expecting" that the Old South Works would have been examined the

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[22] The Respondent also called Larry Pasquale, who is the senior safety supervisor at the mine. Tr. 204. He accompanied Inspector Boylan when McDonald's order of March 23rd was terminated. Pasquale stated that they went to the number 4 fan or intake shaft and walked to the faces. Tr. 206. As with Respondent's other witnesses, Pasquale stated there was no problem walking through the water. Tr. 211. Referring to R's Ex. 6, Pasquale stated he was referring to the faces marked as E and H on that. They did encounter water, ranging from ankle to knee deep, but he maintained there were no tripping or stumbling problems for him or for Boylan. Tr. 207. Pasquale then described the route they took, going from the number 4 intake to the number 3 entry and then to point W. (Actually Respondent's attorney described his route and Pasquale agreed.) Then they went to the fault pump area. They went from the green line at BB to the fault pump and then came back out towards the W. Tr. 209. Then to the fault area, marked as L, then to an old 10 stopping point at marking K. Pasquale stated the water there was really deep, as much as up to the thighs. Tr. 209. This was at point E, but neither had trouble walking through the water there and there was no tripping or stumbling. Tr. 209-210.

night before, on the 22nd. Tr. 199. Explanations aside, mining resumed, that is miners were in the mine for production purposes, as of 11 p.m. on the 23rd. Tr. 200.

DISCUSSION.

The claim of duplication[23]

Respondent contends the Order in issue here, No. 8518110, is duplicative of Citation No. 6699704, as the latter was still pending when the former was issued. Primarily relying upon *Spartan Mining*, 30 FMSHRC 699, 717-718, 2008 WL 4287784, (August 28, 2008), Respondent contends that the duty to comply with the requirements of this standard were subsumed[24] within a previously issued alleged violation of that standard. Oak Grove asserts that the previous citation and the present order were based upon the same act or omission; the mine's failure to examine at least one entry of each return air course in its entirety. Respondent contends that MSHA should have issued a Section 104(b) order for failure to abate Citation No. 6699704, instead of issuing the subject order.

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[23] It is noted that this is not Oak Grove's first problem concerning compliance with this standard. Beyond Inspector McDonald's notation in his Order that the mine had been cited for a violation of 75.364(b)(2) seven times in the past 2 years, litigation involving the provision has also occurred. The Commission's November 10, 2011 decision in *Secretary v. Oak Grove Resources, LLC* ("*Oak Grove,* Commission's November 2011 decision*"*) upheld the administrative law judge's affirmation of an order, which decision referenced the mine's antecedent failure to make the bleeder in its entirety. Also involved was a violation of Section 75.364(a)(2)(iii), which was issued on December 30, 2009. 2011 WL 5905640 at *4. Like Section 75.364(b)(2), Section 75.364(a)(2)(iii) requires a weekly examination, but it speaks to bleeders. In a *deja vu* moment, water accumulations were preventing Oak Grove from meeting its weekly examination obligation under that standard and, also as here, the miners had safety complaints over the matter. Then, again as in this case, an MSHA inspector encountered water accumulations, this time in the bleeder entries, which prevented him from traveling to and examining the longwall. Some 11 (eleven) measuring point locations could not be examined due to those conditions, an obstacle that had existed since far more than a week before the inspector's discovery of the problem. It is true that the judge was addressing an Order which alleged a violation of Section 75.334(d) but the prior citation, alleging a violation of Section 75.364(a)(2)(iii) was raised by Oak Grove, and then, as here, it claimed the two matters were duplicative. However, while affirming the judge, the Commission did not reach the claim of duplication, finding that the matter had not preserved that issue for review. *Oak Grove,* Commission's *November 2011 decision*, 2011 WL 5905640 at * 7.

[24] Other cases are cited by the Respondent, but ironically they were referenced, and effectively *subsumed,* in the *Spartan* decision.

The problem with Respondent's contention is that the prior citation was issued on March 9, 2010, whereas the present order was issued on March 23, 2010. The standard in issue is entitled "*Weekly* examination," and the cited provision within it very clearly requires an examination *at least* every 7 days. Accordingly, at a minimum, every 7 days creates a *new* obligation to perform the weekly exam. As the interval between the two enforcement actions exceeded the 7 day maximum interval between examinations, a new violation arose. To suggest that the duty which arose by the March 23rd failure is subsumed with the March 9th failure, ignores the weekly examination requirement and there is no dispute that the last complete examination to the order here had been at least seven days prior. Tr. 67.

Further, Oak Grove misapprehends *Spartan Mining's* instruction on the subject. First, in reviewing the claim of duplication for an entirely different standard than the matter involved here,[25] while the Commission split evenly on the issue, the effect of that was to *uphold* the administrative law judge's determination that the matters were *not* duplicative. As the members of the Commission noted in upholding the judge's determination, "the two violations occurred at different points in time." Not only did those upholding the judge depart from the idea that duplication exists where the method of abatement is the same, they also found that, while subsuming can occur, as applied in that instance, the duty cited in one regulation was not subsumed in the other. Instead, those members upholding the judge stated that it has "never focused on abatement in its analysis," but rather whether "different actions" were required. *Id.* at *17. Here, clearly, different actions are required, namely that, there be an examination "[a]t least every 7 days" . . . "[i]n at least one entry of each return air course, *in its entirety."* 30 C.F.R. § 75.364(b)(2) (emphasis added).

It should also be noted that the other enforcement action, the previous citation that Respondent looks to in support of its duplication claim here, was not tried in this proceeding, and that it cited a failure to comply with the proscription against anyone entering an underground area if there has not been a weekly examination within the previous 7 days. Thus, there is no evidentiary record to consult if it were accepted for the sake of argument that the present matter could be subsumed with the prior enforcement action. Last, the words employed in the two standards suggest that the focus of the standard cited in this case is upon the importance of examining the entirety of one entry of each return air course while the focus of the earlier citation is to ensure that no one enters "*any* underground area of the mine" unless the weekly exam occurred within the previous 7 days. 30 C.F.R. § 75.364(f)(2) (emphasis added). Obviously, different evidence would be used to establish the respective provisions.

Having rejected the Respondent's only basis for attacking the fact of violation, the Court noting that the Respondent has effectively otherwise conceded the violation, now turns to the

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[25] Although the Court fully recognizes that *Spartan* was cited by the Respondent for its statements on the subject of duplication, it still should be noted that the Commission was dealing with an electrical fatality and the mine operator being cited both for a failure to lock out equipment and for failing to remove the equipment from service.

remaining issues of whether the violation was "significant and substantial" and demonstrated an "unwarrantable failure" to comply with the cited provision.

The determination that the violation was Significant and Substantial.

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984); 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).

On occasion, the difficulty with finding a violation S&S may arise with the third element of the Mathies formula. In *U.S. Steel Mining Co., Inc*., 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co.*, Inc., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co*., Inc., 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co.*, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

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

particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). The Secretary is not required to establish that it is more probable than not that an injury *will* result from the violation. *U.S. Steel Mining Co., Inc*., 18 FMSHRC 862, 865 (June 1996).

As noted in a recent administrative law judge decision, "[T]he Commission has long held that "[t]he fact that injury [or a condition likely to cause injury] has been avoided in the past or in connection with a particular violation may be 'fortunate, but not determinative."' *U.S. Steel IV*, 18 FMSHRC at 867 (quoting *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (Feb. 1986)). See *Elk Run Coal Co.*, 27 FMSHRC 899, 906-07 (Dec. 2005) (holding that absence of adverse roof conditions at time of or prior to violation does not preclude establishing S&S violation); *Blue Bayou Sand & Gravel, Inc*., 18 FMSHRC 853, 857 (June 1996) (noting that absence of accidents involving violative equipment does not preclude S&S finding). The Commission recently reiterated these principles in *Cumberland Coal Resources, LP,* 2011 WL 5517385 (FMSHRC Oct. 5, 2011), [FN6] and *Musser Engineering, Inc*., 32 FMSHRC 1257 (Oct. 2010). Citing *Elk Run Coal* and *Blue Bayou Sand & Gravel*, the Commission emphasized that the test under the third prong of Mathies is *whether the hazard fostered by the violation* is reasonably likely to cause injury, *not* whether the violation itself is reasonably likely to cause injury. *Cumberland Coal Res*., 2011 WL 5517385, at *5; Musser, 32 FMSHRC 1280-81." See, *Pine Ridge Coal*, 2012 WL 601258 at * 9, upholding significant and substantial element for violation of 30 C.F.R. § (b)(2).

Respondent notes that the Inspector's "*primary* justification for [his] S & S designation was that of slip and/or trip injuries." Respondent's Br. at 15. (emphasis added). Given that, Respondent contends that no significant and substantial designation can be supported because the standard in issue is focused on "ventilation issues," not "slipping and tripping hazards." Respondent contends that, to be sustainable, an S & S finding must be related to the intended purpose of the standard. Alternatively, Respondent asserts that even if one may look outside the subject addressed by a standard to evaluate whether a violation is "S & S," here the evidence that there was such a slipping and tripping hazard was no more than speculative.

It is true that when asked by the Court to sum up his "S&S" determination, Inspector McDonald stated that it was "S & S" because of the tripping hazards of those miners who would have to travel the route. He considered the hazard to be both obvious and extensive.[26] Tr. 82.

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[26] The Inspector later reiterated that reason as the basis for his "S & S" finding, when the Court posed a hypothetical to him regarding the air station at 1C, which was one of the locations the inspector was unable to reach. The hypothetical asked McDonald to assume that normally one would access the area by a boat but to assume that on this occasion the water was so high that a boat could not be used because of lack of space between the height of the water and height of the roof. McDonald stated that under that hypothetical he still would have issued the violation for not being able to access 1C and he agreed it would not be based on any tripping and falling (continued...)

Before reaching the issue of whether slipping and tripping hazards can be addressed by 30 C.F.R. § 75.364, the Court first makes the finding that the Inspector's testimony was anything but speculative on that question, and further finds that it was persuasive on the issue. Clearly, there were slipping and tripping hazards abundant as Inspector McDonald waded through the water in the entry, as he attempted to make it in its entirety. In contrast, Respondent's witness, Miller, in his testimony could "not remember" if there was any stumbling or the Inspector dropping his clipboard, although Miller allowed "I mean, he might have [stumbled] but [he didn't] remember [McDonald] falling or tripping." Tr. 121. Miller added, regarding the slipping or sliding issue, "We just walked up there to it, you know. I mean, I don't remember any - -." Tr. 122. And again, later, in terms of any slipping or tripping in these conditions, Miller couldn't "remember it happening." However, he added, "It's a possibility it could have happened." Tr. 128. Though he maintained that, for him, it posed no slipping or tripping hazard, Miller acknowledged that the old track rail remained in the area. Tr. 122. Turning to the mine water itself, Miller agreed that the water was dark and that one can't see the bottom, that there are objects in the water, including rocks, belts, and old tracks. Tr. 152. In fact, Miller acknowledged that he was walking around the rib, holding onto the rib as he was making his way along, "Yeah. I just put one hand on the rib and stayed alongside the rib. That's correct." Tr. 152. This technique was done to help guide him through the water, he admitted.

Notwithstanding the foregoing, the Court finds despite the record evidence establishing a significant slipping and tripping hazard, such conditions cannot form the basis for a "S & S" finding where a section 75.364(b)(2) violation is alleged, because that is not the focus of that standard.[27]

However, it is noted that other administrative law judges have reached a contrary conclusion. In *Consolidation Coal Co.,* 15 FMSHRC 1408, 1993 WL 411806 (July 1993 ALJ) , dealing with the same provision, 30 C.F.R. § 75.364, the judge, considering the depth of the water, the fact that it was cloudy or muddy, the extent of the accumulation, the presence of two

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[26](...continued)
hazard under the hypothetical. However, the Inspector stated that he would not consider that violation to be "S & S." Thus, he agreed that his foremost concern was the tripping and falling hazard that made it "S & S." Tr. 109.

[27] In retrospect, perhaps MSHA should have also cited the Respondent for violating another standard, perhaps relying upon the Mine Act's safeguard provision at Section 314(b). Unlike surface aspects of coal mines, there does not seem to be a specific provision addressing underground safe travel access such as those at 30 C.F.R. § 77.205 (a) or (b). Those subsections for surface areas of mines provide: "Travelways at surface installations. (a) Safe means of access shall be provided and maintained to all working places. (b) Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards."

pipes in the water, and the fact that mud and rocks occur naturally on the floor of mines, concluded that the accumulation of water cited constituted a hazardous condition that should have been reported. 15 FMSHRC at * 1413. The judge continued, having found that the Contestant did violate Section 75.364, and that the violation did contribute to the hazard of slipping or tripping. In evaluating the third element of the Mathies formula, the judge took note of the "depth of the water; the fact that the bottom could not be seen through the water; the presence of 2 pipes in the water; the uncontradicted testimony of . . . an MSHA Inspector who inspected the site on February 7, 1993, and observed, in the area cited, planks and crib blocks lying on the floor in the center of the entry on the right side . . . and [ ] uncontradicted testimony that . . . he had observed a canvas lying on the floor covered with mud which made it extremely slippery when wet." The judge concluded that "[w]ithin the above framework, . . .it has been established that an injury producing event i.e., slipping or tripping, was reasonably likely to have occurred [and that] . . . due to the nature of the items in water, that should a person have tripped or slipped, there was a reasonable likelihood of an injury of a reasonably serious nature. . . . [and] [t]hus, [he] concluded that it [w]as established that [the] violation [ ] was significant and substantial. *Id.* at *1415.

This Court's conclusion that a slipping and falling hazard cannot form the basis for a significant and substantial finding in connection with a Section 75.364 violation does not mean that the violation was not S & S in this case, as there is other, substantial evidence, to support that conclusion. The inspector is not a lawyer, nor a jurist. His critical contribution to making the determination of whether a violation is S & S comes from the facts he observes and his knowledge bases concerning the hazards attendant to the violation. Thus, whether a violation is S & S does not rise or fall on a given inspector's *legal* analysis; it is for the Court to apply the evidence from the hearing and make that legal determination. The Court made note of this observation at the hearing. Tr. 220.

As the Respondent itself concedes, Inspector McDonald's testimony regarding his "S & S" finding was *not* limited to slipping or tripping issues.[28] *Id.* at 15. Respondent observes that the Inspector did testify that he was also concerned that the Number 4 fan was compromised by the restrictions put on it by water and that there was no way of knowing if the fan was affected. R's Br. at 18, citing Inspector's testimony at Tr. 67, 79-80. However, the Respondent asserts that there was "no evidence that the cited condition actually had an effect on the ventilation, or the No. 4 fan." *Id.* Respondent notes that both the Inspector and Mr. Miller conducted *some* air readings during the *attempt* to conduct the weekly inspection and that those readings did not reveal methane or oxygen problems. Acknowledging that the Inspector testified that there were airflow problems at the borehole pump, Respondent points out that no tests of air velocity were taken there, nor did he test the No. 4 fan *on the surface*. Tr. 89. Respondent

[28] Again, Inspector McDonald also stated that the focus of his order was on the inability to reach certain areas *in order to make the required readings.* Tr. 81. Still, the Inspector acknowledged that his Order only mentions the tripping and falling hazard and did not include ventilation concerns. Tr. 90.

characterizes McDonald's concerns over potential issues with the fan as speculation and discounts such concerns, even if valid, as of minimal concern because the active workings would not be affected by such issues. *Id.* Last, Respondent concludes its contention that the violation was not shown to be S & S by noting that the evidence at the hearing established that the ventilation was not compromised and even had that been the case, with air traveling down the No. 6 entry and then ventilating the faces, any ventilation issues would have been detected at the 1-B air station. *Id.* at 19.

However, Miller admitted that, even though there was no active mining in the areas cited by the Inspector, he was not contending that it was not important to take those air readings. Tr. 155. He agreed such readings *were* in fact important to take. Tr. 155. He also agreed it was important to take those readings every week. Tr. 155. Asked by the Court why taking those reading is important, Miller stated "[j]ust to see if there is hazards back there, that if there is low oxygen or high methane. Those are not the only concerns either. One is also examining the roof conditions, as someone could get hurt by such conditions as the fireboss makes his exam once a week. Tr. 156. As noted earlier, Miller admitted that the area must be made every seven days, and he conceded that it is an "important" part of the mine because one wants to know about the ventilation in that area. Tr. 173-174.

As the Secretary notes, when Inspector McDonald arrived at the mine on March 23, 2010, in response to the Section 103(g) miner complaint, a complaint based on the very grounds for which the Inspector later issued his Order here, he examined the mine's record books, finding that the weekly exam for March 18th listed several areas which the examiner could not carry out his examination for the Old Works 10 South and returns weekly exam, because of excessive water. Thus, initially it was the mine's certified examiner, not an MSHA Inspector, who could not examine all the required areas. That examination requires air, oxygen and methane readings at specified locations. These readings are critical to assess whether the mine's ventilation plan is working properly, informing whether there is proper air quality and to determine if methane is being swept out. And while Inspector McDonald may have been mistaken in evaluating the slipping and tripping aspects in reaching his view that the violation was S & S, as noted earlier, he spoke to other safety concerns about the violation as well. In this respect, he stated that the gravity of the violation was "highly likely," because ventilation carries away the methane gas. At this multi-fan mine, *each* fan plays a role in that task, for effective mine ventilation. If one fan is not working properly it impacts the other mine fans. Tr. 67. In this instance the Number 4 fan was compromised by the restrictions put on it by the water. Tr. 67. Further, when asked if his concern was an inability *to get* to a particular location to take air readings or not knowing if the air itself was not moving as intended, the Inspector advised that he had no way of knowing how much the fan had been jeopardized. Tr. 75-80.

Inspector McDonald added, in response to further questions, that if one can't take measurements at the fans and the other measurement places, one is then without any readings, and that means one will not know if something has occurred in those areas to change the air readings. The readings offer assurance that nothing has changed. For example, the brattice could be out at some location and thereby altered the mine ventilation. Tr. 84. If the ventilation

is altered, a situation made graver if one is unable to know of such a change, one could, in an area such as the Old Works, have low oxygen and high methane. As the Old Works is located right below the long wall gobs, if the fan were altered, that low oxygen, high methane situation could occur. Tr. 84. Under such conditions, if one had the low oxygen, and high methane drifting down, an explosion level of methane could occur and one would not know of it because of the incomplete weekly exam. As another example of the hazard which could develop, McDonald related that there have been instances when a weekly examiner has encountered low oxygen on his route and died.[29] Tr. 84.

Inspector McDonald's concerns over the threats associated with the failure to make the entire entry were not mere conjecture. As the Commission noted in its *Oak Grove,* November 2011 decision, this mine is subject to spot inspections because it liberates more than a million cubic feet of methane every 24 hours. 2011 WL 5905640 at *1. In that decision, the Commission noted that Oak Grove failed to take the required air measurements at the "specific locations identified in the mine ventilation plan," areas that, as here, those areas could not be accessed because of water accumulations.

As noted, the Court views Inspector McDonald's other statements to be sufficient, (i.e. those statements apart from his slipping and sliding concerns), regarding his determination that the violation was significant and substantial and it so finds it as such.[30] Having found that the violation occurred and, based on Inspector McDonald's testimony as well as that of Keith Miller, that there was a clearly identified measure of danger to safety contributed to by the violation, the first two *Mathies* elements were established. Further, both Inspector McDonald's testimony, and Miller's too, established the reasonable likelihood that, at this ultra-gassy mine, the hazard contributed to will result in an injury and that it would be an injury of a reasonably serious

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[29] While the inspector acknowledged that examiners carry a detector which will alarm if methane or low oxygen is encountered, that depends upon the detector being properly maintained. Tr. 88.

[30] Addressing the predecessor to regulatory provision at issue here, 30 C.F.R., Section 75.305, and also upholding the significant and substantial element associated with it, the judge in *Kaiser Steel Corp*, 5 FMSHRC 2224 (December 1983) "I further find that such a violation is of a significant and substantial nature as those terms are defined in Cement Division, National Gypsum Company, 3 FMSHRC 822 (April 1981). That is, a finding of whether a violation is "significant and substantial" depends on whether there existed a reasonable likelihood that the hazard contributed to or would have resulted in an injury of a reasonable serious nature. The purpose of the weekly inspection provided for in standard 75.305 is to detect hazardous conditions such as deteriorating roof conditions, air currents being blocked off and reversed, and methane accumulations. Any of these conditions could cause serious injury or death to miners in the area, if undetected." at *Id.* at * 2229.

nature. The Court's determination that the violation was significant and substantial is especially true, when viewed in the context of the undisputed evidence identifying the multiple areas McDonald was unable to access.

Although the foregoing represents the basis for the Court's significant and substantial finding, some additional observations are in order. The cited provision has a long history in terms of coal mine safety. The importance of the provision in issue here was recognized in the Coal Mine Health and Safety Act of 1969.

In enacting the 1969 Coal Act, Congress expressed the importance of the same matter before this Court. By that statutory provision being directly included in that Act, Congress made a clear statement of the importance of this safety practice and in so doing elevated the requirement which later was echoed as a mandatory safety standard.

Congress provided:

> In addition to the preshift and daily examinations required by this section, examination for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, *at least one entry of each intake and return aircourse in its entirety*, idle workings, and, insofar as safety considerations permit, abandoned areas. Such weekly examination need not be made during any week in which the mine is idle for the entire week, except that *such examination shall be made before any other miner returns to the mine*.

Section 303(f), Federal Coal Mine Health and Safety Act of 1969, Public Law 91-173, 91st Congress, S.2917, December 30, 1969 (emphasis added).

That statutory provision then appeared in the proposed and final rule, repeating it as a mandatory safety standard for underground coal mines. See, proposed rule at Fed. Reg. Vol 35, 12911, at 12923, and final rule at Fed Reg. Vol 35, 17890, at 17901, November 20, 1970.

No surprise, the statutory provision from 1969 Coal Act was continued with the Federal Mine Safety and Health Act of 1977 and its amendments, also appearing at Section 303(f), 30 U.S.C. § 863. Accordingly, given the Congressional statement of the importance of this requirement for more than 40 years, it would not be unreasonable to view any violation of the provision as presumptively significant and substantial.

The determination that the violation was an Unwarrantable Failure

The unwarrantable failure terminology derives from section 104(d)(1) of the Mine Act and refers to more serious conduct by an operator in connection with a violation. 30 U.S.C. § 814(d). In *Emery Mining Corp*., the Commission determined that an unwarrantable failure is aggravated conducted constituting more than ordinary negligence. 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Id. at 2003-04; *Rochester & Pittsburgh Coal*, 13 FMSHRC at 194; see also *Buck Creek Coal*, 52 F.3d at 136 (approving the Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), rev'd on other grounds, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal,* 14 FMSHRC at 1261; *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC at 353.

Inspector McDonald confirmed that if no exam is conducted, no one is to enter the mine, other than certified people, until the mine is made in its entirety. Tr. 68. McDonald's Order also listed the negligence as a "reckless disregard." Tr. 69. In so marking that assessment of negligence, the Inspector listed the citation of MSHA Inspector Steve Freeman, citation number 6699704, issued March 9, 2010, and that the information was duly recorded in the examinations book for that date. That information and the citation put the Mine on notice about its failure to make their weekly examination routes.[31] Tr. 69-70. As management had countersigned the books, they were aware that the water was present.[32] Tr. 70, 82 McDonald stated that it was the

[31] The citation was issued to Oak Grove's Larry Pasquale. Tr. 70, GX 6. This is among the stipulations in this case. It reflects that the March 9, 2010 Order is a final order of the Commission. In fact, Inspector McDonald was present at the mine's safety office when Inspector Freeman issued the citation. Tr. 72.

[32] Once again, to be complete, McDonald affirmed that his focus was upon *both* tripping and falling hazards *as well as* the inability to reach required areas to make the required readings.
(continued...)

mine's duty to remove the high water to the point the entries could in fact be examined in their entirety, so that the required air and air quality readings could be made. Tr. 70. As just noted, associated with that earlier citation (i.e. No. 6699704) is GX 7, which consists of Inspector Freeman's handwritten notes and the Old Works fireboss rounds connected with that. Tr. 73. Freeman issued his citation at 7:40 that morning, a little more than an hour after his arrival at the mine.[33]

As with its S & S analysis, Respondent asserts that the Secretary failed to prove that any aggravated conduct was associated with the violation. R's Br. at 20. Maintaining that neither the extent nor the duration of the violation was extensive, Respondent curiously first reminds the Court that, at least from Respondent's perspective, this was the *same* condition that had been previously cited by Citation No. 6699704, as asserted in its argument that the matter at hand is duplicative. Having asserted that, Respondent then, shifted its argument, maintaining that the condition only existed for "essentially one shift." R's Br. at 22.

With the exam needed to be done no later than the afternoon shift on March 22nd, Respondent concedes that did not happen but that the absence of an exam only existed for a short time. Of course, the claimed "short duration" of the violation did not happen in a vacuum. There was, after all, some history here, namely the 103(g) complaint. Nor was the mine's action attributable to some proactive safety step taken by the operator, as Inspector McDonald issued his Order and the miners were then evacuated from the mine.[34]

Respondent also contends that the violation did not present any danger, maintaining that the Commission has relied upon such an evaluation and whether a "high degree of danger" exists, to support an unwarrantable failure finding.[35] Because the evidence did not establish a hazardous condition with the ventilation and failed to show that the condition "actually affected the ventilation," Respondent maintains no unwarrantable failure was demonstrated. R's Br. at 23. However, this may be equally attributable to good fortune. Further, as noted, the after-the-fact

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[32](...continued)
The latter was also part of his determination that the violation was "S & S." Tr. 85.

[33] A difference, which the Respondent attempts to make much of, Inspector Freeman, stated that there were no known conditions that could cause an ignition and listed the violation as *non*-S&S. However, unlike McDonald, Freeman did not go underground to personally view the situation. Thus, while Freeman's violation was based strictly on not entering the weekly routes being made on March 4th and 5th, 2010, Inspector McDonald's order rested upon a physical examination of the route and the observed hazardous conditions that existed. Tr. 75.

[34] Confusing an "S & S" analysis with the unwarrantable failure issue, Respondent argues that the cited condition was "far away from the active areas of mining." R's Br. at 22.

[35] Respondent cites *IO Coal*, 31 FMSHRC at 1356 for the proposition that a high degree of danger is considered in the unwarrantable failure analysis. R's Br. at 22.

determination approach, not applicable to an S & S analysis, is even less pertinent to the negligence and unwarrantable evaluation.

Respondent also urges that it had "no reason to believe that greater efforts were required beyond the pumping procedures" it was implementing. In this regard it notes that the earlier citation for the problem was not marked as "S & S" and it believes that this translates into a lack of notice that it should have been on "heightened alert" to increase its compliance efforts. It points to its diligent efforts to remove the water from the area with all the pumps it had employed to deal with the problem. In an observation that the Court believes undercuts the Respondent's contention, Respondent notes that its own examiners could not "conduct the requisite examinations for the faces of 10 South on March 11th [nor a week later on March] 18th [and that both] Mr. Shortt and Mr. Miller ordered that the examinations be conducted on March 20." Even then, Respondent admits, "water impeded [the mine's own] examiners from conducting the examinations." R's Br. at 24. Of course, the condition cited by Inspector McDonald was not the only problem present, as the mine had been shut down because of the "atmospheric issue behind the seals." By its account, Mr. Shortt had ordered that the exam in issue be conducted before production resumed on the midnight shift on March 23, 2010 and it was on the morning of March 23rd that he then discovered that the exam had not been done. This recounting omits that it was not simply that the exam had not been done but that it *could not* be done. Shortt, it contends, did not know that the exam had not, nor could not have, been done and that his mistake did not rise to any reckless disregard or unwarrantable failure on the mine's part. R's Br. at 25. Shortt, Respondent contends, simply did not know that the exam was not done.

Last, Respondent maintains that it took "reasonable steps to abate the purported violation," and that such reasonable efforts by the mine bears upon the unwarrantable analysis. R's Br. at 26. Oak Grove, it contends had taken "significant steps" both to pump out the water accumulations and to attempt the required weekly examinations. In this regard it points to the various pumps it had installed to address the water accumulations and its unsuccessful attempts to do the required examinations. Viewing its efforts as diligent, it maintains that the steps it took were inconsistent with a conclusion that its failure was unwarrantable.

In addressing the unwarrantable failure contention, the Secretary notes that the Inspector found both Mine Foreman Keith Miller's signature and General Mine Foreman David Ingle's signature on the March 18th Old Works 10 South exam, along with the certified mine examiner's signature for that date. Ineluctably this meant that those two foreman were fully aware that the weekly exam could not be completed or, an equally bad conclusion, that they simple signed the report without ever looking at it. Whether the information identifying the problems was simply ignored or the foremen didn't look at it, as they were supposed to, the purpose of management's signature is to make them aware of the problems noted in the examination and to attend to them immediately. Upon finding the problem, Inspector McDonald then asked if the mine was then producing coal and Ingle advised that in fact they were. The miners were then withdrawn and the Inspector went underground to determine if the Old Works 10 South could still not be examined. Upon doing so, he found that a number of areas could not be made, as previously described.

It is noteworthy that Inspector McDonald's ensuing Order , in which he listed the areas which could not be made for the return air course, noted that the certified examiner identified such areas on March 18 and again on March 20, 2010, and that such problems, though identified, were countersigned by members of management. Inspector McDonald then included in his Order that a "HIGH NEGLIGENCE" Citation (# 6699704) had been issued on March 9, 2010 "for entering the mine with weekly routes not being made and not being made in its entirety." Further, Inspector McDonald's Order pointed out that the mine had been "cited for a violation of 75.364(b)(2) seven times in the past 2 years." Order No. 8518110. Given the history, including the recent history by virtue of Inspector Freeman's prior citation for the same failure, that the problem was clearly identified by the mine's certified examiner and that two management officials signed off on the examiner's report which listed the problem, this demonstrates a serious lack of reasonable care on mine management's part for which it was clearly on notice of the obvious and extensive violation of the provision.

Accordingly, based on the foregoing, the Court affirms the violation, finding that it was both significant and substantial and an unwarrantable failure on the part of Respondent Oak Grove Resources LLC.

PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in the Act. 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. 815(a), 820(a). When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, in assessing civil monetary penalties, the Commission shall consider the six statutory penalty criteria: [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. 820(i).

The parties have stipulated that Oak Grove demonstrated good faith in the abatement of the Order, and that the proposed penalty will not affect the Respondent's ability to remain in business.

GX 1, the R 17 history report, covering March 23, 2008 through March 22, 2010, was admitted, with the notation that this history of violations includes the March 9, 2010 citation but that it was not a final order as of the date of the time captured in this history report. Tr. 17. The Court has considered the appropriateness of such penalty to the size of the business; Oak Grove was assigned 13 points out of 15 possible mine points and 8 controller points out of a possible 10 points. Accordingly, the Respondent is a large mine. The negligence and gravity have already been extensively discussed.

ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), the Court assesses a civil penalty of $70,000.00, the same amount as specially assessed. Oak Grove Resources, LLC is hereby **ORDERED TO PAY** the Secretary of Labor the sum of $70,000.00 within 30 days of the date of this decision.

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

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March 12, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-934-M
Petitioner,	:	A.C. No. 45-03338-113621
	:	
v.	:	Docket No. WEST 2009-1164-M
	:	A.C. No. 45-03338-191588
PALMER COKING COAL CO., LLP	:	
Respondent.	:	Docket No. WEST 2010-1764-M
	:	A.C. No. 45-03338-229589
	:	
	:	Mine: Morgan Kame Terrace

DECISION

Appearances: Amanda Slater, Esq, U.S. Department of Labor, Denver, Colorado on behalf of the Secretary

William Kombol, Manager, Palmer Coking Coal, Co., LLP, Black Diamond, Washington on behalf of Palmer Coking Coal, Co., LLP

Before: Judge David F. Barbour

These cases are before the Court on consolidated Petitions 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 petitions allege that Palmer Coking Coal Co., LLC ("Palmer") is liable for five violations of the Secretary's Mandatory Safety Standards for Surface Metal and Nonmetal Mines. 30 C.F.R. Part 56. The Secretary proposes penalties of $5,280 for the violations. The parties presented testimony and evidence at a hearing in Tacoma, Washington.[1]

[1] At the hearing the Court noted that in her prehearing report counsel for the Secretary stated she planned to vacate the citation alleging the sole violation at issue in Docket No. WEST 2009-1164. Tr. 5. Palmer agreed that vacation of the citation was appropriate. *Id.* The Court stated that it too agreed, and that it would order vacation and dismiss the docket in this decision. *Id*.

STIPULATIONS

At the commencement of the proceeding, counsel for the Secretary and the company's representative and general manager, William Kombol, agreed:

1. That Palmer . . . is the owner and operator of the Morgan Kame Terrace [Mine];

2. That Palmer exhibited good faith in abating each of the violations at issue.

Tr. 8.

HISTORY OF PREVIOUS VIOLATIONS

After these stipulations were entered, counsel for the Secretary introduced computer generated records showing the number of violations issued at the mine 15 months prior to the subject violations. Tr. 10-11. The print-outs reveal that the mine has an applicable previous history of 15 violations. Gov't Exh. 17. By any measure, this is a small history.

THE MINE AND MSHA'S INSPECTIONS

At the time he testified, Anthony Turcotte was the acting health and safety manager of the Kettle River Operation of Kinross Gold Corporation, a Washington facility at which gold is mined and processed. Tr. 11. Turcotte had worked for Kinross for approximately one and one half years. Tr. 12. Before that, Turcotte worked for MSHA as a mine inspector. He started with MSHA in October, 2005, and he left in October, 2009. *Id*. Prior to joining the agency, Turcotte had considerable experience in surface and underground mining, much of it as an equipment operator. Tr. 13. As an MSHA inspector Turcotte visited both surface and underground mines. He estimated that he conducted between 60 and 75 inspections a year. Tr. 14.

Palmer's Morgan Kame Terrace Mine is a sand and gravel surface facility. It is located in King Country, Washington. Tr. 14. Turcotte believed that material extracted at the mine was used for cement, for road building, and for "similar type activities."[2] *Id.* Turcotte inspected the mine twice, once in December 2005, and again on October 4, 2006. Tr. 14. During the course of the inspections Turcotte saw Caterpillar front-end ("loaders") and other smaller loaders

[2] Kombol testified that product from the mine was never delivered by the company outside of Washington state, but he agreed that customers from other states could order product through a vendor in Renton, Washington. Tr. 165.

operating at the mine. Turcotte testified that the Caterpillar loaders were manufactured in Illinois.[3] Tr. 15.

When Turcotte visited the mine in December, 2005, he was not yet a fully authorized inspector. He accompanied MSHA Inspector Gary Tolman. Traveling with Tolman was part of Turcotte's training. Tr. 59-60. While at the mine in December, Tolman and Turcotte were accompanied by Peter West, Palmer's safety manager. Tr. 64. When Turcotte returned to the mine on October 4, 2006, he did so as a full-fledged inspector and as MSHA's sole representative. During the course of the October inspection Turcottte was again accompanied by West. Tr. 15-16. It was during this inspection that Turcotte served Citation No. 6396248 (Gov't Exh. 1) on Palmer's long time owner and mine manager, Kombol.[4] Tr. 16-17.

CITATION NO.	DATE	30 C.F.R. §
6396248	10/4/06	56.9300(a)

The citation states:

> The berms of the [M]ain [H]aul [R]oad and the Morgan Terrace intersection were not maintained where a drop[-] off existed of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. The large rocks which were on the corner of the Morgan Terrance intersection and Main [H]aul [R]oad were knocked off the the drainage ditch below by passing slurry dump trucks. The slurry dump trucks travel the Morgan Terrance road 4-5 times a day to dump slurry into the drainage ditch. The unbermed area was approximately 80-90 feet long and the drainage ditch was approximately 12 feet below the roadway[. The ditch] . . . had approx[imately] 1-2 feet of standing water. Tire tracts were observed along the edge

[3] In its answers to the Secretary's petitions, Palmer stated that it "dispute[d the Secretary's] assertion that . . . [the mine was] subject to the Act or that [the mine's] products enter[ed] into and affect interstate commerce." *See e.g.* Petition of Palmer for Relief, V at 2 (January 5, 2010). Palmer did not specifically raise the issue of jurisdiction at the hearing. However, had Palmer maintained its challenge, the company would have lost. The ability of out-of-state customers to order product from the mine (Tr. 165) and the use at the mine of equipment manufactured out-of-state (Tr. 15) means that the company and its mine clearly affected interstate commerce and came within the compass of the Act. It also means that MSHA rightfully inspected the mine.

[4] At the time of the hearing, Kombol had been the manager for approximately 28 years. Tr. 110.

> of the unbermed roadway above the drainage ditch. The [M]ain [H]aul [R]oad, which intersects the Morgan Terrace [R]oad, was used daily by plant equipment and dump trucks to drive to the plant from the scale house, main shop and equipment ready line. The Mine Manager[,] Bill Kombol[,] stated that he travels the Main [H]aul [R]oad and the Morgan Terrace [R]oad one to two times per week to conduct visual safety inspections throughout the plant. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence in that the hazardous condition was open and obvious, the same location had been cited on a previous inspection and the mine operator failed to take the corrective actions to correct the hazard. This violation is an unwarrantable failure to comply with a mandatory standard. Historically in the mining industry vehicle overturns from elevated roadways has been known to cause injuries of a serious nature.

Gov't Exh. 1.

Turcotte testified that he issued the citation because, "In the area along the Maine Haul Road in the Morgan Terrance Road intersection, I found that the rocks that were in place were knocked off of the roadway and were not sufficient to impede equipment from going off of the roadway."Tr. 17. Turcotte cited the company for a violation of section 56.93009(a), a standard requiring berms to be provided and maintained on the banks of roadways where a drop-off exists of sufficient depth to cause a vehicle to overturn or endanger persons. Tr. 18. Turcotte believed that a drop-off would be of sufficient grade or depth to cause a vehicle to overturn if it was "nearly vertical or . . . would cause the piece of equipment to tip." Tr. 34. According to Turcotte, drop-offs like that existed along the Morgan Terrace Road and the Main Haul Road intersection. *Id.,* Tr. 34.

Turcotte drew a diagram of the Main Haul Road and the Morgan Terrance Road. Gov't Exh. 19. He noted on the diagram that the Main Haul Road began off a public county road at the back entrance to the mine. Tr. 19–20. (The county road is depicted and labeled on the left side of the diagram. Gov't Exh. 19.) The Main Haul Road ran into the mine and past the mine's wash plant, which is located on the south side of the haul road. Tr. 20. Further along, the Morgan Terrace Road intersected with the Main Haul Road on the haul road's north side. Turcotte testified that the Morgan Terrace Road then continued on and entered private property. Kombol thought it ultimately lead to Kombol's residence. Tr. 20-21. According to Turcotte, the road, which was subject to two way traffic, was regularly used by slurry trucks. The trucks traveled along the road to reach the point where slurry was dumped. Tr. 25, 28, 144. Turcotte testified that roads at the mine generally were approximately 15 feet wide (Tr. 27; Gov't Exh. 1 at 3),

which he described as "pretty narrow."[5] Tr. 28. Turcotte agreed, however, that at the point where the Main Haul Road intersected the Morgan Terrace Road, the road was approximately 30 feet wide. Tr. 83.

Turcotte took a photograph of the intersection of the Main Haul Road and the Morgan Terrace Road while he was standing on the Main Haul Road facing the Morgan Terrace Road. Tr. 29; Gov't Exh. 2 at 1. In the photograph two vehicles (a truck and an SUV) can be seen. Gov't Exh. 2 at 1. Turcotte stated that vehicles were parked on the Morgan Terrace Road heading away from the Main Haul Road. Tr. 29. He also stated that a drop-off about which he was concerned was to the right of the vehicles, near the intersection. *Id., 31.* He recalled that the drop-off was difficult to see because vegetation had grown along its sides.[6] *Id.* None the less, he maintained that the drop-off was nearly vertical and that it had one to two feet of standing water at its bottom. Tr. 30. Turcotte did not recall the exact depth of the drop-off, but he stated that it was "significant enough that it would need a berm." Tr. 97.

Trucotte also photographed tire tracks that ran along the right side of the Morgan Terrace Road when heading away from the Main Haul Road. Tr. 30; Gov't Exh. 2 at 2. In Turcotte's opinion the tracks came "dangerously close" to the edge of the road. Tr. 30. He described the tracks as passing, "within inches of the road's edge." *Id.* He believed the tracks were made by slurry trucks and that the trucks had to "take the corner tightly" when they turned from the Main Haul Road onto the Morgan Terrace Road. *Id.*

Turcotte testified that there were no berms along the Morgan Terrace Road where the drop-off existed. Referring to his contemporaneous notes, Turcotte stated that approximately 80 to 90 feet of the road should have had berms. Tr. 31; Gov't Exh. 1. Turcotte thought berms were also required at and near the intersection where the Morgan Terrace Road left the Main Haul Road. He could not mandate them beyond these points because he had no authority to require them on private property. Tr. 25, *see also* Tr. 82. However, he could and he did require them on mine property because some of the rocks formerly serving as berms had been pushed or had slid off the side of the road and into the drop-off, or into the "ditch," as both Turcotte and Kombol sometimes called the drop-off.[7] Tr. 32; Gov't Exh. 2 at 4; *see also* Tr. 98-99. Other rocks had been pushed or had slid off the side of the road and part way down its bank. Tr. 87.

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[5] Turcotte's recollection was challenged by Kombol, who testified that for most of its distance the Main Haul Road was approximately 35 feet wide. Tr. 119.

[6] The Court notes that the drop-off is more apparent in a photograph Tucotte took after the alleged violation was abated by berming the area. Tr. 31-32; Gov't Exh. 2 at 3.

[7] Turcotte testified that he could not tell how many rocks ended up "in the ditch" because the vegetation "was too thick." Tr. 105. Kombol, on the other hand, was certain that there were no rocks at the bottom of the drop-off, that all of the rocks except one were where they were originally placed. Tr. 124.

Turcotte acknowledged that rocks had been purposefully placed along the road to abate a previous citation for missing berms, a citation issued by Inspector Gary Tolman in December, 2005. Tr. 88. Tolman approved of Palmer using the rocks as berms, something that Turcotte would not have done because Turcotte believed that, "[R]ocks do not serve [as] berms under the standard." *Id*., *see also* Tr. 104. Turcotte did not recall whether or not he questioned Tolman about Tolman's decision to allow Palmer to use rocks along the road. Tr. 95.

In Turcotte's opinion a berm could be located on either a road's shoulder or its bank, "As long as the berm has a substantial base, . . . and is at least [the] mid axle height of the largest piece of equipment that travels the [road.]" Tr. 95. He further explained that during his training to become an inspector he learned that: "Earthen material has been proven historically to be a better protective device along roadways." Tr. 96. He acknowledged however that such "earthen material" was not an exclusive berming agent and that other materials could be used for berm construction. Tr. 96. In any event, Turcotte emphasized that his actions were governed by the regulatory definition of "berm," which states that the word:

> [M]eans a pile or mound of material along an elevated roadway capable of moderating or limiting the force of a vehicle in order to impede the vehicle's passage over the bank of the roadway.

30 C.F.R. § 56.2, Tr. 89. Turcotte believed that the individual rocks used by Palmer with Tolman's approval would be "ineffective" in impeding a vehicle's passage over the bank of the roadway. Tr. 90. Moreover, they were not "sufficiently placed to impede a vehicle from going off the roadway." Tr. 32.

Turcotte found that if mining continued it was reasonably likely that a vehicle would overtravel the road and overturn. When it happened, the vehicle's driver was reasonably likely to suffer at least a permanently disabling injury. Gov't Exh. 1. He stated that "statistically [these are] the type[s] of injuries that occurred in . . . similar accidents." Tr. 35. He noted that the road was traveled frequently each work day and the extent of the unbearmed area meant that there was an increased chance that a vehicle would leave the road and go over the unbermed edge. Tr. 38-39. Further, the steep nature of the drop-off increased the likelihood that a vehicle would overturn once it left the road. Tr. 40.

The inspector also found that the alleged violation was caused by Palmer's high negligence and unwarrantable failure. He believed that the lack of berms in the cited areas was visually obvious and he noted that Kombol traveled past the area "one or two times per week," something that Kombol acknowledged. Tr. 40, 166; *see* Gov't Exh. 1 at 5. Turcotte also observed that Palmer was placed on notice that berms were required in December, 2005 (Tr. 41-42), and that Tolman then "reviewed the [cited] standard with the accompanying person from the mine, [and] discussed the standard['s] requirements and the abatement [with the person.]" Tr. 42.

To abate the alleged violation cited by Turcotte, the company put earthen berms along the shoulder of the cited areas. The dirt was approximately 36 inches high (Tr. 34), which Turcotte believed was sufficient to impede all vehicles that used the road. Tr. 33. *See e.g.,* Gov't Exh. 2 at 5.

For his part Kombol maintained that only one rock had slipped out of place since December, 2005. It was about two feet off the side of the road and down the bank. According to Kombol, all of the other rocks were "adjacent to the shoulder of the road." Tr. 169.

Kombol testified that the rocks were deliberately put on the bank of the road rather than on the shoulder "to prevent a vehicle from traveling off the bank." Tr. 169; *see also* Tr. 125. He repeatedly emphasized that to the best of his recollection, on October 4, 2006, the rocks were "precisely where [Palmer] placed them in December[,] 2005." Tr. 124, 135. In Kombol's view, the only problem was at the corner of the intersection where one rock had slipped down the bank. However, this was not a serious problem because trucks traveled very slowly as they turned onto the Morgan Terrace Road. Tr. 140, 163. Therefore, the defect in the berm was not especially hazardous. Tr. 163.

