

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 13, 2023

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

v.

CARMEUSE LIME,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2022-0196
A.C. No. 09-01228-559871

Mine: Talona Mountain Mine

DECISION

Appearances: C. Renita Hollins, Esq., Office of Solicitor, U.S. Department of Labor,
Atlanta, GA for the Petitioner

Arthur Wolfson, Esq., Partner, Fisher & Phillips LLP, Pittsburgh, PA
for the Respondent

Before: Judge William B. Moran

Introduction:

This matter involves two alleged violations of the Mine Act. The events in this litigation were triggered by an E04 hazard complaint, alleging a hazardous condition at the mine. Tr. 86. One, Citation No. 9701256, issued on June 21, 2022, alleged a violation of 30 C.F.R. § 57.18009. Titled “Designation of person in charge,” it provides “When persons are working at the mine, a competent person designated by the mine operator *shall be in attendance* to take charge in case of an emergency.” Emphasis added.

The citation alleged:

A competent person designated by the mine operator was not in attendance on mine property when MSHA arrived to conduct inspection activity. Three workers were working in the underground area of the mine and were exposed to all mine hazards. The workers were working underground, loading and hauling material for a period

of 1 hour with nobody to take charge in the event of an emergency. This condition exposes the workers to serious injuries.

Petition for civil penalty at 14.

The other citation, No. 9701258, issued the next day, June 22, 2022, alleged a violation of 30 C.F.R. § 57.11051(a). Titled “Escape routes,” that standard provides: “Escape routes shall be (a) Inspected at regular intervals and maintained in safe, travelable condition.”

The section 104(a) citation alleged:

Escape routes shall be maintained in safe, travelable condition. Upon inspection, due to an inundation of water from the mine roof, the underground primary escape route on the level 2 portion of the mine could not be traveled safely. The water had accumulated greater than 30 inches in depth in areas along the escape route. This condition exposes miners to potentially fatal injuries from not being able to safely escape the mine in the event of a mine emergency. The termination due date is extended due to the mine cannot be accessed due to being under a 103(k) order. Standard 57.11051(a) was cited 1 time in two years at mine 0901228 (1 to the operator, 0 to a contractor).

Citation No. 9701258

For the reasons which follow, the Court finds that the operator failed to have a designated person in charge, in violation of 30 C.F.R. § 57.18009. The Court also finds that, while the operator failed to maintain the escape route in safe, travelable condition, the condition came about as a result of a mutual misunderstanding, for which it would be improper to hold the operator accountable.

FINDINGS OF FACT

A hearing was held on March 22, 2023, at the Gilmer County Superior Court in Ellijay, Georgia. Joint Stipulations were admitted at the outset of the hearing.¹ The Secretary called MSHA Inspector Christopher Codie McDowell. Tr. 22. McDowell was at the mine on June 5, 2022, because MSHA had received a hazardous condition complaint regarding two allegations: large rocks falling underground and a lot of dust and toxins in the mine atmosphere. Tr. 27. Assigned by his supervisor to investigate the complaint, McDowell and another MSHA inspector, Kevin Dycus arrived at the mine along with two MSHA trainees.²

¹ The Joint Stipulations are set forth in the Appendix

² The MSHA trainees were Justin Vincent and Erastus Cardwell.

The Talona Mountain Mine produces marble. Tr. 90. The MSHA team arrived at the mine around 3 p.m. Tr. 92.

McDowell informed that upon his arrival along with the other MSHA personnel, there were several cars in the parking lot. We went into the mine office. There was nobody in there. Checked the other buildings, we couldn't find anybody, and it was approximately 5 to 10 minutes and a haul truck came out from underground. Because the offices are directly across kind of from where the mine portals are at. So a haul truck come out from the mine portal from underground. And me and Mr. Dycus walked over to him and flagged him down. [The driver] was in a large swivel tail truck [and] he was stopping to fuel up.

Tr. 29

The driver informed McDowell that Nathan Hyatt was in charge. When asked by MSHA where Mr. Hyatt was, the driver informed "he was up the road at the other mine. Tr. 30. McDowell then asked the driver if he could contact Hyatt, advising that MSHA was there to investigate a hazard complaint. The driver made several attempts to contact Hyatt using a handheld radio which they use the radios underground to communicate with each other and to communicate with the surface. McDowell was present and observed the driver make a few attempts to contact Hyatt but with no success. *Id.*

At the time of the driver's attempt to call Hyatt, they were located about 80 feet from the mine portals and about 100 feet from the mine offices. Tr. 31. The driver, after being unable to reach Hyatt via radio, did then reach him using a cell phone. *Id.* The driver then told Hyatt that MSHA was at the site and that he needed to come back to the Talona Mountain Mine. *Id.* This conversation was made in the presence of McDowell. *Id.* Hyatt then did arrive at the mine some five to ten minutes later. Tr. 32. Hyatt arrived via a pickup truck, which, according to McDowell, Hyatt informed he was at the other mine site, which was a "couple of miles" from the Talona mine. Tr. 93. That other mine, McDowell stated, has a separate MSHA Id number. Tr. 94.

When Hyatt did arrive at the mine site, McDowell advised him that they were there on a hazard complaint, and he presented him with a printout which described the allegations in the complaint. According to McDowell, Hyatt then advised that when they (i.e., MSHA) arrived that it was their quitting time and that the other two miners were on their way out from underground. By 'quitting time,' McDowell stated that meant it was the end of the shift for those miners. *Id.*

McDowell informed that on that day, no MSHA inspector went underground. Tr. 33. MSHA did relate to Hyatt during the visit on that first day, about the allegations of rockfalls and the loud booms that miners were hearing underground, and he asked Hyatt if he was familiar with any of that. Hyatt affirmed that the mine had been experiencing some loud booms "from the ten west heading is where they [the mine personnel] thought it was coming from. Tr. 33. McDowell further informed that the mine had some large rock falls underground. Tr. 34. McDowell couldn't remember exactly, but as best as he could recall it was the 1 South or 2 South Mains where the rockfalls had occurred. *Id.* Thus, according to McDowell's testimony,

Hyatt admitted being aware of the rockfalls and he was the person who provided their locations. *Id.*

On the issue of Hyatt's presence at the mine, McDowell stated that Hyatt informed that "several times a day that he would be back and forth between both places." *Id.* This is an appropriate point for the Court to take note that it found Inspector McDowell to be a credible witness throughout his testimony, including on this uncontradicted statement about Hyatt's practice of traveling away from the Talona Mountain Mine's underground site during the day. This finding is apart from the fact that former mine foreman Nathan Hyatt did not testify.