Kombol acknowledged that prior to December, 2005, no berms existed along any of the mine's roads. Kombol stated:

> [The] roads in the previous 20 years hadn't been bermed. We were issued a citation so we went ahead and bermed them. Nobody in our operation and none of the previous inspectors had ever considered them to be a problem but Tolman did so we bermed them.

Tr. 133.

THE VIOLATION

As previously noted, the standard requires that: "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." Citation No. 6396248 charges that, "The berms of the [M]ain [H]aul [R]oad and the Morgan Terrace intersection were not maintained where a drop [-] off existed of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." To prove a violation of the standard the Secretary has to show that "the . . . berms . . . [did] not measure up to the kind that a reasonably prudent person would provide under the circumstances" and she must do so "in the context of the preventive purpose of the statute." *United States Steel Corporation,* 5 FMSHRC 3 at 5 (January 1983). In a case where some material purporting to act as a berm is present, the Secretary does not need to establish that the berm material would prevent a vehicle from overtraveling the road. Rather, she

must show that the material would not allow for the reasonable control and guidance of a vehicle's motion. *See Dannen & Jansen, Inc.,* 18 FMSHRC 1796, 1816.

The Court concludes that the Secretary proved that at the cited intersection and along the road rocks which had once acted as a berm were no longer where they were originally placed and were insufficient in number and location to impede vehicles using the road – including the slurry trucks – from going off of the road and over the drop-off. Tr. 17, 25, 28, 144. The Court fully credits Turcotte's testimony in this regard. Further, the photographs of the cited area taken by Turcotte during the October 4 inspection clearly show that while some rocks were present off the side of the road and down the bank, they were insufficient in number, size, and location to control and guide a vehicle should the vehicle start to leave the road.[8] Gov't Exh. 2 at 1 and 2; *See* Tr. 90-94, 149. Indeed, the lack of adequate berming is so patently obvious it is highly improbable that as Kombol contended all but one of the rocks was where they were placed in December, 2005. For this reason, the Court credits Turcotte's testimony that most of the rocks had been pushed or had slid off the side of the road and down its shoulder and that some had ended up in the "ditch." Tr. 32, 87, 98-99, Gov't Exh. 2 at 4. In addition, it is obvious to the Court that Turcotte was right in his belief that once a vehicle overtraveled the road and went over the drop-off, the vehicle was in danger of overturning. Tr. 97.

Even if Kombol was correct and only one rock at the corner of the intersection had slipped down the bank (Tr. 143, 163), the Court would find the company in violation of the standard because the "slip" would have created a gap in the berm material at the intersection and would have left nothing to help the driver of an overtraveling vehicle regain guidance and control of the vehicle before going over the drop-off and into the "ditch." The Court finds Kombol's belief that the defect was not particularly hazardous because trucks moved slowly past the area inapposite to the issue of whether there was a violation of the standard at the intersection. Tr. 163. Even the driver of a slow moving vehicle can suffer a lapse in judgement and overtravel a road.

S&S AND GRAVITY

As a general proposition, a violation is properly designated as a significant and substantial contribution to a mine safety hazard (an S&S violation) if, based on particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained.

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[8] Although Turcotte implied that had the rocks been more numerous and been located at the edge of the road rather than down the bank, he would not have found a violation, the Court draws no conclusions from his testimony. *See* Tr. 90-94, 149. The hypothetical scenario laid out by Turcotte was just that – hypothetical. The Court must determine the validity of the violation based on facts that actually existed on October 4, 2006.

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

6 FMSRHC at 3-4; *see also Austin Power v. Secretary*, 861 F.2d 99, 103-104 (5th Cir. 1988), *aff'g* 8 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission explained part three of its *Mathies* criteria as follows:

> [T]he third element of *Mathies* . . . "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984) (emphasis in original).

The Commission subsequently reasserted its prior determination that as a part of any S&S finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Co.*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.,*18 FMSHRC 508 (April 1996). However, the Secretary is not required to show that it is more probable than not that an injury will result from a violation. *U.S. Steel Mining Co*., 18 FMSHRC 862, 865 (June 1996).

Resolution of whether an inspector's S&S finding is proper must be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 18 FMSRHC 1541, 1550 (September 1996). Thus, consideration must be given to both the time that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal operations had continued. *Bellefonte Lime Co.*, 20 FMSRHC 1250 (November 1998); *Halfway, Inc.*, 8 FMSRHC 8, 12 (January 1986). Further, the question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texas Gulf, Inc.*, 10

FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987). Finally, the Commission and the Courts have held that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 175, 179 (December 1998); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-136 (7th Cir. 1995).

The gravity of a violation is not synonymous with its S&S nature. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.,* 18 FMSHRC 1541, 1550 (September 1996).

The Court concludes that Inspector Turcotte properly found the violation to be S&S. Tracking the Commission's explanation of the term "S&S," the Court notes that there was a violation of section 56.9300(a) and that the violation, the lack of berms above a steep drop-off on a well traveled road, contributed to the hazard that a vehicle – most likely a slurry truck – turning onto the road and continued along it would go off the road's shoulder and over the bank. Because most of the rocks that served as berms were pushed or had slipped down the shoulder, there was little in place to restrain the vehicle and alert the driver to take corrective action. By the time the driver realized that the truck was off of the road, it would be on its way to the bottom of the drop-off and in danger of overturning.

Moreover, given the unchallenged testimony that slurry trucks used the road (Tr. 25, 28, 144), the fact that other vehicles also used the road at times [9], and Turcotte's credible description of tire tracks that passed dangerously close to the edge of the road (Tr. 30), the Court concludes that during the time the road lacked adequate berms and during the time it would have lacked them as mining continued, it was reasonably likely a vehicle would have left the road, plunged down the bank and that the driver would have suffered at least a reasonably serious injury.[10] In addition, although the Court credits Kombol's statement that trucks traveled slowly when they turned onto the Morgan Terrace road (Tr. 163), it finds that with no adequate berm present, even a slow moving vehicle would be prone to go off the road and down the road's bank if it traveled too close to road's edge, and the Court is mindful of Turcotte's credible testimony that tire tracks indicated vehicles passed dangerously close to the edge. Tr. 30.

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[9] The Court notes Kombol's testimony that he traveled past the cited area once or twice a week. Tr. 166. The Court also notes Turcotte's identification of an SUV as being on the road during his inspection. Tr. 29; Gov't Exh. 2 at 1

[10] The potential gravity of the likely injury was augmented by Turcotte's uncontested testimony that there was one foot to two feet of standing water at the bottom of the drop-off. Tr. 30. The Court judicially notes that operators of vehicles that have overturned and landed in such shallow water have been unable to extricate themselves and have drowned.

The Court also concludes that the violation was very serious. If because of the lack of a berm a slurry truck or other vehicle left the road, was unable to correct its movement, traveled over the drop-off, and overturned, the driver was likely to suffer a serious injury or even to be killed.

UNWARRANTABLE FAILURE AND NEGLIGENCE

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "serious lack of reasonable care." *Id.*; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (February 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340 (March 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Windsor Coal Co,* 21 FMSRHC 997,1000 (September 1999); Consolidation Coal Co., 23 FMSHRC 588, 593 (June 2001).

The Secretary's regulation at 30 C.F.R. §100.3(d) provides that:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

The Secretary also states that "moderate" negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3, Table X. While her characterizations do not bind the Court, they provide an analytical framework to assess Palmer's degree of negligence.

Turcotte found that the violation was due to Palmer's unwarrantable failure and high negligence, but the Court finds that it was due to neither. Gov't Exh. 1. Turcotte's findings were premised on the fact that Palmer was told in December, 2005 that berms were required, that the lack of adequate berms was visually obvious and that Kombol passed the area one of two times per week. Tr. 40. Kombol disputed the alleged visibility of rocks, although he agreed that he passed the cited area once or twice a week. Tr. 166.

Considering all of the factors, the Court concludes that mitigating circumstances warrant finding that the violation was due to Palmer's moderate neglect. The Secretary concedes that Palmer's use of rocks as berms was approved by Tolman. The rocks were put in place approximately 10 months before Turcotte's inspection. It is clear that in those ten months the "berms" approved by Tolman degraded, and it is reasonable to assume that their condition deteriorated over time as they were subject to changes in the weather and to passing traffic. The gradual progression of the berms from compliance in December, 2005, to noncompliance in October, 2006, suggests that the violation was not the result of Palmer's intentional disregard of the need for berms or of is indifference. Although Kombol passed the cited area once or twice a week as he traveled the road (Tr. 166), both Turcotte and Kombol agreed that vegetation grew up and obscured many of the rocks. Like the degradation of the berms, the growth of the vegetation did not happen all at once but occurred gradually over time, starting in the spring of 2006. By the time Turcotte came to the mine in October, 2006, almost all of the rocks had been pushed or had slipped out of place and their location had been hidden. Tr. 124. 134-135. Palmer's failure to detect that many of the rocks were no longer where they had been in December 2005, constituted a failure to exercise reasonable care. However, given the fact that there was no showing Palmer should have been aware that the rocks might be pushed or might slip and no showing that a reasonable operator in similar circumstances would have cut or otherwise defoliated the vegetation, Palmer's failure was mitigated. The likely gradual displacement of the rocks and their measured disappearance under a cover of the growing vegetation meant that the inadequacy of the berms easily could be overlooked by someone who repeatedly passed their locations.

CITATION NO.	DATE	30 C.F.R. §
6396249	10/4/06	56.9300(a)

The citation states:

> The Main Access road through the yard from the shop to the Main Haul road did not have berms where a drop[-]off existed of sufficient grade or depth to cause a vehicle to overturn or endanger person in equipment. The unbermed portion of the roadway was approximately 65-70 feet long and was elevated approx. 3-4 feet. The area was excavated approx. 2 months ago, backfill was put in to establish the roadway but berms were not installed. The roadway was used daily by plant equipment and dump trucks to drive from the plant to the scale house, mail shop and equip-ment ready line. Mine Manager Bill Kombol stated that he travels the roadway one or two times per week to conduct visual safety inspections throughout the plant. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence in that the hazardous condition was open and obvious and the

> mine operator failed to take corrective actions to correct the hazard. This violation was an unwarrantable failure to comply with a mandatory safety standard. Historically in the mining industry vehicle overturns from elevated roadways has been known to cause injuries of a serious nature.

Gov't Exh. 3.

At the hearing there was a dispute between Turcotte and Kombol as to whether the area cited was along a separate road, the Shop Access Road, or was along a continuation of the Main Haul Road. *See* Tr. 45, 118. Inspector Turcotte testified that the cited area was along the Shop Access Road. Tr. 45, Gov't Exh. 19. Kombol stated that the cited area was along a continuation of the Main Haul Road. Tr. 118. The dispute was one of nomenclature only. What is certain from the testimony of both men and from the exhibits is that the cited area was along a road that turned off of the Main Haul Road and lead to the mine's shop and office. *See e.g.,* Tr. 45, 47, 118; Gov't Exh. 19. Although the Court recognizes that the road could in fact be viewed as a continuation of the Main Haul Road, it also could be viewed as a separate road, and for the sake of clarity when discussing the citation, the Court will refer to the road as the Shop Access Road.

Turcotte labeled the Shop Access Road on Government Exhibit 19. Tr. 45; Gov't Exh. 19. He indicated with a green line where there was an elevated part of the road and where there were no berms. Tr. 46; Gov't Exh. 19. He testified that the road was uses primarily to reach the mine's shop and office. Tr. 47.

Turcotte photographed the conditions that he cited along the Shop Access Road. Gov't Exh. 4. He testified that one of the photographs showed where material had been used to elevate the road. Tr. 49, Gov't Exh. 4 at 1. He stated that there was a "nearly vertical" three to four foot drop-off along one side of the road, a drop-off that he believed was sufficient to cause a vehicle to overturn if the equipment operator "misjudged the shoulder" and went off of the road. Tr. 50; *see also* Tr. 106. Turcotte estimated that the areas cited were approximately an eighth of a mile or less from the mine office, and that approximately one half of the Shop Access Road lacked adequate berms. Tr.56. 108. Because of constant traffic to and from the shop and mine office, Turcotte testified that the road was traveled by mine personnel on a "regular" basis. Tr. 46. Indeed, on the day of the inspection he had saw front end loaders and employees' personal vehicles using the road. *Id.* After referring to his contemporaneous notes, Turcotte testified that the road was 15 feet wide and that its shoulders were soft. Tr. 50, 54. The condition of the shoulders made it more difficult for vehicles to recover if they overtraveled the road. Tr. 54.

Turcotte acknowledged that operators of the equipment wore seat belts, therefore he did not expect overturned vehicles to result in fatal injuries. Still, various types of spinal injuries were reasonably likely. Tr. 55. According to Turcotte, the hazards conditions were eliminated when Palmer installed berms along the road. Tr. 53; Gov't Exh. 4 at 3.

For his part, Kombol maintained that the "drop-off" about which Turcotte was concerned existed on one side of the road only, and that it was not a vertical drop but rather a slope of between 30 and 45 degrees. Tr. 121, 127. He further maintained that the incline resulted in a difference of elevation of 12 inches to 18 inches between the top of the road and the bottom of the incline, not three to four feet. In Kombol's opinion the incline was insufficient to cause a vehicle to overturn if the vehicle ran off of the road. Tr. 128; 142-143; Gov't Exh. 4 at 1. What Turcotte described as a "drop-off," Kombol's described as "a very mild slope . . . protected by a shoulder." Tr. 135.

Kombol testified that the company abated the condition by simply smoothing out the incline. He was sure that the company did not add berm material along the side of the road, and he described Turcotte's contrary testimony as "not true." Tr. 128.

In addition to the elevated portion of the road, Turcotte recalled another area that required a berm, an excavated area on one side of the road. Tr. 51. Turcotte testified that the excavation was between 6 to 8 feet deep, and was approximately 20 feet from the edge of the road. Tr. 52, 107. Turcotte circled the area in green on Government Exhibit 19. Tr. 51; Gov't Exh. 19. Turcotte testified that the side of the road bordering the excavation lacked a berm (Tr. 51; Gov't Exh. 4 at 2) and that there was nothing to stop a vehicle that ran off the road from falling into the excavation. Tr. 51.

Because the excavated area was adjacent to the road and because of the significant number of vehicles that traveled the road and past the excavation daily, Turcotte stated that it was reasonably likely a vehicle would go off the road and fall into the excavation. *Id*. He also speculated that if a vehicle pulled off of the road in the fog to let another vehicle pass, the vehicle that pulled off could easily be driven into the excavation by mistake. Tr. 55. Turcotte found that the alleged violation was S&S.

Turcotte described the cited areas as "open and obvious." Tr. 56. Turcotte recalled that Kombol said he traveled the cited parts of the road one to two times a week. *Id.* Turcotte also noted that the company had been cited for violations of section 56.9300(a) by Inspector Tolman in December, 2005. *Id., see also* Tr. 68-70; Gov't Exh. 4. For all of these reasons Turcotte conclude that the alleged violation was due to the company's unwarrantable failure and high negligence. *Id.;* Gov't Exh. 3.

Kombol agreed that the excavated area existed, but he maintained that it was located on the side of the road opposite from where Turcotte placed it. Tr. 121, 129; Gov't Exh. 18. Instead of a depth of 6 to 8 feet, Kombol estimated the area was approximately 3 to 4 feet deep. Tr. 129; Gov't Exh. 19. Kombol also testified that the excavated area was approximately 63 feet to 100 feet from the edge of the road. Tr. 131; *see also* Tr. 136, 143. As for Inspector Turcotte's contention that Kombol should have known of the lack of berms because he traveled the road once or twice a week, Kombol agreed that he traveled the road just as Trucotte testified, but he maintained that when he did, he did not see anything amiss. He stated, "I [drove] through there and I . . . look[ed] around. It look[ed] good to me." Tr. 161. Moreover, according to Kombol, in

August, 2006, three months prior to Turcotte's October, 2006 inspection, two other MSHA inspectors visited the mine. Kombol testified the inspectors drove the same roads as Turcotte and that conditions were "almost the same" as during Turcotte's inspection. Tr. 139. Yet, the inspectors issued no citations for inadequate berms. *Id*. If the violation existed, Kombol questioned how it could be the result of the company's unwarrantable failure given the fact that the company was not cited in August. Tr. 140. Kombol believed that a logical inference to draw from the lack of citations prior to Turcotte's visit was that the company was "doing a good job" in maintaining the berms. Tr. 160, 162.

Kombol noted that the company had a safety committee and that minutes of the committee's meetings were recorded by safety manager, West. The company introduced into evidence copies of West's minutes of the meetings of January through September, 2006. Resp. Exh. 8; *see* Tr. 153. On January 4, 2006, shortly after Tolman's citation was issued, West wrote, "We agree that all b[e]rms are good and road[s] that are not being used are blocked." Resp. Exh. 8. On February 9, 2006, West wrote, "B[e]rms and blocked roads are in place." *Id.* On March 6, 2006, West wrote that another employee told him that "[A]ll non-used roads are blocked and all b[e]rms are good." *Id.* Kombol noted that although the minutes dated August 4, 2006, mention violations found by MSHA inspectors on August 4, 2006, no violations of section 56.9300(a) were mentioned in the notes because MSHA's inspectors found no such violations. Tr. 156; Resp. Exh. 8. According to the minutes, on August 9, 2006, West was told by another miner that "[t]he b[e]rms [were] in place." Resp. Exh. 8. On September 4, 2006, in minutes of the last safety meeting before Turcotte's October inspection, West wrote that the "[b]erms were good." *Id.*

THE VIOLATION

The Court finds that the testimony establishes that significant portions of both sides of the Shop Access Road were elevated but not in such a way that berms were required. The Court does not accept Turcotte's testimony that the road was elevated so as to cause a "nearly vertical" drop of between three to four feet. Tr. 50. Turcotte photographed the areas that lacked berms (Gov't Exh. 4 at 1, 2) and the photographs suggest that Kombol was right when he testified the difference in elevation was between 12 to 18 inches, rather than three to four feet, and that the difference produced a "mild slope," one that was not likely to cause an overtraveling vehicle to overturn or to endanger those in the vehicle's cab. Tr. 128; *see* Gov't Exh. 4 at 1, 2. The limited and gradual nature of the slop can also be inferred from the fact that, as Kombol maintained, the allegedly dangerous condition was not abated through the installation of berms, but rather, as the citation states, through smoothing out or "sloping" the road. Gov't Exh. 3; Tr. 128. In all likelihood this would not have happened had the three to four foot "nearly vertical" drop described by Inspector Turcotte existed. Tr. 50.

Further, the Court finds that although there was an excavated area, it was not sufficiently adjacent to the Shop Access Road to require the road to be bermed. The Court recognizes that the witnesses disagreed as to the depth of the excavated area, Turcotte maintained it was 6 to 8 feet deep (Tr. 52, 107) and Kombol maintained it was 3 to 4 feet deep. Tr. 129. Under either

version the area was deep enough to cause a vehicle to overturn and to endanger those in the vehicle. The Court also recognizes that the witnesses disagreed as to location of the excavated area, Turcotte stating it was on the east side of the Shop Access Road, and Kombol placed it on the west side. Tr. Tr. 51-52, 121,129; Gov't Exh. 1. Since the Shop Access Road was traveled in both directions, it is not critical who was correct. Rather, it is the distance of the excavated area from the edge of the road that is decisive. Turcotte testified that the distance was 20 feet from the edge. Tr. 50, 107. Kombol maintained that it was at its closest approximately 63 feet from the edge and that because the excavated area did not run exactly parallel to the road that at its farthest it was approximately 100 feet from the edge. Tr. 131; Gov't Exh. 4 at 4*; see also* Tr. 136, 143. The Court credits Kombol's version of the facts. Not only was his testimony more definite, the photo taken after the condition was abated shows a distance far greater than the 20 feet testified to by Trucotte. Gov't Exh. 4 at 4. The Court concludes from this that there was sufficient distance between the edge of the road and the excavated area for a vehicle that overtraveled the road to stop before it reached the excavation and its attendant dangers.

For these reasons, the Court finds that the excavated area did not pose a hazard to vehicles traveling the road adjacent to it, and the Court concludes that the Secretary did not establish the violation of section 56.9300(a) that is alleged in Citation No. 6396249.

CITATION NO.	**DATE**	**30 C.F.R. §**
8556174	7/12/10	56.14100(b)

The citation states:

> The ground plug was missing from the energized 110 volt drop light cord . . . located on the North wall of the shop. The drop light is used in the shop area while working on equipment. Without the energized system being grounded and with persons working with the energized light a serious injury could occur.

Gov't Exh. 10.

MSHA Inspector Gary Hebel is assigned to the agency's Kent, Washington office. He has been employed by MSHA since 1998. Tr. 171. Prior to working for the agency, Hebel had a long career as an electrician and an electrical foreman for various engineering firms and metal mines. Tr. 171-172. Hebel conducts between 70 and 75 mine inspections a year. Tr. 172-174. Hebel testified that he inspected Palmer's mine on July 12, 2010, and that during the inspection he was accompanied by Palmer miner, Troy Box. According to Hebel, he and Box visited "Everywhere people work[ed] and travel[ed]." Tr. 175.

During the inspection Hebel had occasion to cite the company for a violation of 30 C.F.R. §56.14100(b), which states in part that, "Defects on any equipment . . . that effect safety

shall be corrected in a timely manner to prevent the creation of a hazard to persons." Hebel issued the citation when he noticed a defective plug on a drop light cord. Tr. 176. He described the cited equipment as "a mobile light on the end of [a] cord." Id. He stated that the cord was designed to be and was plugged into a receptacle that carried 110 volts of electricity. *Id.*

Hebel took photographs of the cord and its plug. Gov't Exh. 11. One of the photographs shows that the ground prong was in fact missing from the plug. Tr. 177, Gov't Exh. 11. Another shows the cord's ground wire. Still another shows a replacement plug with a ground prong. *See* Gov't Exh. 11. The replacement plug was installed to abate the cited condition. *Id.* Hebel explained that plugs are manufactured with a ground prong but that as the plugs are used, "normally [the prongs] get broke off."[11] Tr. 178. Hebel was certain that the ground prong did not break off when he unplugged the cord to inspect it. Tr. 180; *see also* Tr. 195. Rather, it had broken off earlier. *Id.*

Kombol testified that it was standard procedure for miners to check ground prongs prior to using any plug. Tr. 203. The goal was to ensure that the equipment powered via the plugs and cords as well as the cords themselves were properly grounded. *Id.* Kombol stated that the shop's main mechanic, Jack Hope, told him that the ground prongs did not fit well into the receptacles at the mine and as a result the prongs frequently broke off "on their own accord" when they were pulled out of the connectors. Tr. 203. In Hope's view, this had been a problem since "they started manufacturing [the plugs] overseas." *Id.*

Hebel testified that the drop light was used by mechanics when doing maintenance work on mobile equipment at the shop. Tr. 178-179. The light gave the mechanics better and more precise illumination. Tr. 178; Gov't Exh. 10 at 2. The ground prong protected the mechanics or other miners using the light from severe shock caused by a short.[12] Tr. 170.

When Hebel found the defective plug, the cord was plugged in, which indicated to Hebel that the light was used when the plug was defective and that the defect was not corrected in a timely manner. Tr. 179. ("You have to plug it in to make it work." Tr. 184.) In other words, Hebel believed someone used the defective cord and did not repair the defect. *Id.* However, at the time of the inspection Hebel was told that management personnel did not know the plug was defective, and he was assured that "[Palmer did] yearly continuity resistance tests on their equipment and if they . . . found [the defect], they would have pulled [the equipment] out of service." Tr. 180-181.

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[11] He also testified that the ground prongs are sometimes purposefully snapped off so the plugs will fit two-hole receptacles. Tr. 201.

[12] Hebel testified that although without a ground prong miners using the light would have some protection from a short circuit because the light could still ground and its electrical system shut down, with a ground prong the miners would have more protection because the system would ground and shut down almost instantaneously. Tr. 197

In Hebel's opinion the fact that the prong was missing was "pretty obvious." Tr. 185. The defect should have been detected as part of the work place examination of equipment that takes place before equipment was used. *Id.* Hebel looked at the company's work place examination records. The condition of the light cord's plug was not reported. Tr. 200

Hebel testified that if the light and cord continued to be used with the defective plug, "the extension cord would short . . . [which] could result in a fatal injury, as it only takes five mili-amps or less to stop a heart." Tr. 181. Or, if the light's bulb broke and a mechanic touched the electrical components inside the light, the person could suffer a serious shock. Tr. 182-183. One person, most likely the mechanic using the light, was exposed to the hazard. *Id.* Because he concluded that a serious injury was "more reasonably likely than not," Hebel found that the condition of the plug was an S&S violation. Tr. 181; *See also* Tr. 199. He testified that at the close of the inspection he discussed the alleged violation with Troy Box. Hebel was under the impression that Box agreed that the citation was warranted. Tr. 183; Gov't Exh. 18.

THE VIOLATION

As noted, section 56.14100(b) requires that defects on equipment that "affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." When determining whether the standard has been violated the evidence must be evaluated in the light of what a "reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *See e.g., Cannon Coal Co.*, 9 FMSHRC 667. 668 (April 1987); *Quinland Coal, Inc.,* 9 FMSHRC 1614-1618 (September 1987). *Ideal Cement Co.*, 12 FMSHJRC 2409, 2415 (September 1990). Apply this test, the Court finds that the Secretary easily established the violation. There is no dispute about the defect. The ground prong of the plug was missing just as Hebel testified and just as Government Exhibit 11 shows. Tr. 176; Gov't Exh. 11. As Hebel stated, the lack of a ground prong created the hazard of a short circuit resulting in a shock injury to or in the electrocution of a miner using the light. Tr. 181, 182-183. A reasonably prudent person familiar with the mining industry and the electrical hazards associated with it would have ensured that the plug had a ground prong.

In addition, it was incumbent on the Secretary to show that Palmer's failure to be aware of and to correct the defect was unreasonable, which means that the Secretary had to offer evidence as to when the defect occurred or when Palmer should have been aware of the defect. *Oil-Dri Corporation of Georgia*, 34 FMSHRC __, SE 2008-793M, etc. (February 14, 2012) (Judge Rae) at 16. The Court has no problem in finding the Secretary successfully bore her burden of proof. The most logical inference to draw from Herbel's unrebutted testimony that the cord was plugged in when he found it (Tr.179) and from his credible testimony that he was certain the ground prong did not break off when he unplugged the cord (Tr. 180; *also see* Tr. 195), is that the prong was missing when the droplight was last used. Herbel testified that it was "normal" for the ground prong to "get broke off" (Tr. 178), and Kombol testified that he was told by the company's main mechanic about how frequently prongs broke off. Tr. 203. Given the company's knowledge of the unreliability of the prongs, it was incumbent on Palmer to

ensure that a prong was always in place before the cord was used. Indeed, according to Kombol, the company recognized this by making it a policy at the mine for miners to make sure that ground prongs were present before they used affected equipment. *Id.* Either this did not happen in the case of the drop light, or, if it did, a miner used the equipment anyway. Given all of this, the only conclusion the Court can reach is that the defect was not corrected in a timely manner.

S&S AND GRAVITY

Hebel found that the violation was S&S, and the Court agrees. Just as Hebel testified, as mining continued the light and its cord would be subject to continuing use, and it was reasonably likely that the resulting stains and stresses on the light and cord would lead to a short in the cord's wiring. Without a ground prong to immediately shut down the power it was equally likely that the miner using the light would suffer a serious or even a fatal injury. Tr. 181-183; *see also* Tr. 199.

In addition to being S&S, the violation was serious. The Court has been instructed to focus on "the effect of the hazard if it occurs."*Consolidation Coal Co.,* 18 FMSHRC 1541, 1550 (September 1996). The Court concludes that the inspector's unrefuted testimony that a serious electrical injury or a death could result from the equipment shorting is determinative of the violation's gravity. Tr. 179-181.

NEGLIGENCE

Although at the time he cited the violation Hebel found that it was the result of Palmer's "low" negligence (Gov't Exh. 10), his testimony establishes that the company's negligence was at least moderate. Palmer should have detected the missing prong and corrected the condition. Herbel's belief that the condition was "pretty obvious" (Tr. 185) was confirmed by the photographic evidence. Gov't Exh. 11. Moreover, Herbel's opinion that the hazardous condition should have been detected and reported by the work place examiner was not countered by Palmer. Indeed, the fact that the company recognized the hazard and the importance of protecting its miners through properly grounded equipment was emphasized by Kombol's testimony. Tr.203. Herbel looked at the company's work place examination books to determine whether the defect had been noted. Nothing was recorded. Tr. 200. The fact that Palmer failed to detect and correct the "pretty obvious" (Tr. 185) defective condition - a condition about which it cautioned its miners - means that Palmer failed to meet its required standard of care.

CITATION NO.	DATE	30 C.F.R. §
8556175	7/12/10	56.12004

The citation states:

> The energized 16-3 SO type cable powering the Metal Cutting Band Saw located in the [w]ash plant parts trailer had pulled out

> of the motor approximately ½" allowing the inner conductors to be exposed to mechanical damage. No visible damage could be seen to the conductors at this time. Persons use the saw one or more times a week. With the inner conductors exposed to damage and with persons using the system a serious injury could occur.

Gov't Exh. 12.

Hebel testified that during his July 12 inspection, he found that a cable powering a band saw had pulled out one half inch from the saw motor's metal housing exposing the cable's inner conductors to possible damage. Tr. 185-186. Hebel readily acknowledged however that at the time he saw the condition neither the inner conductors nor the cable's outer jacket appeared damaged. Tr. 186, 189. Hebel explained that the inner conductors about which he was concerned were the cable's interior wires. They were insulated, but "not as good as the outer jacket . . . of the cable."*Id.* Herbal identified a photograph he took that showed "where the cable . . . [that powered the band saw had] pulled out of the motor housing, exposing the inner conductors to the . . . sharp metal of the motor['s] housing." Tr. 188; Gov't Exh. 13. The situation concerned Hebel because the band saw cable carried 110 volts of electricity, the exposed interior conductors were near the sharp metal edges of the housing, and the band saw housing was subject to "a lot of vibration" when the saw was used. Tr. 188.

Although Kombol stated he did not contest the fact that the cable had pulled out the housing, he testified that he was told that only 1/4th inch of the cable's conductors was exposed, not ½ inch as Hebel contended. Tr. 204. Kombol agree with Herbal that the cable's inner conductors appeared to be fully insulated. *Id.*

According to Hebel, the band saw was energized at the time he observed the condition. Tr. 189. If the saw was used and the insulation of the exposed inner conductors was damaged by being rubbed by vibrations against the sharp metal of the housing, the naked conductors could touch the metal housing and cause a short circuit that could seriously injure the band saw operator. Tr. 190, 191. The saw was operated approximately one time a week.Tr. 191. Hebel believed that because of the vibrations to which the cable was subject, "It was just a matter of time before [the insulation on the inner conductors would wear away and] somebody would receive a shock." *Id*. Hebel testified that as mining continued it was "more reasonably likely than not" that an accident would occur. "[S]ooner or later," he testified, the cable would short. Tr. 192.

Herbel stated that the cable's condition was "easily seen." Tr. 190. Yet the condition was not reported, nor was the condition corrected. Hebel knew it was not reported because he looked at the company's work place examination records. Tr. 200.

THE VIOLATION

Section 56.12004 requires in pertinent part that: "Electrical conductors exposed to mechanical damage . . . be protected." Palmer does not dispute that the violation existed as charged (Tr. 204) and the testimony fully supports Hebel's allegation that on July 12, 2010, the conductors carrying power to the band saw located in the wash plant's parts trailer were exposed to mechanical damage because the cable had pulled out of the band saw motor's metal housing. Tr. 188; Gov't Exh. 13. As a result, the conductors, which carried 110 volts of electricity, were exposed to the sharp edges of the housing's opening. Tr. 188. When considering the existence of the alleged violation, the question of whether the conductors were exposed for a half inch as Hebel believed (Gov't Exh. 12), or one quarter inch as Kombol testified (Tr. 204), is immaterial. Under either situation the interior electrical conductors of the cable were exposed to the edges of the housing and were subject to being rubbed against the edges as the saw operated. Hebel's testimony in this regard was not disputed. Tr. 190. Nor was his testimony that such exposure could cause an electrical short circuit. Tr. 191. Because there was nothing to protect the conductors except the insulation that wrapped around them – insulation, the Court notes, that was much less durable than the outer insulation of the cable – the Court finds that the violation existed as charged.

S&S AND GRAVITY

Hebel found that the violation was S&S in that it could fatally injure one miner. Gov't Exh. 12. The record supports his finding. Gov't Exh. 12. As Hebel observed, the conductors carried 110 volts of electricity (Tr. 188), and it is common knowledge that exposure to 110 volts of electricity can cause ventricular fibrillation leading to serious injury or death. All that had to happen was for the insulation on an inner conductor to be worn away by the vibrating saw and for the bare metal of the conductors to contact the saw motor's housing. The housing would be energized and when the band saw operator touched the housing, he would be serious injured or killed. Tr. 191. Hebel put it well when he testified that is was "just a matter of time" before such an accident occurred and that Court agrees with Hebel that as mining continued a serious or fatal injury was reasonably likely. *Id.* Further, given the likely results of the expected accident, the Court finds that the violation was serious.

NEGLIGENCE

The Court also agrees with Hebel that the violation was due to Palmer's moderate negligence. In Hebel's opinion the fact that the cable pulled out of the housing and exposed the conductors was "easily seen." Tr. 190. A photograph of the violation supports his assessment. Gov't Exh. 13. Palmer does not take issue with the fact that the condition went unreported in its work place examination book. Tr. 200. The Court infers from Hebel's testimony that the lack of a report indicates that the condition might have been of recent origin, mitigating the company's negligence to some extent (*Id.)*, and the Court concludes that the record supports Herbel's moderate negligence finding.

ASSESSMENT OF CIVIL PENALTIES

The Mine Act requires the Court to consider six criteria in assessing appropriate penalties for found violations. The criteria are: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) the negligence of the operator, (4) the effect of the penalty on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the good faith of the operator in attempting to achieve rapid compliance after notification of the violation. 30 C.F.R. §820(I).

As noted at the start of the decision, the Secretary introduced into evidence computer print-outs showing that the mine's applicable history of previous violations is small. Tr. 10-11; Gov't Exh. 17. The parties also agreed that Palmer is a small operator. Tr. 223. The company offered no evidence to establish that any penalties assessed will affect its ability to continue in business, and the Court concludes that they will not. Finally, the parties concurred that Palmer demonstrated good faith in abating the subject violations. Tr. 8.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
6396248	10/4/06	56.9300(a)	$2,000

The Court has found that the violation existed, that it was very serious and that it was due to Palmer's moderate negligence. Given these findings and the other civil penalty criteria, the Court assesses a civil penalty of $1,000.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
6396249	10/4/06	56.9300(a)	$2,800

The Court has found that the Secretary failed to prove a violation. Therefore, a penalty can not be assessed.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
8556174	7/12/10	56.14100(b)	$117

The Court has found that the violation existed, that it was serious and that it was due to Palmer's moderate negligence. Given these findings and the other civil penalty criteria, the Court assesses a civil penalty of $250.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
8556175	7/12/10	56.12004	$263

The Court has found that the violation existed, that it was serious and that it was due to Palmer's moderate negligence. Given these findings and the other civil penalty criteria, the Court assesses a civil penalty of $250.

ORDER

For the reasons set forth above Citation No. 6396248 **IS MODIFIED** from a citation issued pursuant to section 104(d)(1) of the Act, 30 U.S.C. §814(d)(1), to a citation issued pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), and the inspector's negligence finding **IS CHANGED** from "High" to "Moderate." Citation No. 6396249 **IS VACATED**. The inspector's negligence finding for Citation No. 8556174 **IS CHANGED** from "low" to "moderate and the citation **IS AFFIRMED**. Citation No 8556175 **IS AFFIRMED**. Further, if the Secretary has not already vacated Citation No. 6480349, she **IS ORDERED** to do so within 40 days of the date of this decision.[13] Within the same 40 days Palmer **IS ORDERED** to pay a civil penalty of $1,500 for the violations found above. Upon the vacation of Citation No. 6480349 and payment of the civil penalty, these proceedings **ARE DISMISSED.**

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

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/sa

[13] *See* n.1 *supra.*

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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Washington, D.C. 20001-2021

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March 14, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No.VA 2011-268
Petitioner	:	A.C. 44-00071-245642
	:	
v.	:	
	:	
LOUDOUN QUARRRIES- DIV/	:	
CHANTILLY CRUSHED STONE INC	:	Loudoun Qrs - Div/ Chantilly Crushed
Respondent	:	

DECISION

Appearances: Willow E. Fort, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner

Joshua E. Schultz, Esq., Law Offices of Adele L. Abrams, P.C., Beltsville, Maryland, for the Respondent

Before: Judge Koutras

STATEMENT OF THE CASE

This civil penalty proceeding pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802, et seq. (2000), hereinafter the "Mine Act," concern two Section 104(a) non-significant and substantial (S&S), citations served on the respondent on December 8 and 9, 2010, for alleged violations of mandatory safety standards 30 C.F.R. §§ 56.14100(b) and 56.12005.

A hearing was held on November 9, 2011, in Winchester, Virginia, and the parties appeared and participated fully therein. The parties waived the filing of briefs, and presented their respective arguments on the hearing record. I have considered their arguments in the course of this decision.

The Alleged Violations

Citation number 8578147 is a Section 104(a) non-S&S violation. It was issued on December 8, 2010, and alleges a violation of 30 C.F.R. § 56.14100(b). It states as follows verbatim (Exhibit G-l):

> When checked there were no brake lights working on the 992 C Cat front end loader. The loader was on the ready line next to the shop to be used when needed. The loader was checked by company employee before inspection and no brake lights was not noted. This condition put at risk a rear end collision with no warning of slowing or stopping which could result in lost work time injury if a collision occurred. S/N 42X00800

Citation number 8578148 is a Section 104(a) non-S&S violation. It was issued on December 9, 2010, and alleges a violation of 30 C.F.R. § 56.12005. It states as follows verbatim (Exhibit G-l-4):

> At the repair shop was found a company pickup truck that was parked on an 120 volt electrical cord that was plugged in to the heater on the truck engine. This condition put at risk employees of a shock hazard that may be using the cord later and the cord damaged by the sharp rocks the truck was parked on.

MSHA Inspector David Nichols testified regarding his mining experience, which included maintenance and repair of mining machinery, ownership of a welding business, and working with electricity and fiber optic communications. He has served as an inspector for nine years and received training at the Beckley Mine Academy. He visited the mine on December 7, 2010, in preparation for his inspection the next day and he reviewed the mine files and prepared his regular inspection information form and discussed it with plant manager, Rick Hoffman. He issued no citations that day and returned the next day to conduct his inspection (Tr. 27-31).

Mr. Nichols confirmed that he issued Citation No. 8578147, after finding that both of the 992c front-end loader brake lights were not working (Tr. 32, 36; Ex. G-l, and photographic exhibit G-3). The machine was parked in the "ready line" area where equipment is parked and available for use as needed, and where spare parts may be obtained for equipment repairs (Tr. 32-34).

Mr. Nichols stated that based on his past mining experience, equipment on the ready line would have been looked over and made ready for service and to insure that everything is functional, and all the safety defects are corrected. This would be done in order to insure the availability of dependable equipment that could quickly be returned to production (Tr. 35).

Mr. Nichols concluded that the operator had an opportunity to look at the loader before placing it on the ready line because he knew that he would inspect the equipment at that location and had started the equipment because it was a cold evening. The equipment operator informed him that it was preshifted "to make sure everything was good" (Tr. 36-37).

Mr. Nichols stated that after observing the inoperative brake lights, the equipment operator informed him that he did not check them because he did not have a second person

available to assist him in observing the lights. Mr. Nichols confirmed that during his close-out conference with plant manager, Rick Hoffman, he informed him that if the loader were needed it would have been inspected and the brake lights problem would have been discovered (Tr. 38-40).

Mr. Nichols believed the inoperable brake lights presented the possibility of a collision with equipment that is slowing and stopping. However, he determined that the gravity level was "unlikely" because the loader would be located in the pit and basically driving into the pit and leaving in the evening, and would necessarily be following other equipment (Tr. 41).

Mr. Nichols believed that any hazardous rear-end collision could possibly result in head or neck whip lash injuries. However, he considered the fact that mine management has a good seat belt policy that is well enforced, and that any injury would result in sore muscles and two or three lost work days (Tr. 42). He further concluded that the violation was the result of moderate negligence mitigated by the fact that it has a very good preshift inspection policy (Tr. 44).

In response to bench questions, Mr. Nichols stated that the machine back-up alarms and seat belts were in working order, and no one would be on foot in the pit area where it would be operated. He confirmed that he extended the abatement time in order to allow the respondent to order and receive a required light switch and that the respondent has a good reputation for terminating citations as soon as possible (Tr. 47-49).

On cross-examination, Inspector Nichols confirmed that there is no requirement for an equipment ready line. However, any equipment in that area must be preshifted before it is taken off the ready line and placed into service, and it is not considered to be into service until it is needed.. He did not know how long a piece of equipment can remain on the ready line (Tr. 62-63).

Mr. Nichols stated that the loader was not in operation at the time of his inspection, and he did not know whether it was intended to be placed in service before he inspected it. However, the engine was running and the shop employee informed him that he had "checked it out". Mr. Nichols did not ask the employee if he conducted a preshift inspection, and the loader was taken out of service until the brake lights were repaired (Tr. 64-67).

Mr. Nichols believed that the difference between a walk-around check of a vehicle and a full MSHA required preshift is basically terminology, and would depend on the individual performing this task. He stated he was informed that the loader was ready for him to inspect, and not that it was ready to be put in service. He did not believe there should be a difference because "our standards only specify one type of an inspection of equipment, whether it's been put in service or whether I'm there to inspect it, either one" (Tr. 69). He confirmed that there is no preshift inspection required before a vehicle is inspected by an inspector. He confirmed that there was no evidence that the loader was operated by anyone with defective brake lights and he did not know how long they were defective (Tr. 70-71).

Jesus Vega, Respondent's equipment operator, confirmed that he was working at the mine on December 8, 2010, and his supervisor, Johnny Taylor, instructed him to check out the Euclid 96 and 97, and the 992c Dozer. He confirmed that he started the Dozer but was not instructed to perform a preshift examination and he did not perform one because that was the responsibility of the operator of that piece of equipment and he did not operate it that day (Tr. 88-91).

Mr. Vega stated that he did not check the Cat 992 loader brakes because he cannot check them by himself and needed help and he did not conduct a full preshift examination because he did not operate the machine. He confirmed that when he performs a full preshift inspection he includes the brake lights because the driver is present to observe whether the brake lights are operable (Tr. 92-93). He stated that he is trained to perform a full equipment preshift inspection examination when he is the operator. He explained the procedures he follows to conduct the examination, included inspecting the equipment brake system. He confirmed that the full examination takes one hour (Tr. 94-96").

Mr. Vega stated that on the day of the inspection he started the cited loader, checked the engine oil, transmission, hydraulics, and the antifreeze, and turned the lights on to insure they were operative, but he did not conduct a full preshift examination because he did not operate the loader that day. He was not planning to use it, was not instructed to use it, and did not move it. He did not fill out a preshift inspection form which is normal if a full preshift examination is done. He confirmed that he started four vehicles which took one-half hour, and that a full preshift takes one hour (Tr. 96-99). Mr. Vega stated that his supervisor instructed him to start the equipment because Inspector Nichols was coming. He turned on the loader lights but did not check the brake lights because he had no one to help him (Tr. 99-101).

Johnny Taylor, head quarry pit foreman for 15 to 18 years, testified that there has never been an area called a "ready line," but there is an "available" area. He stated that the area characterized by MSHA as a "ready line'' is an area where equipment that is not in use is parked together with equipment that is taken for use. The equipment that is not used on any day remains parked (Tr. 103-104).

Mr. Taylor stated that the parked equipment is not ready for immediate use until it is preshifted and is ready for use. A preshift is required if the equipment is scheduled for use, regardless of the operational time (Tr. 105). He confirmed that he was present during the inspection. He stated that the loader is a spare and may be used if needed, but only after it is preshifted and it is infrequently used. He believed that it was not used during the week of December 8 because it had not been inspected (Tr. 107).

Mr. Taylor stated that Mr. Rick Hoffman, his supervisor, instructed him to start the parked equipment which was not to be used, including the loader, and four of five pieces of pit equipment for the inspector to look at. He then instructed Mr. Jesus Vega and employee Juan Maple to start the equipment and check it out because of the cool weather, but he did not advise them that they were to operate the loader or to preshift it because it was not intended to be used (Tr. 109).

Mr. Taylor confirmed that he trained equipment operator Jesus Vega to conduct full preshift examinations that take 45 minutes to perform, as well as the preparation of the required check list forms confirming the examinations. The training took place during personal safety meetings and video presentations with Mr. Taylor's crews, including Mr. Vega (Tr. 110-119; Exhibit R-2 through R-5). He stated that in order to fully preshift the loader it would have to be taken to the pit to check the parking brake because of the road grade where it would be operating. That preshift would have included checking the brake lights (Tr. 111).

Inspector Nichols confirmed that he issued Citation No. 8578148, after observing a pickup truck parked on a 120 volt extension cord used to heat the truck heater while parked, just outside the shop on the gravel parking lot, and he photographed the truck (Tr. 50; Exs. G-1-4, G-3-2). He explained that an extension cord is generally hung up over the outside truck mirror pursuant to company policy as a reminder to drivers not to drive over a cable and jerk it loose. When not in use, the extension cord is normally kept outside of the shop (Tr. 52).