Returning to the issue of the hazard complaint, MSHA interviewed the three other miners who were at the site. Tr.35. Those miners, all of whom had been underground, were 'mucking,' a term referring to cleanup crew work. All three confirmed the falls and loud booms that foreman Hyatt acknowledged. *Id.*

McDowell stated that he never told Hyatt that MSHA was shutting down the mine. Tr. 36. The Court finds McDowell's assertion to be credible. McDowell also stated that neither he nor fellow inspector Dycus shut down the mine down on June 21st. Tr. 36-37. There is no documentary evidence to contradict this.³

Inspector McDowell identified Citation No.9701256 as the citation he issued. That citation reflects June 21, 2022, because that is the date the violation occurred, but it was served the following day to the mine's operations manager, Joey Weaver. Tr. 44. McDowell confirmed that when the MSHA inspectors arrived on that first day, all three miners present that day were underground; no one was on the surface. Subsequently, upon a haul truck driver exiting from underground at the mine site, McDowell learned from that driver that Mr. Hyatt was the person in charge but that he was not present at the mine as he was up the road at the other mine. The inspector then asked the driver to contact Hyatt. Tr. 42-43 and Ex. P 1. The driver made several attempts to contact Hyatt *via radio*, but he was unsuccessful. Tr. 43. Following those failures to contact Hyatt, the truck driver was able to reach Hyatt via cell phone. McDowell stated that cell phones do not have reception underground, so for purposes of contacting miners the radio is the only viable option. Tr. 45. This was also not contradicted.

McDowell stated that he issued the citation because the standard requires that "a competent person designated by the mine operator has to be in attendance to take charge in the event of an emergency." Tr.44. In this instance there were three men working underground and Hyatt was the designated person in charge. Tr. 44-45. Here, he noted that if there was an event underground, there would be no communication available as they would have no communication with anyone on the surface because there was nobody on the surface of the mine, because the

³ There was some questioning by Counsel for the Secretary about the mine management's evaluation of the falls and booms on the day before the events in issue. Respondent's Counsel objected to the questioning on the basis that it was not relevant to the issues in this matter. However, the Court overruled the objection, informing that it "might have some relevance tangentially to the issue of the potential hazard of having men underground without a person on the surface. ... it's of some relevance to [the Court] contextually." Tr. 41. The Court stands by its ruling on this issue.

designated person in charge was up the road at the other mine. Tr. 45. The inspector believed that the other mine up the road is the Ellijay Mine. *Id.*

McDowell marked the citation as “significant and substantial” because:

in the event of an emergency and history shows that with underground mining that that can be a variety of things. Even down to just a medical emergency of someone having a heart attack, diabetic, whatever. That in the case of an emergency, they would have had nobody to contact for help. So it would have just been on the three miners working underground, and in a situation where they could possibly be trapped or anything like that, they have no contact with anybody to take charge in the event of that emergency.

Tr. 46.

He marked the gravity as reasonably likely to result in a fatality because:

if in the event of a mine emergency, if there's nobody to take charge or no contact with anybody for them to garner help if they needed it, which would be the designated person in charge is who they would contact. If there's nobody for them to contact, it's reasonably likely that - that injury or illness would occur because in any emergency, especially a mine emergency, time is of the essence. So if they're having to sit around and just wait until he gets in radio range to where they can contact him via radio, then that, to me, makes it reasonably likely. ...[he elaborated that] in the event of a mine emergency. So if just for a example, if somebody had a heart attack or stroke underground and they were needing to get ahold of Mr. Hyatt on the surface to call an ambulance or a helicopter or make medical arrangements for that person and they're unable to get ahold of him. I mean, it's -- it's proven the longer you wait on something like that the less likely the rate of survival.

Tr. 48-49.

The inspector continued that the potential hazard would include that which was alleged in the hazard complaint – rock falls. *Id.* For this mine, as he recalled, the mine’s height was 28 to 35 feet. This meant that even a small rock falling from that height could be a hazard. The hazard complaint, which prompted the MSHA inspectors to be at the mine in the first place, asserted that some of the rocks that were falling were up to the size of a large front end loader bucket. Tr. 50. McDowell listed the negligence as high. This was based on the operator being well-aware of the requirement to have a designated person in charge at the mine site. Based on the MSHA interviews “with Mr. Hyatt and the other miners that it was common practice for him several times a day to be traveling back and forth between the Talona Mountain Mine, and [the other mine] ... [he concluded] if he's traveling back and forth between the two mine sites that is a common practice.” Tr. 51.

Inspectors McDowell and Dycus returned the next day to investigate the hazard complaints. Tr. 53. Company representatives on that day were Mr. Weaver, Hyatt, and Kevin Coleman, the mine supervisor, and Eddie Styles. *Id.* On that second day, MSHA informed that they needed to go underground to investigate the hazard complaints. Tr. 54. Then they proceeded to travel underground using two mine operator pickup trucks. *Id.* and Tr. 55.

McDowell was in the front, or lead, truck. Tr. 59. The mine has two levels and the group traveled through level one and then traveled to level two. However, according to McDowell, when they arrived at the bottom of level two, they came upon a large amount of water at the bottom of the slope. He described the water level as up to about the hood of the truck, adding that it was deep enough so that the inspector could not see the roadway bottom. Tr. 55-56. The inspector considered that depth to be significant because in the event of an emergency, which would have to include the possibility of escaping on foot, travel would be unsafe. This water was in the primary escapeway. The group traveled part way through the water via the truck towards their intended destination – the 10-west heading, as that was the area where miners had complained to MSHA of rock falls. Tr. 56. However, Inspector McDowell then decided it was unsafe to continue to their intended destination because of the water and that it was best to not proceed further. The trucks then turned around, returning to the surface. Tr. 57. The MSHA decision to not proceed further was based on the risk of mechanical problems for the trucks moving through the water. Also, the water depth was such that one couldn't see what was below it, and therefore one could encounter rocks or other material. Tr. 62. This risk would be present if one was on foot as well, presenting tripping hazards. Tr. 63. Though theoretically miners could also escape through the secondary escapeway, the “whole level two of the mine was flooded.” Tr. 63. The Court asked the inspector if he could see if the water ended but the inspector responded that it continued as far as he could see. *Id.* Elaborating, he stated that the water was present as far as the truck's headlights could extend. Tr. 58. He could not tell about the water depth ahead, stating there could be deep and shallow portions. Tr. 58. To say the least, a characteristic of this mine was that large amounts of water comes from its roof. Tr. 65-66.