Mr. Nichols stated that the cited Section 30 C.F.R. § 56.12005, language requiring a power conductor to be "properly bridged or protected" is intended to protect the cable insulation from being crushed or cut if it were run over. Any damage to the cable insulation would expose anyone picking it up to an electrical shock hazard. He explained that the standard requires a structure, such as one using 2 x 4 or 2 x 6 wood placed on either side of the cable to protect it temporarily if someone were to run over it (Tr. 52-55).

Mr. Nichols determined the gravity level as "unlikely" in that the cited occurrence was rare and the respondent has a policy in place to prevent it. He believed that the truck operator failed to notice that he had backed over the top of the cable that was under the rear tire approximately twenty feet where anyone could pick up the brightly colored yellow cord and drape it over the truck rear-view mirror. He stated the truck was used to transport tables that were used for his safety meeting that morning (Tr. 55-56).

Mr. Nichols stated that the hazard presented by running over the extension cord included damage to the inside conductors, and ground, and outer insulation cuts caused by the gravel that could later expose someone to a 120 volt electrical shock hazard (Tr. 57).

Mr. Nichols described the hazards associated with the breaking of the outer extension cord insulation, including a fatal shock from the 120 volt cord, as well as damage to the inside cord conductors that are not visible and could do damage to the ground circuit which could result in an electrical shock if anyone touched the cord (Tr. 57-59).

Mr. Nichols stated that the cited cord was tested to insure that the inside and outside conductors were in good shape through a visual check of the cord exterior and a continuity test by an electrician on the interior of the cord. He stated that he based his "moderate" negligence finding on the respondent's cord hanging policy, the fact that the cord was not damaged, and the annual continuity tests conducted by the operator on all of its electrical cords (Tr. 60).

On cross-examination, Inspector Nichols believed the phrase "to protect a power conductor" means insulated or isolated from damage. He stated that bridging or hanging up a cord, as well as putting it in a piece of conduit and burying it in the gravel are examples of protection (Tr. 72, 74).

Mr. Nichols stated that he found no evidence of any damage to the cord, and he confirmed that his gravity finding of "unlikely" was based on the fact that the cord was a new heavy duty and heavy insulated cord with no cuts and was tested and found to be "OK" (Tr. 75, Exhibit G-2-2).

Mr. Nichols concluded that the cord was heavy due to its size and gauge. He confirmed that the power conductors are inside of the cord and that the heavy insulation helps to protect the conductors "to certain extents, except when you run over it", and that it "probably helped" protect the conductors in this case.

Mr. Nichols attributed the lack of damage to the cord to the tact that it was the first time it was run over, and he did not take it out of service because it was tested and checked and no damage was found. He then terminated the citation and the cord was in compliance and allowed to be used (Tr. 77).

On re-direct examination, Mr. Nichols stated that the size of the truck parked on the cited cord can damage a heavy duty extension cord, and if any danger is not visible from the outside, it can still be damaged, and it must be tested to determine that damage has occurred (Tr. 81).

Discussion and Findings and Conclusions

The cited mandatory safety standard 30 C.F.R. § 56.14100(b), with respect to Citation No. 8578147, states as follows:

> Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

The petitioner asserts that the evidence establishes that the loader brake lights were inoperative and not functional when the inspector observed them and the loader was examined before the inspector viewed it. The petitioner pointed out that the employee who inspected the loader did not see the brake lights because he was not provided another employee to assist him, but that the loader was nonetheless preshifted (Tr. 86).

The petitioner argues that although a violation may not be supportable if it were impossible to discover the brake lights defect, in the instant case the respondent instructed its employees to start the loader in order to insure that it is in order in the event it was needed and put into use (Tr. 127).

Petitioner asserts that the respondent started the equipment in order to make it ready to be inspected, and since the transmission fluid, hydraulics, all lights with the exception of the brake lights, were checked, it was not impossible to check them after the loader was started and checked (Tr. 128).

Petitioner concludes that it was unlikely that the loader would have been preshifted and discovered the defect before taking it from where it was parked and using it in the pits, where it would be hazardous to operate without brake lights. Petitioner dismisses the respondent's assertions that the loader was not being preshifted, but was just "looked at", and did not require a full preshift examination (Tr. 130).

The respondent asserts that the petitioner has not shown how long the defects existed, that it was operated with any defect, that a full preshift inspection was made to discover the defect, and that the defect would not be discovered and timely corrected during a preshift inspection before the loader was next put in operation (Tr. 85).

The respondent argues that it has a system in place designed to stay in compliance with Section 56.14100(b), by preshifting all vehicles before they are put in service to insure that defects are corrected in a timely manner. Respondent maintains that vehicles are routinely looked at when inspectors are on site through a cursory walk-around of the vehicle, and that the loader was started and warmed up for the inspector to look at. However, the full preshift examination pursuant to the respondent's established policy to insure that defects are detected was not performed on the loader. If it were to be put in operation, as it is normally done when a preshift is performed, a full preshift would have been performed (Tr. 133).

Respondent further argues there was no loader hazard exposure or any indication that it was ever driven with defective brake lights. Further, there is no showing how long the hazard existed, or that it was ever a hazard to persons or that the hazard would not be corrected under the respondent's preshift policy which the petitioner acknowledges is strong (Tr. 133-134).

The respondent cited several decisions decided by Commission judges concerning the interpretation and application of Section 56.4100(b). Petitioner's counsel confirmed that she was aware of the cases and discussed them with the respondent's counsel. She believed that cases concerned situations where there was a true impossibility that the operator could have discovered the defect (Tr. 126).

The respondent's counsel stated that this was not true, and that the cited cases involved vehicles that were driving around the mine, and if the brake lights were defective they would have been noticed by other miners and would have actively created a hazard. In the instant case, the loader was never driven and if it were put into operation, it would have been corrected in a timely manner before it created hazards to persons (Tr. 134).

Contrary to the petitioner's argument that the loader was preshifted before the inspector found the inoperative brake lights, the respondent's credible testimony and evidence reflects that although the loader, as well as other vehicles, were started and warmed up because pit foreman

Taylor's supervisor Rick Hoffman was aware that the inspector was on site and would probably inspect them, I cannot conclude that loader operator Jesus Vega's rather brief preparatory work of checking loader fluids and lights constituted a full preshift examination that normally would take one hour. Consequently, I find there is no credible evidence that the loader was preshifted pursuant to the respondent's established procedures that are not in dispute.

Regardless of the characterization of the area where the cited loaders, as well as other vehicles, were parked as a "ready line", the inspector agreed that there was no requirement for such a designation, and he conceded that any parked equipment had to be preshifted before it was moved and placed in service. In this regard, I conclude and find that Section 56.12005 does not require that all parked equipment not in service must be maintained and ready for use at all times. On the facts of this case, I conclude and find that the inspector's preemptive and premature issuance of the violation in absence of any evidence that a full regular preshift examination was performed on the loader, which would have put the respondent on notice that a defect had to be taken care of, did not afford the respondent with a reasonable opportunity to perform a preshift, discover the defect, and timely repair it.

I find no evidence to support the petitioner's assertion that it was unlikely that the loader would have been preshifted and the defect discovered. I credit the testimony of Mr. Taylor that the loader was a spare that was not used during the week of the inspection, is used infrequently, and that if it were needed to be placed in service, it would be preshifted. I also credit his testimony regarding a rather extensive training program for its equipment operators. That program was conceded to be "a very good preshift inspection policy" by the inspector (Tr. 44).

I further find that the cited loader back-up alarms and seat belts were in working order, and that it was not in operation when the inspector inspected it. Further the inspector did not know whether the loader was intended to be placed in service before he inspected it, and he did not ask the operator if he had preshifted the loader, and the operator did not inform him that it was ready to be put in service (Tr. 69).

I also take note of the fact that when the inspector initially observed the loader while it was parked with the engine running, he concluded that the operator had "pre-inspected it", and simply asked him if he had "checked everything out" (Tr. 65-66). I find credible and persuasive operator Vega's testimony that he had not planned to put the cited loader in operation, that he was not instructed to put it in service, and that he did not prepare a preshift inspection report that he would normally submit after preshifting a vehicle.

I find the inspector's belief that the difference between a "walk-around check" of a vehicle and a full MSHA required preshift is "basically terminology", that depends on the person performing the task to be rather contradictory (Tr. 67-68). On the facts of this case, it would appear to me that the loader operator and the inspector differed as to what had taken place with regard to the vehicle inspection.

Based on all of the aforementioned circumstances, and after consideration of all of the arguments advanced by the parties, I conclude and find that the petitioner has not established by

a preponderance of the evidence that the respondent did not correct the cited defect in a timely manner within the meaning of Section 56.14100(b). Accordingly, the citation **IS VACATED**, and the proposed civil penalty assessment **IS DENIED**.

The cited safety standard 30 C.F.R. § 56.12005, with respect to Citation No. 8578148, states as follows:

> Mobile equipment shall not run over power conductors, nor shall loads be dragged over power conductors, unless the conductors are properly bridged or protected.

In support of this alleged violation, the petitioner cites the photograph of the truck parked on top of the regular heavy-duty electrical cord, and points out that this is a non-S&S citation with moderate negligence (Tr. 86; Exhibit G-2-3).

The petitioner argues that in the event the extension cord were run over, any damage would not be detected unless the vehicle was stopped to visually examine any damage to the outside of the cord. In the event of any undetected interior cord damage, anyone subsequently using it would be exposed to an electrical 120 volt shock hazard, particularly if the cord were exposed to wet and cold weather while it were in use. The petitioner rejects any suggestion that the cited extension cord was properly protected and concludes that it could be run over many times and used continually (Tr. 131-132).

The respondent argues that the inspector agreed that a power conductor is protected when it is insulated, and that the cited extension cord was a heavy-duty cord with heavy insulation. Under the circumstances, the respondent concludes that the cord was protected in accordance with the requirements of Section 56.12005, which states that a power conductor must be bridged or *protected* (emphasis added) (Tr. 135).

After careful consideration of the arguments presented by the parties, I conclude and find that the petitioner's position is supportable and correct. Although the regulatory word "protected" invites the defense advanced by the respondent, that any self-insulated heavy duty power conductor inherently provides adequate protection against hazardous cable damages, it is **REJECTED**.

I take note of the inspector's testimony that the size and gauge of a power cord provides some measure of protection, but only if the cord is not run over. In the instant case, the inspector considered the absence of any cord damage, after it was further examined and tested, in his determination that the violation was not significant and substantial.

I find credible the inspector's testimony that given the size of the truck that was parked on the cord, it could have damaged the cord. Further, conceding the fact that the cord was a heavy duty insulated cord with no visible indications of any external damage, and passed a continuity test, I find credible the inspector's belief that any inside cord damages to the

conductors and grounding circuits, which are not visible and readily detectable, would expose anyone handling the cord to an electrical shock hazard.

I conclude and find that running or parking over a power conductor cord presents a realistic potential for interior cord damage that would not be immediately visibly detected, and that any subsequent and continued use of the cord, without correcting the defect, by persons who may not be aware that the cord was run over, would expose them to potential shock hazards.

I further conclude and find that in the context of any normal working environment with the presence of mobile equipment, it would be unlikely that an equipment operator who may have inadvertently run over a power cord, or dragged a load over it, would immediately stop the vehicle or discontinue his work to perform more than a cursory visual examination of the cord. Indeed, in the instant case, the truck was clearly parked over the cord in full view of anyone passing by, with no corrective action until the inspector found it

I credit and adopt the inspector's interpretation that Section 56.12005 requires some independent physical protection other then the cord itself, and his examples of the use of temporary bridging, conduit, or hanging or suspending a power cord off the ground, as a practical and reasonable means of compliance. On the facts of this case, the lack of protection, other than the cord, constituted a violation of Section 56.12005. Accordingly, the violation **IS AFFIRMED**. The proposed civil penalty assessment that I find reasonable, is likewise **AFFIRMED**.

History of Prior Violations

Exhibit A to the petition for assessment reflects the absence of any repeat violations of Section 56.12005, during the prior inspection period of 17-18 days and 50 inspection hours. Exhibit G-5, the petitioner's violation assessment history report from June 27, 2007, to October 2, 2009, reflects no prior violations of Section 56.12005. All of the 19 assessed violations were Section 104(a) citations, 16 of which were non-S&S violations with penalties of $100 each, and the remaining three were S&S violations with penalties of less than $500. Under the circumstances, I cannot conclude that the respondent's history of violations is such as to warrant any increase in the civil penalty assessed for the violation that has been affirmed.

Good Faith Compliance

The record reflects that the violation was rapidly abated in good faith in 15 minutes after the truck was moved and the extension cord was inspected and found undamaged.

Gravity

Based on the inspector's non-S&S determination that any injury was unlikely, which I adopt and affirm, I conclude and find that the violation was minor.

Negligence

The inspector's moderate negligence finding was based on the respondent's cord hanging policy, its annual cord continuity tests, and the fact that the cord was not damaged. The inspector's moderate negligence finding **IS AFFIRMED**.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Remain in Business

In the absence of any evidence to the contrary, I conclude and find that the respondent is a small mine operator and that the penalty assessed in this matter will not adversely affect its ability to remain in business.

In view of the foregoing findings and conclusions, **IT IS ORDERED** that Section 104(a) non-S&S Citation No. 8578147, December 8, 2010, for a violation of 30 C.F.R. § 56.14100(b), **IS VACATED**, and the proposed civil penalty assessment **IS DENIED**.

In view of the foregoing findings and conclusions, **IT IS ORDERED** that Section 104(a) non-S&S Citation No. 8578148, December 2, 2010, for a violation of 30 C.F.R. § 56.12005, **IS AFFIRMED**.

The respondent **IS ORDERED** to pay a civil penalty in the amount of $100, for the violation. Payment shall be made within thirty (30) days of the date of this decision, and remitted by check made payable to "U.S. Department of Labor/MSHA", P.O. Box 790390, St. Louis, MO 63179-0390. Upon receipt of payment, this matter is **DISMISSED**.

/s/ George A. Koutras
George A. Koutras
Administrative Law Judge

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/kss

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March 16, 2012

MINING & PROPERTY SPECIALISTS,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. VA 2010-585-R
v.	:	Citation No. 8170070;09/07/2010
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Derby Wilson Mine
Respondent	:	Mine ID 44-07127 4FT
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. VA 2011-251
Petitioner	:	A.C. No. 44-07127-244720 4FT
v.	:	
	:	
MINING & PROPERTY SPECIALISTS,	:	Derby Wilson Mine
Respondent	:	

DECISION UPON REMAND

Appearances: M. RosAnn Beaty, US Department of Labor/MSHA, Norton, VA
Benjamin D. Chaykin, Esquire, U.S. Department of Labor, Office of the Solicitor,
Arlington, Virginia
Harry Meador, Mining and Property Specialists, Inc., Big Stone Gap, Virginia

Before: Judge William Moran

This case is before the Court upon remand from the Commission. The Secretary sought a $100.00 (one hundred dollar) civil penalty and the Court, upholding the violation, assessed a penalty of $1.00 (one dollar) instead. The finding of violation was not questioned by the Commission, but in its Remand the Commission directed the undersigned to further "explain how his application of the statutory penalty criteria to the facts in each case supports his penalty

determination."[1] Remand at 5. As only the penalty was questioned, Mining & Property Specialists, "MAPS," will be referred to as the Respondent, though it was also a Contestant.

To refresh one's recollection about the nature of this single violation, Respondent was cited for violating 30 C.F.R. Section 75.512. That section provides:

> All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. **A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.**

(emphasis added)

At the hearing, there were no factual disputes in need of resolution. MAPS conceded that the record book was not at the mine site itself. It contended that all the inspector had to do was to drive to MAPS' office where it would be made immediately available for the inspector's review, or that it was willing to send a facsimile of the record book to the mine when requested by the Inspector. The Secretary contended that the requirement that "a record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine" must mean that the records be located *at* the mine site, not at a nearby, but off mine site, location. The Court found, and the Commission did not take issue with, the determination that MAPS was not in compliance.

With no issue other than the explanation of the penalty assessed, the Commission identified specific deficiencies that the Court needed to address. While requiring that the Court address each of the statutory criteria, some were particularly identified.

Negligence

The Commission stated that the "The negligence criterion merits particular consideration," as it was unable to "ascertain what level of negligence the judge ascribed to MAPS [MINING & PROPERTY SPECIALISTS] and how this affected [the Court's] penalty

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[1] Two dissenting Commissioners believed that the Court's decision was supported by its conclusion regarding the operator's negligence and affording greater weight to that criterion. Remand at 6, citing *Spartan Mining Co.*, 30 FMSHRC 699, 724-725 (Aug. 2008). In that decision, the judge departed from the Secretary's assessment of the gravity and negligence, affording *greater* weight to those factors. The dissenting Commissioners noted that the Court's negligence analysis was influenced by MAPS good faith belief that its offer to fax the documents from its central office made the documents "available" under the standard. *Id.* at 6.

determination." Remand at 4. In particular it was noted that the Court found a good faith, though erroneous, view by MAPS of its obligations under the cited provision, but the Commission directed that the Court particularly address the Secretary's assertion that the inspector who issued citation "had spoken with MAPS employees at another mine about the requirement that inspection records for the personnel carriers at those mines needed to be maintained at the mine site." The Commission notes that the Court's view of this assertion could impact "the issue of whether MAPS had notice of MSHA's position regarding maintenance of inspection records offsite, [and that this] could affect the level of negligence." Remand at 4.

Specifically addressing this concern, the Court notes that the issuing Inspector, Richard Whitt, testified that he spoke to MAPS employees about the issue of maintaining the electrical examination records for the electric vehicle on other occasions prior to issuing the citation in issue. However, assuming they occurred, these conversations were at other mines, were only part of several other, unrelated, topics the Inspector discussed with those employees, and resulted in *no* citation being issued, although the Inspector stated that the absence of records at the mine site existed for those prior occasions. Further, these conversations were not made to any supervisory or management person for MAPS. Respondent called one of its non-supervisory employees as a witness at the hearing and he could not recall such prior conversations having occurred.[2] On this

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[2] Although the Court believes that the summary above accurately describes the testimony, more detail is included here. The record at the hearing disclosed that on April 28, 2010, Inspector Whitt was at Looney Creek Mine and that MAPS employees were there, working as contractors. Tr. 22. The notes relied upon by the Inspector were from that date, whereas the citation at issue here was issued to MAPS nearly four months later, on August 28, 2010. Tr. 23. On that April date, Whitt stated that he spoke with MAPS employees about black lung and other matters unrelated to the concerns here. Tr. 23. It was only on the following day, during his continued inspection that Whitt inspected a "three wheel ride" and requested to see the electrical examination for that ride, whereupon he was advised that it was at MAPS' office, and not at the mine. The Inspector stated that he advised the MAPS employees that in the future he expected the book to be available at the mine. Tr. 25 and GX 4, the Inspector's notes from April 28, 2010. As the Inspector's notes made no reference to his claimed warning, the government conceded that the exhibit, GX 4, was of no value to this matter, and the exhibit was withdrawn by it.

Next was GX 5, another exhibit of marginal, if any, value. This time it was the inspector's notes from May 11, 2010, when he was again at the Looney Creek mine. The inspector could not recall the names of the MAPS employees he spoke with on that date, but again the conversation with those employees was initially about Black Lung and respirable dust. However, the inspector stated that he also spoke with the MAPS employees about the requirement to have the exam book at the mine site. Tr. 31. While the notes refer to the Inspector speaking to MAPS employees, there is no mention of the availability issue in them. Also, the Respondent, in objection to the testimony, stated it was unable to determine if the ride

(continued...)

record, addressing the Commission's concern, it can not be said that MAPS had any prior notice of the Inspector's interpretation. If anything, assuming that prior warnings occurred, MAPS, had the non-supervisory employees even relayed the Inspector's alleged comments to management, would have been lulled into believing that the matter was a non-issue, as no citation was issued

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[2](...continued)
in question was a MAPS vehicle and there was no evidence at the hearing that the ride was in fact MAPS' equipment. No evidence was introduced on the vehicle's ownership.

Following that was GX 6. This exhibit pertained to the inspector's notes from June 11, 2010, when he was yet again at the Looney Creek Mine. Tr. 36. The Inspector stated that he again addressed the issue to MAPS' employees of the requirement that the exam book must be at the mine site, although he added that the conversation was directly only with Rodney Hamilton. Tr. 64-65. There were, to say the least, problems with this contention too. In a double hearsay remark, the Inspector asserted that Hamilton told him that Mr. Meador didn't believe he had to have the book at the site. Tr. 37. A major problem with this assertion, as noted by the Court at the hearing, is that GX 6, like the preceding exhibits that had been presented by the government, makes *no reference* to any of the alleged discussions of the issue in this case. Tr. 38. Yet, the notes do reference the Inspector's discussion with MAPS employees about *other* matters, unrelated to the subject of this case. *In addition, though this was now the third time the Inspector asserted that he had raised the matter, at least with MAPS' employees, no citation had been issued for any of those events.* Tr. 38. Following that exhibit, was GX 7, which pertains to the inspector's contact with MAPS' employees on June 11, 2010. Tr. 40. As with the other exhibits, GX 7 makes no reference to the issue at hand nor of any of the conversations the Inspector referred to during his testimony. Tr. 40.

Finally, GX 8, issued August 12, 2010, was introduced. This Exhibit involves the citation, No. 8170070, issued to Mr. Meador on that date. Tr. 41. The abatement date, listed as August 16th, is technically accurate, but misleading, because the Inspector stated that the exam book was actually delivered to MSHA on August 13th. However because the Inspector was off work that day and the weekend ensued, the abatement date was not entered until the following Monday. Tr. 43-44. In the Inspector's notes from that date, as reflected in GX 9, it relates that he asked to see MAPS's exam book for the battery powered ride but that the records were not present at the mine. It was then that Whitt issued the citation which is the subject of this case. Tr. 46. The Inspector stated that the book must be *at* the mine site, and then referenced his earlier statement that he had advised MAPS' employees of this requirement at the Looney Mine. Tr. 46. On the date he issued the citation, Whitt was at the Respondent's Derby Mine. He found nothing wrong upon his examination of the ride in issue. The problem arose when, upon finding that the ride itself had no problems, he requested to examine the electrical book for it. Tr. 49. In his testimony, he then presented reasons why the book must be at the site. These included being able to review when it was last inspected and whether any problems were found. A collateral benefit, the Inspector believed that having the book at the site diminishes the risk of alteration of the records. Tr. 49. *At that point, the government rested*. Tr. 50.

for any of the prior events, though the circumstances were indistinguishable from the event which prompted the citation involved here to be issued.

Further, the Respondent, being unsophisticated in these matters, could not have reasonably known nor should have known that its practice was violative. It seemed, reasonably to MAPS that having the records a few miles from the mines it serviced was sufficient. Respondent was mistaken, but for a first time event as here, the Court determines that no negligence was involved. MSHA, as the government conceded, has never issued any policy statement informing the regulated community of its interpretation of "availability" and this was the Respondent's first violation. As the Court informed Respondent at the hearing, the low penalty it was assessing would be more significant in the event of a repeat violation, now that the Respondent fully understands the obligation under the standard.

Accordingly, on this record at least, the Court finds that MAPS did not have any prior notice of the Secretary's view of the compliance requirements for this standard and it concludes that MAPS' negligence was minimal, approaching the vanishing point, especially when coupled with the other considerations leading to MAPS' conclusion that it was sufficient to keep the records at its close-by mine office.

Maps' efforts to act promptly and in good faith to abate the violation

In its Remand Order, Commissioner Young noted that the "decision does not discuss at all the operator's efforts to act promptly and in good faith to abate the violation, despite the Act's requirement that he do so. The Commissioner observed that MAPS "offered to have the inspection records faxed to the inspector from its office" and that he considered the operator's "offer to make them immediately available in this manner might serve as virtually instantaneous abatement." Remand at n.4.

Discussing Commissioner Young's concerns, the Court notes that the Inspector agreed that the MAPS office is about a 15 to 20 minute drive from the mine site. Tr. 64. Respondent's administrative manager, Doris Dillon, testified that the recordkeeping for the man trips is subcontracted by One Wire, Inc. which provides a certified electrician to do that work. Tr. 91. Those records, in turn, are kept at Respondent's office and this has been the practice for the past 5 or 6 years. Prior to that the records had been kept in the vehicles themselves, but they were subject to becoming lost or damaged. Tr. 91-92. Ms. Dillon stated that if anyone, such as MSHA, needed to see those records, she could produce them in "just a few minutes."[3] Tr. 93.

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[3] While Respondent tried to have Ms. Dillon testify regarding her interpretation of the regulatory requirements, the Court sustained the objection to that effort, explaining the issue was for the Court. Tr. 96-97. The Court added that the regulations' reference to availability at the "mine office" did not seem to help the Respondent in any event, as Respondent's office did not appear to fit that term as it has no Mine ID. Tr. 97. As pointed out on cross-examination, there

(continued...)

Also regarding good faith, Respondent's employee Christopher Belcher did acknowledge that on August 12th, the Inspector issued Respondent a citation for not having the electrical book at the mine site. Tr. 85. However, Belcher noted that the records could be made available "real fast" as the Respondent's office is very close to the mines they service. Tr. 87. He added that Respondent had experienced problems with keeping the records in the vehicles themselves because they would get torn up, lost or damaged and that this prompted them to start keeping them at the R's office.[4] Tr. 87.

Upon consideration, the Court concludes that, while incorrect in its belief that compliance could be achieved by having the records kept at the nearby office, the Court agrees that MAPS offered "nearly instantaneous" abatement and that its believe that keeping the records at its office was held in good faith, and was not a ruse. However, apart from its good faith, as the record established, there can be times when an MSHA inspector could be at a mine site where MAPS does work and that it is possible that the MAPS' office could be closed when such inspections occurred during a evening shift inspection at a mine.

Gravity

In its proposed assessment, MSHA assessed 16 points attributable to gravity. Ten (10) of those points were for likelihood, with that number representing that it was "unlikely" to occur. The severity of any injury factor was given 5 points, a figure representing "lost workdays or restricted duty" would be involved. Finally, for the number of persons affected, one point was assigned, representing that one person would be affected. In the Court's estimation, the gravity here is minuscule. It is hard to determine why "no likelihood" was not selected, given that there was in fact nothing wrong with the ride and that the only offense was not having the record at the mine site, though it could have been, at least in this instance, transmitted via facsimile immediately. Similarly, how lost workdays could result is a mystery, given the type of violation and the circumstances involved here. It follows that, in the Court's estimation, that there was no likelihood of any occurrence and that no lost workdays would be involved, that zero points would have been a more appropriate number to apply for both of those factors. Accordingly, no points should have been ascribed to the gravity criterion. Further, one should not lose sight of the fact that this violation was not about equipment in a state of disrepair, nor even about a

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[3](...continued)
are times when MAPS employees may be at a mine site and the Respondent's office would be closed. Tr. 100. At such times the records would not be available, at least not immediately available.

[4] It would be difficult to contend that MAPS employee Belcher was a part of management. Tr. 57-60. The Inspector noted that an additional reason for requiring the records be maintained at the mine is that they are to be available to miners as well, not simply for MSHA. Tr. 63.

failure to keep proper records about that equipment. Rather, it was about a "presentation failure" only. MAPS had the records and nearby, but they were not at the mine site and therefore not immediately available at any time of the day or night for MSHA's review. While the Court does not apply "points" in determining an appropriate penalty, it does evaluate the elements which make up the gravity evaluation. Doing that, it finds that the gravity associated with this violation to be as minimal as its assessment of MAPS' negligence.

Discussion of the remaining statutory criteria

Appropriateness of penalty to size of business:

Respondent was ascribed four (4) points for this criterion, making it a small operator. This is not in dispute.

History of previous violations:

Respondent received 0 points, for history of violations.

Effect on operator's ability to continue in business.

There was, understandably, no contention that the $100. proposed penalty could adversely affect MAPS' continued business operation.

Conclusion:

Upon further consideration of the penalty criteria, as discussed above, the Court again concludes that a $1.00 (One dollar) penalty is appropriate under these rather unique circumstances and thus it again Orders Mining and Property Specialists to pay the imposed civil penalty.[5]

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

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

Distribution:

Benjamin D. Chaykin, Esquire, U.S. Department of Labor, Office of the Solicitor, 1100 Wilson Boulevard, 22nd Floor West, Arlington, Virginia 22209-2247

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March 20, 2012

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2010-612-M
Petitioner,	:	A.C. No. 21-00209-214371
	:	
v.	:	
	:	
NORTHSHORE MINING COMPANY,	:	
Respondent.	:	Mine: Northshore Mine

DECISION

Appearances: Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn Street, Suite 844, Chicago, IL for the Secretary

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Tower, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA for the Respondent

Before: Judge Harner

This civil penalty proceeding was held pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802 *et seq*. (2000), (the "Act"). This case involves only one citation. The parties presented testimony and documentary evidence at the hearing held in Duluth, Minnesota, on July 6, 2011. Briefs have been filed by both parties and they have been duly considered.

BACKGROUND AND SUMMARY OF EVIDENCE

Northshore Mining Company ("Northshore" or "Respondent") is engaged in the operation of a surface mine that extracts iron ore. Its operation is located in St. Louis County, Minnesota. The mine is subject to regular inspection by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act, 30 U.S.C. § 813(a).

At the hearing, the parties entered into the following stipulations: Tr. 11-12[1]

1. Northshore is an "operator" as defined in Section 3(d) of the Mine Act, at the mine at which the citation at issue in this proceeding was issued. 30 U.S.C. § 802(d).

2. Northshore is subject to the jurisdiction of the Mine Act.

3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its administrative law judges pursuant to Sections 105 and 113 of the Miners Act. 30 U.S.C. §§ 815 and 823.

4. The individual whose signature appears in Block 22 of the citation at issue in this proceeding was acting in his official capacity and was an authorized representative of the Secretary of Labor when the citation was issued.[2]

5. Payment of the proposed penalty for the subject citation will not affect Northshore's ability to remain in business.

6. A duly authorized representative of the Secretary served the citation and the termination of the citation upon Respondent's agent at the date and place stated therein as required by the Mine Act and the citation and termination may be admitted into evidence to establish its issuance.

7. The parties stipulate to the authenticity of all exhibits, but not to the truth or the relevance of the matters asserted therein.

8. The Assessed Violation History Report reflecting the history of violations of the Respondent is an authentic copy and may be admitted as a business record of MSHA. See Exhibit 1.

9. Citation Number 6493272 is an authentic copy of the citation at issue in this proceeding. See Exhibit 3.

10. Northshore demonstrated good faith in the abatement of the citation.

[1] Tr. followed by a number(s) indicates a reference to the appropriate page numbers of the official transcript. The Secretary's exhibits are designated by numbers and Respondent's exhibits are designated by letters.

[2] The signature in Block 22 of the citation is John C. Koivisto, an inspector with MSHA.

As previously noted, this docket contains only one citation (Citation No. 6493272) that is alleged to be a violation of the Secretary's mandatory health and safety regulations. For the most part, there is no dispute as to the salient facts underlying the citation.

A. Respondent's Equipment at Issue

This matter involves the operation of a P&H Model 2800XPC Electric Cable Shovel (the "Shovel"), which has been designated by Respondent as #103.[3] The Shovel is a very large piece of equipment, approximately fifty-five to sixty feet in height that was manufactured by P&H specifically for Respondent. Tr. 115. The Shovel sits on tracks which allow it to move forward or backward. Tr. 35. The Shovel housing sits on a main center pan which allows the shovel to rotate either clockwise or counterclockwise; and a large bucket attached to the Shovel's front permits the bucket to load ore onto trucks. Tr. 35, 38-39. The Shovel has an enclosed housing cabin on top containing the various controls and the operator's cab. Tr. 35. This cab is accessed by climbing up two sets of stairways from ground level. Tr. 116-117. The Shovel has propel, swing, hoist, crowd and gear functions and is electrically powered by 7200 volts on a trailing cable[4] that comes from Respondent's main electrical switch house. Tr. 34-36, 40; Ex. 9. The Secretary's Exhibits 4-8 and Respondent's Exhibit F-2 depict the Shovel and its various components.

Specifically at issue in this case is the disconnecting of electrical power when mechanical work, such as repairing or replacing the teeth on the bucket, has to be performed on the Shovel. Tr. 42, 136. Mechanical maintenance is performed frequently on the bucket, occurring as much as two to three times per day or ten to twenty times per week. Tr. 136. As noted, the power to the Shovel is provided by a 7200 volt trailing cable from the main switch house. Tr. 40. Once the electrical power cable reaches the Shovel, it is then routed to a main transformer power line which controls the Shovel's work functions and to an auxiliary transformer power line which controls the Shovel's lights, heat, air conditioning, etc., the so-called housekeeping functions of the Shovel. Tr. 44. Each of these lines has a knife blade switch which, when opened, shuts off electrical power to the respective main or auxiliary transformer lines.[5] Tr. 83-84.

After Respondent acquired the Shovel from P&H, Ryan Bush, Respondent's Electrical Coordinator, Dean DeBeltz, its then Safety Representative, and Jeff Lamourea from P&H developed a policy to be followed when various maintenance or repair activities were being performed on the Shovel. Tr. 127. The policy provided that before the bucket could be repaired,

[3] Respondent has other P&H Electric Cable Shovels that it uses in its operation and that bear different number designations. Tr. 45.

[4] Koivisto described the trailing cable as "a big extension cord that connects the shovel all the way back to the switch house." Tr. 40.

[5] Although not necessarily similar to the knife blade switches of the Shovel, Exhibit 11 depicts a simplified knife blade switch in its open position showing a visual disconnect from the power source. Tr. 87.

the control supply circuit breaker and the relay supply circuit breaker should be locked out, a test start should be performed, and then each person working on the Shovel would put his own lock on a lock box. Tr. 129-130. This policy was set forth in the control room located on the first level of the Shovel. Ex. A. Exhibits 8 and F-8 depict the control supply circuit breaker and the replay supply circuit breaker utilized by Respondent in "locking out" the Shovel while mechanical work was performed on the bucket. Tr. 39.

B. The Citation

On January 19, 2010, as a result of an E01 inspection, MSHA Inspector John C. Koivisto ("Koivisto") issued Citation No. 6493272 to Northshore for a violation of 30 C.F.R. § 56.12016. The citation, Ex. 3, alleges that:

> Company #103, P&H Model 2800 Electric Cable Shovel: On 1/11/10 a bull gang mechanic was observed working on the "Dutchman" portion of the shovel bucket. A spot-check of the shovel lock-out indicated that he[6] had locked out the "control supply circuit breaker" and the "relay supply circuit breaker" as per company procedure. Subsequent investigation revealed that only control power was de-energized and locked out versus main power. This condition exposed personnel to moving machine hazards. Company personnel involved in developing this procedure, reportedly were un-aware of the hazard of locking out only control power. The company shovel lockout procedure has reportedly been in effect for about 1 year.

The inspector found that an injury was reasonably likely to occur, that the injury could reasonably be expected to be fatal, that the violation was significant and substantial, that one person would be affected, and that the violation was a result of moderate negligence on the part of the operator. The Secretary proposed a civil penalty in the amount of $1,026.00.

The regulation alleged to be violated is 30 C.F.R. § 56.12016 which provides as follows:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

On January 21, 2010, the citation was terminated by MSHA when Northshore "ceased the practice of only locking out control power and began requiring lockout of main power on 1/19/10. The written company procedure has also been updated." Ex. 3, B.

[6] This is an obvious reference to the gang mechanic.

C. The Secretary's Evidence

Koivisto testified that he has been employed by MSHA as a mine inspector since July 2005. Tr. 21. He has a Bachelor's Degree in Biology from the University of Minnesota at Duluth and a certificate in safety and health administration from a local community college. Tr. 22. Before coming to work for MSHA, he worked for many years at taconite plants, including approximately twenty-seven years at Hibbing Taconite Company, where he held various positions of increasing responsibility in the safety area. Tr. 22-23. Although Koivisto is not an electrical expert, he did receive training in basic electrical principles at the MSHA training facility in Beckley, West Virginia.[7] Tr. 26-27.

As to the citation at issue, Koivisto testified that on January 11, 2010, which was a Monday, he was on a regular inspection of the Northshore Mine when he observed one individual working on the Dutchman portion of the Shovel's bucket. Tr. 29. Koivisto was accompanied on his inspection by Dean DeBeltz ("DeBeltz") from Northshore's Safety Department. Tr. 29. Koivisto did not observe any problems with the mechanical work being done on the Dutchman and he and DeBeltz then went up into the Shovel and looked at the two lock-outs in place to prevent the shovel from moving and discussed Respondent's procedure. Tr. 30. Specifically, the procedure used by Northshore, and observed by Koivisto that day, involved the control supply circuit breaker ("CSCB") and the relay supply circuit breaker ("RSCB") being locked out. Tr. 30. This procedure is called locking out control power. Tr. 32. Koivisto testified that he didn't think much more about this the remainder of that work week, but the next time he was in his office on January 19, 2010, it struck him that "something wasn't right with [Northshore's] lock out; that how could they be locking out main power with two little breakers, which I later learned were what, 110- and 240-volt breakers like you would have on a lighting panel." Tr. 31. He then discussed the procedure used by Northshore with a colleague inspector who is the electrical expert in his office and this inspector also agreed that the procedure was not correct. Tr. 31.

Later that same day, January 19, Koivisto returned to Respondent's facility and met again with DeBeltz and also with Ryan Bush ("Bush"), the Electrical Coordinator, and Terry Nanti ("Nanti"), Area Manager of Maintenance. Tr. 29, 31-32. Koivisto told them of his concerns that main power was not being locked out and that the CSCB and RSCB were locking out control power only. Tr. 31-32. Some discussion ensued about Respondent's procedure and Koivisto finally told them that he was issuing a citation. Tr. 32.

Koivisto testified at the hearing that he believed Respondent's procedure in locking out only the two circuit breakers presented a safety hazard, as there could be an inadvertent or unplanned activation or energy on an electrical current that would result in movement of the

[7] Exhibit 2 is an excerpt from the training manual Koivisto received at the Beckley academy. As noted therein, MSHA does not have a program policy on § 56.12016.

Shovel. Tr. 41. He further testified that, at the time, he believed that the violation was "significant and substantial" because usually when this type of shovel equipment is taken down for maintenance, there are many employees present doing a variety of maintenance tasks. Tr. 42. As further support for his conclusion, he stated that the procedure was in place for a year and that employees do not always follow procedures, especially when there are several of them, and they could be harmed if the main power was not locked out. Tr. 42. At the hearing, Koivisto testified that he now believed it "unlikely" that an incident would have occurred, but that it was still a violation of a safety standard.[8] Tr. 43.

Koivisto further testified that he assessed the degree of negligence as "moderate" because Northshore officials had established a procedure when they got the new equipment[9] which they believed was correct, i.e. locking out control power rather than main power. Tr. 43-44.

The Secretary called William J. Helfrich ("Helfrich") as its expert witness. Helfrich is MSHA's Chief of the Mine Electrical Systems Division, a position he has held since 1991. Tr. 74; Ex. 10. This section of MSHA is responsible for supporting MSHA inspectors and the industry as a whole with respect to electrical regulations. Tr. 74. Helfrich, who is an electrical engineering graduate of Pennsylvania State University and a registered professional engineer in the state of Pennsylvania, has been employed by this division of MSHA since 1975. Tr. 76-77; Ex. 10. His extensive experience includes, inter alia, various mine accident investigations, testing of electrical equipment and instructing other engineers concerning electrical issues. Tr. 74-75, 79; Ex. 10. He has familiarity with lock-out/tag-out procedures for shovels, including those manufactured by P&H. Tr. 78. Significantly, Helfrich has been involved in the discussion and drafting of MSHA's electrical regulations since at least 1977 or 1978. Tr. 75-76; Ex. 10.

Helfrich credibly testified that the rationale in enacting mandatory standard § 56.12016 is to ensure that persons who are performing mechanical work on electrical equipment can make sure that the equipment is de-energized even though such persons may not be knowledgeable as to the electrical components of the equipment. Tr. 81-82. In this regard, he noted that there are two hazards that are protected by this standard: accidental movement and electrocution. Tr. 82. Thus, he testified that the standard is intended to cover both mechanical (movement) and electrical hazards. Tr. 81-82.

[8] This testimony of Koivisto establishes that the violation alleged is not significant and substantial as it was "unlikely" that an incident could have occurred.

[9] Although not entirely clear, Respondent apparently put into service three new Model 2800 shovels about a year before the instant citation was written and that it began to apply the new procedure at that time. Tr. 33.

To de-energize the shovel, Helfrich testified that two steps have to be taken. Tr. 207. First, the shovel has to be disconnected from its power source[10] and second, there has to be either visual confirmation that the conductors are separated or the line has to be tested with a meter to insure that there is no electrical current present. Tr. 207.

When asked if he had an opinion on Respondent's policy of locking out the CSCB and RSCB, Helfrich testified that the intent of the regulation was that the main power cable was de-energized and, therefore, locking out the CSCB and RSCB was insufficient because there was no visual determination that the circuit was open and therefore de-energized. Tr. 83, 85-86, 88-89. Helfrich also opined that Respondent's policy of locking out the CSCB and RSCB was inadequate because given the complexity of the equipment, any number of faults could occur that would cause the equipment to start up and move. Tr. 86. Specifically, he listed lightening strikes, water, rodents, vibration and defective wiring insulation. Tr. 88-89.

Finally, Helfrich testified as to general electrical principles. Tr. 95. He testified that "de-energization" means "dead" or no power, relying on the definition of the term in the dictionary of the Institute of Electrical and Electronics Engineers. Tr. 95. Helfrich also testified that the best practices policy of MSHA with respect to lock-out/tag-out is to not rely on control power, but always lock out main power. Tr. 96.

D. The Respondent's Evidence

Ryan Bush, Respondent's Electrical Coordinator, testified that he has occupied his current position for a year and half and had previously held the position of Electrical Planner. Tr. 112-113. In his current position, he is responsible for supervising a crew of twelve employees who perform electrical tasks, including maintenance of the electrical components on the shovels. Tr. 112. Bush has a two-year degree in electronics from Eveleth Vocational Technical College. Tr. 114. Bush testified that Respondent had a total of four 2800 shovels at its mine and three of them were the newer XPC models that had been built by P&H for Respondent's operation. Tr. 115. With the help of Lamourea of P&H, Bush and DeBeltz developed a procedure for locking out the CSCB and the RSCB when employees were working on the bucket teeth, which procedure had been posted adjacent to the circuit breakers. Tr. 127-128, Ex. A, pp. 3-4, F-7. Prior to the citation being written, this procedure called for employees performing mechanical work on the bucket to lock out the CSCB and RSCB, run a test start of the shovel and put their individual locks on a box near the circuit breakers. Tr. 130-133; Ex. F-11, F-12, F14. Bush also testified that when the bottom stairway that runs from the ground to a

[10] Helfrich noted that the North Central MSHA District had allowed the Respondent to disconnect the main transformer line only in lieu of disconnecting the trailing power cable from the switch house, while maintaining power in the auxiliary line, apparently in deference to the harsh weather conditions in winter. Tr. 90, 100, 207. Helfrich testified that by disconnecting the main transformer line by using the knife blade switch, the motive power of the shovel was de-energized. Tr. 207- 208.

mid-point walkway on the shovel[11] is in a down position, the shovel can be started but cannot move to perform crowd, propel or hoist functions as the brakes will not release. Tr. 117-121. Before the shovel can operate and during operation of the shovel, the first or bottom stairway must be pulled up level with the walkway. Tr. 117.

Bush testified that on the day the citation was written, he tried to explain the procedure to Koivisto and show him the electrical prints, but he did not think that Koivisto was too interested. Tr. 134-135. He did not recall telling Koivisto that the procedure only locked out control power, but when asked by Respondent counsel if the procedure de-energized the main transformer, he replied, "In a functionality of it, yes, it does."[12] Tr. 134.

Bush also testified that a method of de-energizing the shovel was to turn off the knife blade switch, but that such a procedure was more difficult as it required appropriate clothing and carried a risk of arcing. Tr. 135-136. He also stressed that only an electrician or an electrical technician could turn off the knife blade switch, whereas a mechanic or other qualified employee could lock out the circuit breakers. Tr. 147-148. The procedure of turning off the knife blade switch presents operational problems for Respondent since the dipper on the Shovel has to be locked out up to twenty times per week for maintenance and an electrician must perform the task, even if he must be summoned from other areas of Respondent's operation. Tr. 136. In this latter instance, Respondent would have to assess the importance of the repair of the Shovel versus the electrician's need in other areas of Respondent's operation. Tr. 147-148. Finally, Bush testified that there are two knife blade switches, the first one controls the hoist, crowd, propel and the other functions, while the second auxiliary knife blade controls the heat and light functions of the Shovel. Tr. 148.

Brian Gsell testified as the Respondent's expert witness. Gsell currently works for Kilgore Engineering as a Senior Electrical Engineer where he typically performs post-failure evaluations of electrical equipment in various industries not limited to mining. Tr. 167-169; Ex. E. He holds a Bachelor's Degree in Electrical Engineering Technology from the University of Hartford (1981) and a M.S. degree in Engineering Science from Rensselaer Polytechnic Institute (1992) and has twenty-nine years of experience in the electrical engineering field. Tr. 169-170; Ex. E. Since 2003, Gsell has specialized in the investigation of residential, commercial and industrial accidents involving electrical system or component failures and damage. Ex. E. He is a licensed electrical engineer in the state of Texas. Tr. 170; Ex. E. His employer, Kilgore Engineering, is a forensic engineering firm which specializes in litigation issues, both for plaintiffs and defendants. Tr. 168, 170-171.

In preparation for his testimony, Gsell testified that he was provided documentation regarding the Shovel, including 200 pages of electrical schematics, which show how the system

[11] There is a second stairway on the shovel which goes from the mid-point walkway to the operator's cab.

[12] I note that this is an equivocal answer and does not establish that the Shovel was de-energized.

is controlled. Tr. 172. He also physically inspected the Shovel three or four times. Tr. 172-173. When asked by Respondent's counsel during the hearing if he came to a conclusion as to whether locking out the CSCB and RSCB "de-energized" the Shovel, Gsell testified "that it is not possible to produce mechanical movement of that machine while those two breakers are locked and tagged out." Tr. 173. On follow-up, when asked if the circuits were in fact de-energized, he replied, "They de-energize a number of circuits throughout the machine […]" Tr. 173. Respondent introduced into evidence Exhibit D, which is an electrical schematic showing the two knife switches (marked "A" and "B") and the pre-citation lockouts of the CSCB and RSCB. Ex. D. Gsell testified in detail that with both the CSCB and RSCB locked out, it was impossible to produce mechanical movement of the shovel. Tr. 177-188.

During both his direct and cross-examination, Gsell opined that if the CSCB and RSCB were locked out, there would have to be a large number of faults or errors in the circuit for movement to occur. Tr. 189-194. On cross-examination, he characterized the likelihood as an "extremely low probability." Tr. 194. He also testified on cross-examination that with the trailing cable de-energized or the knife blade switch that controls the shovel functions opened, there would be no electrical energy or concern with faults producing movement. Tr. 195-197. When asked if he would touch a de-energized circuit, Gsell replied that he would, but when asked if he would touch the load side of the vacuum contactor with the CSCB and RSCB locked out, he testified that he would want to verify that there was no power present before doing so. Tr. 195-196.

LEGAL ANALYSIS AND CONCLUSIONS

A. Analysis

In interpreting the meaning of a statute, the Commission has recognized that "[w]hen the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails and it cannot be expanded beyond its plain meaning." *Western Fuels-Utah, Inc*., 11 FMSHRC 278, 283 (Mar. 1989); *Consolidation Coal Co*., 18 FMSHRC 1541, 1545 (Sept. 1996). It is a cardinal principle of statutory and regulatory interpretation that words that are not technical in nature "'are to be given their usual, natural, plain, ordinary, and commonly understood meaning."' *Western Fuels*, 11 FMSHRC at 283 (citing *Old Colony R.R. Co. v. Commissioner of Internal Revenue*, 284 U.S. 552, 560 (1932)). It is only when the plain meaning is doubtful that the issue of deference to the Secretary's interpretation arises. See *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (deference is considered "only when the plain meaning of the rule itself is doubtful or ambiguous") (emphasis in original); *Azno Nobel Salt, Inc*., 21 FMSHRC 846, 852 (Aug. 1999).

In pertinent part here, 30 C.F.R. § 56.12016 mandates that all electrically powered equipment be de-energized before mechanical work is done. It is clear and unambiguous that this includes locking out the power switches and taking any other measures necessary to prevent the equipment from energizing without the knowledge of those working on it. The plain, common-sense interpretation of this regulation is that the equipment should be de-energized so

that those working on it have no reason to fear movement that could result in their injury. I note that the *Dictionary of Mining, Minerals and Related Terms*[13] defines "deenergize" as "[t]o disconnect any circuit or device from the source of power." (Emphasis added)[14]. See also *Youghiogheny & Ohio Coal Company*, 3 FMSHRC 1073, 1078 (1981)(ALJ). Finally, this definition is also consistent with Helfrich's discussion of the definition found in the dictionary of the Institute of Electrical and Electronics Engineers. See Tr. 95.

Respondent argues, however, that the same result can basically be achieved by locking out the control power to the CSCB and RSCB by pulling the circuit breakers. It states that although the CSCB still receives some energy, the RSCB locks out all functions of the Shovel, making it virtually impossible to create movement. Expert witness Gsell testified that if this procedure is utilized, a lot of faults and errors must take place in order for movement to occur and described this scenario as having an "extremely low probability." Tr. 184-195. Therefore, it claims that, although the CSCB is not completely locked out, Respondent has essentially achieved the same result by locking out the two circuit breakers, which also saves it time. Further, Respondent claims that, because the Secretary has expressed the fear of physical injury due to energized moving parts, 30 C.F.R. § 56.14105 would have been the correct regulation to cite, and it does not require equipment to be locked out while being maintained.[15]

I disagree that Respondent has met the standards set in 30 C.F.R. § 56.12016 by disabling the CSCB and the RSCB rather than locking out the knife blade switches to both. First, the regulation mandates that the equipment be de-energized prior to work being performed. Respondent's witness testimony all seems to recognize that the Shovel is not completely de-energized; rather, it believes that it is de-energized enough. Tr. 134, 173, 195-196. However, this ignores the plain language of the regulation which demands de-energization, not partial de-energization. Further, although there was much testimony that pulling the circuit breakers

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[13] See "Deenergize." Dictionary of Mining, Minerals and Related Terms, EduMine (Originally compiled by the U.S. Bureau of Mines), <http://xmlwords.infomine.com/xmlwords.htm>.

[14] This definition is also similar to the *Merriam-Webster* dictionary which defines "de-energize" as "to disconnect from a source of electricity: shut off power to."

[15] 30 C.F.R. § 56.14105 is titled "Procedures during repairs or maintenance" and states as follows:

> Repairs or maintenance of machinery or equipment shall be performed **only after the power is off**, and the machinery or equipment blocked against hazardous motion. Machinery or equipment **motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation**, provided that persons are effectively protected from hazardous motion. (Emphasis added)

Thus, it would appear that even in this standard, the lack of electrical power is important to protect miners.

essentially locked out the equipment and movement functions were unlikely, Respondent's witnesses also admitted that the equipment was receiving power, as it was not disconnected from the power source. Further, and telling, Respondent's expert witness testified that he would need verification that there was no power running to the Shovel before he would even touch particular parts of it. See Tr. 195-196. Finally, this expert witness conceded that enough faults could occur, although it was not likely ("extremely low probability"), that movement could occur. See Tr.194.

Second, the regulation demands that either the power switches be locked out or, in the alternative, measures be taken to prevent the equipment from being energized. 30 C.F.R. § 56.12016. Neither is accomplished by Respondent's procedure. Because the lock out of the power switches or knife blades require the presence of an electrician, Respondent has chosen the alternative method of pulling the circuit breakers. However, as shown above, this does not prevent the Shovel from being energized. In fact, Bush testified that the Shovel can be started under this method. This plainly conflicts with the regulation's intent to ensure that equipment is de-energized for maintenance and repairs.

What is arguably ambiguous about the standard is exactly to what injuries the regulation applies. Respondent argues that under *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982), 30 C.F.R. § 56.12016 applies only to the hazard of electric shock, not to injuries caused by mechanical movement. However, the Commission has never explicitly followed the logic of this case and I do not agree that it should. In *Phelps Dodge*, the Court found that the Secretary had abused her discretion in reading the regulation, then 30 C.F.R. § 55.12-16[16], to apply to movement of the equipment. *Id*. at 1193. It reasoned that because the regulation was found under the heading "Electricity" and found between regulations "whose purpose is manifestly to prevent the accidental electrocution of mine workers," the instant regulation does not address the hazards of accidental movement. *Id*. at 1192. Moreover, it concluded that another code section provided for this protection and the language of § 55.12-16 inadequately expresses an intention to reach the situation as described. *Id*. at 1193.

Given all of the facts, circumstances and testimony herein, I find a violation notwithstanding *Phelps Dodge*. First, in his dissent in that case, Circuit Judge Boochever adeptly acknowledges that the language of the statute is clear and unambiguous, and it does not in any way limit the regulation to situations involving electric shock.[17] *Phelps Dodge*, 681 F.2d at 1193. Nor did he believe that principles of fair warning were in any way offended, as the

[16] This was the predecessor standard to § 56.12016.

[17] I note that in *Empire Mining Partnership*, 29 FMSHRC 317 (2007)(ALJ), ALJ Barbour was tempted to make the same ruling based on the ruling of ALJ Amchan in *James M. Ray, employed by Leo Journagan Construction Co., Inc.*, 18 FMSHRC 892 (1996)(ALJ) and the persuasive nature of the *Phelps Dodge* dissent. The issue was never reached, however, as the Secretary had pled in the alternative.

words sufficiently warn that the regulation is applicable to electrical equipment regardless of the threat of electric shock. *Id*. at 1194.

Second, the ALJ decision in Phelps Dodge was a short bench decision in which ALJ Merlin relied heavily on the expertise of the inspector. *Id*. at 460-461. Although it is not explicitly clear from the decision, it would imply that no experts were called to testify. In the instant case, however, we do have the benefit of expert testimony and MSHA expert Helfrich had been involved in the discussion and drafting of most of the electrical regulations since at least 1977 or 1978. Tr. 75-76; Ex. 10. At hearing, he gave clear, uncontradicted testimony that the standard was designed with the intent to prevent injury from both mechanical movement and electrical hazards. Tr. 81-82.

Finally, I note that while 30 C.F.R. § 56.12016 and 30 C.F.R. § 56.14105 have many overlapping characteristics, they do not in any way preclude one another. The former falls within the category of "Electricity" which would seem to imply that it applies to electrical equipment. Therefore, if an operator follows the lock out and tag out procedures described in the standard so that a miner performing mechanical work cannot be harmed by electric shock or mechanical movement created by electricity flowing through the machine, it is in compliance with this statute. The latter standard requires that repairs or maintenance can only be performed when the power is off, except to the extent that motion is necessary for adjustment or testing and then only when miners are protected from such hazardous motion. In this way, the regulations actually work together to create a safer working atmosphere rather than creating a situation where the operator is forced to comply with one or the other. The argument to the contrary is unpersuasive. For the foregoing reasons, I decline to follow the logic of Phelps Dodge and find that 30 C.F.R. § 56.12016 relates to accidental movement as well as electrical shock.

As a final argument, Respondent claims that forcing it to lock out the CSCB and RSCB by turning the knife blade switches will necessarily reduce efficiency in the mine because a certified electrician is needed to perform this task, while any experienced miner may pull the circuit breakers. It argues that, at times, it will have to balance the importance of maintenance to the Shovel with the need for electricians in other areas of the mine. While I appreciate the need for efficiency in the mine, it is established that, when the safety of the miners is concerned, some efficiency must be sacrificed. See generally *Morris Sand and Gravel*, 16 FMSHRC 624, 630 (1994)(ALJ)(Preventative safety measures must not be sacrificed in the interests of production and continuing operations); *Plateau Resources Limited*, 5 FMSHRC 605, 607 (1983)(ALJ).

Based on all of the foregoing, and noting particularly that Respondent's practice of locking out the CSCB and the RSCB will not insure against accidental movement, I find that the Secretary has met her burden of establishing a violation of 30 C.F.R. § 56.12016. I also find that the violation is non-significant and substantial as there would be little likelihood of an incident occurring if Respondent's method of locking out the circuit breakers were utilized. This finding is supported by the testimony of Inspector Koivisto.

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id*. MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id*. Low negligence exists when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id*. Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." Id. High negligence exists when "[t]he operator knew or should have known of the violation condition or practice, and there are no mitigating circumstances." *Id*. See also *Brody Mining, LLC*, 2011 WL 2745785 (2011)(ALJ).

From the testimony, Respondent knew that it was not de-energizing the Shovel by pulling the circuit breakers rather than locking out the knife blade switches. In plain terms, the method used was instead a work around of the language of the statute to increase efficiency at the Mine. This, in and of itself, would indicate high negligence on the part of the operator. However, I believe that Respondent had a good faith belief that this method would be highly unlikely, if ever, to result in an injury to a miner. Therefore, mitigating circumstances exist to justify moderate rather than high negligence. In this manner, Citation No. 6493272 remains as issued by the Secretary.

B. Penalty

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

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
>
> 30 U.S.C. § 820(i).

I have considered all of the above factors and find that a penalty of $500 is appropriate under the circumstances herein. I note specifically the size of the operator's business and the negligence of the operator, particularly its decision to consider operational efficiency over the safety of miners.

ORDER

Based on the criteria in Section 110(i) of the Act, 30 U.S.C. § 820(i) and having found that a violation exists, I assess a penalty of $500.00. The Respondent, Northshore Mining Company is hereby **ORDERED** to pay the Secretary of Labor the sum of $500.00 within 30 days of the date of this decision.[18]

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

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[18] 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

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March 26, 2012

BLACK BEAUTY COAL COMPANY, Contestant,	:	CONTEST PROCEEDING
v.	:	Docket No. LAKE 2008-669-R Order No. 6681046; 09/11/2008
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Air Quality #1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2009-304 A.C. No. 12-02010-174468-01
	:	Docket No. LAKE 2009-305 A.C. No. 12-02010-174468-02
v.	:	Docket No. LAKE 2009-598 A.C. No. 11-03017-191233
	:	Docket No. LAKE 2009-608 A.C. No. 11-02408-191230
BLACK BEAUTY COAL COMPANY Respondent.	:	Docket No. LAKE 2009-684 A.C. No. 11-03017-194327
	:	Docket No. LAKE 2009-698 A.C. No. 11-02408-194324
	:	Air Quality #1 Mine Wildcat Hills Mine Gateway Mine

DECISION

Appearances: Matthew M. Linton, Esq, and Nadia A. Hafeez, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Arthur M. Wolfson, Esq., and Dana M. Svendsen Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, and Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me on a notice of contest and petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Black Beauty Coal Company ("Black Beauty") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Evansville, Indiana, and filed post-hearing briefs.

Black Beauty operates several large underground coal mines in southern Illinois and southern Indiana. A total of eleven section 104(a) citations and four 104(d)(2) orders of withdrawal were adjudicated at the hearing The Secretary proposed a total penalty of $316,216.00 for these citations and orders. Three additional citations settled at the hearing.

I. BASIC LEGAL PRINCIPLES

A. Significant and Substantial

The Secretary alleges that the violations discussed below were of a significant and substantial nature ("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. 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 most difficult to apply. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.,* 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.,* 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). "The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (*citing Musser Engineering, Inc. and PBS Coals, Inc.* 32 FMSHRC 1257, 1281 (Oct. 2010)).

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The Commission has emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a

hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1575 (July 1984). With respect to citations or orders alleging an accumulation of combustible materials, the question is whether there was a confluence of factors that made an injury-producing fire and/or explosion reasonably likely. *UP&L,* 12 FMSHRC 965, 970-971 (May 1990). Factors that have been considered include the extent of the accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area. *UP&L,* 12 FMSHRC at 970-71; *Texasgulf,* 10 FMSHRC at 500-503.

B. Negligence and Unwarrantable failure

The Secretary defines conduct that constitutes negligence under the Mine Act 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.F.R. § 100.3(d). The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC,* 52 F. 3d. 133, 136 (7th Cir. 1995). 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).

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Docket No. LAKE 2009-304, Air Quality #1 Mine

1. Order No. 6669341

On August 19, 2008, at 9:00 a.m. MSHA Inspector Anthony M. DiLorenzo issued Order No. 6669341 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.400 of the Secretary's safety standards. Order No. 6675150 states:

> Combustible material in the form of loose coal, coal fines, and coal dust have been allowed to accumulate on the 2 Main East Belt tail located between crosscut 43 and crosscut 44 on the intake brattice line side. One pile measuring 5 feet in length by 18 inches in width by 8 inches in depth was observed under the tailpiece and another pile measuring 5 feet in length by 2.5 feet in width by 10 inches in depth was observed with evidence showing the belt was rubbing in this pile for approximately 4 feet in length. The operator, Jason Nelson (Section Foreman), showed more than ordinary negligence by allowing the belt to run under this known condition until the arrival of MSHA to the area. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. G-1). Inspector DiLorenzo determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was high, and that ten persons would be affected.

Section 75.400 of the Secretary's regulations requires that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." 30 C.F.R. § 75.400. The Secretary proposed a penalty of $41,574 for this alleged violation.

a. Background Summary of Testimony

Inspector DiLorenzo testified that the order was issued in an active section of the mine. (Tr. 15). He used a tape measure to determine the size of the accumulations. (Tr. 16). He observed more than ten people inby the cited area. DiLorenzo's concern was that a fire could start and miners would be overcome by smoke inhalation. (Tr. 17). The combustible material was in contact with the moving belt. He testified that the belt continuously running on top of the accumulations would create frictional heat. (Tr. 19). He determined that the belt was running along four feet of one of the piles. There was no fire suppression system in the area. (Tr. 21).

The section foreman and section mechanic were standing close to these accumulations working on a remote switch when the inspector arrived. After the belt was shut down, the section foreman advised Inspector DiLorenzo that "he had been having problems with this remote line and the belt training and that he was going to clean that side [of the tail piece] afterwards." (Tr. 22). The travelway side of the tail piece had already been cleaned. DiLorenzo testified that he did not "believe that just cleaning half of the accumulations and then allowing the belt to run knowing that there's accumulations in contact with the belt" amounts to reasonable care. He marked the negligence as "high." In addition, it is the inspector's belief that Black Beauty was not adequately maintaining its belt lines because it had received many citations alleging violations of section 75.400 along belts. DiLorenzo testified that MSHA inspectors had advised Black Beauty that it needed to take greater "efforts to get a handle on the situation along their belt lines." (Tr. 23). He further testified that the Air Quality #1 Mine has about 17 miles of belts and an insufficient number of people to maintain them. (Tr. 24, 27). The belt that was rubbing against the accumulations had several splices that were in need of repair, which increased the hazard. He admitted, however, that Black Beauty vulcanizes the splices in its belts. (Tr. 39).

Production coal was not loaded onto the belt during the previous shift but it is possible that scoops could have dumped coal onto the belt during cleanup on that shift. (Tr. 34). Inspector DiLorenzo testified that it is possible the accumulation he cited could have been created in 20 minutes or it could have been present during the previous shift. (Tr. 43).

Jason Nelson was the section foreman on the day of the inspection. (Tr. 48). Mr. Nelson testified that when he arrived underground that morning he performed his typical safety checks during his onshift examination. When he checked the tail piece he noticed that coal had been spilling at that location. He did not believe that these accumulations were in contact with the belt. (Tr. 54). He testified that he started shoveling the accumulated coal. (Tr. 51). There had been problems with the belt that morning. It would surge and then slow down. The section mechanic believed that there was a problem with the remote switch for the belt. (Tr. 52). The remote line functions as a stop-and-start switch for the belt. The section mechanic shut down the belt to work on the switch. (Tr. 55). Nelson had not completed shoveling the area when the inspector arrived but he would have completely cleaned up the accumulations in about ten minutes. (Tr. 57). Nelson testified that the section mechanic was in the area to repair the remote line and that he, Nelson, was present to shovel up the coal accumulations. Nelson said he was not involved in shutting down the belt and the belt would have been shut down by the mechanic even if the inspector had not arrived. (Tr. 56). Nelson further testified that smoke from a fire at the tail would have traveled out the return and not to the working section.

Nelson testified that he arrived on the section at about 7:30 a.m. and that he discovered accumulation at about 8:30 a.m. (Tr. 60). The belt had been started at the end of the previous shift. He had been shoveling for about ten minutes when the inspector arrived. He stated that he did not observe the belt running in accumulations. (Tr. 61).

Joseph H. Robinson was the senior electrician and mechanic at the time the order was issued. He stated that when he arrived on the section on August 19, he noticed that the belt was surging. (Tr. 66). He called his supervisor, Jason Nelson, to come over to look at the belt.

Robinson testified that Nelson noticed there were accumulations at the tail. As a consequence, Nelson started shoveling up the accumulations and Robinson started troubleshooting. *Id.* Robinson testified that he discovered there was a short in the twist lock plug and told Nelson. Robinson testified that he walked to the breaker to shut down the belt and left to find a replacement for the plug. (Tr. 67). He had to walk outby the area to shut down and lock out the power to the belt. Nelson was still shoveling when he returned. At this point, Robinson observed Inspector DiLorenzo and he said, "Federal is here." (Tr. 70, 73-74). Robinson testified that he said this, not to warn Nelson of the presence of an MSHA inspector, but to warn him that there was an extra person on the section. Robinson testified that he did not shut the belt down because an MSHA inspector was present. (Tr. 71). Robinson agreed that there was a coal accumulation at the tail. (Tr. 72).

b. Summary of the Parties' Arguments

The Secretary argues that the evidence establishes that, when Nelson became aware an MSHA inspector was present, he ordered that the belt be shut down. The belt was being shut down as he walked up to the tail piece and he did not observe anyone shoveling. Given these facts and assuming continued mining operations, it was reasonably likely that a fire would have started that could cause burns and smoke inhalation. DiLorenzo observed places where the belt had been running in the accumulations. Nelson had allowed the belt to continue running even though it was in contact with the accumulations. This mine had a history of accumulation violations and MSHA inspectors had previously discussed this issue with mine management.

The Secretary maintains that the conditions created a serious fire hazard. The rotating conveyor belt supplied a frictional heat source for the coal and coal dust and a fire would have started if the condition had been allowed to continue. This was especially true in this instance because the belt contained several splices in need of repair. The Secretary states that the credible evidence establishes an S&S violation of section 75.400. She also argues that the evidence establishes that the violation was an unwarrantable failure because the accumulation was obvious and the section foreman was aware of its existence. Nelson cleared the travelway side of the belt but he failed to clear the intake side. By clearing only one side of the belt, Nelson allowed the belt to continue running and rubbing in the accumulation. In addition, past discussions with MSHA about accumulation problems serve to put an operator on heightened awareness that it needed to improve its compliance with section 75.400.

Black Beauty argues that the violation was not S&S. The particular facts of this case do not support a finding that there existed a reasonable likelihood that the hazard contributed to by the violation would have resulted in an injury or illness of a reasonably serious nature. Black Beauty maintains that there was no ignition source. Inspector DiLorenzo did not observe the belt running in the accumulations; he merely believed that the belt "had been rubbing in the accumulations." (Tr. 21). His testimony should not be credited on this issue. In addition, the violation was not extensive. The inspector agreed that the accumulations could have developed very quickly and that Nelson had shoveled up the accumulations on one side of the belt. Finally, assuming continued normal mining operations, the material would have been cleaned up within minutes.

Black Beauty also argues that the violation was not the result of its unwarrantable failure to comply with the safety standard. The order was issued because the inspector believed that Nelson would have allowed the condition to continue if he had not arrived. The evidence establishes, however, that the belt was shut down by Robinson so that he could repair the remote line and that Nelson was in the process of removing the accumulations. Thus, the evidence establishes that Black Beauty was actively in the process of removing the hazard.

c. Discussion and Analysis

I find that the Secretary established a violation of section 75.400. As Black Beauty concedes, the accumulation violated that standard. I find that the Secretary did not establish that the violation was S&S, however. I agree with the Secretary that she is not required to establish that it is more probable than not that an injury will result from a violation. *U.S. Steel Mining Co.,* 18 FMSHRC 862, 865 (June 1996). Reviewing the particular facts surrounding the violation in this instance in the context of continued mining operations, I find that an injury was unlikely. I credit the testimony of Jason Nelson and Joseph Robinson. Nelson credibly testified that he had been cleaning up the accumulations. Robinson, the mechanic, shut down the belt to troubleshoot the surging problem. I find that the evidence establishes that, if the inspector had not arrived, the belt would have been repaired and the accumulations cleaned up in a very short period of time. Given that the belt was shut down, no hazard was present. I do not credit the evidence that Nelson ordered the belt be shut down when he became aware that the inspector was on the section. The gravity was moderate.

I also find that the violation was not the result of Black Beauty's unwarrantable failure to comply with the safety standard. The accumulations had been present for a short period of time; the operator was in the process of abating the violation when the inspector arrived; and the violation did not present a high degree of danger. The violation was rather obvious and extensive, but given that clean up had commenced, I find that Black Beauty's conduct did not rise to the level of aggravated conduct. The operator's negligence was moderate. A penalty of $8,000 is appropriate.

2. Order No. 6681297

On November 20, 2008, MSHA Inspector Philip Douglas Herndon issued Order No. 6681297 under section 104(d)(2) of the Mine Act for an alleged violation of section 75.402 of the Secretary's safety standards. The order alleges:

> The MMU-001 was not properly rockdusted within 40 feet from the faces of #3, #4, #7, and #8 including cross cuts #4 to #5, #3 to #4. The unrockdusted areas have existed for a minimum of 12 to 16 hours prior to the issuance of this order and have existed while production continued through these areas by evidence of the existing mine cycle. This violation is the result of the operator's unwarrantable failure to comply with a mandatory standard and demonstrates more than ordinary negligence.

(Ex. G-10). The inspector found that an injury or illness was unlikely to occur but that any injury would result in lost workdays or restricted duty, that the violation was not S&S, that ten people would be affected, and that the violation was a result of high negligence on the part of the operator. Section 75.402 provides, in part, that all underground areas of a coal mine "shall be rock dusted to within 40 feet of all working faces. . . ." The Secretary has proposed a civil penalty in the amount of $4,000.

a. Background Summary of Testimony

Inspector Herndon has been an inspector for MSHA for approximately four years. Prior to that he worked in coal mines starting in 1982. Herndon was familiar with the Air Quality #1 Mine, because it was one of the mines where he had worked and because he had visited it "on a regular basis" as an inspector. (Tr. 77) Herndon described Air Quality as a large, gassy room and pillar mine. (Tr. 77-78). Pursuant to a regular E01 spot inspection of Mechanized Mining Unit Number 1 ("MMU-001"), Herndon issued seven citations or orders on November 20, 2008 in that unit. (Tr. 79). Citation No. 6681297 was issued because the area was not rockdusted to within 40 feet of the working face. (Tr. 80).

Herndon determined that faces 3, 4, 7, and 8 and crosscuts 4 to 5 and 3 to 4 were not rockdusted and there was zero incombustible content material in the area. (Tr. 80-81). Herndon designated this order as not S&S because, at the time, he did not find an ignition source. (Tr. 81). Herndon still found this to be an unwarrantable failure because a large area was not rockdusted, mining activities would be continuing in the area, and the violative condition was completely overlooked and unreported by the supervisors and examiners on MMU- 001. (Tr. 82; Ex. G-16). Calling the violation "very extensive and extremely obvious," Herndon designated it as high negligence, finding no mitigating circumstance for the lack of attention paid to the problem (Tr. 84-85). The manager of the mine apologized to Herndon for the violations, offering no excuse. (Tr. 85-86). Herndon required that the areas be rock dusted and that mine personnel be retrained to make sure they understood their responsibilities. (Tr. 86).

Kimberly Jean Orr, an outby utility worker, testified that her job involved accompanying inspectors once or twice a week. (Tr. 92-93). Orr has approximately seven years of mining experience, including rockdusting experience. (Tr. 92). After explaining the distinction between hand dusting and machine dusting, Orr testified that it is common to hand dust and then subsequently machine dust an area. (Tr. 93-95). Orr testified that she accompanied Herndon on his inspection and that Toby Heiden was the section foreman at that time. (Tr. 95). Orr testified that the entries were lightly hand dusted, and likely had been partly washed of their dust by the "head spray" of the continuous mining machine. (Tr. 96-99). Orr testified that the "curtain had been rolled up so they could bring the sling duster in to dust." (Tr. 97). Orr testified that the amount of rock dust that was on the rib at the time would not be noticeable to an average person unless they were standing close. (Tr. 100).

b. Summary of the Parties' Arguments

The Secretary argues that the areas were never rock dusted, and even if they were hand dusted, it was inadequate because the surfaces were black, instead of the white of a properly rock

dusted surface. (Sec'y Br. 13-14). The Secretary further argues that the extent of the violations constituted an unwarrantable failure because all of the inspected areas were either overlooked or ignored by mine supervision. (Sec'y Br. 14). In support of this argument, the Secretary points to a mine examiner's date, time, and initials on the black surface of the ribs, indicating that although an agent of the mine witnessed the black, undusted surfaces, no measures were taken to abate the condition. (Sec'y Br. 14).

Black Beauty argues that the order should be vacated because no violation of standard 75.402 occurred. (BB Br. 8). Black Beauty supports its argument by the light coating of dust that Orr testified about. (BB Br. 8). Black Beauty argues that it was in the process of complying with the standard because the crew was preparing to machine dust prior to the mining of any coal and that Inspector Herndon was mistaken. (BB Br. 9).

Black Beauty also argues that the unwarrantable failure finding is inappropriate, even if a violation is found. (BB Br. 9). As additional support, Black Beauty refers to the machine dusting that was about to occur, based on Orr's testimony that the curtain had been rolled up in preparation for machine dusting and the low degree of danger due to the lack of an ignition source. (BB Br. 10).

c. Discussion and Analysis

The order is affirmed as written. I credit the testimony of Inspector Herndon and find that the cited area was not properly rock dusted to within 40 feet of the working faces as described in the order. I find that any hand dusting that may have occurred was insufficient to provide any protection at the time of the inspection. I credit the testimony of Inspector Herndon that the cited areas were black in color and that the incombustibility content was very low. I also find that the violation was the result of Black Beauty's unwarrantable failure to comply with the safety standard. The violation had existed for a considerable length of time, the violation existed over a large area and was very obvious, and the operator knew that the condition existed. Preshift examiners had to have been aware of the condition and, indeed, one mine examiner's date, time and initials were written on a black undusted surface. Black Beauty may well have undertaken some initial steps to rock dust in the cited areas, but its actions were insufficient to correct the obvious conditions in a timely manner. Black Beauty's failure to rock dust in these areas demonstrated aggravated conduct constituting more than ordinary negligence. I find that its negligence was high but that the gravity was low. A penalty of $5,000 is appropriate.

3. Order No. 6681046

On September 11, 2008, MSHA Inspector Glenn E. Fishback issued Order No. 6681046 under section 104(d)(2) of the Mine Act for an alleged violation of section 75.400 of the Secretary's safety standards. The order alleges, in part:

> Obvious and extensive accumulations of combustible materials in the form of loose coal, coal fines, and float coal dust were allowed to accumulate along the energized 2 Main East conveyor belt

> entry. The accumulations of combustible materials were allowed to accumulate from the 2 Main East header inby to the #48 x-cut.

(Ex. G-17). The order includes further details as to the amount of accumulations between each crosscut. The inspector found that an injury was potentially fatal, though unlikely to occur, and that the violation was not S&S. The inspector further found that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $23,825.

a. Background Summary of Testimony

Inspector Glenn Fishback was recently promoted to an MSHA roof control specialist for District 8. (Tr. 103). Before his promotion, Fishback was a regular coal mine inspector. (Tr. 103). He has worked for MSHA for a total of three and a half years. (Tr. 104). Before joining MSHA, he worked in the mining industry for twenty-eight years. (Tr. 104). Fishback is familiar with the mine because he has inspected it numerous times. (Tr. 105). Fishback described the mine as a gassy room and pillar mine, subject to spot inspection every five days. (Tr. 105-6).

Inspector Fishback issued the order because of the amount of accumulations of loose coal, coal fines, and float coal dust found on the Main East conveyor belt, in violation of MSHA standard 75.400. (Tr. 108-9). The accumulations began at the belt header, the dumping point from the drive to crosscut 48. (Tr. 110). The crosscuts were on 70-foot centers at the time. (Tr. 110). Fishback estimated the total length of the area to be 3500 feet, describing this as atypical, with a "catastrophic" number of accumulations. (Tr. 112).

Inspector Fishback testified that the belt line was running and miners were dumping coal on it at the time of inspection. (Tr. 114). Fishback explained that the hazard posed by the accumulations was an explosion, a fire, or smoke inhalation from a fire, any of which can be potentially fatal. (Tr. 116-17). Fishback testified that the accumulations were up to the level of the conveyor belt in some places, two feet or so off the ground. (Tr. 117). Fishback, despite designating the situation as not S&S, marked it for "high negligence" given that "some examiner should have noticed these conditions," and as an "unwarrantable failure" because "the operator should have known it existed" due to the record books, the length of the condition's existence, and how "obvious and extensive" the condition was. (Tr. 118-19). To Fishback, this demonstrated a "total disregard" for maintenance and inadequate examinations. (Tr. 121). Finally, Fishback testified that the removal of the accumulations took a "significant effort." (122-23). On cross-examination, Fishback testified that, along the 3500 foot conveyor belt, he was unable to find an ignition source. (Tr. 123).

Travis Kyffin, belt maintenance and examiner at the Air Quality #1 Mine, was a full time examiner at the time of the inspection. (Tr. 140). His duties included conducting onshift and preshift examinations of belt lines. (Tr. 141). Kyffin testified that the third shift was typically a maintenance shift, and a belt line would not be walked by an examiner during that shift. (Tr. 142). Kyffin testified as to the difference between a hazardous and a nonhazardous condition, and provided examples of each. (Tr. 143). Kyffin testified that on September 10, 2008, he was working the second shift. (Tr. 144). During this shift, he examined the 2 Main East belt line and

recorded "[p]ressings from the drive at crosscut 11 and spill on the return side from 48 to 49," which was recorded as cleaned. (Tr. 146). Kyffin testified that, because the third shift was a maintenance shift, his onshift examination on September 10 would have been the last time an examiner walked that belt line before day shift on September 11. (Tr. 146-47).

On cross-examination, Kyffin testified that he was using a golf cart for the inspection and that this did not inhibit his ability to inspect the belt line. (Tr. 150-51). Kyffin testified that he did not see anything he would classify as a hazard or as a violation during his most recent inspection. (Tr. 153).

Gary Campbell, Mine Superintendent at Air Quality in September of 2008, testified that on September 11, 2008, he received a phone call stating that the 2 Main East belt had been shut down pursuant to a (d)(2) order. (Tr. 155). Campbell went underground and walked the 10 to 12 crosscuts by himself, but was unable to find anything that he thought would "deem a belt being shut down." (Tr. 157-58).

Campbell testified that he then called Ron Madlem, then Safety Manager at Air Quality, to accompany him for further inspection of the belt line. (Tr. 160-61). Campbell testified that he did not see anything that warranted a 104(d) order. (Tr. 164). During the joint inspection with Madlem, Campbell encountered Tom Culberson, the dayshift mine examiner, doing his belt line examination. (Tr. 165). When Culberson asked him what he should write, Campbell testified that he told Culberson to "write what you see." (Tr. 166). Madlem left for a previously scheduled meeting at MSHA's offices and Campbell went to find Fishback to "see what we had to do to . . . get this belt line back running." (Tr. 166).

Upon questioning Fishback and Mary Jo Bishop, the MSHA Assistant District Manager for District 8, Campbell was told to clean up four areas. (Tr. 167). After relaying this information to Terry Courtney and being assured that people were working on them, Campbell walked the belt line with Bishop and Fishback for about 15 crosscuts or so before going to check on the progression of the cleanup. (Tr. 169). Campbell testified that he then was instructed by Fishback that there were four more spots to clean up, which he again passed on to Courtney. (Tr. 172).

Campbell testified that he then asked Bishop and Fishback whether he could run the belt while rock dusting was going on. (Tr. 174). Campbell testified that his request was refused and that Bishop said, "No, you can't. It will make it hard for the D to stick." (Tr. 174-75). Campbell estimated that to rock dust the entire belt line and adjacent crosscuts would take approximately fifteen hours. (Tr. 176).

Before returning to the surface, Campbell checked to make sure people were cleaning the specified areas, which Campbell testified "they were just finishing up." (Tr. 176-77). Upon returning to the surface, Fishback and Bishop issued Campbell the order, which he testified identified additional crosscut numbers that were not "brought up underground." (Tr. 178). Campbell disputed MSHA's claim that any potential fire would affect ten miners, testifying that the regulator at the end of the tail piece and the block curtain in the roadway would prevent most smoke from flooding the section, assuming a fire ever got to that point despite the other safety

mechanisms in place. (Tr. 179-82). Campbell testified that Fishback never returned to look at the areas he had specified needed to be cleaned. (Tr. 189).

Ronald Madlem confirmed that he received a call from Campbell and accompanied Campbell on a joint inspection of the belt line. (Tr. 199). Madlem testified to encountering Culbertson when he and Campbell were walking. (Tr. 202). Madlem testified that he was surprised when he saw a copy of Order No. 6681046, because the conditions described did not reflect what he observed when he walked the belt line. (Tr. 204).

On cross-examination, Madlem testified that just by looking, a person could tell the difference between a piece of rock and a piece of coal. (Tr. 207). Madlem also testified that Fishback had a habit of issuing additional orders before the work on the first order was done; "the list seemed to expand as time went on and that's why things took so long." (Tr. 209).

Thomas R. Culbertson testified that he made an onshift examination of the 2 Main East belt on September 11, 2008. (Tr. 212). Culbertson testified that the belt was shut down because of the order when he began his examination. (Tr. 213). He examined the belt and found it to be "in good condition," without any hazards. (Tr. 214). Culbertson encountered Madlem and Campbell, and then, after being told to write down "whatever you see," continued his examination. (Tr. 214). Culbertson confirmed listing two hazards pertaining to bolting. (Tr. 216). Culbertson testified that he did not see anything that would constitute a hazard in violation of an MSHA safety standard. (Tr. 218-221).

b. <u>Summary of Parties' Arguments</u>

The Secretary argues that the evidence unambiguously supports Fishback's determination of a highly negligent unwarrantable failure regarding a condition that could cause death. They argue that (1) the coal accumulations were dangerous and potentially fatal; (2) Black Beauty's failure to clean up the coal accumulations was highly negligent; and (3) Black Beauty's failure to clean up the accumulations was an unwarrantable failure.

The danger presented by the coal accumulations is premised on the possibility of a death-causing fire or explosion. Additionally, "smoke inhalation could cause a fatal injury." (Sec'y Br. 17). The Secretary's allegation of high negligence is argued based on the "obviousness of the accumulations" and the notice given to Black Beauty of prior violations of the same safety standard. (Sec'y Br. 17). The Secretary argues that the company was unable to offer evidence that would rebut or mitigate its failures. (Sec'y Br. 17).

The Secretary argues that the extent of the condition means that the accumulations likely built up over more time than just the previous shift, as Black Beauty alleges as a defense. (Sec'y Br. 18). Finally, referring to Fishback's separate citation of Black Beauty for inadequate examination records, the Secretary argues that Black Beauty cannot "use this very failure as its primary defense to challenge whether accumulations existed at all." (Sec'y Br. 19). Black Beauty contested the inadequate examination records in a hearing on the merits before Judge Feldman, whose decision was pending at the time the present case was briefed. (Sec'y Br. 18).

Black Beauty argues that the unwarrantable failure and high negligence findings are inappropriate because those designations were based on several false premises. (BB Br. 12). In support of its argument, Black Beauty asserts that "Fishback's opinion that the cited condition was extensive is not credible" and "was exaggerated and the product of an overzealous effort to establish the propriety of a 104(d) order that was disputed by Black Beauty and recognized as questionable by another MSHA official." (BB Br. 12).

The other MSHA official to whom Black Beauty refers is Mary Jo Bishop, who, according to Campbell's testimony, commented that allowing the belt line to be turned back on after the areas were cleaned but before rockdusting, "would make it hard for the [104(d) order] to stick." (BB Br. 12-13). Black Beauty argues that this meant that she believed the order was suspect. (BB Br. 12).

Black Beauty argues that Fishback's belief that the beltline had been traveled in its entirety by an examiner on the preceding midnight shift was erroneous because that shift was a maintenance shift so no onshift examination of the belt was required. (BB Br. 13). Black Beauty also contends that Inspector Fishback incorrectly assumed that the accumulations had been present for a lengthy period of time. (BB Br. 14). Black Beauty calls Fishback's position that the conditions he observed existed for at least a week "entirely speculative, unfounded, and contradicted by the evidence," pointing to the detection and correction of accumulations on the 2 Main East beltline on nine separate occasions during the week preceding the Order. *Id.* Black Beauty relies on the "substantial coal production" which occurred between the most recent examination of the whole belt line and the issuance of the Order. (BB Br. 14). Black Beauty argues that "Campbell's account of the facts should be credited over Inspector Fishback's as [Campbell's] testimony was corroborated by Mr. Madlem and Mr. Culbertson," whereas Ms. Bishop did not testify to corroborate Mr. Fishback's account. (BB Br. 13).

c. <u>Discussion and Analysis</u>

I find that the preponderance of the evidence establishes the following facts. The most recent examination of the beltline occurred during the onshift examination for the afternoon shift on September 10, which occurred at about 6:30 p.m. that evening. (Tr. 146). The examiner observed what he called pressings from the drive to crosscut 11 and a spill at crosscuts 48-49. (Tr. 146; Ex. G-22). Coal had been produced on the afternoon shift until about 1:00 a.m. (Tr. 182; Ex. R-21). Coal production did not resume again until September 11 at about 7:00 a.m. (Tr. 183; Ex. G-21). When Campbell and Madlem walked the belt line shortly after Inspector Fishback had shut it down, they only observed material at crosscuts 27-28, some spillage at crosscuts 24-25, some spillage at crosscuts 15-17, and a rib roll at crosscut 27. (Tr. 200-01). None of the material they observed was in contact with the belt or any roller or structure. (Tr. 116). They testified that the beltline was white in color, with some grey areas, which indicated to them that the area was adequately rockdusted. (Tr. 158, 164, 201).

At that point, Inspector Fishback indentified four areas that he believed needed to be cleaned. (Tr. 167-68). After these areas were cleaned, Inspector Fishback walked the beltline a second time. Campbell met with the inspector and he identified four additional areas that he believed needed to be cleaned. Those areas were then cleaned by Black Beauty. When

Campbell asked the inspector if the belt could be restarted, he was advised that the belt could not be restarted. When the order was reduced to writing numerous additional areas were required to be cleaned that had not been previously identified.

I find that the Secretary established a violation of section 75.400, but that the violation was not the result of Black Beauty's unwarrantable failure to comply with the safety standard. The beltline had not been examined in its entirety by Black Beauty since about 6:30 p.m. on Saturday, September 10. Coal was produced for the remainder of the afternoon shift on September 10. Inspector Fishback erroneously believed that the beltline had been examined during the shift before his inspection. The previous shift was a maintenance shift, however, and MSHA's safety standard requires such examinations only during shifts in which coal is produced.[1] As a consequence, the inspector's belief that Black Beauty's onshift examiner had observed the same conditions that he observed is erroneous. I do not credit the inspector's opinion that the conditions he observed had existed for at least a week because this opinion is not supported by the evidence. He simply had no knowledge of the condition of the beltline during the immediately preceding days and conditions could have changed significantly. Black Beauty's records show that accumulations found during the most recent onshift examination had been cleaned up. (Tr. 146; Ex. G-22).

I find that the Secretary did not establish that the accumulations existed for a significant length of time. The record shows that Black Beauty cleaned up accumulations that existed following the previous onshift examination. It cannot be determined how long the conditions existed, but it is doubtful that all of them were created since the previous onshift examination. The accumulations did not present a high degree of danger. The gravity of the violation was serious but it was not S&S. Inspector Fishback traveled the beltline several times and added areas that he believed needed cleaning with each trip. Whether the violation was obvious is in dispute. I find that the violation was obvious and extensive at the time of the MSHA inspection but it must be remembered that Black Beauty had not completed the onshift examination for that shift. Black Beauty has a significant history of violations of section 75.400. Such a history should put an operator on notice that greater efforts are necessary to comply with the safety standard. It is not clear how many of these previous violations involved accumulations along beltlines, but there can be no dispute that MSHA had been putting greater emphasis on eliminating accumulations along beltlines at underground coal mines since the fire at the Aracoma Alma Mine in January 2006.

I find that it was not established that the violation was the result of Black Beauty's unwarrantable failure to comply with section 75.400. The company did not show indifference or reckless disregard toward the need to reduce and eliminate accumulations of combustible materials. Its preshift and onshift examinations conducted along its belts and at the header and

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[1] Inspector Fishback issued Order No. 6681047 alleging a violation of section 75.362(b) for the failure of Black Beauty to perform an adequate examination during the previous shift. Judge Jerold Feldman vacated that order "because Black Beauty was not required . . . to conduct an on-shift examination of the belt haulage way during the September 11, 2008, midnight maintenance shift." *Black Beauty Coal Co.*, 34 FMSHRC ____, slip op. at 9, No. LAKE 2009-72 (Feb. 10, 2012) (petition for discretionary review granted March 21, 2012).

drive motors may not have been sufficiently thorough to discover and remove all accumulations. I find that Black Beauty's negligence was moderate. Because the violation was serious and extensive, a penalty of $10,000 is appropriate.

B. Docket No. LAKE 2009-305 and -304, Air Quality #1 Mine

1. Citation Nos. 6682240, 6682241, 6682242, and Order No. 6682243

On Monday, December 8, 2008, Inspector Glenn E. Fishback issued Citation Nos. 6682240 and 6682242 under section 104(a) of the Mine Act for alleged violations of section 75.400 of the Secretary's safety standards and Citation No. 6682241 for an alleged violation of section 75.202(a) of the standards. Fishback also issued Order No. 6682243 under section 104(d)(2) of the Act for an alleged violation of 75.362(b) of the safety standards. The citations and order were issued between 1:00 a.m. and 6:00 a.m. on Monday morning.

Citation No. 6682240 alleges that:

> Obvious and extensive accumulations of combustible materials in the form of loose coal, coal fines, and float coal dust (Black in color and dry) were allowed to accumulate on the energized Wheatland slope conveyor belt tail located in entry #5 crosscut #1. The accumulations measured approximately 2 feet in width by 2 feet in depth and 8 feet in length and the belt was observed running in these accumulations. Directly above this area a second area measuring approximately 4 feet in length by 8 inches wide by 5 inches in depth was observed with the belt running in it. The main structure frame work had float coal dust measuring approximately 2 inches to 3 inches in depth for an approximant distance of 38 feet on all of the frame work.

(Ex. G-23). The inspector found that an injury was highly likely to occur and result in lost workdays or restricted duty, that the violation was S&S, that ten people would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $63,000.