No mine operator representative in the group objected to the decision to retreat, but McDowell stated that there was a comment that the reason the water was present was because the pumps had not been operating on the prior shift. Tr. 60-61. The inspector asked why the pumps had not been operating and was told it was because they had not worked, meaning they were not operating, on that shift, which is to say the night before the inspectors arrived. Tr. 61-62.

As with the other citation, the inspector also marked this violation as significant and substantial. Tr. 66. His rationale was:

in the event of an emergency if the miners had to escape the mine, [he] felt it was reasonably likely that injury or illness could occur traveling through that large amount of water. Because of your slip, trip, and fall hazards just where you would not be able to see the mine floor when you're traveling. You would[n't] be able to see where you're stepping; you wouldn't know if there was holes or rocks or material or anything like that on the mine floor. Which, in turn, in that amount of water a slip, trip, and fall if someone is unable to swim or ... fell down and hit their

head and knocked unconscious or anything like that, then would -- would bring into effect, drowning.

Id.

McDowell listed the negligence as moderate because the primary means of travel in the mine is via vehicles, not on foot. Tr.67. However, he considered the likely injury to be fatal because his training informed that escape routes must be maintained even for foot travel. He reasoned that if a miner slipped and fell drowning was possible. *Id.*

Cross-examination of the inspector began with questions about the depth of the water McDowell encountered, which he stated was 30 inches or perhaps somewhat less. Tr. 97. The inspector agreed that, while no order had been issued initially, he did expect that the miners would not go underground and that he expected they would remain on the surface until MSHA came back to the site. Tr. 99. However, McDowell did not agree that the mine could not pump as a result of that expectation that they would not go underground, stating that the MSHA team “never stated that to them.” Tr. 99. McDowell asserted that the miners could have gone back underground and done work while the MSHA team was conferring with MSHA supervisory personnel. *Id.* The MSHA team conducted that conference, via Wi-Fi, at a local restaurant. McDowell asserted that he “expected [the mine] would stay as is, but there was nothing restricting them from going underground and doing work.” Tr. 100.

McDowell stated that when they went underground the next day there was no mining going on. Tr. 100. Once they proceeded to go underground that second day, he did exit from the pickup truck at a location he considered to be at level 2. The location was at the bottom of the slope from level 1 to level 2. Tr. 101.

Upon cross-examination, Counsel for the Respondent suggested that perhaps the inability to reach Hyatt was simply that the wrong channel was being used on the radio. Tr. 104. The Court rejects this claim because the key determination is that Hyatt was not at the mine site. Therefore, the wrong channel suggestion is of no moment. Even if the claim, unsubstantiated as it was, was established, that would not overcome the violation of the standard for a basic reason: Hyatt was not at the mine site. Accordingly, McDowell’s remark [at Tr. 104] responding to a question, that he has never seen a prep plant and an underground mine on the same mine ID is irrelevant in this matter.

McDowell did confirm that upon meeting Hyatt on the first day at the mine, MSHA advised they would return the next morning to start their investigation regarding the hazard complaint. Tr. 105. However, McDowell had a different recollection of the conversation. By his account, “Hyatt told [the MSHA team that] it was the end of their shift, and we [i.e. MSHA] were actually wanting to go underground that afternoon, [but Hyatt] said it was the end of their shift, and [MSHA] agreed to come back in the morning. Tr. 105. McDowell said it was important from MSHA’s view to go underground but he maintained that the mine didn’t want to do it at that time, again because it was the end of the shift. Tr. 106. McDowell denied knowing that there would be a production crew coming on for the night shift under normal operations at the mine. He only learned that later. Tr. 106. He didn’t think that any work would be done after MSHA left on that first day. *Id.*

In terms of McDowell marking the citation as S&S and fatal, he admitted that he considered the allegations of rock falls in part in making that determination. Tr. 107. At that time, the area of concern had been bermed off. Tr.108. While he agreed, in part, that the water had accumulated on level 2 because the pumps hadn't been running, he couldn't know how much water would have accumulated even with the pumps operating. Tr. 109. He did concede however that after the pumps resumed only a minimal amount of water remained. *Id.* And, that being the case, he terminated the citation, as it was then safe to travel. *Id.* Inspector McDowell's testimony ends at Tr. 110.

The Secretary then called MSHA Mine Inspector Kevin Dycus. As noted, he was at the mine on June 21, 2022 with Inspector McDowell.⁴ Tr. 116. Dycus was there for the same reason – the complaint about rock falls. *Id.* Inspector Dycus' testimony was consistent with that of Inspector McDowell:

When we arrived, nobody was there. And they had like a little -- couple of little buildings up there. And we was up there at the buildings. And you could see the mine portal, and then it had like a fuel tank down there and some stuff. We looked around. Could not find nobody, so, you know, we stayed there for a little bit. I don't know how long it was. But we finally had the guy come out of the mine, like, it was a truck driver, haul truck. Codie got with them and asked him who was in charge and then that's when the process started of trying to get a hold of Nathan Hyatt. They said he was in charge, and he was at the other mine. And he called two or three times, and they finally used the cell phone to get a hold of him. He come up there.

Tr. 117.

Dycus confirmed that Mr. Hyatt was not at the mine on that first day. Also, he met Joey Weaver on the second day of MSHA's visit to the mine. Tr. 118. He also confirmed that Hyatt was reached only by a cell phone. *Id.* Hyatt arrived at the mine site about 30 minutes after MSHA's arrival. Dycus affirmed that miners were underground at the time MSHA arrived. *Id.* He then recounted that McDowell spoke with Hyatt about the allegations and that McDowell interviewed miners about the issue of rocks falling and then McDowell spoke again with Hyatt about the information from the miners. Then, according to Dycus, Hyatt informed that, as it was late in the day, *Hyatt made the decision* to lock the gates and that everyone would come back in the morning to continue the matter. Tr. 119-120. *He told MSHA that the night crew would not be arriving that evening.* Tr. 120. Dycus informed that Hyatt advised that he would "would lock the gate and come -- we'd come back in the morning asked, if that would be all right, and we said, yeah." Tr. 120. Dycus confirmed that inspector McDowell gave Hyatt a copy of the allegations about rocks falling that brought MSHA to the mine site. Tr. 120-121.