Citation No. 6682241 alleges that:

> A loose coal rib gapped away from the solid pillar 4 to 5 inches measuring approximately 36 feet long, 4 feet in height, and 4 inches to 16 inches in thickness was observed along the 2 Main West belt between crosscut number 63 and crosscut number 64. This rib was located on the travelway side of the belt. This area is routinely traveled by mine examiners 3 shifts per day 6 days a week.

(Ex. G-24). The inspector found that an injury or illness was reasonably likely to occur and could reasonably be expected to be permanently disabling, that the violation was S&S, that one person would be affected, and that the violation was the result of high negligence on the part of the operator. Section 75.202(a) of the Secretary's regulations requires that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). The Secretary proposed a civil penalty in the amount of $12,248.

Citation No. 6682242 alleges that:

> Combustible materials in the form of loose coal and coal float dust were allowed to accumulate along and under the energized 1st Main North Conveyor belt from crosscut number 1 to crosscut number 3. The accumulations measured approximately 3 inches to 2 1/2 feet in depth by 6 1/2 feet in width, and 160 feet in length. This area is traveled 3 shifts per day 6 days per week.

(Ex. G-30). The inspector found that an injury or illness was reasonably likely to occur and could reasonably be expected to result in lost workdays or restricted duty, that the violation was S&S, that ten people would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $34,652.

Order No. 6682243 (LAKE 2009-304) alleges that:

> An inadequate onshift examination was conducted for the 8:30 PM to 11:30 PM examination on 12/07/2008 for the second shift production. Citation numbers 6682240, 6682241, and 6682242 were issued under this 104(d)(2) order. Obvious and extensive accumulations of combustible material in the form of loose coal, coal fines and float coal dust (Dry and black in color) and the conveyor belt running in this material were observed by MSHA on this date. The examination record for the 8:30 PM to 11:30 PM examination of these affected areas in the citation listed showed no hazards listed. This violation is an unwarrantable failure to comply with a mandatory standard. Management will have a meeting with all mine examiners to terminate this 104(d)(2) order.

(Ex. G-34). The inspector found that an injury or illness was reasonably likely to occur and could reasonably be expected to be fatal, that the violation was S&S, that ten people would be affected, and that the violation was the result of high negligence on the part of the operator. Section 75.362(b) of the Secretary's regulations requires that "[d]uring each shift that coal is produced, a certified person shall examine for hazardous conditions along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift." 30 C.F.R. § 75.362(b). The Secretary has proposed a civil penalty in the amount of $53,858.

a. Background Summary of Testimony

On December 8, 2008, Inspector Fishback was conducting an inspection of Air Quality #1 Mine. (Tr. 223). As a result of this inspection, Fishback issued Citation No. 6682240, a 104(a) citation for an accumulation of combustible materials in the form of loose coal fines on the Wheatland slope tailpiece. (Tr. 223). Fishback testified that the Wheatland slope conveyor belt carried the majority of coal out of the mine, that it was elevated about 2 or 2 1/2 feet off of the mine floor, and that it was the last belt coal traveled on when coming out of the mine. (Tr. 224). Fishback described the accumulations as being approximately 2 feet in width by 2 feet in depth and 8 feet in length, and that the belt was observed running in these accumulations. (Tr. 225). In other words, the belt was "energized." (Tr. 225).

Fishback observed two ignition sources where the conveyor belt was rubbing the tail piece and on the structure of the framework. (Tr. 227). Fishback testified that the accumulations were black, meaning that no rock dust was present and making ignition more likely to occur. (Tr. 227). Fishback then went on to explain his modification of the initial "highly likely" designation to "reasonably likely" and the change from "lost work days" to "fatal" based on the accumulations and the ignition sources. (Tr. 228). He explained his "high negligence" designation on the basis of the amount of accumulations and the estimated number of shifts the accumulations took to develop. (Tr. 229). Fishback testified that his S&S classification of the alleged violation was because, "if there was an injury, it would be of a reasonably serious nature." (Tr. 230).

Fishback testified that other potential ignition sources, such as the area's electrical equipment and the tail roller turning in the accumulations, could also start a fire. (Tr. 231-32). Fishback testified that the accumulations should have been obvious to Black Beauty's examiners. (Tr. 233).

Fishback issued Citation No. 6682241, a 104(a) order when he discovered that a loose rib had gapped from a solid pillar 4 to 5 inches, measuring 36 feet long, 4 feet in height, and 3 to 16 inches in thickness. (Tr. 233-34). Fishback testified that Section 75.202(a) requires the mine to substantially support, if not correct, the roof and ribs where men work or travel. (Tr. 234).

Fishback testified that he believed permanently disabling injuries were reasonably likely, given that the alleged violation was on the travelway side of the belt where the belt examiner walks every shift. (Tr. 234). Fishback testified that part of the reason he determined it was an S&S violation was because, when the condition was abated, the loose rib was pulled down by a pry bar with very little effort. (Tr. 236-37).

Fishback issued Citation No. 6682242, a 104(a) citation for accumulations of combustible material along the energized First Main North conveyor belt from crosscut 1 to crosscut 3. (Tr. 237). Fishback testified that he designated the violation as S&S due to the mine's history of violations and the fact that they were already on notice for violations of 75.400. (Tr. 238). Fishback testified to the presence of additional potential ignition sources in the area, including the electrical cables going to the drive motors and the drive motors themselves. (Tr. 238). Fishback testified that the drive area has a fire suppression system, but that it only covered

about 60 feet of the area, leaving about 100 feet of the 160-foot area without any fire protection. (Tr. 240).

Fishback issued Order No. 6682243, a 104(d)(2) order for an alleged violation of 75.362(b). Fishback testified that the purpose of the onshift exam is to provide information to the mine operator and to MSHA on the conditions of the coal mine in its entirety. (Tr. 252). Inspector Fishback testified that the area at issue in Citation No. 6682240 was required to be examined onshift because it was a running conveyor belt. (Tr. 252-53). Fishback testified that there would be three shifts in a 24-hour period at the mine and that each shift is required to have an onshift examination. (Tr. 253). Fishback next testified that the area cited in Citation No. 6682241 was also required to be examined onshift three times a day because the belt line there was also running. (Tr. 254). The area involved in Citation No. 6682242 was also required to be examined onshift three times a day. (Tr. 254).

Fishback testified that, although there was an exam conducted at the right time, there were no violations or hazards listed in the examination book, despite the accumulations that had developed as described in Citation No. 6682240. (Tr. 255-56). The examination book, under "Actions Taken or Remarks" said "needs cleaned," signifying that the examiner had found accumulations that needed to be cleaned. (Tr. 256-57). Fishback testified that this entry was not sufficient to meet the requirements of an onshift exam because the comment should have been listed under "Hazardous Condition," in the exam book. Accumulations are hazards that need to be listed as such and taken care of immediately. (Tr. 257-58). Similarly, there was no recording of a loose rib in the examination book, in violation of the requirement to conduct a proper onshift examination. (Tr. 259). Finally, Fishback testified in regard to Citation No. 6682242 that the onshift book did not describe the extensiveness of the violation. (Tr. 262).

Fishback determined that the violation of section 75.362(b) was the result of Black Beauty's high negligence because of the history of past accumulation violations at the mine, and an unwarrantable failure of management to comply because management signs off on the onshift examination reports, and is responsible for ensuring the accuracy of the reports. (Tr. 265-67).

On cross-examination, Fishback testified that only accumulation violations that constitute hazards need to be put in the onshift exam record. (Tr. 270). Fishback testified that he did not know the ignition temperature of coal at the mine. (Tr. 276-77). Fishback testified that, on a given onshift examination, the belt examiner only travels one direction, and that sometimes a rib may be gapped only on one side. (Tr. 283).

On redirect examination, Fishback testified that, with continued mining, the belt could have started rubbing the accumulations at any point. (Tr. 294). Mine examiners should be over-inclusive rather than under-inclusive in terms of what violations and hazards they record in their onshift exam books in order to protect the health and safety of miners. (Tr. 296). Fishback testified that a fire suppression system would not have stopped a potential ignition with respect to Citation No. 6682240 and that there was "a substantial amount" of the area addressed in Citation No. 6682241 that would not have been under the fire suppression system. (Tr. 297-99). Inspector Fishback testified that there is a separate fire suppression system at each belt head.

(Tr. 303). He also testified that there was no methane gas detected during his December 8, 2008, inspection. (Tr. 304).

Randall L. Hammond is the supervisor of safety compliance at the mine. (Tr. 307). The job requires Hammond to maintain and review safety and production records. (Tr. 307). Hammond has about 28 years of experience in the mining industry. (Tr. 308). He was previously the Director of the Indiana Bureau of Mines and holds a Bachelor of Science degree in Mining Engineering Technology. (Tr. 308). Hammond testified that, during the 12-hour weekend shifts, it is typical to use only the South side, not the Wheatland side, "because there were less belts that had to be run, and that would save on power." (Tr. 312). Hammond testified that the citations and orders at issue all refer to areas on the Wheatland side, which would have been idle during the weekend shifts. (Tr. 313). According to computerized records, 1,542 tons of coal went out the South portal, and zero tons went out the Wheatland side up through midnight on December 7, 2008. (Tr. 315). No coal went out the Wheatland side. (Tr. 316).

Based on the clock-in times of Brian L. Nord and Eugene Merrimon III, Hammond testified that these two miners conducted a preshift examination rather than onshift examinations on December 7, 2008. (Tr. 320). Hammond also testified that a belt in contact with accumulated material is less obvious when the belt is not running, such as during a preshift examination conducted during a maintenance shift. (Tr. 321).

On cross-examination, Hammond testified that he was not at the mine on December 7 or 8, 2008. (Tr. 322). Hammond testified that, if an examiner sees a spill of sufficient quantity on the beltline, he is required to mark it down in the examination book. (Tr. 325). In reviewing the belt and roadway exam books, Hammond confirmed that there was no evidence that the Wheatland Slope was cleaned, although it was marked as "needs cleaned." (Tr. 326-27).

On redirect examination, Hammond testified that the "needs cleaned" entry in the exam book on December 7 was a carryover from the December 6 examination, simply a copy of what was previously written. (Tr. 331). On recross examination, Hammond testified that there was no record of the Wheatland Slope being cleaned for at least three shifts. (Tr. 333).

Terrance Kiefer, an examiner at the mine, testified that, at the beginning of an onshift examination, he and his examination partner would examine different belts. (Tr. 336-37). A full onshift examination would take about three and a half to four hours. (Tr. 337). After the onshift exam was complete, the examiners would preshift other areas of the mine in advance of an oncoming shift. (Tr. 337). On December 6, 2008, Gary Ball was Kiefer's fellow examiner. (Tr. 338). The records for December 6 indicate an onshift examination was conducted but no preshift examination. (Tr. 337). Kiefer inspected parts of the 1 Main North and 2 Main West Slopes and Ball inspected the Wheatland Slope and the rest of the Main West Slope. (Tr. 339). On cross-examination, Kiefer testified that, if he or another examiner discovered a hazard that required some attention, they would have to correct the hazard and enter it as a hazard in the preshift report. (Tr. 341-42).

Chad Barras, Midwest Safety Director for Peabody Energy, the parent company of Black Beauty Coal, was next to testify. (Tr. 342-43). Prior to working for Peabody, Barras worked for

MSHA as a ventilation engineer, whose job included reviewing mine plans and inspecting mines for proper ventilation systems. (Tr. 343). Barras testified that in December of 2008, the belt lines at the mine were equipped with fire detection systems, including carbon monoxide ("CO") sensors, spaced 1,000 feet apart. (Tr. 345). These CO sensors set off surface alarms at 10 parts per million ("ppm") pursuant to what was then a new regulation. (Tr. 345). Barras testified that 10 ppm was an extremely low concentration of CO relative to what would cause a fire or an explosion. (Tr. 346).

Barras also testified that he knew of no instance where float coal dust led to an explosion without the presence of methane. (Tr. 347-48). In addition to the fire detection system, there was also a fire suppression system at the Mine. (Tr. 348). Miners are also required to carry personal CO detectors that alarm at 50 ppm. (Tr. 349). There are caches of self-contained self rescuers ("SCSR's") located along the belts at the Mine. (Tr. 349). A SCSR is a self-contained apparatus that, upon being breathed into, scrubs out the CO from a miner's exhaled breath, maintains the oxygen, and adds a supplemental amount of oxygen to keep the miner breathing the normal 20 to 21 percent of oxygen. (Tr. 349-50).

Barras testified that miners are trained to put on the SCSRs when their personal CO detectors reach 50 ppm. (Tr. 350). Barras testified that the ignition temperature of coal at the mine is approximately 880 degrees Fahrenheit, and that the "reject" coal, about 60 percent of the coal mined, would have an even higher ignition temperature because it is about 65 percent rock. (Tr. 351-52). Barras was unsurprised by the findings of an MSHA study that said from 1980-2005, there were 63 reportable mine fires along belt lines, none of which resulted in fatalities or reportable lost-time injuries. (Tr. 355; Ex. R-35 p. 6). Barras reported that the CO systems are extremely accurate and sensitive. (Tr. 355). The 2006 Aracoma Alma Mine fire, which resulted in two fatalities was, in Barras's opinion, attributable to the anomalous removal of ventilation controls and the ignoring of alarms. (Tr. 356-57).

Barras testified that additional safety measures were put into place subsequent to the Aracoma disaster as mandated by the 2006 Miner Act, including more SCSR's, rescue chambers, and lifelines in both primary and secondary escapeways. (Tr. 357-58). Barras disagreed with the assertion in Citation Nos. 6682240, 6682242, and Order No. 6682243, that ten persons would be affected because "we don't have ten people over that way" during normal mining operations. (Tr. 362-63). On cross-examination, Barras confirmed that the mine was on a five-day spot inspection due to its high methane levels. (Tr. 366). On redirect examination, Barras explained that preventive safety actions are taken when methane levels reach a low threshold, long before they reach dangerous levels. (Tr. 373-74).

b. Summary of the Parties' Arguments

Citation No. 6682240

The Secretary argues that the violation was S&S. (Sec'y Br. 20). The Secretary points to Fishback's testimony of two ignition sources: the belt rubbing the tail piece and the structure of the framework at two different locations. (Sec'y Br. 20). The Secretary also argues that the potential for a fire was exacerbated by the apparent lack of rock dust and the practice of running

the belt lines during the maintenance shift. (Sec'y Br. 20). The Secretary also points to Fishback's analysis that the fire suppression system would be inadequate to stop a fire because the location of the potential fire would be a "substantial distance from the main fire suppression system." (Sec'y Br. 20).

The Secretary compares the conditions at the mine to those that caused the Aracoma Mine fire in June of 2006. (Sec'y Br. 21). The Secretary argues that given the extensive accumulations, the presence of ignition sources, the amount of time the condition was allowed to exist, and the significant quantities of methane at the Mine, the Court should find that the violation was S&S. (Sec'y Br. 21).

The Secretary also argues that the violation showed high negligence by Black Beauty because it "knew or should have known of the violative condition or practice, and there are no mitigating circumstances." (Sec'y Br. 22). This assertion is based on Fishback's testimony that it would have taken several shifts for the amount of accumulations present to accumulate. (Sec'y Br. 22).

Black Beauty stipulates to the finding of a violation, but contests the finding that the violation was S&S. (BB Br. 18). Black Beauty argues that, assuming normal mining operations, a fire would be prevented before its inception through a combination the CO monitoring systems, the fire brigade, and the presence of a temperature-sensitive fire suppression system. (BB Br. 18). Black Beauty analogizes the facts to those in *Mach Mining LLC* 33 FMSHRC 763 (March 2011) (ALJ), where "this Administrative Law Judge rejected the S&S designation for an accumulations violation on a slope belt when similar systems were present." (BB Br. 18).

Black Beauty argues against a finding of high negligence, asserting that, contrary to Fishback's conclusion, the Wheatland Slope was not running during the preshift examination. (BB Br. 19).[2] Black Beauty also argues that the accumulation was small when compared with the 48-inch width of the belt, and therefore not extensive. (BB Br. 19).

Citation No. 6682241

The Secretary argues that the violation was S&S and the result of high negligence on the part of Black Beauty. (Sec'y Br. 23). The Secretary bases this argument on the potential of a loose rib to cause permanently disabling injuries, the likelihood of injury, and the number of people in danger of injury. (Sec'y Br. 23).

The Secretary's high negligence designation was the result of Black Beauty being on notice due to its previous loose rib and roof issues for which it had received citations. (Sec'y Br. 23). The Secretary further argues that the rib gap widened over time and could have fallen at any time, given how loose it was. (Sec'y Br. 23).

[2] In its brief, Black Beauty argued that this citation, as well as other section 104(a) citations at issue in these cases, should not be characterized as an unwarrantable failure. As the Secretary did not allege an unwarrantable failure, I have considered its arguments when considering the high negligence allegation.

Black Beauty stipulates to the fact of a violation. (Sec'y Br. 22). However, Black Beauty contests the findings of S&S and high negligence. (BB Br. 20). Black Beauty argues against the S&S designation on the basis that there was not a reasonable likelihood that the hazard would result in an injury, given the low volume of people passing through the area. (BB Br. 20). In support of its argument that a high negligence finding was inappropriate, Black Beauty asserts that MSHA did not meet its burden of establishing that it was "more likely than not" that the observed condition existed at the time of the examination. (BB Br. 21). Black Beauty also argues that, because Fishback was not present at the time of the examination, his belief that the condition existed at that time was speculative and thus insufficient to support an unwarrantable failure finding. (BB Br. 21).

Citation No. 6682242

The Secretary argues that the S&S designation was justified by the mine's history and the fact that the mine had already been put on notice for its extensive history of violations of section 75.400. (Sec'y Br. 24). The Secretary also argues that the mine has a history of belts becoming misaligned, which would become a potential ignition source. The Secretary cites *Buck Creek Coal*, 52 F.3d 133, 136 (7th Cir. 1995) and *Amax Coal Company*, 19 FMSHRC 846, 850 (May 1997) in refutation of Black Beauty's argument that the fire suppression system at the mine would make a fire less likely. (Sec'y Br. 25). The Secretary points to over 200 accumulation violations cited at the mine in the fifteen months before this inspection in support of its high negligence designation. (Sec'y Br. 25).

Black Beauty stipulated to the violation but did not agree to stipulate as to the gravity or negligence designations. (Sec'y Br. 24). Black Beauty argues the S&S designation was inappropriate because Fishback's nonspecific reference to past conditions "is entitled to no weight because he did not . . . explain why such instances would be relevant to the condition he observed" the day of the inspection. (BB Br. 22). Additionally, Black Beauty argues that, because the Secretary did not present evidence that an actual ignition source was present, the S&S finding should be deleted. (BB Br. 23).

Black Beauty argues that the high negligence determination should also be deleted. (BB Br. 24). Black Beauty argues that the condition did not pose an immediate hazard at the time it was found and, in the course of normal operations, it would likely have been corrected during the midnight shift. (BB Br. 24). Black Beauty also argues that the Secretary's "passing and non-specific reference to past history of section 75.400 violations" cannot be used to support a high negligence finding. *Id.*

Order No. 6682243

The Secretary argues that the violation was S&S, demonstrated high negligence and a lack of reasonable care, and was an unwarrantable failure. (Sec'y Br. 28-29). The Secretary argues that section 75.362(b) required the mine examiner to list the conditions set forth in Citation Nos. 6682240, 6682241, 6682242 as hazardous conditions in the onshift examination book. The operator's failure to discover these hazards and correct and record them created a serious S&S violation. The Secretary also relied on the mine's history of improper belt

maintenance and cleaning, the amount of the accumulations, and the amount of time it must have taken for the accumulations and the loose rib to develop. (Sec'y Br. 28). The Secretary also noted Fishback's statement concerning a lack of managerial follow-up when designating the citation S&S. (Sec'y Br. 28).

The Secretary argues that Black Beauty was highly negligent because of its awareness of the continual problem of loose ribs and roof issues, as well as management's prior meetings about past violations with MSHA personnel and company management personnel. (Sec'y Br. 29). The same argument is made with respect to the accumulation violations. The Secretary argues that Black Beauty displayed a lack of reasonable care and showed "unwarrantable failure" because of the obviousness of the conditions, the mine's prior notice of numerous accumulation citations, the potentially fatal consequences of the underlying accumulations, and the abject failure of the mine to identify the conditions in the examination reports. (Sec'y Br. 29).

In response, Black Beauty argues that the order should be vacated because no onshift examination of the Wheatland belt line occurred between 8:30 and 11:30 p.m. (BB Br. 17). Black Beauty argues that the onshift examination cannot be inadequate where no onshift examination even occurred and was not required. (BB Br. 18).

c. Discussion and Analysis

Citation No. 6682240

I find that the Secretary established that the violation was S&S. I reach this conclusion for several reasons. The accumulations were black in color and extensive around the belt tail. The combustible material was dry and consisted of loose coal, coal fines, and float coal dust. A similar condition existed further up the beltline and the belt was running in these accumulations. The structural framework was covered with float coal dust that was several inches deep. Although Black Beauty had a CO monitoring system in place, such a system would not always detect a rapidly building fire quickly enough to prevent a fire from spreading and injuring miners. In addition, the evidence establishes that the entire area was not adequately protected by the fire suppression system.[3]

I find that it was reasonably likely that the hazard contributed to by the violation would have resulted in an injury of a reasonably serious nature. In reaching this decision, I have relied on the Commission's decision in *AMAX Coal Co.*, 19 FMSHRC 846, 850 (May 1997). In that case the Commission was not persuaded by the operator's argument that the presence of fire detection systems, self-contained rescuers, and firefighting equipment minimized the risk of injury to miners from a fire. *See also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995). Only a few miners would have been affected by this violation.

[3] The present case is factually distinguishable from *Mach Mining*. In that case, I found that the accumulations were wet, the cited area was near the surface, and the air traveling through the cited area was flowing in an outby direction. I also found that the conditions had existed for a short period of time.

I find that the negligence of Black beauty was moderate. Inspector Fishback erroneously believed that the Wheatland Slope belt was running at the time of the applicable preshift examination that occurred between 8:30 and 11:30 p.m. in advance of the oncoming maintenance shift. The evidence demonstrates that the belt was idle at that time.[4] In addition, if there had been contact between accumulations and the belt, it would not have been obvious because the belt was not running. A penalty of $30,000 is appropriate for this violation.

Citation No. 6682241

I find that that it was not established that the violation of section 74.202(a) was S&S or the result of Black Beauty's high negligence. The facts show that it was not reasonably likely that the violation would have contributed to an accident in which there was an injury, assuming continued mining operations. A measure of danger to safety was contributed to by the failure to properly support or take down the loose rib. An injury to a miner struck by the rib falling would most likely be reasonably serious. Therefore, the primary issue in the S&S analysis is whether the violation was reasonably likely to result in an injury-causing event. The likelihood of an injury-producing event must be evaluated by considering the likelihood of two specific events occurring simultaneously, material falling from the loose rib and the presence of a miner directly beside it. *See Freedom Energy Mining Co.*, 32 FMSHRC 1809, 1821 (Dec. 2010) (ALJ). Although the loose rib was sizable, it was in an area that was not frequently traveled. Although it was possible that the loose rib would fall at some point, it is also possible that an examiner would have pulled it down before it deteriorated much further. In addition, the likelihood that it would fall at the exact moment when an examiner was in the area was remote at best.

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). Inspector Fishback certainly qualifies as an experienced MSHA inspector. However, while it is possible that a miner could have been injured as a result of the violation, I find that the Secretary has failed to prove that it was reasonably likely that an injury-causing event would occur. The violation was serious.

I also find that the company's negligence was moderate. The inspector presumed that the same conditions existed at the time of the preshift examination. In fact, he had no knowledge whether the condition existed at that time. The Secretary did not establish that it was more likely than not that the condition observed by Inspector Fishback existed at the time of the Black Beauty's prior examination. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 13 n. 10 (Jan 1997). Indeed, he testified that a rib can "gap quickly." (Tr. 283). The Secretary also relies on the fact

[4] The Air Quality #1 Mine is a slope mine. The coal seam is close enough to the surface that men and materials enter the mine down a sloped entry from the surface. Similarly, the mined coal exits the mine on conveyor belts that travel up the slope. At this mine, there are two slope entries that are used to transport coal out of the mine: the Wheatland Slope and the South Slope. The credible evidence demonstrates that the South Slope was operating over the relevant weekend and that the Wheatland Slope was idle. I credit the evidence presented by Black Beauty on this issue.

that the mine had been issued numerous citations for violations of section 75.202 for "roof and rib issues." (Tr. 236). The condition was not extensive and did not pose a high degree of danger. Although the Secretary's arguments have some merit, I find that, taken as a whole, Black Beauty's negligence was moderate. A penalty of $11,000 is appropriate.

Citation No. 6682242

I find that the Secretary did not establish that the violation was S&S. Clearly, there was a violation of section 75.400 which created a measure of danger to safety. In addition, if a fire were to start one or more miners could suffer smoke inhalation injuries. I find, however, that the Secretary did not establish that there existed a reasonable likelihood that the hazard contributed to by the violation would have resulted in an event in which there was an injury. The accumulations were not in contact with the belt and there were no ignition sources present. Although it was certainly possible that a belt could become misaligned and rub against the support structure, there was no showing that such an event was reasonably likely to occur before the accumulations were cleaned up. I credit Black Beauty's evidence that the belt had not been running over the weekend. There was also no showing that the electrical equipment in the area was a likely ignition source.

The evidence establishes that the accumulations extended for a distance of 160 feet but the fire suppression system did not extend that entire distance. Although I have considered this fact, it is not determinative of the S&S issue. The likelihood of a fire in the unprotected area was not significant, as discussed above. The violation was serious.

To support her high negligence allegation, the Secretary relies primarily on previous violations of section 75.400. For example, Inspector Fishback testified about a huge accumulation on September 11, 2008, in which combustible materials were present for a distance of 3,500 feet along a belt entry where the belt was running. In addition, the Belt & Roadway Inspection Report for the shift that ended at 3:30 p.m. the day before the citation was issued states that the "stationary roller on take up needs cleaned." (Tr. 241; Ex. G-33, p. 3). The Secretary relies on this report to prove management's knowledge of the condition.

I find that this violation was the result of Black Beauty's moderate negligence. The evidence shows that the 1 Main North belt was idle during the 8:30 to 11:30 p.m. preshift examination. The following shift, when the citation was issued, was a maintenance shift so an onshift examination had not been conducted. The above-referenced notation in the Belt & Roadway Inspection Report does not support a finding of high negligence in this situation because the accumulation mentioned in that report could well have been cleaned up before production resumed. The condition listed did not present a significant hazard at that time. I recognize that this mine received a high number of citations alleging violations of section 75.400 along belt lines. After the Aracoma fire in 2006, MSHA began to more rigorously enforce section 75.400 along belt entries in underground coal mines and most underground coal mines were issued many citations as a result. Basing a high negligence finding on such a history is not warranted in this instance. I find that a penalty of 15,000 is appropriate for this violation.

Order No. 6682243

Order No. 6682243 is vacated. All of the beltlines cited by Inspector Fishback were on the Wheatland side of the mine. These belts were the Wheatland Slope Belt, No. 2 Main West Belt, and the 1 Main North belt. The order alleges that Black Beauty's onshift examination of these belts was inadequate. The evidence shows that on Sunday, December 7 a small production crew was using only the South Side belts, with the result that the Wheatland belts were idle during this time and no onshift examinations were made along these belts. Although preshift examinations were made in advance of the maintenance shift that started at 11:00 p.m. on December 7, such exams only cover the drives, tails, and heads of such belts.

Section 75.362(b) requires onshift examinations during production shifts along belts that are being operated. The belts in question were idle because a partial production crew was using the South Side belts. I credit the evidence presented by Black Beauty that belts that are not being used are idled to save on electricity costs. As a consequence, no onshift examination occurred on December 7. Inspector Fishback erroneously believed that the mine was in full production the afternoon of Sunday, December 7 and that an onshift examination of the Wheatland belts occurred during the shift. The examination that occurred during this period was a preshift examination for the oncoming midnight maintenance shift and not an onshift examination. Government Exhibit 27, which the inspector used to support Order No. 6682243, is actually a preshift examination report rather than an onshift report. (Tr. 319-21). As stated above, the inspector started his inspection shortly after the start of the midnight maintenance shift. Because I find that no onshift examination occurred on December 7 in the cited areas and that such an examination was not required by section 75.362(b), the order is **VACATED**.

2. Citation No. 6682067

On November 29, 2008 Inspector Danny L. Franklin issued Citation No. 6682067 under section 104(a) of the Mine Act for an alleged violation of 75.202(b) of the Secretary's safety standards. The citation alleges:

> By evidence of equipment tire tracks, person or persons have traveled through an area of unsupported mine roof measuring approximately 10 by 11 feet. The area was very obviously dangered off prior to the tracks being made in the rock dust and on the rock, which has fallen from the roof, by evidence of the rock dust on the danger flagging. This condition existed between number 4 and 5 entries of the 2 Main East entries, two crosscuts inby spad number 35574, crosscut number 65. Training must be conducted and safety meetings on the hazards of unsupported mine roof. Documentation must be presented in order for this citation to be terminated.

(Ex. G-42). The inspector found that a fatal injury was reasonably likely to occur, that the violation was S&S, that one person would be affected, and that the violation was the result of high negligence on the part of the operator. Section 75.202(b) provides, in part, that "[n]o person shall work or travel under unsupported roof. . . . The Secretary has proposed a civil penalty in the amount of $13,268.

a. Background Summary of Testimony

On November 29, 2009, Inspector Franklin was conducting an inspection of Air Quality #1 Mine accompanied by Gary Campbell. (Tr. 424). Franklin has worked for MSHA for four years. (Tr. 376). Before that, he worked in underground mines starting in 1973. (Tr. 376). Franklin testified that rock had fallen from the roof onto the floor, that red danger ribbons were hanging off the affected area, and that the two middlemost of the four grouted roof bolts were damaged. (Tr. 425). Franklin testified that he saw fresh tire tracks in the area that looked like they belonged to the vehicle that carries the mine examiners. (Tr. 426). Franklin based his designations of S&S and fatal on his belief that rock had already fallen and this condition demonstrated a lack of adequate support that might result in a second roof fall that could result in crushing injuries. (Tr. 427). Franklin testified that the violation was reasonably likely because the condition was a violation of a mandatory standard and there were no other markers, other than the red flags, to indicate the danger to miners. (Tr. 429). Franklin expressed concern about the adequacy of the mine's safety training. (Tr. 430).

Gary Campbell, mine superintendant, testified that the area was not active, but rather was a return area that was infrequently traveled. (Tr. 439-40). Campbell testified that not going under an unsupported roof was a "golden rule" at the mine, and to violate it would be punishable by termination from employment. (Tr. 444). Campbell testified that he thought a mine examiner had driven through the area, seen the rock on the ground, and was concerned about avoiding having the "moon buggy" get stuck and missed the hanging flags when looking down at the rock. (Tr. 444-45). Mr. Campbell also testified that it was common for mine examiners to use discarded ribbon to flag danger areas and that fact may offer an explanation for why the ribbon was covered with rock dust. (Tr. 445-46).

b. Summary of the Parties' Arguments

The Secretary argues that the citation should be affirmed as written. (Sec'y Br. 33-34). The Secretary argues that the tracks of a mine examiner's vehicle show that an examiner drove beneath the unsupported roof. (Sec'y Br. 34). The Secretary argues that such "conscious disregard for an obvious safety violation" is evidence of Black Beauty's high negligence. (Sec'y Br. 34). Finally, the Secretary argues that, given that the roof had already fallen, it was reasonably likely to fall again and cause an injury. (Sec'y Br. 34).

Black Beauty argues that the S&S finding is inappropriate and should be deleted because there was a low level of exposure to the hazard given the speed with which an individual examiner would be traveling through the area. (BB Br. 29). Black Beauty argues that a confluence of an actual roof fall and a person being at the location at the time of the fall was not reasonably likely to occur. (BB Br. 29). Finally, Black Beauty argues that the high negligence finding is excessive and should be reduced because, even assuming an individual traveled through the area with the flagging present, this would have been an "anomalous isolated incident, not reflective of defective training or indifference on the part of management." (BB Br. 30).

c. Discussion and Analysis

There are many similarities between facts presented in this citation and the facts in the loose rib citation discussed above (No. 6682241). For similar reasons, I find that the present violation is not S&S. It was highly unlikely that this violation would contribute to a situation in which there was an injury. The loose roof was in a remote, infrequently traveled area of the mine. The violation was serious.

I find that the violation was the result of Black Beauty's high negligence, however. The violation was obvious and at least one examiner had driven right by it. The condition was marked with danger ribbons, but this warning had been ignored. The examiner, who was an agent of the operator, was indifferent to the danger posed by the condition. A penalty of $12,000 is appropriate for this violation.

3. Citation No. 6682048

On November 17, 2008 Inspector Franklin issued Citation No. 6682048 under section 104(a) of the Mine Act for an alleged violation of 75.370(a)(1) of the Secretary's safety standards. The citation alleges:

> The company's Approved Ventilation Plan was not being followed on the 4 Main North travelway for 4,000 feet. This road is the alternate escapeway and is traveled regularly by miners working on 3 different working sections. The travelway is dry and has visible dust suspended in the air when mantrips, personal vehicles and other mobile equipment travel this roadway. The approved Ventilation Plan requires that haulage roads be watered or a wetting agent applied to control respirable dust.

(Ex. G-38). The inspector found that an injury was reasonably likely to occur and result in permanent disability, that the violation was S&S, that ten people would be affected, and that the violation was the result of high negligence on the part of the operator. Section 75.370(a)(1) provides, in part, that the mine "operator shall develop and follow a ventilation plan approved by the [MSHA] district manager." The Secretary has proposed a civil penalty in the amount of $37,416.

a. Background Summary of Testimony

On November 17, 2008, Inspector Franklin was conducting a spot inspection of Air Quality #1 Mine. (Tr. 378). Franklin was accompanied by Todd Armstrong, an outby utility employee with the mine, and Franklin informed then-superintendent Gary Campbell of his reason for being at the mine. (Tr. 378). Franklin testified that the 4 Main North travelway, the area for which he issued this citation, was an active working section of the mine. (Tr. 379). Inspector Franklin explained that the Mine's ventilation control plan calls for the application of water, calcium chloride, or other chemicals to outby travelways to abate respirable dust. (Tr. 380).

Franklin testified that the violation was apparent by the thick dust in the air. (Tr. 381). Franklin estimated that the condition had existed for about eight hours. (Tr. 382). Franklin explained that the danger presented by the suspended dust was the development of black lung. (Tr. 383). Inspector Franklin justified his S&S determination because it was a violation of the mandatory standard, an illness was reasonably likely to occur, and such illness was likely to be of a serious nature. (Tr. 382). Franklin classified the citation as high negligence because he felt it was obvious and extensive. (Tr. 384).

On cross-examination, Franklin testified that, although there was no specific benchmark measurement for a dangerous amount of dust, it was obvious that abatement procedures were necessary in this instance. (Tr. 386). Franklin testified that he did not know whether the dust he observed was coal dust, rock dust or road dust. (Tr. 388).

Todd Armstrong had eight years total coal mining experience. (Tr. 395). Armstrong testified that he traveled the 4 Main North travelway in a fourteen-man mantrip with Franklin. (Tr. 395-96). Armstrong testified that when he was asked by Franklin to stop the mantrip several times, he did not observe any visible dust. (Tr. 397). Armstrong testified that Franklin picked up dust or dirt to test it for dryness during two of these stops. (Tr. 399-400). Armstrong testified that, upon Franklin expressing his opinion that the dust was too dry and would need to be watered, Armstrong contacted Eric Carter, the assistant mine manager. (Tr. 402-3). Armstrong testified that Carter said he would take care of it. (Tr. 403). Armstrong testified that travelways are usually watered once a day and must be neither too wet nor too dry. (Tr. 404). Armstrong disagreed with the inspector that the travelway was too dry. (Tr. 404-5).

Eric Carter testified that, as part of his job, he coordinates outby work, including watering roadways. (Tr. 415). Carter confirmed receiving the call from Armstrong saying that Franklin wanted the travelway watered, but never indicated whether there was going to be a citation. (Tr. 412-13). Carter testified that preshift examiners would note when a road needed to be watered. (Tr. 416). Upon reviewing the preshift examination for that day, Carter testified that it gave no indication that the 4 Main North needed watering. (Tr. 417).

b. Summary of the Parties' Arguments

The Secretary argues that the citation is "straightforward—the approved ventilation plan requires that the mine apply water to control 'dust' and the mine failed to do so." (Sec'y Br. 31; Ex. G-40 p. 7). The Secretary argues that Franklin's observations concerning the amount of visible dust are virtually undisputed because Black Beauty failed to offer credible testimony to the contrary, and Black Beauty relies solely on unsubstantiated oral denials of the condition by its miners. (Sec'y Br. 31).

The Secretary argues that the finding of high negligence should be upheld because management knew or should have known about the dry and dusty condition of the travelway given that multiple employees, including three foremen, passed through the area not long before Franklin. (Sec'y Br. 31). Finally, the Secretary argues that the S&S designation should be upheld because any amount of coal dust may be damaging to a miner's lungs to some degree and inspectors must err on the side of caution. (Sec'y Br. 31-32).

Black Beauty first argues that the citation should be vacated because no violation occurred. (BB Br. 26). In support of this argument, Black Beauty points out that the ventilation plan does not contain a specific requirement relating to dust along travelways and the plan does not provide any benchmark amount of dust that must be controlled or an increment of time for when water needs to be applied. (BB Br. 26). Black Beauty argues that it complied with the requirement by regularly watering the travelway and that the travelway was not dusty at the time of inspection. (BB Br. 26-27).

Black Beauty argues that, if a violation is found, the S&S designation is inappropriate. (BB Br. 27). Black Beauty argues that Franklin offers no evidence to substantiate his opinion that the amount of dust he found was damaging. (BB Br. 27). Black Beauty argues that even if there were excessive dust, the short period of exposure would be insufficient to give rise to black lung disease. (BB Br. 27-28). Finally, Black Beauty argues that the dust Franklin purported to observe did not constitute "respirable dust" under the statutory definition. (BB Br. 28).

c. Discussion and Analysis

I find that the Secretary established a violation of section 75.370(a)(1). Under a section entitled "Dust Control Provisions" is a subsection entitled "Methods Employed Outby the Working Sections." (Ex. G-40 pp 6-7). The subsection under that heading, entitled "Additional Dust Control Measures Used and Maintained," the plan provides for "calcium chloride, water, or other suitable chemical treatment." *Id.* at 7. Although this provision of the ventilation plan is rather cryptic, it is clear that dust in the outby areas of the mine is required to be controlled by the use of chemicals or water. Roadways would be included within the common meaning of an outby area. The inspector determined that, given the amount of dust he observed, the cited roadway had not been treated sufficiently to control the dust. I credit the inspector's testimony that the roadway was dry and dusty and that it should have been watered more frequently.

I find that the Secretary did not establish that the violation was S&S. Black Beauty waters the roadways daily. Although this was insufficient on November 17, there was no showing that the roadways are consistently dry and dusty or that miners are subjected to dusty conditions on a regular basis. There is also no showing that this dust was respirable dust, as opposed to nuisance dust. Although it is probably unhealthy to be exposed to such dust on daily basis, there was no showing that this type of exposure was a common occurrence at the time. It was not reasonably likely that the hazard contributed to by this violation would result in an injury or illness. The violation was not very serious.

I find that there was no justification for the high negligence determination of the inspector. Although management employees may have passed through the area, the evidence reveals that the dust only became obvious when the inspector ordered the vehicle to be stopped so he could observe the conditions. The violation was not particularly noticeable or serious. Black Beauty's negligence was moderate. A penalty of $5,000 is appropriate for this violation.

C. Docket No. LAKE 2009-698, Gateway Mine

1. Citation Nos. 8415648 and 8415650

On June 19, 2009, Inspector Robert Lee Bretzman issued Citation Nos. 8415648 and 8415650 under section 104(a) of the Mine Act for alleged violations of section 75.517 of the Secretary's safety standards. Citation No. 8415648 alleges:

> The trailing cable supplying 480 Volts to the Lee Norse Roof Bolter, company number 412 was not insulated adequately and fully protected. Two separate places in the cable were damaged; one of the damaged cables had inner conductors that were also damaged. These damaged places were repaired with vinyl plastic tape covering the outer jacket. Both repairs were not made properly.

(Ex. G-57). The inspector found that a fatal injury was reasonably likely to occur, that the violation was S&S, that one person would be affected, and that it was the result of moderate negligence on the part of the operator. Section 75.517 provides that "[p]ower wires and cables . . . shall be insulated adequately and fully protected." 30 C.F.R. § 75.517. The Secretary proposed a civil penalty in the amount of $6,458.

Citation No. 8415650 alleges:

> The trailing cable supplying 480 volts to the Lee Norse Roof Bolter, located on Unit #3, was not adequately protected. Four splices or repairs were inspected; all four splices had vinyl (plastic) electrical tape applied on the inner layer of the repair.

(Ex. G-58). The inspector found that this violation posed the possibility of fatal injury, though he designated it as unlikely to occur and not S&S. The inspector believed the violation to be the result of moderate negligence on the part of the operator. The Secretary proposed a civil penalty in the amount of $1,304.

a. <u>Background Summary of Testimony</u>

Inspector Bretzman has over 30 years of general mine experience, has various educational qualifications relating to mine safety, and has inspected the Gateway Mine at least six times. (Tr. 493-94). On June 19, 2009, Bretzman was accompanied by Inspector Kenneth Benedict and Mr. Kevin Thome, maintenance supervisor, on his regular inspection of Unit 3. (Tr. 495-97). Bretzman testified that the cable at issue in Citation No. 8415648 was improperly repaired through the use of vinyl plastic tape at two locations. (Tr. 497). After the repaired areas were opened up, the inspector discovered that the outer jacket was damaged at both locations and the inner insulated conductors were also damaged at one of these locations. Bretzman explained that the operator should have first removed the outer jacket of the cable before applying any tape and followed the instructions on the cable splice kit. (Tr. 499-500; Ex. G-61). Simply covering a

damaged area with vinyl tape is not sufficient. Black Beauty did not remove any of the outer jacket or follow any of the instructions that came with the cable splice kit. (Tr. 501). Although the tape provided insulation value, it would not seal up the damaged area sufficiently to keep water out. (Tr. 502).

He designated the violation as S&S because the tape used by the operator would not have properly sealed the cable, resulting in a potentially fatal electrocution hazard if the cable were pulled through wet conditions and water were to get into the area where the inner conductors were damaged. (Tr. 502-03). He testified that the water could carry the current to the surface of the cable and that such accidents have occurred at mines. Because of the high amperage, a miner could be fatally injured if he were to receive such an electric shock. The cable was not wet at the time of his inspection. Bretzman explained his designation of moderate negligence by testifying that he believed that the mechanics who repaired the cable did not understand the hazard. (Tr. 505). He admitted that the mining industry has been repairing damaged trailing cables with vinyl tape for years. (Tr. 515).

Inspector Bretzman testified that he returned to the same roof bolter later the same day and examined the trailing cable for a second time. (Tr. 507). He asked the operator to cut open an existing splice in the cable and discovered that there was a layer of vinyl tape under the rubber tape. (Tr. 508). There were four areas where splices were improperly completed in that manner. Inspector Bretzman testified that the mechanics improperly wrapped vinyl tape around the insulated inner conductors. He said that mechanics often do that in case they ever need to cut open the splice to see if there is an electrical fault in the splice. (Tr. 511). The inspector said that it was improper because, by putting vinyl directly on the insulated power conductors, a proper water-proof seal may not be created. *Id.* The splices were not wet.

On cross-examination, Bretzman testified that he frequently orders mine operators to cut open trailing cable splices so he can examine them if he sees something that he does not believe is correct. (Tr. 520). He admitted that the instructions for the cable splice kit permit a layer of vinyl tape to be installed against the inner conductors. (Tr. 523). He further stated, however, that the purpose of placing vinyl tape on the insulated inner conductors is to get them to "lay in there nice and neat so you can [apply the rubber tape] nice and neat." (Tr. 527). His concern was that the mechanic wrapped the vinyl tape up on the tapered ends of the outer jacket. (Tr. 527, 529-30).

The Secretary also called Michael Tite, another coal mine inspector, to testify about these citations. Inspector Tite was not present when the citations were issued and he did not see the cited conditions. He corroborated Inspector Bretzman's testimony by testifying that, in order to correctly make a repair to a damaged cable jacket, the mechanic should remove the entire jacket around the damaged area, taper the ends of the jacket and then follow the taping instructions set forth in the cable splice kit. (Tr. 569). He testified that just wrapping some tape around the damaged area does not meet the safety standard. He relied on section 11.0 of the cable splice kit instructions in giving his testimony. (Tr. 570; Ex. 61 p. 13). These instructions state, under the heading "Repairing Damaged Cable Jacket," "11.1 Remove damaged cable jacket and taper jacket approximately 1" (25mm)". (Ex. 61 p. 13). The instructions go on to describe the other steps necessary to complete the repair.

Inspector Tite testified that simply covering the damaged area with vinyl tape does not sufficiently "vulcanize the [tape] to the outer jacket and will not exclude moisture . . . ." (Tr. 570). He stated that if moisture gets into the damaged area, a miner holding the cable would very likely receive an electric shock, which could be fatal. The circuit breaker for the roof bolter is designed to protect the cable and not people, so a person could receive a lethal shock even though the roof bolter is protected by a breaker. (Tr. 572). He admitted that, if the roof bolter were grounded and the grounding system were working perfectly, a miner would not receive a fatal injury. (Tr. 578). But, if there were many splices in a cable or other less than perfect conditions exist, the grounding system might not adequately protect a miner.