⁴ Inspector McDowell is also referred to as "Christopher" and "Codie." Tr. 116

MSHA did not issue any citations on that first day. Tr. 123. Dycus confirmed that he went underground on the MSHA's second day at the mine. Tr. 124. Dycus stated that on the first day MSHA did not close the mine down. Tr. 124. Hyatt closed the mine, not MSHA. *Id.*

On the second day of MSHA's visit to the mine, the two inspectors arrived along with the two MSHA trainees. Several employees of the mine were there on that second day. Eddie Styles was one of those named by Dycus, along with Hyatt. The second day's visit was to investigate the allegations of the complaint to see if there was any validity to them. Tr. 125. Though they went underground, using two trucks supplied by the mine for access to the area to be investigated, MSHA never made it to the area involving the allegations, because of the water they encountered. Tr. 126. Dycus stated that as they proceeded underground they came upon "water [] almost up coming in the truck." He described the water as 'deep,' and that they then stopped at a high spot. They then decided that it was too risky to proceed further to the area of concern."⁵

Dycus described the quantity of water they encountered as significant "Well, you're talking about up to the bottom of the truck where your feet is; you're probably talking some 20 inches maybe, or so. It's a pretty good -- maybe more than that. It's -- it's just a lot of water. You couldn't see, you know --if the bottom -- you know, when you were driving. It was so dark in there that it could drop off. And but it's pretty deep." Tr. 127.

Inspector Dycus then described the problem presented by the water for miners needing to use the escapeway:

it goes back to the deal they gotta -- if they have to walk out, it would be the same hazard. You got uneven ground, and you can't see it. And then if you hit a rock or it drops off and you fall and hit head your head, you pass out. Or if you're driving the vehicle and if it, you know, goes out there and drops off, you know, you're under water. You -- I mean, it's just-- you can't see the road where -- where it's at.

Tr. 130.

⁵ The Court finds that MSHA's decision to retreat was wise. As Dycus described the conditions MSHA encountered at that time, MSHA "decided to stop on a place where there wasn't very much water, and we got out, and we talked, and we could hear so much water coming in we decided to go back out -did not -- because we already been told rocks as big as buckets -- load buckets and then small rocks, like desks was falling. And when you got that much water coming in, it will eat out a cavity and that -- we was afraid that more rocks would be falling. So we went back out." Tr. 126.

He elaborated about the safety hazards presented by the water when asked by the Secretary's attorney "If miners ... are trying to escape ... from the mine in case of a mine emergency [and if] they are traveling by foot, based upon the conditions that you observed, what, if anything, could possibly happen?" Tr. 132

Slip, trip, and fall because you can't see where you're walking in the water, you know, if you get overbalanced a little bit and your feet don't, you know, they're not moving as good because there's so much water there; you can trip, fall. You can hit rocks, bust your head open. Knock yourself out, cut your arm. Now, I'm going by my past experience on floors and walkways; they're not as smooth as concrete. They're off -- they're a little bit uneven. So and then there could be rocks down there, you know, loose rocks. So you can't see that, and when you're walking, if you turn your ankle, then you can fall and hit the water. If you pass out, if it's in deep enough water, you can drown. It's a lot of things can happen if you have to walk out because you just can't see what's going on. What's -- what's underneath you.

Id.

Dycus added that a vehicle using the escapeway under those conditions could also have problems.

Well, I mean, if it gets deep enough of water, you can stall the engine out, and then you got to get out and walk. The water could come up inside. Again, you can go the wrong way and go in too deep, just a dropoff and you can cover the whole truck up if it's deep enough. You know, we did not see no areas, but we didn't go farther than just where we went. It might have been deeper areas in there than what we saw. We don't know.

Tr. 133.

The Court then asked for Dycus' reaction if, hypothetically, the foreman had asserted upon encountering the water underground:

yeah, there's water here, but that's only because when you guys were here last evening, and the shift ended, we -- we shut her down and -- and so we didn't have a night crew. So that's the hypothetical. In other words, he's explained to you why you've encountered this water. Do you still, based on your 10 years of experience, do you still issue a citation ...for the escapeway impassible issue?

Tr. 134.

The thrust of Dycus' answer was that the mine had enormous water issues. Something on the order of 8 million gallons entering the mine a day, and that Eddie Styles treated it as a common everyday issue at the mine:

We're talking about, you know, there's a big number, like, 8 million gallons a day that comes in there. So, that's -- that's unheard of in our mining industry. That much water coming in. So by that, and then you going in there, we have no -- and then act like the guy that was with me, Eddie. I think that was -- I'm almost 100 percent sure that was him. He acted like this was a common practice, these escape ways being this deep. It wasn't like this all -- they did not tell us or tell me -- we was in two different vehicles. I wasn't told that, like, hey, this is why all this water is because of what happened to the pumps. They act like this was a everyday occurrence with this much water in the mine.

Tr. 135.

Dycus' bottom line⁶ was that he would still issue the citation because the water was a routine and common occurrence at this mine. Tr. 136. The inspector's answer was the same if the water was not a common experience because the standard requires that the escapeway be maintained. Tr. 136. In such a situation, the key is to have everyone get out of the mine until is safe again. Tr. 136-137.

Upon cross-examination, Dycus agreed that when MSHA arrived at the mine on the second day, no mining was going on. Tr. 137. He also agreed that the mine had been closed at the end of the first day -- "they closed the gates." Tr. 138. Further, it was his expectation that no one would be entering the mine until the next day when MSHA arrived to perform their inspection. Tr. 139. Dycus then agreed that the pre-shift occurred as they entered the mine on that second day. *Id.* He also knew that there would normally be a night crew underground at the mine, though he did not know if it would be a production crew. Tr.141. He agreed that it was MSHA's expectation that no work would be done between the time MSHA left at the end of the first day until they returned the next day. Tr. 147.

The Secretary then called Joey Weaver, the operations manager of the Carmeuse Mine. Mr. Weaver was designated as an adverse witness. Tr. 152. He informed that Nathan Hyatt was the foreman on June 21, 2022, but that Hyatt is no longer employed with Carmeuse. *Id.* Weaver was not at the mine on the first day of MSHA's visit, June 21, 2022. Tr. 153. However, he agreed that the mine was open on that date and that miners were working underground on that date as well. *Id.* Further, he agreed that Hyatt was working at the Talona mine on that date. *Id.* As Weaver was not there on that date, he did not know if Hyatt was underground that day, but he knew Hyatt was at the mine because he called him that day. Tr. 154. All Weaver knew about that day is what Hyatt told him over the phone. *Id.* Further, on that day Weaver did not speak with the MSHA inspectors. Tr. 155. Not being present that day, he did not personally observe any of the conditions at the mine then either. *Id.*

⁶ While Dycus was at the mine both days, and was therefore able to answer some questions, overall he was second to Codie [] in this matter and was unable to answer several questions such as whether the mine asked for permission to start the pumps. Tr. 145. As he put it, "Codie was in charge." Tr. 145.