With respect to Citation No. 8415650, Inspector Tite testified that Black Beauty should not have applied vinyl tape as the first layer of tape when splicing the trailing cable. Inspector Tite relied, in part, on a video tape played by the Secretary at the hearing. The video showed rubber splicing tape being applied rather than vinyl tape as the first layer in the splice. He admitted that the instruction allow a "small amount" of vinyl tape to be used to "bind" the insulated power conductors together in section 10.1. (Tr. 574, 584; Ex. G-61 p. 12).

The company called Kevin Thome, maintenance supervisor at the mine, as its first witness. (Tr. 588-89). Thome has approximately 33 years of mining experience. (Tr. 589). Thome was present for the issuance of both citations. (Tr. 590-91). He testified that when the inspector removed the tape from the cable a small cut was visible that was about the size of the end of his little finger. (Tr. 595). The inner conductors were not visible. Inspector Bretzman, ordered that about three inches of the outer jacket be removed around each of the damaged areas. In one location, the insulation around an inner conductor was damaged. This damage would not have been visible without removing the outer jacket. (Tr. 597). Thome testified that a prudent electrician would not use vinyl tape to repair a cable if the insulation on one of the inner conductors were damaged. *Id.* Thome stated that the person repairing a cable is trained on proper procedure but is also allowed a certain amount of discretion in determining when a cable is sufficiently damaged that it needs more than a layer of vinyl tape. (Tr. 607). Prior to the present citation, the Gateway Mine had never received a citation for using vinyl tape when repairing a damaged outer jacket on a trailing cable. (Tr. 606). The area where this roof bolter is used is never wet or muddy. With respect to Citation No. 8415650, Thome testified that it was normal practice to apply vinyl plastic tape to the insulated conductors when splicing a trailing cable. (Tr. 599).

Gary Wilhelm, maintenance manager at the mine, has about 25 years experience working at underground coal mines. (Tr. 482). He testified that one of his duties was to choose which maintenance products should be used at the mine, including splicing kits. (Tr. 612). Wilhelm was also in charge of implementing cable jacket repair techniques. He chose the splicing kit manufactured by 3M because it is reliable and easy to obtain. (Tr. 613). The vinyl tape that is used at the mine is 3M Temflex 1700 Vinyl Electrical Tape that is included in the cable splice kit and is also purchased separately. (Ex. R-60). This tape is rated at 600 volts. Wilhelm testified that Temflex tape is moisture and water resistant when applied in half laps and it binds well to the outer jacket of the cables. (Tr. 615-16; Ex. R-60).

Wilhelm testified that the miners who handle cables are required to wear gloves which provide protection from electrical hazards. (Tr. 617-18). Also, some boots that the miners wear provide similar protection. (Tr. 618). Wilhelm testified that the power center for the cables include a ground-fault circuit interrupter ("GFCI"). (Tr. 620-21, 642). If the grounding system in the cables stops functioning, the breaker is automatically tripped. It is designed to protect people and not just the cable. (Tr. 622). Wilhelm also testified that cables are inspected for damage on a weekly basis. (Tr. 654). He believed that it was not reasonably likely that the conditions cited by Inspector Bretzman would result in any sort of injury. (Tr. 623). With respect to Citation No. 8415650, Wilhelm testified that, when he showed the inspector the splice kit instructions that permitted the use of vinyl tape when constructing a splice, the inspector replied that he did not believe the instructions were correct. (Tr. 624). He testified that he believes, based on conversations with 3M representatives, that the Temflex should be applied as "strain relief between the internal leads and the external jacket." (Tr. 626-27).

Wilhelm testified that the instructions in the splice repair kits recommended the use of Temflex tape when splicing a cable. (Tr. 625-26). Wilhelm said that the 3M kits were MSHA-approved, and that he was not aware of any MSHA guidance rescinding that approval. (Tr. 627-28). Black Beauty played a 3M video which showed the use of vinyl tape inside a splice for strain relief. (Tr. 629; Ex. R-63).

b. Summary of the Parties' Arguments

The Secretary argues that Citation No. 8415648 should be upheld because the observed damage to the cable and the failure to properly repair and adequately insulate this damage violates section 75.517 of the safety standards. (Sec'y Br. 39). The Secretary argues that the inspector's determinations on gravity and S&S should be affirmed because the inspector testified that miners have been shocked in similar circumstances and that the mine should have known to properly repair the cable. (Sec'y Br. 39).

With respect to Citation No. 8415650, the Secretary argues that it is clear that the operator applied the wrong tape as the inner layer of the splice, which violates the safety standard. She maintains that the citation should be affirmed as written by the inspector.

Black Beauty argues that Citation 8415650 should be vacated because no violation of section 75.517 occurred, given that the cable splice kit was approved by MSHA and the miners followed its directions. (BB Br. 39, 41, 43). In the alternate, Black Beauty argues that the citation should be vacated for lack of notice, arguing that a safety standard cannot be what the Secretary meant "but did not adequately express." (Sec'y Br. 43). Black Beauty argues that the inspector's decision to cite the use of Temflex tape for the cable repair in Citation No. 8415648 "amounts to nothing more than enforcement of his personal preferences," not MSHA standards. (BB Br. 44). Black Beauty argues that, if a violation is found, the S&S finding should be deleted and the negligence finding should be modified to "none" because the inspector assumed conditions of wetness and damage to the Temflex tape, neither of which were present on the date of inspection. (BB Br. 44).

c. Discussion and Analysis

Citation No. 8415648

The safety standard at issue is broadly worded to cover a wide range of circumstances. It simply states that "[p]ower wires and cables . . . shall be insulated adequately and fully protected." The Secretary's Program Policy Manual ("PPM") is instructive. It first requires that "damaged insulation on insulated power wires and cables (including trailing cables) and damaged jackets on power cables (including trailing cables) be repaired." (Ex. R-73; V MSHA U.S. Dept. of Labor, *Program Policy Manual*, Part 75 at 66). There is no dispute that Black Beauty repaired the trailing cable where it was cut. The issue is whether it was adequately repaired. The PPM goes on to state:

> Tapes or other materials that are used to form the outer jacket of approved permanent splices may be used to replace damaged areas of outer jackets of trailing cables. Outer jackets shall be replaced in such manner so as to prevent moisture from entering the cable.

Id.

The evidence establishes that the tape Temflex tape used by Black Beauty is water resistant, provides excellent mechanical protection, and is rated for up to 600 volts when it is applied in a half-lapped manner. (Tr. 616, Ex. R-60). This tape is authorized by MSHA to be used when splicing cables as part of the splice kit. Mr. Wilhelm credibly testified that the tape is used for all types of cable repairs and is also used when splicing two trailing cables. Indeed, Inspector Bretzman acknowledged that the electrical tape used by Black Beauty can be part of the top layer of an electrical splice. (Tr. 518). There is no question that the vinyl tape used was properly applied in half lap layers and that it covered the damaged area in the cable completely. The tape had not been damaged since it had been applied. Kevin Thome removed the vinyl tape from the trailing cable at the inspector's request. At one location there was only a small cut in the outer jacket and the insulated inner conductors were not exposed.

The cable splicing kit instructions recommend that a damaged cable jacket be cut away when a cable jacket has sustained significant damage and that the splicing kit be used to repair the damage. (Ex. G-61 p. 13). In addition, Mr. Thome testified that a prudent electrician would not use vinyl tape to repair a cable if the insulation on one of the inner conductors is damaged. (Tr. 597). The 3M splice kit used by Black Beauty has been approved by MSHA. (Tr. 521, 627). The instructions were included in the splice kit. Black Beauty uses an easy-to-apply rule when repairing damaged cable jackets. If the damage appears to be superficial, such as a nick, it carefully wraps the area with Temflex vinyl tape. If the damage is such that the inner insulated conductors may have been damaged, then the damaged area of the cable jacket is removed and repaired as set forth in the cable splice kit's instructions. Given the language of the safety standard, the guidance in the PPM, and the instructions that came with the cable splice kit, I find that such an approach is reasonable and that it does not violate the safety standard if it is

followed.[5] As discussed with respect to the next citation, vinyl tape is one of the types of tape that is "used to form the outer jacket of approved permanent splices." (PPM at 66).

Black Beauty should err on the side of caution, however. When the cited cable was cut open for inspection, the damage in one of the two areas cited by the inspector included damage to the insulation on an inner conductor. In such an instance, I find that simply using vinyl electrical tape to cover the area does not "adequately and fully protect" the area from further mechanical damage and from an electric shock hazard. Although the vinyl tape is moisture-resistant, it does not provide as good a seal as the original jacket or an area where a full splice has been installed. Additional stress on the cable and exposure to moisture can create a situation which creates an electric shock hazard. On this basis, I find that the Secretary established a violation of the safety standard.

I find that the violation was S&S. I credit the testimony of Black Beauty's witnesses as to the dry conditions in the area where the roof bolter operated and as to the GFCI system that is part of the roof bolter. If the grounding system is not working, the circuit breaker will trip, greatly reducing shock hazard. Nevertheless, given that the damaged inner conductor was hidden and unknown to Black Beauty, the hazardous condition would not have been corrected until the trailing cable was replaced. I find that, given the stress that is put on a trailing cable as it is moved and reeled on and off the roof bolter, it was reasonably likely, assuming continued mining operations, that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. The gravity was serious.

I also find that Black Beauty's negligence was low. It has been repairing minor damage to trailing cables by using vinyl electrical tape for years without receiving a citation or even a comment from MSHA to indicate that such a procedure might not always meet the requirements of the safety standard. In this instance, the damage to the insulation on the inner conductor was hidden and would not necessarily have been expected with such a minor cut in the cable jacket. Black Beauty must more carefully examine damaged areas on cable jackets to make sure that insulation on inner conductors has not been damaged before it simply uses vinyl electrical tape to make repairs. A penalty of $4,000 is appropriate.

Citation No. 8415650

Inspector Bretzman instructed Mr. Thome to cut open four splices on the trailing cable on the same roof bolter involved in the previous citation. The splices were neither wet nor damaged when the inspector ordered that they be cut open. In addition, once they were cut open there was no sign of water or other damage to the insulated internal conductors. The inspector issued the citation because vinyl electrical tape had been used inside the splice. Mr. Wilhelm, at a meeting on the surface after the citation was issued, tried to convince the inspector that the instructions

[5] If the Secretary believes that the type of electrical tape used by Black Beauty should not be used to repair nicks or cuts in trailing cables, she must engage in rulemaking to reflect such a change or, at a minimum, amend her PPM to state that vinyl electrical tape cannot be used to repair nicks and small cuts in electric cables.

for the approved 3M splice kit provides for the use of vinyl tape inside the splice. Indeed, the instructions for the 3M Mining Cable Splice Kit 3100 specifically provide for the use of Temflex Vinyl Electrical Tape to bind and secure the underlying insulated conductors when splicing two cables. (Ex. R-61). Vinyl tape is apparently applied to provide strain relief between the insulated internal conductors and the external jacket. After the vinyl tape is applied, the outer jacket is constructed using rubber splicing tape and heavy duty mining tape. *Id.* Inspector Bretzman's only concern with the splices he examined was the fact that the operator applied vinyl electrical tape as the first layer in making the splice. It became apparent during Inspector Bretzman's testimony that, if the vinyl tape had not covered part of the tapered ends of the cable jackets that were being spliced together, he would not have issued the citation. He believed that only a small amount of vinyl tape should have been used and that it should not have extended out onto the tapered ends of the cable jackets at each end.

The evidence demonstrates that the method and materials used by Black Beauty to splice trailing cable did not violate the safety standard. Accordingly, this citation is vacated. Nothing in the safety standard, the 3M cable splice kit instructions, or the PPM can be interpreted to conclude that the splices the inspector examined failed to meet the requirements of section 75.517. The vinyl tape was present to provide strain relief and it was completely covered by the rubber splicing tape and heavy duty mining tape, as described in the cable splice kit instructions. (Ex. G-61, p. 12). There was no showing that the splices constructed by Black Beauty did not completely seal the area inside the splice from moisture. The citation is **VACATED**.

2. Citations Nos. 8414855 and 8414858

On June 17 and 19 respectively, Inspector Kenneth Benedict issued Citation Nos. 8414855 and 8414858 under section 104(a) of the Mine Act. Citation No. 8414855 was issued for a violation of 75.604 of the Secretary's safety standards and alleges:

> The 480 volt AC trailing cable supplying power to the #403 roof bolter located on Unit #3 has 3 permanent splices that are not effectively insulated and sealed so as to exclude moisture. The 3 splices have areas where the insulation has been worn off exposing the inner leads. These splices are close to the bolter and would be sliding on a guide assembly on the bolter that is damaged allowing the cable to slide on the frame of the bolter.

(Ex. G-62). The inspector found that this violation was reasonably likely to result in fatal injury, was S&S, would affect one person, and was the result of moderate negligence on the part of the operator. The Secretary proposed a civil penalty in the amount of $4,689. Section 75.604 provides:

> When permanent splices in trailing cables are made, they shall be:
> (a) Mechanically strong with adequate electrical conductivity and flexibility;
> (b) Effectively insulated and sealed so as to exclude moisture; and
> (c) Vulcanized or otherwise treated with suitable materials to

> provide flame-resistant qualities and good bonding to the outer jacket.
> (d) Made using splice kits accepted or approved by MSHA as flame resistant.

30 C.F.R. § 75.604.

Citation No. 8414858 was issued for an alleged violation of section 75.503 of the Secretary's safety standards and alleges:

> The company #412 roof bolter located on Unit #3 is not being maintained in a permissible condition. (1) There are three bolts that hold the cable reel cage in place that are coming in contact with the 480 volt AC trailing cable. (2) There is an upright bar that the cable wraps around that is not insulated. When tested by a qualified electrician with an ohm meter the bolts and the bar show continuity with the frame of the machine. (3) The cable guide that the cable passes through at the reel compartment has an insulated roller missing allowing the cable to come in contact with the frame of the machine.

(Ex. G-65). The inspector found that this violation was reasonably likely to result in a fatal injury, was S&S, and would affect one person. The inspector believed the violation to be the result of moderate negligence on the part of the operator. Section 75.503 provides that the "operator of each coal mine shall maintain in permissible condition all electric face equipment required . . . to be permissible which is taken into or used inby the last open crosscut of any such mine." 30 C.F.R. § 75.503. The Secretary proposed a civil penalty in the amount of $9,634.

a. <u>Background Summary of Testimony</u>

MSHA Inspector Benedict has close to 39 years mining experience and worked at the Gateway Mine for a few years, under a different operator, before working for MSHA. (Tr. 538). Benedict explained the issuance of Citation No. 8414855 as stemming from his observation that the cables "had quite a bit of abuse" that had exposed the "inner leads . . . damaging the outer jacket of insulation." (Tr. 540). This exposure, he testified, allows moisture to get into the taped area, presenting the hazard of electrocution. (Tr. 540-41). The copper wire in these inner leads was not exposed. (Tr. 557). The damaged areas were close to the reel for the cable on the roof bolter. He issued another citation for a permissibility violation on the same roof bolter. (Tr. 542; Ex. G-77). Benedict testified that Black Beauty's only safety mechanism was the "breakers that are supposed to kick when the cables come in contact with the . . . ground," but that if a miner was any closer to the exposed cable than the breaker, the miner would be electrocuted." (Tr. 544).

Inspector Benedict next explained why he issued Citation No. 8414858. (Tr. 546). He found three bolts in the cable reel that were not insulated and a bar on the cable reel that was not insulated. This citation was issued on the same roof bolter that Inspector Bretzman cited for

improper repairs to a trailing cable, Citation No. 8415648, discussed above. The damaged areas on the trailing cable were close to the reel and he believed that if there were a fault, the current could flow to the frame of the roof bolter and electrocute someone. (Tr. 549). Benedict testified that an Ohmmeter reading showed that there was continuity between three uninsulated bolts and the frame of the roof bolter, which meant that "any bare cable" that touched the bolts would energize the frame of the machine, electrocuting anyone who touched it. (Tr. 548-49). It is not uncommon for a circuit breaker to fail. (Tr. 550).

Inspector Tite testified that the conditions described in the two citations were reasonably likely to cause a fatal injury. (Tr. 574-75). He agreed with Inspector Benedict's S&S determinations. (Tr. 576-78). He admitted that three events would have to occur simultaneously: a portion of the bare copper wire would need to be exposed, the bare wire would need to come in contact with the reel, and a miner would need to be touching the roof bolter. (Tr. 575). He testified that it was reasonably likely that these three events would occur at the same time. (Tr. 585).

Mr. Thome testified that there was no methane present in the areas where the roof bolters were operating. (Tr. 600). He also testified that all employees are required to wear gloves, which provides some protection from electric shock. (Tr. 601). In addition, the cable closest to the reel is not handled by miners as frequently as the middle section of the cable.

Mr. Wilhelm testified that everyone wears gloves in the mine; it is company policy. He further testified as to the GFCI circuits that protect the trailing cables on roof bolters. (Tr. 634). These GFCI are specifically designed to protect people working with the roof bolters and the associated trailing cables. (Tr. 635). It checks the continuity of the grounding system.

b. <u>Summary of the Parties' Arguments</u>

The Secretary argues that Citation No. 8414858 should be upheld because the exposed bolts and bar on the cable reel could have made contact with the improper cable splices and repairs and electrocuted a roof bolter operator. (Sec'y Br. 39-40). The Secretary argues that Citation No. 8414855 should be similarly upheld because the damaged trailing cable could come in contact with the uninsulated parts on the reel and energize the roof bolter, which would reasonably likely cause a fatal shock to a miner operating the roof bolter. (Sec'y Br. 43).

Black Beauty stipulates to the fact of violation for Citation Nos. 8414855 and 8414858, but contests the findings of injury, gravity, severity, and S&S. (Tr. 553). Black Beauty argues that the Secretary failed to establish the reasonable likelihood of fatal injury in Citation No. 8414855, given that the inner conductors were not damaged, the area was dry, and the cited splices were unlikely to be handled by miners. (BB Br. 49). Based on these conditions, and on its assertion that the violation identified by Citation No. 8414858 would have been discovered on the next permissibility examination of the equipment, Black Beauty argues that the a fatal accident was not reasonably likely to occur. (BB Br. 50).

c. Discussion and Analysis

Citation No. 8415655

Black Beauty is only contesting the inspector's gravity and S&S determinations. As stated above, Black Beauty argues that the Secretary failed to establish the reasonable likelihood of a fatal injury given that the inner conductors were not damaged, the area was dry, and the cited splices were unlikely to be handled by miners. The evidence establishes that the insulated inner conductors were dry and were not damaged in any way. It is also clear that miners would rarely handle the cable because it is supported by hangers and the cited portions of the cable were close to the roof bolter. In addition, the circuit was equipped with GFCI protection, which will quickly trip the power in the event of any imbalance in the power.

I find that the violation was serious and that a fatal injury was possible, but that the violation was not S&S. The Secretary did not establish the third element of the *Mathies* S&S test. Redundancy in electrical circuit protection is required in all electrical installations. In this case, the inner conductors were insulated, the area was dry, and the circuit was equipped with GFCI protection. There was no evidence that this ground fault protection system was not functioning properly. Such circuits are specifically designed to protect people from electric shock hazards. While it was possible that someone could receive a shock or even a fatal injury from the conditions described in the citation, such an event was not very likely. A penalty of $4,000 is appropriate.

Citation No. 8415658

The roof bolting machine at issue in this citation is the same one as cited by Inspector Bretzman in Citation Nos. 8415648 and 8415650, discussed above. Although I vacated Citation No. 8415650, I determined that Black Beauty violated section 75.517 in Citation No. 8415648. All three of these citations were issued on the same day.

Black Beauty is only contesting the inspector's gravity and S&S determinations. The Secretary argues that the three exposed bolts on the cable reel could have easily come into contact with the improperly made splices and improperly made repairs on trailing cable. I find that the Secretary established the S&S nature of this citation. As stated above, one of the repairs made with Temflex tape was to an area on the trailing cable where the inner insulated conductors had been damaged. As discussed above, Black Beauty was not aware that one of the inner conductors had been damaged and it was not likely that such damage would have been discovered before the trailing cable was replaced. Citation No. 8415658 adds one more element to the S&S equation. I find that, given the stress put on a trailing cable as it is moved and reeled on and off the roof bolter, it was reasonably likely, assuming continued mining operations, that the hazard contributed by the violation would result in an injury of a reasonably serious nature.

I find that Black Beauty's negligence was moderate. A penalty of $10,000 is appropriate.

3. Citation No. 8414334

On July 8, 2009, Inspector Bobby F. Jones issued Citation No. 8414334 under section 104(a) of the Mine Act for an alleged violation of section 75.400 of the Secretary's safety standards. The citation alleges:

> When inspected the Unit #2—No. 5 belt was observed with accumulations of coal and float coal dust from the No. 5 belt drive located at 96 x-cut to the 130 x-cut. These accumulations ranged from 2 inches to 24 inches in depth and 2 inches to 2 feet in width at numerous locations along both sides.

(Ex. G-68). The inspector found that an injury of lost workdays or restricted duty was possible, though unlikely to occur, that the violation was not S&S, that 18 people could be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $4,329.

a. Background Summary of Testimony

Inspector Jones has worked for MSHA for four years. (Tr. 657). Before that, he worked in the mining industry for 28 years. (Tr. 657). Jones issued the citation for accumulations of coal and float coal dust of varying depths along the belt line, which Jones testified could result in a mine fire. (Tr. 660). He determined that 18 miners would be affected by the violation. He described the unit as a "fishtail" unit with nine miners on each side. *Id.* The mine brings the ventilation up an entry and it is split to supply air to two faces. In such a configuration, the left and right side have their own ventilation so "they can run two units on one belt." (Tr. 661). He analogized the hazard to a house fire. if there were ten people in the house at the time, they would all be affected by the fire. He determined that 18 people would be affected because the miners from both sides would tend to gather at the regulator. (Tr. 665). The mantrips and SCSR's are at that location.

Bruce Waldman, Safety Manager at the mine, has 33 years of experience working at underground mines, and has been a safety manager for the past 10 years. (Tr. 474). He testified that the CO sensors are monitored "24/7" by a security guard. (Tr. 669). Waldman testified that the people who check the CO monitors are also equipped with monitors that detect methane, oxygen, and CO. (Tr. 671). There was no methane in the area at the time the citation was issued. Waldman testified that the miners are aware of the location of the primary escapeway and they would meet at that location. (Tr. 676-77). On the date the citation was issued, the feeder was at crosscut 157. (Tr. 679). The belt is ventilated with neutral air, which is directed by check curtains and stoppings to the return. (Tr. 680-81; Ex. R-70, p. 13). This configuration prevents any contaminants in the belt air, including smoke, from entering the working sections. Belt air does not ventilate the face. Due to the air pressure and the fact that the isolation curtains were fully intact, it would be impossible for smoke from the belt entry to travel up into where the miners were working. (Tr. 682). Waldman disagreed that 18 people would be affected because check curtains would keep air that passed over the cited area away from both working units. *Id.*. At most, the examiner and another miner in the neutral air would be affected. *Id.* He admitted

that if the intake stopping lines went out, the smoke could get into the working section. (Tr. 687).

b. Summary of the Parties' Arguments

The Secretary argues that, because the escape map is kept at the work bench where belt air flows, all miners would have to come into contact with the smoke on their way to the escape map. (Sec'y Br. 45). The Secretary argues that both nine-miner crews would be affected by exposure to smoke if a fire were to occur. (Sec'y Br. 45).

Black Beauty argues that only one person, an examiner, would be affected if a fire were to occur, not 18 miners. (BB Br. 37). In support of this argument, Black Beauty points to the location of the miners and quotes from an MSHA Handbook, which instructs inspectors to "enter the . . . number of persons who could or would be affected if the anticipated event occurred." (BB Br. 36).

c. Discussion and Analysis

Based on the evidence, I find that only one or two miners would have been affected by the cited conditions in the event of smoke or fire. I credit the evidence presented by Mr. Waldman on this issue. The No. 5 belt leads to Unit No. 2, which includes two different mining crews of nine miners each. There was no methane in the area. The cited belt is ventilated with neutral air which exhausts to the secondary escapeway. The evidence establishes that the miners gather near the power center in the intake air. Although in a worst case scenario all of the miners could be affected, it was not particularly likely. In all other respects the citation is affirmed. A penalty if $4,000 is appropriate.

D. Docket No. LAKE 2009-608, Gateway Mine

1. Citation No. 4269996

On June 1, 2009, Inspector James Dean Rusher issued Citation No. 4269996 under section 104(a) of the Mine Act for an alleged violation of section 75.400 of the Secretary's safety standards. The citation alleges:

> There is an accumulation of combustible material in the form of spilled hydraulic oil that is mixed with loose coal fines and coal dust. This material was found on both the left and right boom, front of the main frame and hydraulic pump compartment in depths up to about 1/4" to 3/8". This machine was energized and in use in the No. 3 unit, in the No. 9 entry at tag No. 84+00, MMU 002-0.

(Ex. G-54). The machine cited was the No. 403 roof bolter. (Tr. 455, 484). The inspector found that an injury was reasonably likely to occur, resulting in lost workdays or restricted duty, that a violation was S&S, that two people would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $5,961.

a. Background Summary of Testimony

Inspector Rusher has been with MSHA for 33 years, the majority of which he worked as an inspector. (Tr. 450). Prior to MSHA, Rusher worked in the mining industry for 12 to 13 years. (Tr. 450).

Inspector Rusher testified that he marked the violation as reasonably likely because the hydraulic oil mixed with coal dust and coal fines would be even more combustible than oil in isolation because coal will burn at a lower temperature. (Tr. 457-58). Rusher testified that there were several ignition sources in the area, including spontaneous combustion due to heat and lack of air movement, the friction of the bearings from the pump motors, electrical conduits, and sparks flying from the drill holes of the auger installation. (Tr. 458). Rusher then related both his firsthand experience of a spark causing an ignition in a similar situation and reports of similar accidents resulting from such conditions. (Tr. 459-60). Rusher stated that an accident would likely result in lost work days or restricted duty because the miners could have been burned and would have inhaled smoke. (Tr. 461-62). Rusher designated moderate negligence because the other equipment "was reasonably clean." (Tr. 464).

Bruce Waldman accompanied Rusher on his June 1, 2009 inspection of Unit 3. (Tr. 476). Based on his review of the onshift examination report, Waldman testified that no methane was found in the active section where Unit 3 was mining. (Tr. 479; Ex. R-58). No permissibility citations were issued. (Tr. 481). The equipment was warm, but not hot.

Gary Wilhelm, maintenance manager at the mine, testified that he had never seen the surface temperature of the roof bolter higher than 100 to 150 degrees Fahrenheit. (Tr. 485). The hydraulic oil used at the mine has a flashpoint of 392 degrees Fahrenheit. (Tr. 485-86; Ex. R-53). A running motor on the roof bolter would not be an ignition source. The roof bolter is equipped with a fire suppression system. (Tr. 488). Welding would not be performed on the roof bolter until it was moved to an outby area and it was cleaned of oil. *Id.*

b. Summary of the Parties' Arguments

The Secretary argues that the accumulations were obvious and substantial. (Sec'y Br. 36). Given that the roof bolter machine was operating when Rusher discovered the condition, management placed an obviously dangerous piece of equipment into active use. (Sec'y Br. 36). Numerous ignition sources contribute to the Secretary's argument that the violation could result in an ignition causing serious injury. (Sec'y Br. 36).

Black Beauty stipulates to the fact of violation, the number of persons affected, and the negligence designation. (Tr. 655). Black Beauty argues that, because the S&S finding is "not supported by the facts," it should be deleted. (BB Br. 32). Black Beauty argues that the absence of methane, and the presence of a fire suppression system and a methane monitor show that the occurrence of an injury was unlikely. (BB Br. 32-33). Finally, Black Beauty argues that Rusher's "vague recollection" of an occasion of a fire and his "speculative ignition sources" fail to establish any condition that would cause a reasonable possibility of ignition. (BB Br. 33).

c. Discussion and Analysis

I find that the Secretary did not establish that this violation was S&S. I credit the testimony of Mr. Waldman and Mr. Wilhelm on this issue. It was unlikely that any welding would occur, at least not until the roof bolter was cleaned. I find that there were no ignition sources that were reasonably likely to create a fire or smoke. Heat from the engine was unlikely to ignite the hydraulic oil, even with the presence of coal dust on the roof bolter. *See, generally, Highland Mining Co.,* 30 FMSHRC 1097, 1100 (Nov. 2008) (ALJ). The third element of the *Mathies* S&S test was not established. It was not reasonably likely that the hazard contributed to by the violation would have resulted in an event in which there was an injury. The violation was only moderately serious. A penalty of $5,000 is appropriate.

III. SETTLED CITATIONS

A number of the citations at issue in these cases settled, either prior to the hearing or at the conclusion of the hearing. By order dated January 25, 2011, I approved the settlement of Citation No. 6678961 in Docket No. LAKE 2009-598, Citation Nos. 4269991, 4269992, 42269993, 4269995, and 4270000 in Docket No. 2009-608, and Citation Nos. 8414856 and 6675880 in Docket No. LAKE 2009-698. The settlement amount of $35,392 was ordered to be paid for those citations.

At the hearing, the parties agreed to settle three additional citations. The parties agreed to reduce the proposed penalty for Citation No. 6678958 in Docket No. LAKE 2009-598 from $2,901 to $2,176 and modify the citation to delete the S&S designation. The parties agreed to reduce the proposed penalty for Citation No. 6678965 in Docket No. LAKE 2009-684 from $1,203 to $902 and modify the citation to delete that S&S designation. The parties agreed to reduce the proposed penalty for Citation No. 8415654 in Docket No. LAKE 2009-698 from $7,578 to $7,199 and reduce the gravity from fatal to permanently disabling. The total amended penalty for these settled citations is $10,277. I have considered the representations and documentation submitted and I conclude that this proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

IV. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have reviewed the Assessed Violation History Reports, which are not disputed. (Ex. G-71). At all pertinent times, Black Beauty Coal Company was a large mine operator and the controlling company, Peabody Energy Corporation, was also a large operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Black Beauty's ability to continue in business. (Joint Stip. ¶ 12). The gravity and negligence findings are set forth above.

IV. ORDER

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

Citation/Order No.	30 C.F.R. §	Penalty
LAKE 2009-304		
6669341	75.400	$8,000.00
6681297	75.402	5,000.00
6681046	75.400	10,000.00
6682243	75.362(b)	Vacated
LAKE 2009-305		
6482240	75.400	30,000.00
6682241	75.202(a)	11,000.00
6682242	75.400	15,000.00
6682048	75.370(a)(1)	5,000.00
6682067	75.202(b)	12,000.00
LAKE 2009-608		
4269996	75.400	5,000.00
LAKE 2009-698		
8415648	75.517	4,000.00
8415650	75.517	Vacated
8414855	75.604	4,000.00
8414858	75.503	10,000.00
8414334	75.400	4,000.00

SUBTOTAL	123,000.00
CITATIONS SETTLED AT HEARING	$10,277.00
TOTAL PENALTY	$133,277.00

For the reasons set forth above, the citations are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above. Black Beauty Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of $133,277.00 within 40 days of the date of this decision.[1] The contest proceeding is **DISMISSED**.

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

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RWM

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, N.W., Suite 9500

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March 27, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2010-367
Petitioner	:	A.C. 44-06685-217167-02
	:	PAW PAW MINE
v.	:	
	:	Docket No. VA 2010-368
BANNER BLUE COAL COMPANY	:	A.C. 44-07046-217172
Respondent	:	LOCUST THICKET MINE

DECISION

Appearances: Robert E. Motsenbocker, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner

Robert Huston Beatty, Jr., Esq., Dinsmore and Shohl, Morgantown, West Virginia, for the Respondent

Before: Judge Koutras

STATEMENT OF THE CASE

These civil penalty proceedings pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802, et seq. (2000), hereinafter the "Mine Act," concern three Section 104(a) significant and substantial (S&S) citations served on the respondent on February 28, 2010, and March 2, 2010, and one Section 104(a) non-S&S citation served on the respondent on February 25, 2010. A hearing was held on September 8, 2011, in Abingdon, Virginia, and the parties appeared and participated fully therein. The parties filed post-hearing briefs, and I have considered their arguments in the course of this decision.

The Alleged Violations

Docket No. VA 2010-367

Section 104(a) S&S Citation No. 8171200, March 2, 2010, 30 C.F.R. § 75.512, states as follows (Ex. P-5):

> The cathead provided for the Stamler Feeder Co. No. 1 was not being maintained to assure safe operating conditions. The cathead was not latched down to prevent the cathead from being accidentally pulled out under a load. The cable from the cathead extended 3.5 feet into the travelway along the section power center. This creates a tripping hazard that could pull the cathead out while energized. Miners travel this area to the circuit breaker for the feeder and other circuit breakers at the section power center.

Section 104(a) S&S Citation No. 8171201, March 2, 2010, 30 C.F.R. § 75.512, states as follows (Ex. P-6):

> The cathead provided for the Cogar Feeder Co. No. 2 was not being maintained to assure safe operating conditions. The cathead was not latched down to prevent the cathead from being accidentally pulled out under a load. The cable from the cathead extended 3 feet into the travelway along the section power center. This creates a tripping hazard that could pull the cathead out while energized. Miners travel this area to the circuit breaker for the feeder and other circuit breakers at the section power center.

Section 104(a) S&S Citation No. 8171198, February 28, 2010, 30 C.F.R. § 75.503, states as follows (Ex. P-8):

> The 482 S&S scoop Co. No. 2 being used on the 002 MMU was not being maintained in permissible condition. The receptacle on the batteries had the insulator missing from the brass connector on the inside of the receptacle. This condition exposes miners to the hazards of electrical shock or burns when plugging the batteries up for use or for charging.

Docket No. VA 2010-368

Section 104(a) non-S&S Citation No. 8167700, March 25, 2010, 30 C.F.R. § 75.360(a)(l), states as follows (Ex. P-23):

> On 02-25-2010 the roadways and travelways where employees were scheduled to work and travel had not been completely examined, by a certified pre-shift examiner, within the established 8 hour interval. The evening shift interval established at this mine is between 20:00 and 23:00 each day the employees normally work. The scheduled pre-shift examination for this shift was not completed until 00:35 the following day (02-26-2010). The evening shift employees were brought outside through the intake

> entry following the evening shift examiner. He made an examination of the area for them, even though it was after the established 8 hour interval. The owl shift employees were held outside until all the required examinations where they work or travel had been completed.

MSHA Inspector William Ratliff testified that he has served as an inspector for four years and eight months and has a respirable dust sampling certificate that enables him to sample dust and conduct regular mine inspections. He identified the Section 104(a) Citation No. 8171200 that he issued on March 2, 2010, and explained his MSHA training at the mine academy and his 24 years in underground mining as a shop foreman, mine foreman, and weekly examiner (Tr. 6-10; Ex. 5).

Mr. Ratliff identified Exhibits 6 and 7, as his notes relate to the citation, as well as a subsequent citation issued during his inspections on the evening and midnight shifts. He stated that the respondent's representative, Randy Sutherland traveled with him during his inspection (Tr. 11-16).

Mr. Ratliff stated that he issued the citation after finding that the cathead, which is an electrical plug used to power the Stamler Feeder used to crush coal and feed it onto a conveyor belt, was not latched to prevent it from inadvertently or accidentally coming out under a load. He explained that the cathead is the male part, similar to a plug that plugs into a receptacle, which is the female part (Tr. 16-17).

Mr. Ratliff stated that the cathead latch consisted of thin metal that was worn and "was not catching the way it should." He confirmed that Mr. Sutherland observed the condition and voiced no objection. Mr. Ratliff believed that the condition would reasonably likely cause an injury because the unlatched cathead could cause the cable that extended into the travelway to be pulled out to the side while under load if someone tripped over it, and anyone pulling on the cable to the side could cause the cathead to rock out of the receptacle and expose the person pulling the cathead from the receptacle to severe burns or shock from an electrical arc (Tr. 19-21).

Based on the aforesaid findings, Mr. Ratliff determined that the violation was S&S and that the condition of the latch was a violation of Section 75.512, which requires electrical equipment to be maintained in a safe operating condition. He believed that one person traveling alongside the cathead could possibly trip and be exposed to the hazard. He confirmed that the violation was terminated in 15 minutes after the latch was repaired by bending it so that it could latch down the cathead (Tr. 23-26, Ex. 5).

Mr. Ratliff testified that he issued a second Section 104(a) citation, Citation No. 8171201, on the same day after finding the cathead on the Cogar Feeder number 2 that was in close proximity to the first cited cathead location. It was not latched down and could be pulled out sideways under a load. He stated that the latch condition was identical to the other cited cathead and the latch was not engaged because it was worn (Tr. 27-29; Ex. 6).

Mr. Ratliff stated that the cathead power cable was located three feet into the same travelway as the prior violation and that a miner walking down the travelway would be exposed to the same severe hazardous injuries that were reasonably likely to occur by tripping over the cable. He confirmed that one person traveling along the power center would be exposed to injury (Tr. 29-31).

Mr. Ratliff determined that the violation was a result of moderate negligence because the catheads are plugged in by the section electrician who observes them at that time as well as during his weekly inspections. He confirmed that his notes reflect that the conditions of both cited catheads existed for less than one day. The violation was terminated after the latch was bent, so that it would catch the lip on the cathead, similar to the first citation (Tr. 31-35; Ex. 7).

Mr. Ratliff stated that electricians and equipment operators, resetting circuit breakers, would be using the travelways, but conceded that the majority of the circuit breakers on the power box are on the opposite side of the area where the catheads are plugged in (Tr. 96-97).[1]

On cross-examination, Mr. Ratliff stated that he has eleven years of experience as an underground mechanic, and is a State of Virginia certified maintenance foreman. He confirmed that none of his previous 24 years of mining experience was as a maintenance person, and that he is not a certified electrician, and is not certified to work on catheads, power cables, or to do other electrical work (Tr. 37-39).

Mr. Ratliff stated that his statement that Mr. Sutherland did not object to his findings is not reflected in his inspector's notes, and that his findings that the latches on both cited catheads contained "thin metal and were worn" are not in his notes. He agreed that the conditions of the latches contributed to the failure of the latches to latch. He indicated that this is an important factor in upholding the citations; however, he did not record the conditions in his notes (Tr. 44, 49).

Mr. Ratliff believed that the latch on the bottom of the receptacle was the only method to prevent the cathead from coming out of the receptacle. Referring to the cathead photograph, he identified a steel bar going through the top of the receptacle box latch below the black square portions of the photograph. He agreed that in order to plug the cathead into the receptacle it has to first fit under the steel bar that he believed is used for leverage in order to allow the device at the top of the cathead to go under, and wraparound, and snap down on the bottom of the cathead. Mr. Ratliff did not believe that the steel bar in the receptacle would prevent it from being pulled out and the unsecured latch would not prevent the cathead from being pulled out. He explained that the steel bar "is used for leverage to pull the latch down to latch." He further stated, that "the latch is what actually holds the cathead in place" (Tr. 52-54, 57).

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[1] Note: For demonstration purposes and cross examination, Respondent's counsel produced a cathead that is identical to the two that were cited by Inspector Ratliff, and a receptacle that is similar, and photographs of each device (Exs. R-10, R-l 1), and they were admitted for the record without objection (Tr. 34-36, 55).

Mr. Ratliff stated that the latches on both cited catheads were repaired by bending the metal so that the catheads could be latched as stated in the citations, but was not reflected in his notes. He confirmed that the latches needed to be replaced (Tr. 60-62). With respect to the Stamler Cathead, his notes reflect that injury would be likely due to the condition of the latch and not a tripping hazard (Tr. 67).

Mr. Ratliff stated that there was a 3 ½ foot travelway between the Stamler Cathead power center and the mine rib, and a 3 foot travelway between the Cogar Cathead area and the rib. He agreed that the widest travelway would more likely be used by miners, but he did not know whether the travelways on the other side of the two he described would be wider or narrower. He confirmed that an electrician would normally be the only person using the travelways where the catheads were located (Tr. 69-71).

Mr. Ratliff could not recall the seam height during his inspection, but confirmed that they could not stand up and had to wear knee pads, and he spent most of his time "duck walking" and could not walk normally. The travelways would be alongside the power center and he did not issue any citation for obstruction of the travelway because there was no obstruction, but someone could trip over the cables. Although car operators checking their circuit breakers could use the travelways, they could also use the back side of the power center to the receptacles and would not have to pass the area where the catheads were located (Tr. 73-77).

Randy Sutherland, testified that he is a certified first class mine foreman and was a certified electrician when the citations were issued by inspector Ratliff, and since 2005 has served as an outby foreman performing maintenance of the belt lines, preshifting, and changing rollers. When he served as a certified electrician he had occasion to plug and unplug catheads similar to the one cited in this case. During belt maintenance, he de-energized the belt power systems that contain plugged-in catheads, and moved and locked them periodically (Tr. 100-103).

Mr. Sutherland confirmed that he traveled with Mr. Ratliff during his regular inspection and that he was served with both citations at 3:10 and 3:15, on the owl shift. He stated that he was familiar with the cited catheads and has plugged and unplugged them when there is a power move as the section is advancing. The Cogar Feeder was the only feeder that was in use on the production belt line at that time. The Stamler Feeder was a spare one that was available if something happened to the cogar (Tr. 105-107).

Mr. Sutherland stated that the Stamler Feeder was located on the left side of the power box looking inby toward the working faces, and it was "powered up." He explained that there are more power breakers where the majority of the catheads plug in on the right side where they are located in order to provide wider travelways, and that there was approximately six feet of walking space between the power center and coal rib on the right side where most of the miners travel. He confirmed that both of the catheads were plugged into the left side of the power box, and the cables from the power box to the feeders were lying on the ground at the left rib location going inby, looking toward the face (Tr. 108-112).

Mr. Sutherland explained and demonstrated that after de-energizing the Stamler Feeder Cathead, Mr. Ratliff "just lifted it up, and that's the only way it will come out." He confirmed that Mr. Ratliff made no attempt to grab the cathead without lifting it up and pulling it to the right and to the left. He stated that based on his experience with the catheads, one could not have been moved to the right or to the left without being lifted first and disconnected, and he has never seen one disconnected to the right or left without first being lifted up. After it is lifted up, it can be moved right or left (Tr. 116-117).

Mr. Sutherland stated that an electrician would be the only one on the left side of the power box where the cathead cables are plugged for trouble shooting any feeder or continuous miner problems that are powered at that location. No other equipment was plugged in at that time, and the shuttle cars are plugged in at the opposite right side of the catheads in question (Tr. 119).

Mr. Sutherland stated that the section seam height was 44 inches and no one was able to walk straight up. He stated that he used kneepads and that he and Mr. Ratliff crawled and "duck walked" while bent over, and that the miners around these power centers got around by similar methods. An electrician who came into the feeder areas to plug in or unplug the catheads would have to crawl into the space in order to do so (Tr. 121).

Mr. Sutherland believed that in the event the lower cathead latch was unlatched it would not come out and be disconnected if it was hit from the left or right, because of a latch at the top that is secured by a steel bar demonstrated in photographic Exhibits R-10 and R-l 1 (Tr. 121-122).

Mr. Sutherland stated that both of the catheads were not latched down before Mr. Ratliff cited them and he could not recall anyone making any adjustments to the latches. He stated that he re-energized the breakers after Mr. Ratliff checked them and latched both of the catheads with the bottom latches, and he never used any channel locks to bend either of the latches. He stated that electrician, Mike Clevenger was present while he set the breakers, pushed the latches and closed them, and neither he nor Mr. Clevenger made any adjustments to the bottom latches in any manner. He further stated that the citations were abated when he latched both catheads down (Tr. 122-126).

On cross-examination, Mr. Sutherland stated that the purpose of a latching system is to prevent the cathead from being pulled out, and he did not believe there was any danger in pulling a cathead out under a load because it cannot cause an arc and he has never seen this happen (Tr. 131).

In response to bench questions, Mr. Sutherland stated that it would be stupid for anyone to pull out an energized cathead, and that if it were not latched, anyone could inadvertently pull it out without first de-energizing it. However, he explained that the cathead monitoring system will de-energize it if anyone pulled it out, and that if anyone tripped over a cable and it came out, the cathead would be disconnected and de-energized (Tr. 131-132).

Eddie Taylor, maintenance superintendent at the time Citations 8171200 and 8177206 were issued, testified that the cathead and receptacle used for courtroom demonstration were the same type as the one on the feeder box and he explained the circuits, ground monitors, and the cathead connection procedures (Tr. 138-142).

Mr. Taylor stated that the term "cathead" is a slang term for a male receptacle plug (Tr. 139). Utilizing the demonstration cathead, he stated that it has two latching mechanism devices consisting of a solid steel bar at the top, and a latching device at the bottom and he demonstrated how they operate to secure the cathead after the plugs and receptacle are mated. He explained that the cathead has to be raised up and slid under the top bar and then pushed down and engaged into the bottom spring loaded latch that was cited by the inspector (Tr. 143-144).

Mr. Taylor stated that one purpose of the top steel bar is to provide leverage to facilitate the mating of the receptacle plugs, and that a second purpose is to "make the latching mechanism at the bottom work properly" (Tr. 145). He stated that the bottom latch alone would not sufficiently latch the receptacle without the top bar, and that the bottom latch "first locks it in place where it cannot move" (Tr. 145).

Mr. Taylor explained that the first step for unplugging the cathead is to de-energize the power and release the bottom latch by pulling it up to clear the bottom ground monitor pins, which are unplugged as the receptacle is raised. As it is raised, the ground monitor pins are pulled out and the receptacle power is de-energized (Tr. 146-147).

Mr. Taylor did not believe it was possible to unplug the cathead from the receptacle by kicking the power cable lying on the ground as long as the steel bar is securely in place by the meshing of the lugs and latches that hold it tightly in place. In the event the cable plug was to "kick out," the ground monitor would de-energize the power. He confirmed that the ground monitoring system is inspected by an electrical inspector weekly pursuant to Virginia state law and monthly by MSHA (Tr. 149-150).