Weaver was at the mine on the second day. Tr. 156. He was a participant on that second day, and he was in one of the two trucks that went underground then. *Id.* He agreed that there was water on the mine floor on June 22, 2022, and that they were there to investigate a hazard complaint. Tr.157. The group did not make it to the location of the alleged hazard, as MSHA had the trucks stop at the 15/16 crosscut. *Id.* Weaver stated that he questioned inspector Dycus over the decision to exit from underground, but he did not voice an objection to the decision, nor did he tell MSHA that they should keep going forward to the asserted hazard location. Tr. 158. However, when asked by counsel for the Respondent, Weaver stated that MSHA makes the determination about where an inspection will proceed. Tr. 160. He acknowledged that he did see the hazard complaint and the allegation of large rocks falling from the roof. Tr. 159.

When the Respondent began its formal direct exam of Weaver, he informed that he is the operations manager for Carmeuse. Weaver has extensive mining experience. Tr. 163. His present position entails two mine sites in Virginia and six sites in North Georgia, with the subject mine, Talona Mountain, (“Talona”) being one of those under his responsibility. Tr. 160-161. Weaver is also responsible for the Marble Hill mine which is also known as the “Ellijay Mine.” Tr. 161. Weaver’s office is based some 45 miles from the Talona Mine. Weaver has several mine managers under him. Hyatt did not report to Weaver, instead he reported to the mine manager, Kevin Coleman, who was in charge of the Talona, the Marble Hill and the Cisco Mines. Tr. 162. However, if Coleman was not available Hyatt could contact Weaver. Tr. 162-163.

Regarding the Carmeuse Mine, Weaver informed that it has two shifts, a day and an evening. Tr. 164. Travel in the underground mine is by pickup truck. *Id.* Weaver agreed that the Talona mine, which started in 2014, was intended to replace the Marble Hill/Ellijay Mine, because that mine was running out of reserves. *Id.* The distance between the two mines is slightly less than two (2) miles. Tr. 164-165. The mines are on the same road. Tr. 165. **Before Talona began operations, the following were part of the Ellijay Mine: the underground portions of the Ellijay mine, the preparation plant, crushing facility, and the -- the maintenance shop was all on that** *Id.* Weaver stated that when Talona began operations, the company included parts from Ellijay on the Talona mine ID, adding the plant, the shop (where they service local equipment) and the crushing facility. He described the plant as a facility that “that crushes the stone that’s mined out the Talona Mine, and ... a mill that also mills the stone down to pow[d]er for carbon business.” Tr. 166. These were added to the same Mine ID as the Talona. Tr. 165. This occurred at a time when the Ellijay was idled. *Id.*

Weaver stated that when MSHA inspects the Talona Mountain Mine it includes the shop and plant. Tr. 167. The Ellijay Mine had been idled, but it is presently operational. Tr. 167. In June of 2022, the Ellijay was not operating. Tr. 168. Weaver stated that when MSHA inspects the Ellijay, they do not inspect the shop and plant for Ellijay. Tr. 168. Weaver also stated that when Talona came online, the company established communication between that mine and the shop and the plant. This was through a “leaky feeder-type system with an antennae on the surface that picks up at the shop and the plant.” *Id.* When a signal comes to the surface it is relayed by an antenna over the shop, but the system only works on channel 1, even though there are 9 or 10 channels on the radio. Tr. 168-169. Weaver maintained that there has never been a problem communicating between the underground mine and the shop and the plant. Tr. 169.

The Court would note that, plainly, from this incident, there has been at least one such instance of a problem communicating.

Weaver hedged when asked if, as part of the miners' training, they are made aware of the communication system between the underground mine and the shop and the plant, that they are all part of the Talona mine ID, responding, "When we do the tours, we tour all the facility and tell them this is a part of the mine, but to designate the difference, I'm not sure of that." Tr.169-170. But he asserted the miners are aware that the shop and plant are part of the Talona operation.

On the first day in issue for this matter, Mr. Coleman was the mine manager in charge at the Talona Mine. Tr. 170. However, he was not there for the entire day. After he departed, mine foreman Nathan Hyatt was then in charge. At that point, Weaver's version of the events of that day were very different from that of MSHA's, as Weaver stated that, in talking with Hyatt, Hyatt informed that "MSHA was there on a complaint, and they're asking us to lock the portals until they can come back tomorrow and inspect." Tr. 171. Weaver continued that he told Hyatt "that would be fine, but [to] let them [i.e. MSHA] know that once the pumps run out of fuel, we will begin to flood."⁷ *Id.* According to Weaver, Hyatt then asked him to hold their conversation and when he came back to the call, Weaver stated that Hyatt told him "that was okay." Tr. 172.

Weaver continued that Hyatt told him during their conversation that day that he (Hyatt) was at the shop, checking a piece of equipment. *Id.* According to Weaver, the Ellijay mine was not operating that day. *Id.* Weaver maintained that after his conversation with Hyatt, his expectation was that the mine would flood. *Id.* In fact, Weaver stated that they would come across the roadway flooded the next day. *Id.* His plan was that they would then start the pumps to dewater the mine. Tr. 173.

In speaking further about the pumps, Weaver informed that the "pumps are diesel fuel pumps, and they have to be fueled within every 8 hours." *Id.* Normally they are fueled at 4:00 p.m., quitting time for day shift, then at midnight and once again in the morning. Thus, the day shift fuels them twice; night shift fuels them once. *Id.*

The pumps work by having the water pumped from level 2 to level 1 and then to a sump pump and from there to the surface. There are electric pumps too, but they cannot keep up with the water. Weaver stated that if the evening crew had worked that night, they would have fueled the diesel pumps and they would have kept the mine dewatered. Tr. 174. Accordingly, based on his conversation with Hyatt, it was MSHA's idea to close the gates and allow the pumps to run out of fuel. Tr. 174-175. Weaver, based on his conversation with Hyatt, believed that MSHA knew the mine would "be starting to flood that [next] morning." Tr. 175. Weaver estimated that it would take less than two hours for the pumps to remove the excess water. *Id.*

Turning to the events of the next day, Weaver was then at the mine for MSHA's second visit. He arrived about 5:30 that morning. Despite his statement that the mine had been gated the