MSHA Inspector William Ratliff testified that he issued Citation No. 8171198, for a violation of mandatory safety standard Section 75.503, after finding that the insulator of the scoop battery receptacle was missing. The insulator is located on the inside of the receptacle and is intended to prevent the positive and negative parts of the battery from touching and causing "extreme arc and fire." The cited standard requires equipment to be maintained in a permissible condition (Ex. P-8; Tr. 157-159).

Mr. Ratliff stated that electrician David Smith and section foreman Terry Stiltner traveled with him and after pointing out the missing insulator to Mr. Smith, he did not disagree. Mr. Ratliff believed the missing insulator presented an electrical shock or burn hazard, and he stated this in his notes (Ex. P-9). He also believed it was reasonably likely that this would occur if anyone unplugging the battery came in contact with the negative and positive conductors without an insulator (Tr. 159-161).

Mr. Ratliff believed the cited condition would have existed for at least one week because it takes an extended period of time to damage an insulator, and a weekly examination would have detected the condition because once the battery plugs are removed from the receptacle anyone could observe the insulator inside the receptacle. He confirmed that the citation was terminated after the receptacle was replaced (Tr. 164).

On cross-examination, Mr. Ratliff stated that his notes reflected that the missing insulator was located at the left side of the scoop operator's position, and he identified photograph Exhibit R-13, as the same type of receptacle that he cited and pointed out the location of the missing insulator (Tr. 165-169).

Mr. Ratliff stated that the insulator "had been damaged to the point that it was missing." When asked to explain the type of damage, he replied, "I did not see an insulator." He confirmed he never performed any electrical work on a scoop battery insulator, receptacle, or plugs (Tr. 170-171).

Mr. Ratliff confirmed that his experience as a mechanic did not include performing any electrical work and that his belief that an insulator prevents the negative and positive portions of the insulator from coming together is based on his mechanical experience. Although his notes reflect that the insulator was missing and damaged, he assumed that it was missing because it may be damaged (Tr. 171-173). Referring to photographic Exhibit R-13, of the receptacle, Mr. Ratliff identified the negative as the outer portion, or far ring surrounding the insulator, and the positive as the smaller inside ring (Tr. 174).

Mr. Ratliff stated that his notes reflect that the cited condition existed for more than one day, and he based his conclusion on his experience as a scoop operator. His notes do not reflect that he reviewed the permissibility records. Also, he did not know when the last scoop permissibility examination was conducted. He confirmed that he terminated the citation four days after he issued it during his next inspection (Tr. 182-184). He stated that the scoop receptacle was removed and replaced and he was not present when this was done. He confirmed that when he inspected the scoop, it was parked and the power circuit breaker was taken out by the scoop operator (Tr. 188-189).

Electrician David Smith testified that citation No. 8171198 was served on him by Inspector Ratliff. He stated that Mr. Ratliff informed him that the insulator for the 482 scoop battery receptacle was missing from the brass connector inside the receptacle. The scoop was used on the day shift, but it was idle and parked with the pump motor shut off when it was inspected. However, the scoop was energized because the breaker was on (Tr. 199-201).

Mr. Smith confirmed that he was familiar with the scoop receptacle insulator and that after Mr. Ratliff informed him he would conduct a scoop permissibility inspection, he decided to take company electricians, Eugene Keene and Earl Steel, with them. After the catheads were disconnected, Mr. Ratliff looked into the scoop battery receptacle area with his flash light and informed him that the insulator was broken (Tr. 203-204).

Mr. Smith stated that he instructed Mr. Keene to replace the receptacle and to bring the one cited by Mr. Ratliff to the surface. Mr. Smith identified Exhibit R-13, as a photograph of the cited receptacle that was removed from the scoop and he confirmed that the receptacle used for demonstration purposes at the hearing was the same one shown in the photograph. He identified it because of its damaged dust covered bell cap (Tr. 208-209).

Mr. Smith identified a statement signed by Mr. Keene and Mr. Steele on February 28, 2010, stating that the receptacle that they removed from the cited scoop, after a replacement was installed, did not have a missing insulator (Ex. R-l 5). Mr. Smith stated that he prepared the statement because the insulator was not broken or missing and he intended to contest the violation. After viewing photographic Exhibit R-l 3, petitioner's counsel agreed that the insulator was not missing (Tr. 210-216).

Eddie Taylor testified that he was the Paw-Paw mine maintenance superintendent when Citation No. 8171198 was issued. He was familiar with the cited 482 scoop and has performed work on battery receptacles. He identified photographic Exhibit R-l4, as a mating plug for the scoop receptacle and he explained the orientation of the plugs, their functions, and the connection process (Tr. 221-226).

Referring to the photographic exhibit and the inside of the receptacle, Mr. Taylor identified three circular rings. He stated that the outer ring is the positive plate, the inside ring is the negative potential, and the "brownish area" between the two as the insulator between the positive and negative potentials (Tr. 226). He stated that Mr. Ratliff's identification of the insulator outer ring as the negative polarity is erroneous. He explained that the inner ring is the negative, the outer ring is the positive, and that the insulator protects the two polarities from coming together (Tr. 228-229).

Mr. Taylor stated that the insulator is held in place by a resin compound that provides additional insulation and that it cannot be removed intact unless it was damaged. Based on his electrician and maintenance experience, he has never seen any insulator plugs come completely out or missing. Although he was not present when the cited receptacle was removed, it was his opinion that the receptacle, he examined at the hearing, was permissible and serviceable (Tr. 231-232).

On cross-examination, Mr. Taylor stated that an insulator is intended to prevent the scoop from shorting out in the event of an arc if the negative and positive polarities came together. He confirmed that the receptacle has no identifying part or serial number associated with any particular scoop (Tr. 233-234).

On re-direct examination, Mr. Taylor stated that he was aware of arcing caused by poorly connected receptacle plugs, but was unaware of a broken insulator creating an arc. He observed no evidence of any arcing on the receptacle in question, and if the insulator was missing, it would be highly unlikely that the male and female plugs could create enough of an arc to create a burn hazard (Tr. 236).

MSHA Inspector Donald Hale testified that he has 29 years of mining experience and has served as an inspector for four years. He confirmed that he issued Citation No. 8167700 on February 25, 2010, after arriving at the mine and reviewing the mine record books on the surface and finding no record entry that the required preshift examination for Mr. Prater's section had been called out or recorded in the books (Tr. 240-245).

Mr. Hale stated that the preshift inspection should have been made between 8:00 p.m. and 11:00 p.m., three hours before the scheduled shift. The surface crew informed him that the inspection had not been called out and needed to be reported before 11:00 p.m., before the incoming owl shift was prepared to go underground. Mr. Hale stated that the surface person, responsible for receiving and recording the called out inspection, confirmed that it had not been done (Tr. 147-249).

Mr. Hale stated that the owl shift had not gone underground and that part of the second shift worked more than eight hours and was still underground. Mr. Hale explained that since the preshift for that crew had to be done before the end of their shift, and because they worked one hour over the eight-hour interval at 11:00 p.m., that the shift had to be preshifted. He stated that he held the incoming owl shift on the surface until all of the required examinations were completed (Tr. 250).

Mr. Hale stated that the violation was not significant or substantial because the failure to conduct and record the pre-shift inspection was unlikely to cause an injury or illness. He determined that the violation was the result of high negligence because Mr. Prater knew that the preshift inspection had to be made and he failed to do so. Mr. Hale stated that he terminated the violation the following day after the second shift and owl shift examiners completed their required pre-shift examinations (Tr. 250-251).

Mr. Hale stated that he discussed the matter with Mr. Prater after he came to the surface on February 25, 2011, and informed him that he would issue a violation and serve it on him at that time. Mr. Hale stated that Mr. Prater informed him that he did not have time to conduct the preshift examination, stated "you caught me," and offered no other excuses. Mr. Hale stated that 15 miners were underground even though the pre-shift inspection had not been made (Tr. 252-254).

On cross-examination, Mr. Hale discussed his note taking procedures, but failed to explain why he prevented the owl shift from going underground, and keeping them on the surface until the required inspections were made. Also, he failed to reference discussions with mine management regarding prior citations. (Tr. 256-261).

Mr. Hale confirmed that Mr. Prater conducted a preshift examination on his section. He explained that Mr. Prater was also obligated and required to conduct a preshift examination of the areas on his section where miners work or travel and that he was responsible to preshift the area from the mine face area all the way to the surface because he was the foreman in charge (Tr. 261-263).

Mr. Hale confirmed that it was standard mine practice to have someone preshift the outby areas, but it was different in this case because no one was available to inspect the outby areas and Mr. Prater should have been aware of this. He conceded that Mr. Prater may not have been aware that no one else was available (Tr. 264).

Mr. Hale explained that if Mr. Prater completed his preshift examination, the remaining areas to preshift would be the travelway and the belt lines, areas normally done by someone in an outby area. He confirmed that Mr. Prater conducted his examination as he was bringing his men off the section and he believed that his examination was complete and adequate and he did not cite him for an inadequate preshift examination (Tr. 265).

David Jackson testified that he is a certified mine foreman and served as the third shift crew boss on the evening the citation was issued. He stated that he arrived at the mine at approximately 10:30 p.m., to prepare to go underground. He informed his crew at the time that they could not go underground because the outby areas had not been completed (Tr. 305).

Mr. Jackson stated that shortly after 11:00 p.m. he observed Mr. Prater coming to the surface, but did not speak to him and had no conversations with him prior to that time. Mr. Jackson confirmed that he completed his preshift examination at 12:30 a.m., and called it out to outside person Sam Campton. The area he examined was safe and clear, and the area examined by Mr. Ramsey was also reported (Tr. 309-312).

DISCUSSION AND FINDINGS AND CONCLUSIONS

Docket No. VA-2010-367

Citations 8171200 and 8171201, relate to two catheads (plugs) that were unlatched in violation of 30 C.F.R. § 75.512. The cited regulatory standard states as follows:

> All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

The petitioner argues that the cited Stamler Feeder Cathead was not latched to prevent it from coming apart while under a load because the latch was worn. With respect to the Cogar Feeder Cathead, the petitioner asserts that it was not latched down and could be decoupled sideways while energized because the latch was worn and bent and would not catch on the cathead.

The respondent concedes that the two cited unlatched equipment catheads violated Section 75.512. Under the circumstances, the violations **ARE AFFIRMED**. However, the respondent denies that the cited conditions were S&S.

Significant and Substantial

An 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." 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. FMSHRC*, 52 F.3d 133,135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y*, 861 F.2d 99, 103-104 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *US Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-1575 (Jury 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is

significant and substantial must be based on the particular facts surrounding the violation. *Texasguff, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The respondent concedes that the bottom latches on both cited catheads were not fully latched down and secured. I conclude and find they were not properly maintained as required by Section 75212, and the fact of violation satisfies the first prong of the Mathies test.

With respect to the second *Mathies* prong requiring a discrete safety hazard contributed to by the violation, I conclude and find that the unexpected pulling out of a cable cathead under load while it is energized and not fully and securely latched down by the latching mechanisms, intended for that purpose by a person tripping over the cable, presented a discrete electrical safety hazard. I also find that the cited conditions existed for one day in one case, and less then one day in the other case, and that both violations were abated and terminated within 15 minutes in each case.

The third and fourth *Mathies* prongs require a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury, and a reasonable likelihood that the injury will be of a reasonably serious nature. The focus of the inspector's concern was that someone on the travelway would trip over the cathead cable causing it to disconnect from the power receptacle under load and exposing someone in the proximity of the cathead power source to electrical shock or burn hazards. He issued no tripping hazard citation.

The inspector testified that the catheads extended 3 feet and 3 ½ feet into the travelway (Tr. 69). Although he could not recall the height of the coal seam, I credit the testimony of Mr. Sutherland, that it was approximately 44 inches. They both confirmed that no one could walk the area standing erect, and the inspector confirmed that he spent most of his time bent over and "duck walking" (Tr. 72-73). Mr. Sutherland testified credibly that he had to crawl and use knee pads in that area and that an electrician would be crawling on his hands and knees to access the cathead circuit breakers (Tr. 120-121).

Given the low coal seam height where the cable catheads were located, and the credible testimony establishing that anyone in the travelway would be crawling or "duck walking", I conclude and find that it was highly unlikely and improbable that anyone in that position would trip over the cable with such force as someone walking upright and in full stride, so as to disconnect a rather large and heavy cathead, as demonstrated in the court room, from its power receptacle and contribute to any hazard exposure.

The inspector's citations reflect that one person would be exposed to the hazard, and he identified that person as the one tripping over the cable (Tr. 20-21, 24). He confirmed that anyone would have to be near, or next to, the catheads when they disconnected, and that anyone three feet away who may trip and disconnect the cable would not be exposed to any hazard (Tr. 79).

There is a dispute as to whether or not the completely unlatched cathead latches would readily result in a disconnection if they were dislodged side-to-side by anyone tripping over the cable. The inspector, who is not an electrician, believed that the correct procedure to disconnect the cathead after it is de-energized, is to lift it straight up, rather than down, so that the circuit breaker monitor lead can come out (Tr. 51).

Mine foreman electrician Sutherland and maintenance superintendent Taylor believed that the catheads were secured at the top by a steel bar holding the top latch in place (Tr. 121-122). They believed the catheads had to be lifted upward in order to disconnect them and de-energize the circuits. Mr. Sutherland testified that after de-energizing the cathead, the inspector had to first lift it up and out, and made no attempt to move it from right to left, and Mr. Sutherland has never, in his experience, observed a cathead disconnected to the right or left without first lifting it up (Tr. 116-117).

I credit the testimony of Mr. Taylor and Mr. Sutherland that in order for a heavy cathead that is latched only at the top with a steel bar that holds it securely in place to be disconnected, it must be pulled directly out and upward, similar to the procedure described by the inspector when he disconnected the cathead after he de-energized it by lifting it up, and apparently made no attempt to freely move it from side-to-side, with the unlatched bottom latch to confirm that it could be done. On the facts of this case, and based on my findings and conclusions concerning the prevailing conditions, I conclude and find that it was highly unlikely the catheads could have been readily dislodged from side to side by anyone tripping over a cable.

With regard to the likelihood of any serious injury exposure, the inspector agreed that a disconnected de-energized cable and cathead lying on the ground would be inert and not energized under load, and would not present an electrical hazard to anyone (Tr. 22, 79). Although the cable may present a tripping hazard, he did not issue any tripping citation.

The inspector speculated that anyone "could be close, could be a distance" to the cathead power source (Tr. 97). Although he testified that electricians or equipment operators resetting circuit breakers would be in the area, he conceded that the cathead feeder circuits were located at an opposite side area and that an electrician would be the only likely person there, and he did not know how close anyone would be to the cathead power source if anyone were to trip over the cable (Tr. 96-97).

I find no credible evidence establishing that anyone was close to or would have been close to the cathead power sources and exposed to any injury in the unlikely event the catheads were unexpectedly disconnected by the unlikely tripping event. I find it unlikely that the one person who would be at the cable in the travelway, and who may have caused the cathead disconnections, would at the same time be the person exposed to any hazard or injury.

After careful consideration of all of the arguments and evidence presented in this case, I cannot conclude that the third and fourth prongs required by the *Mathies* test have been established by a preponderance of the credible evidence. In view of the prevailing conditions when the inspector observed the unlatched catheads and in the context of continuing mining

operations, I find it highly unlikely and improbable that the partially unlatched catheads would have contributed to, or resulted in, any injury of a reasonably serious nature. I find no credible evidence of the presence of any confluence of factors that could have come together and resulted in any serious injuries. Accordingly, the significant and substantial (S&S) violations **ARE MODIFIED** to non-significant and substantial (Non-S&S) violations.

Negligence

The inspector determined that both citations were the result of moderate negligence because an electrician was the person who plugged and unplugged the catheads when they worked on them and he was responsible for inspecting them on a weekly basis (Tr. 32-33).

The inspector confirmed that the unlatched condition on both catheads had existed for one day or less, but nonetheless believed that the electrician should have known about the conditions (Tr. 33). Although he could not recall when the last weekly examination was done or how long the conditions had existed unnoticed, given the condition of the latches, I find it improbable that they occurred right before the inspector issued the violations. Accordingly, in the absence of any considerable mitigating circumstances warranting the reduction of the inspector's negligence determinations from moderate to low, I agree with his determinations that the respondent knew or should have known about the violative conditions and his moderate negligence findings **ARE AFFIRMED**.

Citation No. 8171198

This citation concerns an alleged violation of mandatory permissibility safety standard 30 C.F.R. § 75.503, which states as follows:

> The operator of each coal mine shall maintain in permissible condition all electric face equipment required by Sections 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

The petitioner argues that the citation is supportable because the inspector discovered a missing insulator inside the cited scoop battery receptacle which would allow the battery plug to contact the power lead (contact between positive and negative terminals), creating a hazard of extreme arcing resulting in shock or burn injuries.

The respondent maintains that the conditions cited by the inspector in support of the citation did not exist, and that the petitioner has failed to prove a violation. Respondent asserts that the cited battery receptacle was in permissible condition, and assuming that a violation is established, Respondent concludes that it was not S&S.

The respondent relies on the fact that three electricians, David Smith, Eugene Keene, and Earl Steele, observed the receptacle and its insulator at the time it was cited by the inspector and concluded that the insulator was intact and not missing. Mr. Smith felt strongly that the

insulation was not missing and instructed Mr. Keene and Mr. Steele to replace the receptacle in order to terminate the violation and to retain the cited one and bring it to his office.

A photograph of the cited receptacle that was removed and given to Mr. Smith (Ex. R-13), as well as the actual receptacle, was produced at the hearing and was authenticated by Mr. Smith (Tr. 208-211). A February 28, 2010, statement signed by Mr. Keene and Mr. Steele and given to Mr. Smith confirming that the cited receptacle they removed and brought to the surface was the one they replaced for the inspector and that the insulator was not missing was received in evidence over the hearsay objection of petitioner's counsel (Tr. 211). I re-affirm my bench ruling accepting the statement as relevant evidence, noting that hearsay is acceptable pursuant to the Commission's rules. Further, I take note of the fact that after viewing the photograph of the cited receptacle, Petitioner's counsel agreed that the insulator was not missing (Tr. 216).

The respondent asserts that the inspector's testimony should be viewed by considering his lack of experience with electrical components reflected by his misidentification of the location of the insulator's positive and negative components, and by reversing the actual polarity during his explanatory testimony concerning the function of the insulator (Tr. 175, 224-228).

The inspector's citation, on its face, states that the receptacle insulator was missing. His inspection notes, in relative part, states that the insulator was *missing and damaged* (Ex. G-9 at 5-6). The inspector testified that the insulator was "damaged to the point that it was missing", that he "did not see an insulator", and in explaining his contradictory notes that the insulator was missing and damaged, he stated that he assumed that it was missing because it may be damaged (Tr. 171-173). He confirmed that he did not review the permissibility records, did not know when the last permissibility examination was conducted and conceded that he never performed any electrical work on a scoop battery receptacle or insulator (Tr. 170-171).

After careful consideration of all of the testimony and evidence adduced with respect to this citation, I conclude and find that the petitioner has failed to establish by a preponderance of the credible evidence that the cited scoop was not maintained in permissible condition in violation of Section 75.503, because of the alleged missing battery receptacle insulator.

I conclude and find that the inspector's testimony in support of his contention that the insulator was missing to be contradictory, particularly in light of his equivocal testimony that it was either damaged or may have been damaged, and his contradictory notes that it was missing as well as damaged. I find no credible evidence to support either conclusion regarding the condition of the insulator.

I find that the inspector's lack of electrical expertise, as demonstrated by his mistaken identification and explanation of the critical components of the insulator, is less than credible than the testimony of maintenance superintendent, Eddie Taylor, whose testimony regarding the correct insulator polarity and electrical expertise, and his observation and conclusion that the receptacle he observed at the hearing was permissible and serviceable (Tr. 231-232).

I am further persuaded by the consistent and credible testimony of Mr. Smith regarding the condition of the insulator and his credible efforts in securing the chain of custody with respect to the cited receptacle to support what he believed was an invalid citation, as well as the petitioner's counsel's agreement during the hearing that the receptacle insulator was not missing.

During his cross-examination of Mr. Eddie Taylor, Petitioner's counsel inferred that the lack of any insulator identification markings cannot establish any direct connection with any particular scoop (Tr. 233). Mr. Taylor agreed, and explained that an insulator usually has a part number, but is not serialized, and he can actually examine it (Tr. 233-234). Counsel did not pursue the question further.

I conclude and find that the absence of any insulator identification markings does not *ipso facto* rebut the respondent's credible evidence that the receptacle cited by the inspector, with the insulator intact, was the same one produced at the hearing.

Based on all of the aforementioned findings and conclusions, Citation No. 8171198, **IS VACATED**, and the proposed civil penalty assessment **IS DENIED**.

Docket No.VA 2010-368

Citation No. 8167700, concerns the failure of the section foreman to conduct the required preshift examination as required by 30 C.F.R. § 75.360(a)(l), which requires that it be made within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground.

In addition to their post-hearing briefs, counsels for the parties presented oral arguments on the record with respect to this citation (Tr. 280-301). Respondent conceded that the failure of section foreman, Danny Prater to complete the required preshift examination until an hour and thirty-five minutes after it was required to be completed, constituted a violation of 30 C.F.R. § 75.360(a)(l). *See also*, (Resp't Post-hearing Br. at 29).

The focus of the respondent's contest is on the inspector's "high" negligence finding and his failure to consider any mitigating circumstances. In support of its request to reduce the negligence level of the non-S&S citation from high to low, Respondent cites the language found in the petitioner's civil penalty assessment criteria found at 30 C.F.R. § 100.3, Table X, where the justification for a high negligence finding is based on the fact that "the operator knew or should have known of the violative condition or practice, *and there are no mitigating circumstances*" (emphasis supplied). Respondent further relies on the language found at 30 C.F.R. § 100.3(d), which states that mitigating circumstances "may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices."

Respondent asserts that the most important circumstance in this case is crew chief David Jackson's decision to order his men not to go underground and to remain on the surface until he completed his preshift examination, and that he did so in order to protect his crew from any

possible hazardous conditions. Respondent concludes that Mr. Jackson's action serves as a mitigating circumstance justifying a reduced negligence finding.

Respondent further points out that section foreman, Prater completed his preshift examination on the way out of the mine in order to ensure safe passage for his crew while returning to the surface, while at the same time, Mr. Jackson and his electrician were heading into the mine to examine the remaining areas. Since mine personnel were made aware of a possible violation and worked promptly to fix the problem, Respondent concludes that these actions should also be considered a mitigating circumstance (Tr. 288-297; Resp't Post-hearing Br. at 29).

The petitioner acknowledges the fact that the respondent has conceded the fact of a violation which resulted from section foreman Prater's failure to timely complete his preshift examination, and that the inspector's examination of the mine records establishes that the required preshift was not completed and reported as required.

Petitioner's counsel argued that while it is true that Mr. Jackson's crew was on the surface preparing to go underground and were prevented from doing so, foreman Prater's 15-man crew was still underground and exposed to an area that had not been preshifted. Counsel agreed that even though Mr. Prater conducted an examination as he traveled to the surface, the fact remains that his crew worked for approximately two hours beyond 11:00 p.m., without being preshifted (Tr. 283-286).

Petitioner's counsel further argued that Mr. Prater's efforts to protect his crew by conducting an examination on his way out of the mine to the surface, in advance of his crew coming out, is totally unconnected to the fact that the violation was issued for his failure to preshift the section when that citation was issued (Tr. 299-300).

The inspector believed that a mitigating circumstance for the failure of Mr. Prater to conduct his examination ''would be a reasonable excuse for not doing so" when the violation actually occurred. He did not believe the actions by Mr. Prater and Mr. Jackson mitigated the violation because the circumstances prompting the issuance of the violation concerned Mr. Prater's crew that was still underground when the required preshift examination was in fact not made (Tr. 301).

I take note of the inspector's credible and unrebutted testimony that when he discussed the matter with Mr. Prater after he exited the mine, Mr. Prater admitted that he did not complete his examination and stated "I have not had time to get it completed," and that "you caught me," and that no further excuses were offered (Tr. 252-253).

After careful consideration of the arguments advanced by the parties, I conclude and find the petitioner has the better part of the argument and the respondent's position is rejected. The respondent's reliance on the petitioner's civil penalty assessment formula and guidelines, found in Part 100, of Title 30, Code of Federal Regulations, proposing recommended penalty

assessments do not control a judge's discretion after hearing a case *de novo*, and rendering a decision on the merits.

I accept the petitioner's arguments that the mitigating circumstances suggested by the respondent are not related to the violative conditions that prevailed at the time of the initial inspection that prompted the inspector to issue the citation. I reject the respondent's arguments that the actions of Mr. Jackson and Mr. Prater, after-the-fact with respect to their efforts to insure the safety of the miners preparing to enter and leave the mine, are acceptable and reasonable mitigating circumstances warranting a lower negligence finding.

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The fact remains that 15 members of Mr. Prater's crew were still underground when the initial preshift examination was not completed and Mr. Prater's actions, after-the-fact, to complete the examination on his way out of the mine, well after the time that it should have been completed, were expected or required, and should not excuse or reward him for his failure to complete the required preshift, particularly in view of his admissions that he had no time to complete the examination. With regard to Mr. Jackson, while one can expect nothing less from a responsible crew chief, I cannot conclude that it mitigates the negligence of the foreman responsible for the initial violative condition.

Based on the foregoing, the citation **IS AFFIRMED**. Further, the respondent's request to lower the negligence **IS DENIED**, and the high negligence determination by the inspector **IS AFFIRMED**. The inspector's non-S&S determination, which is not contested, **IS AFFIRMED**.

History of Prior Violations

The petitioner presented no additional information regarding the respondent's history of prior violations other than Exhibit A attached to its petition for assessment of civil penalties which reflects seven prior citations of 30 C.F.R. § 75.512, and no prior violations of 30 C.F.R. 30 § 75.360(a)(l). However, no further information was presented with respect to the violations, and I cannot conclude that the respondent's violation history warrants any additional increases in the penalties that are assessed for the violations that have been affirmed.

Good Faith Compliance

The parties stipulated that the respondent timely contested the violations, and I conclude and find that it abated the cited conditions in good faith.

Gravity

Citations Nos. 8171200, 817201, and 8167700, have been affirmed as non-S&S citations, and I consider them to be non-serious violations.

Negligence

Based on the aforesaid findings and conclusions, Citation Nos. 8172200 and 8171201, were the result of moderate negligence by the respondent (Docket No. VA 2010-367). Citation No. 8167700 was the result of high negligence by the respondent (Docket No. VA-2010-368).

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Remain in Business

Based on the stipulated mine production of approximately 187,780 tons of coal in 2009, and 185,016 tons in 2010, I conclude and find that the respondent is a small operator. The parties stipulated that payment of the proposed civil penalty assessments will not adversely affect the respondent's ability to remain in business.

Proposed Settlements of Remaining Violations Docket No. VA 2010-367

The parties filed a motion for approval of a proposed settlement of the following two remaining Section 104(a) S&S violations and one non-S&S violation in this docket.

Citation No.	30 C.F.R. Section	Assessment	Settlement
8171430	75.1103-1(b)	$745.00	$334.00
8171205	75.410(a)(1)	$3,405.00	$460.00
8171206	75.1606(a)	$3,405.00	$460.00
		Total Settlement $1,254.00	

The parties filed a motion for approval of a proposed settlement of the following five remaining Section 104(a) S&S violations and one non-S&S violation in this docket.

Citation No.	30 C.F.R. Section	Assessment	Settlement
8167694	77.205	$1,203.00	$540.00
8167696	75.1103-1(b)	$634.00	$285.00
8167697	75.220(a)(1)	$1,412.00	$634.00
8167698	75.400	$1,530.00	$687.00
8173815	77.410(a)(1)	$362.00	$300.00
8173818	77.410(a)(1)	$807.00	$362.00
		Total Settlement $2,808.00	

In support of the proposed settlements and amended civil penalty assessments, the petitioner recognizes there are legitimate factual and legal disputes with respect to the level of negligence and the severity of injuries associated with the alleged violations. The petitioner concludes that the settlement compromises are consistent with her enforcement responsibility, are in the public interest, and will further the intent and purpose of the Mine Act.

Upon consideration of the motions and supporting representations presented by the parties, I conclude and find that the petitioner has reviewed and considered the factual evidence surrounding the alleged violations, and has advanced reasonable mitigating circumstances in support of the proposed settlements, including the six statutory civil penalty criteria set forth in Section 110(i) of the Mine Act. Accordingly, I conclude and find that the proposed settlements are reasonable and in the public interest. The motions **ARE GRANTED**, and the settlements **ARE APPROVED**.

It is **ORDERED** that Citation No. 8171430, be **MODIFIED** to reduce the degree of negligence from moderate to low; that Citation Nos. 8171205 and 8171206 be **MODIFIED** to reduce the degree of negligence from moderate to low, and reduce the severity of injury from fatal to lost workdays/restricted duty. The respondent is **ORDERED** to pay a civil penalty assessment of $1,254.00, for these violations within thirty (30) days of the date of this decision (Docket No. VA 2010-367).

It is **ORDERED** that Citation Nos. 8167694, 8167696, 8167697, 8167698, and 8173818, be **MODIFIED** to reduce the degree of negligence from moderate to low. The respondent is **ORDERED** to pay a civil penalty assessment of $2,808.00, for these violations within thirty (30) days of the date of this decision (Docket No. VA 2010-368).

It is **ORDERED** that Citation Nos. 8172200 and 8171201, are **AFFIRMED** and **MODIFIED** to Section 104(a) non-S&S moderate negligence violations. The respondent is **ORDERED** to pay a civil penalty assessment of $500.00 for each violation ($1,000.00 total) within 30 days of the date of this decision (Docket No. VA 2010-367).

It is **ORDERED** that Section 104(a) S&S Citation No. 8171198, February 28, 2010, 30 C.F.R. § 75.503, is **VACATED**, and the proposed civil penalty assessment is **DENIED** (Docket No. VA 2010-367).

It is **ORDERED** that Citation No. 8167700 be **AFFIRMED** as issued as a Section 104(a) non-S&S high negligence violation. The respondent is **ORDERED** to pay a civil penalty assessment of $2,106.00 for this violation within 30 days of the date of this decision (Docket No. VA 2010-368).

The respondent is **ORDERED** to pay a total civil penalty assessment of $7,168.00, in satisfaction of all of the aforesaid violations issued in these matters. Payment shall be made within thirty (30) days of the date of this decision, and remitted by check made payable to U.S. Department of Labor/MSHA, P.O. Box 790390, St. Louis, MO 63179-0390. Upon receipt of payment, these matters are **DISMISSED**.

_/s/ George A. Koutras____
George A. Koutras
Administrative Law Judge

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/kss

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 30, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2010-401-M
Petitioner	:	A.C. No. 08-01194-207900
	:	
v.	:	
	:	
FLORIDA ROCK INDUSTRIES, INC.,	:	MINE: Tampa Sales Yard
Respondent	:	

DECISION

Appearances: Jonathan Hoffmeister, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, on behalf of the Secretary of Labor;
William Doran, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, D.C., for Florida Rock Industries, Incorporated.

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 Florida Rock Industries, Incorporated, is liable for two violations of the Secretary's Mandatory Safety and Health Standards for Surface Metal and Nonmetal Mines,[1] and proposes the imposition of civil penalties in the total amount of $9,800.00. A hearing was held in Tampa, Florida, and the parties filed post-hearing briefs following receipt of the transcript. For the reasons that follow, I find that Florida Rock committed the violations, but that they were not significant and substantial or the result of Florida Rock's unwarrantable failure, and impose civil penalties in the total amount of $750.00.

Findings of Fact - Conclusions of Law

At all times pertinent to the violations at issue, Florida Rock operated a facility referred to as the Tampa Sales Yard, on the shores of Tampa Bay, in Hillsborough County, Florida. Crushed stone was shipped to the facility from a quarry at Calica, near Playa del Carmen, Mexico. The stone was either sold directly to customers, or washed to Department of Transportation specifications and stockpiled for sale. Eight employees worked at the site, from 6:00 a.m. to 3:00 p.m., five days a week. Occasionally, when a ship was being unloaded, work

[1] 30 C.F.R. Part 56.

was performed at night and on weekends. In 2009, when the subject inspection occurred, ships arrived every month or two.

On October 14, 2009, Billy Ray Handshoe, an MSHA inspector, inspected the facility. He issued a number of citations and orders. Florida Rock timely contested the civil penalties assessed for the two violations at issue in this proceeding, each of which is discussed below.

Citation No. 6596602

Citation No. 6596602 was issued at 10:00 a.m., on October 14, 2009, pursuant to section 104(d)(1) of the Act.[2] It alleges a violation of 30 C.F.R. § 56.20003(a), which requires that "Workplaces, passageways, store-rooms, and service rooms shall be kept clean and orderly." The violation was described in the "Condition and Practice" section of the citation as follows:

> The metal storage building, located at the shop area, was not being kept clean and orderly. Approx. 20-40 one-inch metal poles were located in the middle of the floor/walkway. This condition exposed miners to a trip/slip fall hazard. Footprints were observed on the metal poles. This metal storage shed has been accessed frequently during the past week by management. The mine supervisor admitted that . . . his footprints [were] on the metal

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[2] Section 104(d)(1) of the Act provides:

> (d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1).

> poles. Management are the only persons that carry a key to the storage shed. The mine recently had a cook out and used the poles for tent supports. During the discussions, it was discovered that the yard manager, Hershel Burton, was the person that placed the poles in the middle of the floor. Manager Burton and Supervisor Mendoza engaged in aggravated conduct constituting more than ordinary negligence in that manager Burton created the hazard and supervisor Mendoza was aware of the hazzard and both failed to correct the slip/trip hazard. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-1.

Handshoe determined that it was reasonably likely that the violation would result in an injury requiring lost work days or restricted duty, that the violation was significant and substantial ("S&S"), that one person was affected, that the operator's negligence was high, and that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard. A civil penalty, in the amount of $2,700.00, was assessed for this violation.

The Violation

The metal storage building referred to in the citation was a Conex shipping container that had been placed on blocks and was located on a corner of the property, in the vicinity of an oil containment facility and a repair shop. The container is depicted in photographs introduced by Florida Rock. Ex. R-1, R-2. It was long and narrow, with doors on one end. Shelves had been constructed along the sides of the container, leaving a four-foot wide walkway down the center. There was no illumination in the container. It was used to store sales receipts and related paperwork, samples of material, and supplies used for community services events, including chairs, tables, and a tent.

Florida Rock hosted approximately three community service events each year. It sponsored two Ocean Conservancy International Coastal Cleanup events, and one elementary school class trip designed to educate students on geology and similar matters. A tent was set up for such functions, and a barbeque lunch was supplied. An Ocean Conservancy event was held on Saturday, October 3, 2009. Following the lunch, and departure of the guests, Respondent's employees dismantled the tent, and returned it, along with tables and chairs, to the storage container. When almost everyone had departed, the only items remaining were approximately 30-35, one-inch-diameter, steel tent poles.

Hershel Burton, Respondent's yard manager, had them placed in his truck, and told the others to leave and enjoy the rest of the day. He took the poles to the storage container, intending to return them to the shelves where they were typically stored. However, volunteers who had returned other items to the container had placed things where the poles were normally kept. In light of the hour, and the fact that he would need some help to move some of the items, Burton decided to place the poles on the floor of the container. He carried the poles into the

container a few at a time, and laid them in the four-foot-wide aisle between the shelves. He took care to assure that they were "pinned down," which he described as being "pinned between two shelves." Tr. 136. He intended to have employees rearrange the items in the storage shed the following Monday, which would have cleared the floor. However, he forgot about the poles, and they remained as he had originally placed them until the day of the inspection, eleven days later. Pictures of the inside of the storage container depicting the poles on the floor, and its condition after they had been properly stored, were introduced into evidence. Ex. G-3, R-4.

On October 13, the day before the inspection, a scale clerk asked Saul Mendoza, the yard supervisor, to retrieve an empty file storage box from the container. Mendoza unlocked the door and saw the poles on the floor. He testified that he entered the container, grabbed a hold of a shelf, found secure footing on the poles, took two steps and retrieved the folded-up box with one hand, departed the container, locked it and left. Tr. 213-17, 236-38. Because it was approximately 3:30 p.m., the end of the work day, he intended to have the poles properly stored the next day. However, two employees called in sick that day, and he had to perform some of their duties. Tr. 213-14.

On October 14, Handshoe inspected the Tampa Sales Yard, accompanied by Mendoza. When they arrived at the storage container, Mendoza unlocked it and Handshoe observed the poles lying on the floor. He believed that the poles presented a serious slip and fall hazard to anyone who might attempt to traverse them. They were uneven, appeared unstable, and the steel surface of the poles would be very slippery for anyone whose boots were wet or oily. Tr. 19-20, 25-28. He considered that a person walking through the nearby oil containment area or the shop might get oily residue on his boot. Wet conditions, e.g., rain, would also create an enhanced potential for a slip and fall injury. Handshoe also determined that persons entering the storage container would be carrying something in or out, and their hands would be occupied. Their sight lines would be compromised and, unable to brace themselves, their chances of falling and suffering a serious injury would be high. Tr. 24-26, 28-29.

Handshoe saw what appeared to be footprints on the poles, and asked who had accessed the container. Mendoza replied that he had entered the container the previous day. Handshoe testified that there were multiple footprints on the pipes, reflecting several different sole configurations. Tr. 17, 22, 27, 82-84. He pointed out two prints in a photograph as being different, and indicated that others were smudged. Tr. 82-84; Ex. G-3. Based upon the footprints, he concluded that the container had been accessed "frequently." Tr. 54.

Florida Rock argues that the floor of the container was clean and orderly, because the poles were carefully stacked in a secure manner. However, Mendoza's testimony contradicted that argument, and confirmed that the pipes presented a hazard. While he stated that the condition was not hazardous, his actions in bracing himself when he walked on the pipes while retrieving the file box evidenced that he perceived that the surface was unstable. Tr. 236-37. He further explained that "the way the poles were sitting in there, they would slide across the ground. The way the poles were shifting, that's why I stepped on it lightly at first." Tr. 237-38. Burton, too, indicated that the poles were not entirely secure, stating that "they were pretty stable and relatively heavy. They wasn't moving around too bad." Tr. 111-12. Pictures of the

condition confirm Handshoe's assessment that the poles presented an uneven and unstable surface that posed a hazard to persons attempting to use the walkway. I find that the passageway in the storeroom had not been kept clean and orderly. Consequently, the condition violated the standard.

Significant and Substantial

The Commission recently reviewed and reaffirmed the familiar *Mathies*[3] framework for determining whether a violation is S&S. As explained 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).
>
> . . . .
> . . . .

[3] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 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 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. The remaining elements of the S&S determination are in dispute. Florida Rock argues that the violation did not contribute to a discrete safety hazard, reiterating its position that the poles presented a stable walking surface. In finding that the condition violated the standard, that position was rejected. It is, therefore, necessary to identify the discrete safety hazard contributed to by the violation and assess whether it was reasonably likely to result in a reasonably serious injury.

In *Cumberland*, the Commission emphasized that the "clear identification" of a discrete safety hazard contributed to by a violation is a critical step in the S&S analysis, because it is the hazard contributed to, rather than the violation, that must be found reasonably likely to result in a reasonably serious injury. 33 FMSHRC at 2368. Florida Rock did not advance a specific definition of the safety hazard contributed to by the violation. The Secretary argues that since the container had been accessed and was open to access, the violation contributed to a discrete safety hazard identified as "miners accessing the storeroom would have to navigate the poles covering the floor, with the attendant increased risk of injuries due to a slip or trip fall."[4] Sec'y. Rp. Br. at 4.

The Secretary's definition of the hazard incorporates her arguments on the violation issue regarding access to the container, i.e., that at least two persons, Mendoza and Burton, had entered the storage container and traversed the poles, and that the container was generally accessible by anyone at the yard through use of a third key available in the office. As noted below, I find that exposure to the hazard was far more limited. I find that the discrete safety hazard contributed to by the violation was an uneven and unstable surface in the storeroom passageway that presented a risk of slipping or tripping to any miner attempting to traverse it.

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[4] The Secretary argues that no discrete safety hazard would have been contributed to by the violation only if it had been established that "no one had or ever would access the storeroom with the poles on the floor." Sec'y. Rp. Br. at 3-4.

In general, the likelihood of a safety hazard resulting in a reasonably serious injury is largely dependent upon the nature of the hazard and the degree of miners' exposure to it. A highly dangerous condition, e.g., an open hole in a walkway elevated 20 or more feet in the air, could present a high probability of a fatal or permanently disabling injury if even one miner could have encountered it. A more benign condition, like the poles here at issue, might be traversed safely by a miner taking appropriate precautions, as Mendoza did. It might produce a relatively minor injury to one less cautious, or it could result in a sprain or fracture. For such conditions, the likelihood of the hazard resulting in a reasonably serious injury would largely be a function of the number of persons encountering it. If it existed in a well traveled area for as much as one shift, such that numerous miners could be expected to encounter it, a reasonably serious injury could almost certainly be expected. On the other hand, if only one or two miners might have been exposed to the condition, the likelihood of the hazard resulting in a reasonably serious injury would be substantially lower.

The violative condition did not pose a high degree of danger to miners. While the pipes presented an uneven surface, and were somewhat unstable, the condition was not so severe that a slip, trip or fall would have been the inevitable result of a person encountering it. Moreover, if a slip or fall occurred, any injury suffered could have been minor. Handshoe's assessment of the hazard presented by the pipes was based on his visual observation. He did not attempt to step on them or otherwise test the stability of the pipes. Tr. 19-20, 25, 79. Mendoza took two steps on the pipes while steadying himself by holding onto shelving, and did not find them highly unstable. Tr. 217, 237-39. He did not slip or trip and did not suffer an injury.

The violative condition existed from October 3 to October 14, eleven days. It may have continued for some unspecified period of time if Mendoza, like Burton, failed to have it corrected. Mendoza testified that he discovered the condition late on October 13, and that his intention to have it corrected the next day was thwarted by the unexpected absence of two employees. Neither the time that he discovered it, nor the absence of the employees, were verified by independent evidence, e.g., time sheets for October 14. While it is possible that the task of correcting the hazard had faded from Mendoza's consciousness, in the absence of evidence to the contrary, I credit his testimony and find that the hazard would have been corrected within a day or two of October 14.

Mendoza actually stepped on the pipes, exposing himself to the hazard. Burton placed the pipes in the container on October 3, but it is unclear whether he walked on them when he did so. The Secretary argues that Burton walked on the poles when he made repeated trips into the container. However, Burton testified that he walked the poles to the container, carrying three-to-four at a time, held them in the middle and set them down. Tr. 110-11. He was not asked exactly how he placed the poles on the floor, and was not asked whether he stepped on poles when he did so. He may well have elected to slide the poles length-wise into the space between the shelves. Handshoe stated that Burton told him that he "threw" the poles into the container. Tr. 63. I cannot find, by a preponderance of the evidence, that Burton stepped on the poles when he placed them into the container. There is no direct evidence that he did so, and it seems unlikely that he would have, because as poles were placed on the floor, partially filling the space

between the shelves, they would have been able to roll freely and would have been substantially more unstable than when they filled the four-foot space.

There is no credible evidence that anyone, aside from Mendoza, entered or would have entered the container after the poles had been placed there. The door to the container was locked. Burton and Mendoza each had a key. Both testified that no one asked for a key to the container between October 3 and the inspection, and that, to their knowledge, no one other than Mendoza had entered, or had any reason to enter, the container during that time period. Tr. 116, 137, 215.

The Secretary maintains that the container was accessible to any of the yard employees, because there was a third key kept in the office that was available to anyone. Mendoza and Burton testified that the key to the container lock that had been kept in the office also fit a lock on a gate at another sales yard, and that the office key was frequently borrowed by persons needing access to that yard. They stated that as of October 2009, the office key had been missing, although they could not specify when it went missing. Tr. 112-13, 132-33, 215-16. Handshoe testified that he remembered very well that Mendoza told him that there was a third key in the office and that anyone wanting to access the container could just go and get it. Tr. 88. However, he recorded in his field notes, and reiterated in the citation, that only the two managers had keys. Tr. 51-53; Ex. G-1, G-2. Handshoe testified that he was very much interested in how many keys there were, because access to the container was an important consideration in the S&S analysis. If he deemed it important, as he should have, then it is difficult to understand why he would have recorded, with seeming certainty, that only Mendoza and Burton had keys.[5] I find that during the pertinent time there were only two keys available, and that they were held by Mendoza and Burton. Yard employees had no access to the container unless they obtained a key from Burton or Mendoza, and no one had done so during the pertinent time period.[6]

The only evidence that anyone other than Mendoza had entered the container after the pipes had been placed on the floor was Handshoe's determination that there were "multiple" footprints of different sole configurations on the pipes, and his conclusion that they indicated that the container had been accessed frequently. Tr. 22, 54, 82-84. I find that evidence unpersuasive. The pipes are fairly depicted in photographs, and do not appear to bear multiple distinct footprints. While Handshoe attempted to point out "distinctive" footprints on one of the photographs, it is difficult, if not impossible, to identify any footprints with any degree of confidence. Tr. 82-84; Ex. G-3, R-4. As Respondent points out, marks on the pipes may have

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[5] Handshoe may have recorded information about a potential third key in a form that he filled out following the inspection concerning possible proceedings against individual agents of Florida Rock. That form was turned over to counsel for Respondent at the hearing, but was not introduced into evidence. Tr. 50-53.

[6] The Secretary correctly notes that the "office" key was apparently in someone's possession and that neither Burton nor Mendoza knew who that person was. However, if such a person retained the key, he would not have been employed at the yard and would not have used the key to access the container.

pre-existed their placement in the container, e.g., they may have been stepped on prior to being placed into Burton's truck.

A further difficulty with the "multiple access" argument is that there does not appear to have been any reason why anyone else would have entered the container. There were only three reasons that the storage container would have been accessed; 1) to obtain the community service event supplies; 2) to store or retrieve a sample of material; and 3) to store or retrieve records. There were no other community service events held in the pertinent time frame and, if one would have been held, presumably the poles would have been removed to facilitate erection of the tent and access to other supplies. The stone samples had been in the container for a "long time," and entry of the container by lab personnel was unlikely. Tr. 135, 141. A scale clerk would place records in the container only three or four times per year.[7] Tr. 114, 129. It is unlikely that a scale clerk would have accessed the container while the pipes were on the floor. Moreover, it is far from certain that anyone intent on placing a box of records in the storage container would have attempted to traverse the poles. The poles were placed on the floor because other items had been placed on the shelves where they had been stored. As shown in photographs of the condition, boxes of records had been placed on the floor of the container, and there appears to have been open floor space next to the boxes near the entrance to the container. Ex. G-3, R-4. It is entirely possible, if not likely, that a person tasked with placing a box of records in the container would have placed the box on the floor, alongside or even on the pipes, which could have been done without encountering the hazard.

Considering the length of time that the hazard existed, and would have existed under continued normal mining operations, the fact that it was not highly dangerous to miners, and that no one except Mendoza encountered or would have encountered the hazard, I find that it was unlikely to have resulted in a lost work days or restricted duty injury and that the violation was not S&S.[8]

From a broader perspective, the poles were in a locked container that was accessed by only one person while the hazard existed. That person suffered no injury, having taken reasonable precautions when he chose to encounter the condition. While a reasonably serious injury was possible, no injury occurred or was likely to occur, and any injury might well have been very minor. Under the circumstances, it would be difficult to characterized the violation as one of the "more serious violations" arising under the Act.

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[7] Handshoe knew that one of the reasons for access to the container was to store records, but he made no attempt to find out how often that occurred. Tr. 55.

[8] I am mindful of Commission precedent that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *See, e.g., Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998). However, I disagree with Handshoe's determinations of S&S for the violations at issue, for the reasons stated.

Unwarrantable Failure - Negligence

In *Lopke Quarries, Inc.,* 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).
>
> Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Secretary argues that the violation was the result of Florida Rock's unwarrantable failure because Burton, its manager and agent, created the violative condition, and neither he, nor

Mendoza, also Florida Rock's agent, took any affirmative steps to remedy the hazard. Florida Rock argues that a number of mitigating factors render its negligence no more than moderate, including that the poles were stacked in a locked container that was rarely accessed, that only Burton and Mendoza had keys, that the condition was not extensive or highly dangerous, and that the actions of Burton and Mendoza do not rise to the level of reckless disregard, indifference or serious lack of reasonable care.

Operator's knowledge - Abatement efforts

Both Burton and Mendoza knew about the violative condition. Burton had created it 11 days earlier, and Mendoza discovered it the day before the inspection. Both were managers and agents of Florida Rock, which is charged with their knowledge. Neither had taken any affirmative steps to remedy the condition prior to issuance of the violation. However, I accept Burton's explanation that his failure to act was due to a simple lapse in memory, rather than a conscious decision to subordinate safety concerns to production or other efforts. Mendoza gained knowledge of the condition late on October 13, the day before the inspection. He deferred initiating corrective action because Florida Rock's work day had ended. His intention to correct the condition the following day was thwarted by the unexpected absence of two employees.[9]

Obviousness - Extensiveness - Notice of need for additional compliance efforts

The violative condition was confined to the walkway inside the locked storage container. I disagree with the Secretary's argument that the condition was extensive and obvious. It was not extensive in the sense that numerous persons were exposed to it, or that it covered a large area such that it should have been observed. It could not be observed unless the locked container door was opened. Only at that point could the condition be said to be obvious. In any event, I find neither factor is particularly relevant to the analysis in light of Burton's and Mendoza's admitted knowledge of the condition. Although the Secretary argues that, Burton and Mendoza should have been on notice that additional compliance efforts were necessary because of their training,
I find no evidence of such notice. The parties stipulated that Florida Rock had no history of violations during the pertinent time period. Ex. G-11. In fact, Florida Rock had no previous housekeeping violations. Tr. 127-28; Ex. R-16.

Length of time violation existed.

The violative condition would have existed from October 3 until October 14 or 15, when Mendoza would have taken steps to correct it. Unlike in other contexts, where a violation's existence for more than one shift can be a significant aggravating factor, here the condition was confined to a locked container where miners did not normally work or travel. It was allowed to exist because Burton forgot to have the condition attended to. Its existence after 3:30 p.m. on

[9] As noted previously, in the absence of evidence to the contrary, I credit Mendoza's explanation for his failure to remedy the condition on the morning of October 14.

October 13 was also attributable to Mendoza's decision to defer remedial efforts to the next day, and then to further defer them when workers called in sick. On the facts of this case, considering that the condition was virtually inaccessible to persons engaged in routine work activities, I find that the length of time factor is only slightly aggravating.

Danger to miners

The violative condition did not pose a high degree of danger to miners primarily because of its inaccessibility, but also because of the nature of the condition. The container was locked, was typically accessed less than ten times per year, and was accessed only once during the time the violative condition existed. Mendoza exercised care, steadied himself by holding onto a shelf, and took two steps to retrieve an empty box. No other persons entered the container and none would have under continued normal mining conditions. The most likely reason for accessing the container, to place a box of records in it, may well not have resulted in a person encountering the hazard.

Conclusion

The most significant factors weighing in favor of a finding of unwarrantable failure are that Respondent's agents created and knew of the violative condition, but had taken no affirmative steps to abate it. That it was allowed to exist for 11 days is a slightly aggravating factor. Several factors: extensiveness, obviousness, and notice that greater compliance efforts were necessary, are essentially neutral. Weighing against a finding of unwarrantability, is the fact that the condition posed a very low degree of danger to miners primarily because it was in a virtually inaccessible location.

On balance, the above factors do not strongly suggest a finding of unwarrantibility. Florida Rock argues that the actions of Burton and Mendoza cannot properly be characterized as aggravated conduct. I agree that the agents' knowledge of the condition and inaction should not be considered a strongly aggravating factor on the facts of this case. As noted above, the first 10 days that the condition existed were attributable to Burton's failure to recall the need to correct the condition. It was out of sight, in the locked storage container on a corner of the property, and only he and one other supervisor had a key to the lock. He did not subordinate abatement efforts to production, and it would be difficult to characterize his simple act of forgetfulness as aggravated conduct. Similarly, Mendoza's decision to defer abatement efforts to the next day, and then to further defer them because of the absence of employees, would be difficult to characterize as aggravated conduct, considering the inaccessibility of the violative condition.

Based upon the foregoing, and considering all the pertinent factors, on the facts of this case I find that the violation was not the result of Florida Rock's unwarrantable failure to comply with the standard, and that its negligence was moderate. A different outcome would be called for if the condition had existed in a normal work area, where miners could be expected to encounter it in the exercise of their work assignments.

Order No. 6596610

Order No. 6596610 was issued at 1:30 p.m., on October 14, 2009, pursuant to section 104(d)(1) of the Act. It alleges a violation of 30 C.F.R. § 56.14100(b), which requires that "Defects on any equipment . . . that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The violation was described in the "Condition and Practice" section of the Order as follows:

> Defects affecting safety were being reported on mobile equipment pre-shift examination, but management has failed to correct such hazards in a timely manner. Numerous defects on two separate pieces of equipment have been reported to management for several shifts. This condition exposed miners to serious injuries should an accident occur due to defects reported. Management reviews pre-shifts on a daily basis. One out of the two was tagged out of service to prevent usage until repairs can be made. Management has engaged in aggravated conduct by failing to repair defects on mobile equipment in a timely manner. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-4.

Handshoe determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator's negligence was high. The Order was issued pursuant to section 104(d)(1) of the Act, and alleged that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard. A civil penalty, in the amount of $7,100.00, was assessed for this violation.

The Violation

In preliminary discussions with management, Handshoe typically inquires about work place examinations and defects on mobile equipment. Burton informed him that some defects had been reported on mobile equipment, and Handshoe asked to see records relating to the reports. He examined records of pre-operational inspections of equipment, and noted that a broken step on a loader had been reported on several occasions. Tr. 31. The parties stipulated that the broken step had been reported on October 6, 7, 8, 9, and 13. Jt. Stip. 16. He also noted that several reports indicated that headlights on a small yard tractor were not working. Tr. 31; Ex. G-7. He inspected the loader and found that the step had not been repaired. The step was suspended below a small work platform and facilitated access to the platform, which was approximately three feet off the ground. Photographs of the condition, as cited and post-abatement, were introduced into evidence. Ex. G-8. Handshoe issued a citation for the

condition.[10] He also inspected the tractor and found that the headlights were not working. He allowed Mendoza several minutes to try and get them to work, but he was unsuccessful. A citation was not issued for the tractor because it had been tagged-out of service, albeit for a different reason.

Handshoe concluded that the broken step and the malfunctioning headlights were defects affecting safety that had not been corrected in a timely manner to prevent the creation of a hazard to persons. Florida Rock contends that the defects did not affect safety and, in any event, were timely corrected.

The small work platform on the loader was too high to simply step up onto. The broken, missing step dictated that alternate means would have to be found by anyone attempting to reach it. One possibility was presented by the proximity of the rear tire, the lugs on the tread of which might have been judged to present a sufficient foothold. Ex. G-8. A person attempting that route, or some other route, could slip and suffer an injury. Consequently, the defect affected safety, at least on occasions when access to the platform might be attempted. However, that finding does not dictate that it was a defect that required that the loader be taken out of service, i.e., that the defect be immediately corrected to prevent the creation of a hazard to persons.

Florida Rock contends that the sole reason to access the work platform was to reach the loader's air filter, a task that was performed only by service personnel who typically brought their own equipment, such as ladders and work platforms. Mendoza confirmed that he reviewed the pre-operational inspection reports and was aware that the step had been reported as broken. Tr. 218, 224. He did not believe that the defect affected safety, because no one in his operation, i.e., no employees at the yard, used the step, or would be expected to use the step. Tr. 219-22. He had operated the loader, and been trained on it. All pre-operational inspection tasks were performed from the ground, or from the operator's cab, which was accessed by separate steps on either side of the loader. Tr. 219-22. The broken step and work platform could be used to access the air filter compartment, but that was a task performed by service personnel, not miners at the yard.[11] Tr. 220-21. Service personnel were scheduled to work on the loader on October 26, at which time the broken step would have been repaired.[12] Tr. 222; Ex. R-17.

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[10] Citation No. 6596601, which is not at issue in this proceeding, alleged a violation of 30 C.F.R. § 56.14100(b). Ex. G-9. Handshoe determined that the violation was unlikely to result in a lost work days or restricted duty injury, that the violation was not S&S, that the operator's negligence was high and that one person was affected.

[11] Mendoza testified that the air filter compartment could also be reached from a deck which was part of a system of steps leading to the operator's cab. Tr. 221, 242-44.

[12] A replacement step had been ordered and had been received on October 13. It had not been installed because bolts required to attach it to the work platform were rusted and had to be cut off. Tr. 223. The step was replaced on October 14, following issuance of the order.

Mike Rice, who was being trained for the position of yard supervisor at the time of the inspection, was reviewing and signing off on the equipment pre-operational inspection reports, and was aware of the reports of the broken step on the loader. Tr. 148-49. He did not view it as a hazard or a safety issue because he believed that Florida Rock yard employees had no reason to use the step. He described the pre-operational inspection of the loader and explained that all access to engine and transmission compartments was from the ground. Tr. 150-56. A latch to the upper right of the work platform opened a door that provided access to the air filter, a task not performed by yard employees. The air filter was changed by Florida Rock's service personnel who had ladders and platforms that were used to access various parts of the loader. Tr. 157. He believed that the step would most likely have been repaired on October 26 during the next scheduled servicing of the loader.

Edil Villatoro operated the plant and various equipment in the yard. He had operated the loader on October 7, 8 and 9, and had noted the broken step on the pre-operational inspection reports. Tr. 185; Ex. R-12. He confirmed that Florida Rock's policies required that if a safety hazard was discovered during a pre-operational inspection, the equipment could not be operated, and had to be tagged-out for repair. Tr. 183-84. He did not consider the broken step to be a safety hazard because he had never used it, and did not need to use it to perform his pre-operational inspection or for any other reason. Tr. 186-93. He also confirmed that had never accessed the air filter or vents higher on the body of the machine.

Julio Perez, an equipment operator at the yard, testified that, except for accessing the operator's cab of the loader, all pre-operational tasks were performed from the ground. He had never used the step in question and had never seen anyone use it, with the possible exception of a mechanic. Tr. 201-09.

I accept the unrebutted testimony of Respondent's witnesses, and find that the broken step leading to the work platform on the loader was not accessed by any of Florida Rock's yard employees. Service personnel may have used the platform to gain access to and change the air filter during scheduled preventive maintenance. However, those same personnel would have repaired the step. The part was on hand, and the loader was scheduled for servicing on October 26, 2009. The broken step was not a defect affecting the safety of Florida Rock's employees. To the extent that it was a defect affecting safety, it would have been corrected timely, such that it would not have presented a hazard to miners. I find that the standard was not violated with respect to the broken step on the loader.

Florida Rock makes similar arguments as to the headlights on the yard tractor. It was a relatively small piece of equipment used for various light duty tasks, such as cleaning up spills of material and unloading deliveries of supplies trucked to the yard.[13] It is depicted in photographs

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[13] The Secretary argues that the tractor would have been used when yard employees worked at night to unload a ship. However, Burton explained that yard employees stayed on shore and "operated the off-loading system." Tr. 125. The tractor was a very light-duty piece of equipment that appears particularly unsuited to a high volume material handling task. Absent

(continued...)

introduced by Respondent. Ex. R-13, R-14. The tractor was used only occasionally, approximately five times between September 23 and October 14, and the pre-operational inspection and daily report sheets indicate that it was typically operated less than three hours on days it was used. Tr. 234; Ex. R-15. It had been operated for only 16.2 hours from September 2 through October 8, 2009. Ex. R-15. Beginning in September, problems with the tractor's headlights were being reported on some of the inspection sheets.

Perez conducted the pre-operational inspection on September 23, and noted that the headlights were not working. Tr. 204-05; Ex. R-15. He operated it during daylight, did not believe that the headlight malfunction was a safety issue, and did not take the tractor out of service. Tr. 204-05. Villatoro operated the tractor on September 26. He did not note any problems with the headlights during the pre-operational inspection, and had no recollection of there being a problem with the headlights. Tr. 194-96; Ex. R-15. Another miner operated the tractor on September 30 and October 1, and noted that the headlights were not working. Ex. R-15. He did not take the tractor out of service, and apparently concluded that the defect did not affect safety, most likely because it was operated in daylight. Rice operated the tractor on October 8, and reported no problem with the headlights. Tr. 159-61; Ex. R-15.

The inconsistent functionality of the headlights was attributable to a defective ground relay discovered following the inspection. The headlights on the tractor were controlled by two switches. One was an on/off switch and the other switched the lights between high and low beams. Tr. 176. Operators tended to throw the headlight switches at the same time, which resulted in the beam switch being on "high beam" when the headlight switch was in the "on" position. Tr. 228. With the switches in those positions, the headlights would not function, and Mendoza was unable to demonstrate to Handshoe that the headlights were functional. After the inspection, Mendoza discovered that the malfunction occurred only when the headlights were in "high beam" mode. He took a picture of the tractor following the inspection on October 14, which showed the headlights functioning. Tr. 233; Ex. R-14. No repairs had been made before the picture was taken. Tr. 244-45. Later, it was determined that a ground relay for the high beams was defective. Tr. 244. Rice also testified that the headlights were functional on October 14. Tr. 162.

Apparently, some equipment operators knew how to operate the headlights, or the switch happened to be in the low-beam position when they were checked. Villatoro and Rice found no problems with the lights when they checked them on September 26 and October 8. However, Perez, and at least one other operator were not able to get the lights to work. Tr. 175; Ex. R-15. Mendoza also was unable to get the lights to function until after the inspection.

The problem with the headlights would have been a defect affecting safety only if the tractor was operated during darkness or periods of significantly reduced visibility. Rice testified that there would have been no reason to operate the tractor under such conditions. Tr. 177. He

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[13](...continued)
evidence to the contrary, I find that it would not have been used during the ship unloading process.

and Mendoza pointed out that the tractor would not have been operated during inclement weather because it had no operator's cab. Tr. 177, 230. Mendoza was confident that the tractor had not and would not be operated in the dark without functioning headlights. Tr. 230, 247-48. His belief was based upon a number of considerations, including, the fact that the tractor was not often used, and was used for short periods of time for tasks that typically needed to be performed later in the day or could be deferred. He was also confident that the operators had been properly trained, and would, as they had in the past, follow instructions not to operate equipment when to do so would present a hazard. Rice opined that there was no reason that the tractor would have been operated in the dark. Tr. 177. He also believed that equipment operators would function as they had been trained, and would tag the tractor out and not operate it in darkness if the headlights were not functioning. Tr. 159.

While the vast majority of the yard's working hours occurred during daylight, in months like October when the inspection was conducted it was dark for the first hour or so of the work day. Tr. 208. Villatoro and Perez testified that the tractor was occasionally operated while it was dark, although it was never operated in the dark while the headlights were not working. Tr. 195-96, 204-08. Rice conceded that the tractor was used for deliveries, that deliveries came at all times of the day though not generally in the early morning, and that the tractor was available for use at all times. Tr. 178-79.

The inspection was conducted during daylight hours, and it does not appear that Handshoe was able to take into account the effect of illumination on the property. Because of the facility's proximity to the port of Tampa, the Department of Homeland Security required that the area be illuminated at night, and there were lights mounted on poles around the perimeter of the facility. Tr. 165-66. Shadows of those light poles are visible in an overhead photograph of the facility. Ex. R-1. There is virtually no evidence in the record as to the intensity of those lights, how they were controlled, or to what extent they provided illumination in areas where the tractor was likely to be operated. Villatoro indicated that there was illumination in"some places" around the facility. Tr. 196. Because they were intended to provide lighting for security purposes, it is likely that the lights were of relatively high intensity and would have provided considerable illumination in areas near the perimeter of the facility.

Considering the testimony of Villatorro and Perez, it is apparent that there were occasions when it would have been desirable to operate the tractor in darkness, or when visibility was reduced, e.g., at dawn or when fog was in the area.[14] Because of the defective ground relay, the operator may not have been able to get the headlights to function. Depending upon where the tractor was to be operated, illumination provided by security lighting may not have been sufficient to avoid exposing the operator to a hazard. At least two of the tractor's operators did not know how to configure the switches to make the headlights function. The condition had existed since September 23, and apparently would have continued to exist for some extended period of time because Florida Rock had not taken, and had not planned to take, any steps to

[14] Because the tractor did not have a cab for the operator's position, it would not have been operated in inclement weather.

correct the problem.[15] While an equipment operator who was unable to get the tractor's headlights to function may have been able to defer the task requiring use of the tractor, or may have tagged the tractor out of service, it is possible, particularly in borderline situations, that he would have elected to operate the tractor despite the fact that the headlights were not functioning. As the Secretary points out, the Commission has, in other contexts, instructed that the vagaries of human conduct must be taken into account in the construction of mandatory safety standards involving miners' behavior. *See Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984).

I find that the malfunctioning headlights on the yard tractor constituted a defect affecting safety and that Florida Rock did not timely correct the defect to prevent it from becoming a hazard to miners.[16] Accordingly, the standard was violated.

Significant and Substantial

The fact of the violation has been established. As the Secretary observes, because of the wording of the standard, the first and second *Mathies* factors are merged. Consequently, it is necessary to identify the discrete safety hazard contributed to by the violation and to determine whether it was reasonably likely to result in a reasonably serious injury.

The Secretary identified the hazard as follows: "the tractor operator would lack headlights at a time when headlights were needed, with the attendant risk of the tractor hitting someone or being hit by something due to reduced visibility." Sec'y. Rp. Br. at 8. I accept that definition of the hazard contributed to by the violation, with a slight alteration. The hazard contributed to was that a miner would operate the tractor without functioning headlights when headlights were needed, with the attendant risk of the tractor hitting someone or being hit by something due to reduced visibility. The tractor, which is depicted in several photographs, was relatively small, and had an unprotected operator's compartment. Large pieces of mobile

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[15] The defective ground relay may have been repaired during scheduled maintenance on the tractor. However, there is no indication as to whether or when such maintenance would have occurred. The loader apparently was serviced after 500 hours of operation. If the tractor was on a similar schedule, it could have been months before such maintenance would have been performed.

[16] Florida Rock argues that the malfunctioning headlights were not a defect affecting safety, and that no discrete safety hazard was contributed to by the alleged violation because the Tampa Sales Yard is "primarily" a day-time operation and "typically" does not operate the tractor during hours and weather conditions that would require the use of headlights. Resp. Rp. Br. at 8-9. In support, it cited *Nelson Brothers Quarries*, 24 FMSHRC 980 (Nov. 2002) (ALJ), where the absence of headlights on a front end loader was found not to be a violation of section 56.14100(b). However, there it was "undisputed" that no mine operations were conducted after dark. *Id*. at 988. Here, as noted above, the tractor was occasionally operated in darkness or in conditions of reduced visibility. Consequently the defect affected safety and was not timely repaired to avoid a hazard to miners.

equipment operated at the facility, e.g., the loader and customer trucks, and a collision involving the tractor, even with a smaller vehicle such as a pick-up truck, could result in very serious injuries to the operator. Pedestrians also traveled about the facility, and malfunctioning headlights would impair the ability of the operator to see a pedestrian, as well as a pedestrian's ability to see the tractor. A serious injury could be expected if the tractor struck a pedestrian. The primary issue in the S&S analysis is whether the hazard contributed to by the violation was reasonably likely to result in an injury causing event.

I find it highly unlikely that the tractor would have been operated in darkness or conditions of reduced visibility when headlights were needed but were not functional. For the reasons discussed above, the occasions when it would have been desirable to operate the tractor in darkness or reduced visibility were extremely rare. The tractor was not used in a production capacity. It was used only occasionally for short periods of time, primarily on tasks that were performed later in the day.

On the rare occasion when it would have been desirable to operate the tractor in conditions of reduced visibility, if the operator could not get the headlights to function, he most likely would have deferred operation of the tractor, or tagged it out for repair. As Handshoe concluded, the equipment operators did a good job of conducting pre-operational inspections of equipment and noting any defects. They were trained to conduct such inspections and to tag equipment out of service if they discovered a defect affecting safety. The loader had been tagged out because of low tire air pressure the day before the inspection and, on the day of the inspection, the tractor had been tagged out for a defective muffler that was blowing exhaust in the operator's face. Equipment operators had tagged equipment out in the past for safety defects. Tr. 231, 249.

Considering the vagaries of human conduct, a decision to operate the tractor under such circumstances would not result from inadvertent action or momentary inattention. However, an error in judgment could have resulted in operation of the tractor when it should not have been operated. That possibility justified the finding of a violation. However, it is not sufficient to establish that an injury causing event was reasonably likely. In *Thompson*, consideration of the vagaries of human conduct justified a finding of a reasonable possibility of contact and injury sufficient to establish a violation of the guarding standard there at issue. However, the Secretary's contention that the violation was S&S was rejected, and the Secretary did not seek review of that finding. 6 FMSHRC n.3 at 2095. While it is possible that an operator would have made such an error, it is far from likely that he would have done so. *See Amax Coal Co.*, 18 FMSHRC 1355, 1358-59 (Aug. 1996) (to prove S&S nature of violation, Secretary must prove that it is reasonably likely that an injury producing event *will* occur, not that one *could* occur).

I find that the hazard contributed to was unlikely to result in an injury causing event, and that the violation was not S&S.

Unwarrantable failure - negligence

Handshoe believed that the failure to timely repair defects on mobile equipment was a major failing of management. As he described it, the equipment operators were doing a good job of reporting defects, but management was not following through and having the defects repaired. While Handshoe stated in his order that numerous safety defects had been reported, he conceded that there were only two, the broken loader step and the malfunctioning tractor headlights. Tr. 67. I have found that Respondent did not violate the standard with respect to the loader step. Consequently, that aspect of the order will not be considered in the unwarrantibility analysis.

Operator's knowledge - Abatement efforts

Mendoza, Florida Rock's agent, reviewed the pre-operational inspection forms and knew that the defect on the tractor had been reported on September 23 and 30 and October 1.[17] Ex. R-15. While no problem with the headlights had been reported when the tractor was operated on September 26 and October 8, the recurrent reports of malfunctioning headlights put Florida Rock on notice of the defect. It is less certain that Mendoza knew that the defect affected safety. The tractor had not been tagged out of service when the headlight malfunction was noted, undoubtedly because it had been operated in daylight. Both Mendoza and Rice believed that the tractor would not be operated in conditions of low visibility if the headlights were not functioning. Nevertheless, Mendoza should have been aware that there were occasions, however, rare, when the tractor might have been operated in conditions of reduced visibility, and that a miner might choose to operate the tractor in such conditions if he was unable to make the headlights function. Since no efforts to correct the defect had been initiated, Florida Rock is charged with knowledge of the violative condition. [18]

Obviousness - Extensiveness - Notice of need for compliance

The defect affecting the tractor's headlights, which was reported during the pre-operational inspections, was an obvious condition. However, in light of the apparently rare occasions that the tractor might have been operated in conditions of reduced visibility, the "violative condition," i.e., failure to timely repair a defect affecting safety so as to prevent creating a hazard to persons, was not particularly obvious. There was only one defect on mobile equipment that had the potential to affect safety, and that would have been only on rare occasions. Consequently, the violative condition was not extensive. There is no contention that

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[17] Rice was a trainee during the pertinent period. Since Mendoza reviewed the same reports that he did, it is unnecessary to decide whether Rice was also an agent of Florida Rock.

[18] It is important to keep in mind that the standard at issue did not require that equipment like headlights be functional at all times, or even that defects on mobile equipment be corrected. The standard required that defects affecting safety be corrected in a timely manner so as to avoid creating a hazard to persons. Consequently, in order to charge Respondent with knowledge of the violative condition, more must be shown than simple knowledge that there was a problem with the headlights.

Florida Rock had been put on notice that greater compliance efforts were necessary.

Length of time violation existed.

The violative condition was the failure to correct a defect affecting safety in a timely manner so as to prevent the creation of a hazard to persons. The problem with the headlights was first reported on September 23. While there were subsequent reports that noted no problems with the headlights, other reports put Mendoza and Florida Rock on notice that the problem continued to exist. By the time of the inspection, steps should have been taken to correct the problem in order to avoid exposing miners to a hazard. Under continued normal mining operations, it may have continued for months.

Danger to miners

The violative condition did not pose a high degree of danger to miners. Had it been established that Florida Rock failed to address "numerous" safety defects, as stated in the order, a different conclusion could have been drawn. The same is true if the tractor had been used in production such that it typically would have been operated during the dark early morning hours. On the rare occasion that the tractor might have been operated in conditions of reduced visibility, and the operator would have been unable to get the headlights to function, and the security lighting did not provide sufficient illumination in the intended work area, it is likely that use of the tractor would have been deferred, or it would have been taken out of service.

Upon consideration of all of the pertinent factors, Florida Rock's negligence with respect to the violation, i.e., the failure of supervisor/agents to address the reports of headlight malfunctions on the tractor, did not rise to the level of gross negligence or deliberate indifference. I find that the violation was not the result of Florida Rock's unwarrantable failure, but that its negligence was high.

The Appropriate Civil Penalties

Section 110(i) of the Act provides, that in assessing civil penalties, the Commission must consider the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). The determination of the proper civil penalty is committed to the Administrative Law Judge's discretion, which is bounded by the statutory criteria of section 110(i) of the Mine Act as well as the deterrent purpose of the Mine Act's penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

The Tampa Sales Yard is a small mine, and it had no history of violations during the pertinent time period. Ex. G-11. Florida Rock does not contend that payment of the proposed penalties would affect its ability to continue in business. Florida Rock demonstrated good faith

in promptly abating the violations. The negligence and gravity factors have been addressed with respect to each violation.

Citation No. 6596602 is affirmed. However, it was found not to be S&S and was not the result of Florida Rock's unwarrantable failure. Rather its negligence was moderate. A specially assessed civil penalty of $2,700.00 was proposed by the Secretary. Considering the reductions in the level of negligence and gravity, the factors enumerated in section 110(i) of the Act, and guided by the Secretary's penalty assessment regulations, I impose a penalty in the amount of $250.00.

Order No. 6596610 is affirmed as a violation. However, it was found not to be S&S, and was not the result of Florida Rock's unwarrantable failure. The violation was unlikely to result in permanently disabling injury, and Florida Rock's negligence was high. A specially assessed civil penalty of $7,100.00 was proposed by the Secretary. Considering the reductions in the levels of negligence and gravity, the factors enumerated in section 110(i) of the Act, and guided by the Secretary's penalty assessment regulations, I impose a penalty in the amount of $500.00.

ORDER

Citation No. 6596602 and Order No. 6596610 are **modified to citations issued pursuant to section 104(a) of the Act, and are AFFIRMED, as modified**. Respondent is **ORDERED** to pay civil penalties in the total amount of $750.00 within 45 days.

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

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 29, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2011-687-M
Petitioner	:	A.C. No. 48-01203-245465
	:	
v.	:	
	:	Crusher #1
MCMURRY READY MIX COMPANY,	:	
Respondent	:	

ORDER GRANTING, IN PART, THE SECRETARY'S MOTION FOR SUMMARY DECISION AND ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Mine Act"). It involves a single citation issued to McMurry Ready Mix Company ("McMurry") at its Crusher #1 site, a portable sand and gravel plant, for an alleged violation of 30 C.F.R. § 56.9300. The Secretary of Labor has moved for summary decision on the basis that there exists no genuine issue of material fact as to whether McMurry violated the standard when it provided rub-rails that were nine inches high on the truck scale at the mine. McMurry has moved for summary decision on the basis that the citation was issued in error, that 30 C.F.R. § 56.9300 does not apply to scales, and that it lacked fair notice that the standard would apply to its scale.

I. JOINT STIPULATIONS OF FACT

The parties entered into detailed stipulations of facts for the purpose of summary decision. The relevant stipulations are set forth below.

1. At all times relevant to this proceeding, McMurry was an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act").

2. McMurry owns and operates portable sand and gravel plants in Wyoming.

3. Crusher #1 is one of those portable sand and gravel plants.

4. On November 30, 2010, Crusher #1 was located three miles west of Guernsey, Wyoming on the north side of Highway 26.

5. On November 30, 2010, Crusher #1 was a "mine" as defined by Section 3(h) of the Mine Act, and its mining services affected interstate commerce.

6. McMurry's Crusher #1 is assigned Mine I.D. No. 48-01203.

7. McMurry is subject to the jurisdiction of the Mine Act, and the Administrative Law Judge has jurisdiction in this matter.

8. On November 30, 2010, MSHA Inspector Coby Wilkes issued McMurry Citation No. 6456059.

9. Citation No. 6456059 alleges that McMurry was in violation of 30 C.F.R. § 56.9300(b) on November 30, 2010 because the guardrail on one of the edges of the elevated scales was not at least mid-axle height of the largest self-propelled mobile equipment which usually travels over the scales.

…

12. At the time of the inspection on November 30, 2010, both edges of the scales were equipped with a sturdy metal bumper which was nine inches high.

13. The citation was written for only one of the two edges of the scales.

14. At the time of the inspection on November 30, 2010, the edge at issue had neither a berm nor a guardrail which was mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

15. The scales were 10 feet 10 inches wide and 115 feet long.

16. On the side of the scales at issue, the drop-off, measured from ground to platform, ranged in height from 35 to 40 inches.

17. The drop-off on the other side of the scales is not at issue.

18. Joint Exhibits 2-4 are photographs of the scales taken from three different positions.

19. Joint Exhibits 2-4 depict what they purport to depict.

20. Joint Exhibit 4 is a photograph of a semi-tractor on the scales.

21. Semi-tractors like the one pictured in Joint Exhibit 4 are the largest, self-propelled equipment that travels on the scales.

22. A stoplight stands near the trailer at the end of the scales.

23. That stoplight is pictured in Joint Exhibits 2 and 3.

24. The scales are regularly used to weigh the product mined and processed by McMurry as it is leaving the mine to be delivered to a purchaser.

25. McMurry stipulates that, if Citation 6456059 were affirmed, the $100 penalty would be appropriate and would not impair its ability to remain in business.

26. On August 22, 2007, MSHA inspected a scale at McMurry Crusher #3, Mine I.D. #48-01518.

27. Following the inspection, Citation No. 6305593 was issued for a violation of 30 C.F.R. § 56.9300(b) for not having guard rails on the scales at the scale house.

28. According to the termination document, that citation was terminated the same day after, "[g]uarding and a tire bumper were installed on the scales at the scale house bringing this violation into compliance."

29. Following an MSHA inspection on July 21, 2010, McMurry Crusher #3 mine, I.D. # 48-01418 was issued Citation No. 6455327 for violation of 30 C.F.R. § 56.9300(b).

30. The inspector noted in Box 8 of Citation No. 6455327 that the outside guards on the elevated scales were only 6 ½ inches high and there was a drop off of 3 feet on each side of the scales.

31. Citation No. 6455327 was terminated on August 17, 2010 when, "[a]n additional guardrail was installed along the sides of the scales, bringing this violation into compliance."

32. Rub-rails are intended to guide vehicles and provide a visible, audible, and/or tactile indication to the driver of the edge of the travelway.

33. At a hearing in *MSHA v. Knife River Corporation, Northwest* in Portland, Oregon on May 5, 2011 two MSHA inspectors testified that they were not aware of any instances in which (1) a truck had over-traveled an elevated truck scales and overturned, or (2) a truck driver had been injured as a result of traveling the side of any elevated scales.

II. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor

The Secretary argues that there is no genuine issue of material fact as to whether McMurry violated the standard of 30 C.F.R. § 56.9300(b) when it failed to provide berms or guardrails of sufficient height along an edge of an elevated scale used by vehicles at its mine and that McMurry had sufficient notice that the standard applied to elevated truck scales.

The Secretary argues that in satisfaction of the elements required to prove a violation of the standard, the scale at McMurry's Crusher #1 was part of a roadway, had a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment, and was not equipped with berms or guardrails that were at least mid-axle height of the largest self-propelled mobile equipment that usually traveled the roadway. The Secretary argues that the rub-rails along the edges of the elevated scale were noncompliant. Mid-axle of semi-tractors like the one pictured in Joint Exhibit 4, the largest self-propelled mobile equipment traveling the scale, was approximately 22 inches. The height of the sturdy metal bumper at the edge of the scale was only nine inches high.

The Secretary further argues that the Operator was on notice that the scale violated 30 C.F.R. § 56.9300(b). The Operator had notice that the scale was a roadway and that the rub-rails did not meet the standard through prior enforcement because another of McMurry's mines, Crusher #3, was issued a citation for violation under circumstances where the scale was equipped with a rub-rail that was less than mid-axle height. Further, Program Policy Letter P10-IV-01 (the "PPL"), which was intended to clarify the standard, was mailed to mine operators and posted on the MSHA website after it was issued August 26, 2010.

B. McMurry Ready Mix Co.

McMurry argues that summary decision in its favor is appropriate. First, it argues that the cited standard does not apply to truck scales. Second, it argues that it did not have adequate notice that the cited standard would apply to the scale at the Crusher #1 mine.

McMurry has three points to support its first argument that 30 C.F.R. § 56.9300 does not apply to truck scales. First, McMurry argues that a truck scale is not a roadway. Second, it argues that even if scales are considered to be a "roadway," the cited standard does not require berms or guardrails on McMurry's scale because the standard is not intended for scales that are equipped with rub-rails. Third, McMurry asserts that MSHA's policy letter No. P10-IV-1 cannot be used to establish enforceable standards for determining when a rub rail is insufficient protection and when a mid-axle height berm or guardrail is required.

McMurry's second argument is that it was not given fair notice that the cited standard applied to the truck scales at the Guernsey site. It argues that the plain language does not clearly indicate that truck scales are covered by the "berms and guardrails" standard; instead the standard covers "roadways." It also argues that MSHA has a long history of non-enforcement. It notes that from the time of the installation at Crusher #1 in July 2008 up to the November 30, 2010 inspection, MSHA has inspected the truck scales and has never issued a citation. MSHA had also determined in August 2007 at the same site, but at the Crusher #3 mine, that a truck scale equipped with a rub-rail similar to the one in this case had not violated 30 C.F.R. § 56.9300(b). Finally, MSHA issued a video on its website entitled "Workplace Exams – How to Recognize Common Hazards," which depicted rub-rails installed on a truck scale that are similar to those for which the citation was issued.

III. DISCUSSION AND ANALYSIS OF THE ISSUES

Commission Procedural Rule 67 sets forth the grounds for granting summary decision, as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

The safety standard at issue provides:

> (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.
> (b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

30 C.F.R. § 56.9300. The Commission established three elements that must be analyzed in a case involving scales. *Lakeview Rock Products, Inc.*, 33 FMSHRC ____, No. WEST 2010-1856-RM (December 16, 2011); 2011 WL 6740384). The three elements are:

> (1) Whether the scales are part of a roadway;
> (2) Whether each scale has a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons or equipment; and
> (3) Whether the scales are equipped with berms or guardrails that are at least mid-axle height of the largest self-propelled mobile equipment that usually travels the roadway.

A. The First Element

The first element of 30 C.F.R. § 56.9300 is whether the scales are part of a roadway. Part 56 the Code of Federal Regulations does not define "roadway." In cases considering the first element, according to the plain meaning of the word, scales are a roadway if the scales are part of the entire route traveled by trucks on the trek to the consumer and are not merely equipment.

In *APAC-Mississippi, Inc*., 26 FMSHRC 811, 814-15 (Oct. 2004) (ALJ), the judge determined that "in harmony with the dictionary definitions, i.e., the common meanings of the

terms at issue, the *entire* route traveled by the trucks is to be considered a roadway." *Id.* Under the facts in that case, the route consisted of "*traveling* from the two-way road, along a ramp and scale in the same line, and continuing from the scale in the same direct line down the next portion of the ramp back to the road." *Id.* (emphasis in original).

In *Carder*, 27 FMSHRC 839, 858 (Nov. 2005) (ALJ) an operator was cited for violating 30 C.F.R. § 56.9300 because a scale lacked guardrails or berms. The citation was vacated because the operator did not have notice that guardrails would be required for the scale.. *Id.* However, the scale was found to fit within the scope of the safety standard. *Id.* The scale was a roadway with a drop-off of sufficient grade or depth that could cause a truck to overturn or endanger persons in the truck. *Id.*

In *Knife River Corporation*, 32 FMSHRC 912, 914 (July 2010) (ALJ), Judge Pricilla Rae relied on the dictionary definition of "roadway," and rejected the notion that scales were not a roadway and were merely "equipment" that must be driven over at 5 mph. *Id.* The scales were an essential part of the "commercial trek from the pit to the consumer." *Id.* The common meaning of the term roadway encompassed the entire route traveled by the trucks, including the scales. *Id.* The judge determined that the language in the safety standard was sufficiently clear to be enforceable. *Id.*

I find that the stipulations establish that the scale at Crusher #1 is part of the roadway. This scale was an essential part of the "commercial trek from the pit to the consumer." *Knife River Corp.,* at 914. The scale at McMurry's Crusher #1 mine is not merely a piece of stand-alone equipment; it is undisputed that the scale is regularly used to weigh the product mined and processed by McMurry as it is leaving the mine to be delivered to purchasers. Jt. Stip. 24. The *entire* route traveled by the trucks is to be considered a roadway. *See APAC-Mississippi, Inc*., 26 FMSHRC at 814. The route at Crusher #1 consists of traveling onto the scale, stopping at the stoplight for weighing, then continuing onto the main roads to leave the mine for delivery. *See Id.* at 815; Jt. Ex.2-4; Jt. Stip. 18-20. Consequently, I find that the scale at issue in this case is part of the roadway.

B. The Second Element

The second element is whether the scale has a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons or equipment**.** In *Lakeview Rock Products*, the administrative law judge determined that rub-rails, similar to those installed on the scale at McMurry's Crusher #1, would prevent a vehicle from overturning and harming its occupants and vacated the citation on that ground. 33 FMSHRC 1538, 1545 (June 2011). The Commission explained that the ALJ should have first considered whether the drop-off was sufficient to cause a vehicle to overturn before determining whether the rub-rails would function to keep a vehicle on the roadway. The Commission held that this second element must be considered independently from an analysis of the adequacy of rub-rails. Thus, when analyzing this element I must consider whether the scale has a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons or equipment without taking into consideration the presence of the rub-rails.

In *Knife River Corp.*, the judge vacated the citation because the Secretary did not meet the burden of showing that this second element was met: that the depth and grade of the drop-off were such that a hazard existed. 32 FMSHRC at 915. The Secretary had alleged the scales were 36 inches at their highest point while the operator argued they were only 26.5 inches. Neither party provided any "expert's statement, case law, or any other authoritative guidance as to how or why a 26.5 to 30 inch elevation for some undetermined distance on the scales is of sufficient depth as to pose a danger of a vehicle overturning or endangering persons in equipment." *Id.*

McMurry argues in its Motion for Summary Decision that the cited standard does not require berms or guardrails on its scale because the standard is not intended for a scale that is equipped with rub-rails. McMurry Mot. at 7-12. However, the Commission has clearly stated that a judge must first analyze this second element before considering whether rub-rails would have any effect.

The parties have stipulated that the scale at the Crusher #1 ranged in height between 35 and 40 inches. Jt. Stip.16. Thus, the critical question in this matter is whether this drop-off was "of sufficient grade or depth to cause a vehicle to overturn or endanger persons or equipment." *Lakeview Rock Products*, 2011 WL 6740384 at 4.

The parties have not stipulated that 35 to 40 inches meets the criteria of the second element set forth in *Lakeview Rock Products*. It is clear that McMurry has directly contested the Secretary's assertion that this drop-off poses a hazard. McMurry Mot.16. Because there exists an unresolved dispute about this fact, the proper course is to proceed to an evidentiary hearing to determine whether the drop-off at the scale of Crusher #1 was of a sufficient grade or depth to cause a vehicle to overturn or endanger persons or equipment, without considering the effect of the rub-rails. As a consequence, there is a "genuine issue" as to "material fact" on this issue. 29 C.F.R. § 2700.67(b)(1).

C. The Third Element

The third element for consideration is whether the scale was equipped with berms or guardrails that were at least mid-axle height of the largest self-propelled mobile equipment that usually travels the roadway. *Lakeview Rock Products,* 2011 WL 6740384 at 3. In this case, the rub-rails were only nine inches in height. Jt. Stip.12. The parties have stipulated that semi-tractors like the one pictured in Joint Exhibit 4 are the largest, self-propelled equipment that travels the subject scale. Jt. Ex. 4; Jt. Stip. 18-20. Joint Exhibit 4 clearly shows that the rub-rails installed are far short of the required mid-axle height.

Guardrails are only required by the safety standard if the second element discussed above is satisfied. If the Secretary establishes at an evidentiary hearing that the drop-off is of sufficient grade or depth to cause a vehicle to overturn or endanger persons or equipment, then the evidence in the joint stipulations has established this third element.

D. Fair Notice of the Requirements of Safety Standard

In making its argument that it was not provided with fair notice that the cited standard applied to the subject truck scale, McMurry relied on evidence that it attached to its motion. The Secretary disputes most of this evidence. The Secretary disputes McMurry's assertion that during an August 2007 inspection of Crusher #3, MSHA determined that a scale equipped with a similar rub-rail did not violate the safety standard. Sec'y Opposition at 3-4. The Secretary also disagrees with the conclusions McMurry draws from the photograph it attached to its motion as Exhibit F. She notes that the photograph is not authenticated in the declaration of J. David Hornbeck or in any other document. The Secretary questions what the photograph depicts because it does not look like a rub-rail or any other similar railing. *Id.*

I agree with Judge Rae's conclusion in *Knife River Corp.*, that the subject safety standard is "sufficiently clear and the language is meant to apply to a variety of circumstances." 32 FMSHRC at 915. In addition, the Secretary's PPL, dated August 26, 2010, states that the Secretary interprets the safety standard to include elevated truck scales. Lack of fair notice of the applicability of a safety standard is an affirmative defense. McMurry bears the burden of proof on this issue. Determining whether an operator lacked fair notice depends on the specific facts at issue. The mere fact that an operator has not been previously cited for a violation of the standard is not sufficient. I find that there appear to be genuine disputes of material fact with respect to this notice issue and that summary decision cannot be granted.

IV. ORDER

For the reasons set forth above, the Secretary's motion is **GRANTED IN PART**. I find that the scale at Crusher #1 was a roadway as that term is used in the safety standard. I also find that, if the Secretary is able to prove that the scale at Crusher #1 had a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons or equipment, then McMurry violated the safety standard because the scale was not equipped with a berm or guardrail that was at least mid-axle height of the largest self-propelled mobile equipment that usually travels the roadway. There are genuine issues of material fact as to whether the drop-off created a hazard of overturning or endangered persons in equipment. McMurry's motion for summary decision is **DENIED.**

Unless the parties settle this case or reach further stipulations, an evidentiary hearing will be necessary on the second element set forth in *Lakeview Rock Products*, as discussed above, and on the issue whether the Secretary provided fair notice that the safety standard applies to truck scales.

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

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