⁷ Weaver repeated the claim that he told Hyatt "that would be fine to lock the gates, but once the pumps run out of fuel, the mine will start to flood." Tr. 173.

previous night, when he arrived "-- the mine manager was there, ... Mr. Styles, the supervisor, was there, and the night shift and day shift crew was there." Tr. 176. Thus, he admitted that the night shift crew *was there. They came to work that night. Id.* However, Weaver maintained that they did not go underground that night. Instead, they spent the night washing equipment. *Id.*

Regarding the second day of MSHA's visit, Weaver stated that he did go underground with the inspection group that day. According to his recounting, they "went down -- we went onto level 1, across level 1, down the ramp to level 2, and then turned and come about halfway out level 2." Tr. 177. Ex. R-2 and Ex. R 2-1. That exhibit, R2, is a mine map of level 2 and the down ramps from the level 1 to level 2, as it appeared on June 22, 2022. Tr. 179. At the entrance to that level, he observed water at the intersection at crosscut 18. *Id.* He took no water measurements at that location, but he estimated it to be 15 to 20 inches maybe. Tr.180. The pickup trucks drove through this water accumulation. *Id.* The two pickups then proceeded down to level 2, which is south to the entrance. *Id.* Once past the location where Weaver marked a 'B' with a circle on the exhibit, he maintained no water was encountered, stating that aside from some mudholes, it was fairly dry. Tr. 181. They then proceeded down South 2, and he contended that they were not driving through water there. *Id.* Weaver stated that at the area where the trucks stopped at crosscut 15 there was no water. Tr. 182. He confirmed that the trucks went no further from that point. Tr. 183. He stated that MSHA gave no reason for returning to the surface at that time but when on the surface Dycus informed that the mine would have to come up with a plan to prevent water from coming in the mine. He added that MSHA would not allow pumping until the mine had a plan. Tr. 184. Weaver reiterated that there was no water at the location where the trucks stopped and that even in the direction where the trucks had been heading, which was uphill at that location, there was little water ahead, perhaps 4 to 5 inches. Tr. 186. Weaver asserted that, if the pumps had been working, the water issue would not have been present. Tr. 188.

Ultimately, in the wake of a 103(k) order, a plan for removal of the water issue was submitted to MSHA and the mine resumed pumping on June 23rd. Tr. 190. It then took about two hours to pump the water down on level 2. *Id.* Weaver was then directed to his notes for the second day at the mine, June 22nd. Those notes reflected "drove level 2 water high in 18 crosscut." Tr. 192. Annotated map and letter B.

Upon cross-examination by the Secretary, Weaver was again directed to his notes for June 21, wherein he wrote "asked about blocking portals until they could get back in the morning to start investigating complaint." Tr.193-194. Weaver confirmed he wrote that and that he did not seek any confirmation from to verify with MSHA that it made that request. Tr. 194.

Regarding the underground visit on the second day, Weaver reasserted that the group turned around at crosscut 15. Tr. 196. When then directed to Ex. R 1, page 2, Weaver read from his notes which reflect "due to level 2 water height, crosscut 18 at north fork, drove around to the crosscut up level 2 and got out. They looked at the water coming through and said let's go outside." Tr. 197. Asked if the group actually turned around at crosscut 16, Weaver agreed that his notes reflected that it was at 16 that the group turned around. Tr. 197-198. However, Weaver stated that, despite his notes, the group actually turned around at crosscut 15. Tr. 198. Thus, he stated that his notes were incorrect about that. At crosscut 18, Weaver acknowledged that the

water was ‘a little bit’ high there. *Id.* Further, Weaver said that at crosscut 18 the water was low, but that was after it had been pumped out. Tr. 199. He admitted that the water level was high at crosscut 18. Tr. 199-200. At that location, Weaver stated that the water was 15 to 20 inches high. Tr. 200. It should be noted that the hazard complaint involving the allegation of rocks falling was located at crosscut 10. Tr. 200.

The Court asked about the escape route, Weaver confirmed that if one were at crosscut 8, the only way to exit the mine if one was at crosscut 8 or 11, would be either through where it's marked South 1 or South 2. Those are the two escapeways. Tr. 205. There is no escape route below crosscut 8. *Id.*

In further examination, the Secretary's attorney asked about and Weaver confirmed that regarding the Talona Mine, there is a shop area and the shop area is the same as for the Ellijay mine and the shop is adjacent to the mine. They are separate buildings about 200 yards apart. The shop services both Talona and Ellijay. Tr. 209-210.

The Court then asked for clarification about the two mines, Talona and Ellijay. Weaver agreed that the first mine was the Elijah *and then at some point in time there was a plant and a shop, and that they were all connected with the Elijah.* Tr. 212. Continuing from the past to the present day, the Talona mine was later created. *Id.* Accordingly, Weaver agreed there was no Talona mine when the Elijah and the plant and the shop were first created. Tr. 213. Weaver also informed that **the Talona mine opened some 15 plus years, possibly 20 years, after Elijah began its operations.** *Id.*

The Court also inquired about Ex. R1, at page 2 and focused on the remark in Weaver's notes ‘interviewed hourly crew and ‘big bump yesterday.’ Tr. 213-214. These notes, he informed, were made at the time of those events. Tr. 214. His notes then remarked, “small and big rocks. Big rocks fell; size of loader buckets. Small ones; size of desk.” The information he wrote in his notes about this came from MSHA. Tr. 215. His notes then remarked, ‘need ground control plan’ and Weaver explained that was something asked for from MSHA. *Id.* The same is true about the remark in his notes that “employee saying common practice that rocks are falling all the time,” that this was also something MSHA relayed to Weaver.

Analysis of the alleged violation of 30 C.F.R. § 57.18009; failure to have a competent person designated by the mine operator in attendance to take charge in case of an emergency when persons are working at the mine.

The Secretary notes that “[o]n June 21, 2022, when inspectors traveled to Talona mine, they discovered that miners were underground working, but there was not a competent person present to take charge in case of an emergency.” Sec's Br. at 11. Though the Respondent asserts that the Talona Mine was under the same identification number as the Ellijay Mine, the fact remains that the designated person in charge, Mr. Hyatt, was at the Elijah Mine, not the Talona Mine, and as such, Hyatt was not in attendance at Talona. Employing the plain language

definition of ‘in attendance’ those words mean “‘to be present at,’ ‘to take charge’ or ‘to remain ready to serve, wait.’” *Id.*⁸.

The Court agrees with the Secretary’s statement that “it is clear by the intent of the language that the standard anticipated the designated person be on site and immediately available to make decisions and activate emergency plans in the event of a mine emergency.”⁹ *Id.*

It is undisputed, as the Secretary notes, that factually Hyatt was approximately two (2) miles away from the Talona Mine and that when MSHA arrived on that first day miners were underground. It also undisputed that Hyatt could not be reached via the mine’s radio, that it took a cell phone to reach him and that it took about 30 minutes for Hyatt to arrive at the Talona Mine. *Id.* at 12.

On the issue of whether the Secretary’s take as to whether the violation was significant and substantial, the Court subscribes to the testimony from Inspector McDowell that “history shows that with underground mining there can be many things that create a mine emergency and [in this instance] if there was a mine emergency the miners would not have [had] anyone to take charge.” *Id.* at 13. Though it is true, as the Secretary also notes, that the Inspector believed that it was reasonably likely “that an injury or illness would occur that would be fatal,” *Id.*

The Court would observe that an injury need not be fatal to qualify as significant and substantial.

Thus, the Court finds that, under the measure of continued normal mining operations, there was an inherent risk of an injurious event and a resulting injury when miners are working underground. And, applying the cited standard, one is to presume that the hazard has occurred in assessing the reasonably likelihood of an injury. Perforce, not having a person in attendance at the underground site, with miners underground as here, necessitates a finding that the violation was significant and substantial.

The Court also agrees with the Secretary that high negligence was amply demonstrated in this matter. In this regard, the Secretary points to the unrefuted testimony that “it was customary practice for Foreman Hyatt to travel back and forth between the Talona Mountain Mine and the Ellijay mine several times a day [and] ... that the operator was aware that a designated person in charge had to be on site . *Id.* at 14. The Respondent’s assertion that high negligence is inappropriate fails, as it rests upon the argument that Hyatt could be at either the maintenance shop, some two miles away from the underground mine, or the underground mine, and meet the

⁸ Citing *The American Heritage Dictionary*, Second College Edition 439 (1982).

⁹ Secondly, the Court also agrees with the Secretary’s statement that “it is well established that the Secretary’s interpretation of her own regulations in the complex scheme of mine health and safety is entitled to a high level of deference and must be accepted if it is logically consistent with the language of the regulation and serves a permissible regulatory function.” *Id.* at 12, citing *Island Creek Coal Co.*, 20 FMSHRC 14 (January 1998); *Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257, 121261-62 (D.C.Cir. 1994), cert denied, 115 S.C.t 2611 (1995).

standard on the claim that the two locations were “functionally integrated.” R’s Br. at 16. The Court rejects this legerdemain both factually and legally. Recall that factually the shop was in existence decades before there ever was a Talona mine. Further, the reality of being “in attendance” some two miles down the road does transmogrify into attendance at the Talona underground mine.

Respondent asserts that the requirement of 30 C.F.R. §57.18009, that “[w]hen persons are working at the mine, a competent person designated by the mine operator shall be in attendance to take charge in case of an emergency,” was not violated. R’s Br. at 11. The assertion is without merit. Respondent contends that “Mr. Hyatt was the competent person designated to be in charge at Talona when the MSHA personnel arrived on June 21, 2022 [because] [h]e was present at the maintenance shop.” *Id.* In Respondent’s telling of the events on that day, “[t]he miner who initially met the MSHA personnel knew that Mr. Hyatt was the competent person in charge, knew he was at the maintenance shop and contacted him to speak with the MSHA representative upon their arrival ... Such constitutes compliance with the cited standard.” *Id.* at 12. The first two assertions do not speak to the requirement of the standard and the last, that the miner “contacted [Hyatt] to speak with the MSHA representative upon their arrival” is a half-truth. The facts are that Hyatt was not *in attendance* at the underground mine site, and he was not able to be contacted using the mine’s radio system.

Respondent’s theory is that Hyatt was in attendance by his presence at the maintenance shop some two miles from the underground mine location. The Respondent contends that as the maintenance shop is part of the Talona mine ID and that MSHA inspects that shop when it conducts its regular inspection, there was compliance. *Id.*

In the event the Respondent’s assertion that the standard was satisfied is rejected, the Respondent alternatively contends that the violation was not significant and substantial,¹⁰ not reasonably likely to occur and that the gravity of any injury should not be deemed as ‘fatal.’ *Id.* at 13. Respondent argues that the purported hazard was the alleged rock falls made in the hazard complaint which brought MSHA to the site. Respondent maintains that, as the claimed hazardous area in the 10 West heading had been bermed off when MSHA arrived on that first day, there no longer was any hazard. Under that telling, “that hazard no longer could have existed by the time that Mr. Hyatt’s presence at the maintenance shop was called into question.” *Id.* at 15.

Such an argument comes up short, because it rests on the idea that the only potential hazard had been addressed. The standard is not so limited. The plain purpose of the standard does not evaporate when a particular hazard is allegedly addressed. Instead, the purpose is to have one in attendance to take charge in the event of *any* emergency. Further, in attendance, does not mean ‘nearby.’

¹⁰ In making that claim, the Respondent concedes, and the Court agrees, that whether a particular violation is S&S must be based on the particular facts surrounding the violation and that an evaluation of the reasonable likelihood of an injury should be made assuming continued normal mining operations, citing *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988), and *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). *Id.* at 14.

Respondent is also too generous in its description that “the miner [the MSHA inspector] initially met had difficulty contacting Mr. Hyatt by radio.” *Id.* On that score, apart from the fact that Hyatt was not in attendance, the reality is that Hyatt was *not* able to be contacted using the mine’s radio system. Contact was achieved by using a cell phone.

On the subject of the mine operator’s negligence, the Respondent contends that the inspector’s ‘high negligence’ designation was unwarranted. Respondent asserts that the degree of negligence should be measured by considering “the totality of the circumstances holistically,” citing *Lehigh Anthracite Coal, LLC*, 40 FMSHRC 273, 279 (April 2018), quoting *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). Here too, the Respondent raises the points it made when contending that there was no violation, namely that the maintenance shop shares the same mine ID as Talona and is ‘functionally integrated’ with Talona’s mining process. *Id.* at 16.

Rather boldly, the Respondent also highlights that the mine had a communication system between the shop and the underground mine and that the miners were trained on that system. As the Respondent put it, high negligence is inappropriate because the mine “provided a communication system between the shop and underground mine and trained miners on the interrelation between the maintenance shop and underground mine.” *Id.* This ignores that the mine and the shop were miles apart, that the same shop existed at the Elijah Mine long before there ever was a Talona Mine, that foreman Hyatt was not at the Talona underground mine and, by the way, the communication system, touted by the Respondent, with the miner training on it and all, did not work and that contact had to resort to using a cell phone to reach Mr. Hyatt.

The Court adopts the rationale of Inspector McDowell with his conclusion that the violation involved high negligence.¹¹ The Court finds that foreman Hyatt traveled back and forth between the Ellijay and Talona mines several times a day and that it was a common practice for him.

The Court, applying the totality of the circumstances approach, and relying upon the credible testimony of MSHA Inspectors McDowell and Dycus, finds that high negligence was established.

Regarding the gravity for the failure to be in attendance violation and the inspector’s evaluation that an injury was reasonably likely to occur, and that such injury was reasonably likely to be fatal and whether, by extension, the violation was “significant and substantial,” the

¹¹ An obvious misstatement, the Secretary incorrectly states that the inspector evaluated the negligence as moderate. Sec. Br. at 9. The inspector listed the negligence as ‘high.’ In contrast, the inspector listed the negligence as ‘moderate’ for the alleged escapeway maintenance violation. In the Secretary’s Reply Brief, that error was corrected, there listing the negligence as ‘high.’ Sec. Reply at 4-5.

Court finds that Inspector McDowell's evaluation is supported by the record, and was correct in each of those aspects.¹²

¹² In this regard the Court notes that the Secretary states the following in this regard: "The Commission's decision in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), sets forth four elements in determining whether a violation is S&S; the second element is the existence of "a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation." *Mathies*, 6 FMSHRC at 3. However, in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2036-40 & n.13 (Aug. 2016), the Commission reformulated step two of the *Mathies* test. The Commission determined that, at step two of the *Mathies* test, the Secretary must demonstrate that the violation was reasonably likely to result in a hazard given continued normal mining operations. *Newtown*, 38 FMSHRC at 2038 (emphasis added). In *Peabody Midwest Mining, LLC*, the Commission "integrated" this new requirement into *Mathies* and held that step two requires proof that "the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed..." 42 FMSHRC 379, 383 (June 2020).

The *Newtown/Peabody* reformulation is inconsistent with the Mine Act's definition of S&S, which focuses on violations that could significantly and substantially contribute to a hazard. 30 U.S.C. § 814(d)(1). This aspect is satisfied if the violation "could" contribute to the hazard. Section 104(d)(1) of the Mine Act expressly uses the term "could," and the Fourth and Seventh Circuits have rejected the idea that step two requires proof of reasonable likelihood. *See Knox Creek Coal Corp. v. Sec'y of Lab.*, 811 F.3d 148, 164 (4th Cir. 2016) (noting that at step two, "the Secretary must establish that the violation contributes to a discrete safety hazard," and at steps three and four, "that the hazard is reasonably likely to result in a serious injury"); *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 616 (7th Cir. 2014) ("the question is not whether it is likely that the hazard . . . would have occurred; instead, the ALJ had to determine only whether, if the hazard occurred (regardless of the likelihood), it was reasonably likely that a reasonably serious injury would result"). The legislative history of the Mine Act also "suggests that Congress intended all except 'technical violations' of mandatory standards to be considered significant and substantial." *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1085 (D.C. Cir. 1987); accord *Knox Creek*, 811 F.3d at 163 ("Congress did not intend for the S & S determination to be a particularly burdensome threshold for the Secretary to meet"). In addition, this analysis is consistent with the Commission's own understanding of step two of the *Mathies* test up until *Newtown*. *See, e.g., Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280 (2010) (stating that, at step two, "[t]here is no requirement of 'reasonable likelihood'"). Sec's Br. at 6-7.

The Court has determined that there is no need to resolve this conflict in this instance as it finds that under both tests, the gravity evaluations and the significant and substantial determination by the inspector were supported by the substantial evidence provided by his testimony. Further, the inherent nature of underground mining and the attendant ubiquitous hazards that environment involves supports this Court's determination.

The alleged violation of Section 57.11051(a): the maintenance of escape routes being maintained in safe, travelable condition.

As noted above, per Citation No. 9701258, this citation involves the requirement that, “[e]scapeway routes shall be [i]nspected at regular intervals and maintained in safe, travelable conditions.”

Respondent raises two arguments in support of its claim that there was no violation of the cited standard: “[a]t times relevant to this matter, the escapeway remained in ‘safe, travelable condition;’ [and that] Carmeuse ‘maintained’ its escapeway in such proper condition. R’s Br. at 17. Alternatively, Respondent contends that “to the extent that the escapeways were not in such condition at times relevant to this matter, this was due to facilitation of the MSHA inspection.” *Id.*

In support of its contentions, the Respondent asserts that, despite the water accumulations in the escapeway, the pickup trucks could travel the underground areas without problem.¹³ Putting aside for the moment the contention that the pickup trucks could travel without any problem, that assertion does not speak to the obstacles the water could present if foot travel were required during an escape. As the Respondent notes, the water “was approximately 15-20 inches in depth.” *Id.* The Court does not consider this to be an insignificant amount. Without deciding the exact extent of the water accumulation nor its depth, the Respondent’s assertion that “the water did not significantly continue past crosscut 18,” is sufficient to establish its presence, at least to that extent. This, coupled with the testimony of both MSHA inspectors about the depth of the water and the hazards it would present in the event of an escape is sufficient to establish that the escapeway was not then “maintained in a safe, travelable condition,” per 30 C.F.R. § 57.11051(a). That the Respondent should be held responsible for that accumulation is a different question.

The real basis of the Respondent’s defense to this violation is that MSHA brought it about by closing the mine on the first day. As the Respondent expresses it, the citation should be vacated because “Carmeuse maintained the escapeway through consistent pumping and *the development of the water in this instance was due to the facilitation of MSHA’s inspection.* *Id.* at 19 (emphasis added). A problem with this contention is that MSHA did not close the mine on that first day. There is no competing factual basis to support the assertion that MSHA closed the mine that day. Clearly, it did not. No closure order was issued.

Alternatively, should the Court determine that the standard was violated, Respondent contends that the significant and substantial (“S&S”) and “reasonably likely” and “fatal” gravity findings are inappropriate. *Id.* at 20. In support of this, Respondent revives its claim that the pickup trucks were able to “travel[] in and out of Level 2 twice during that inspection, meaning that the escapeway was traversed four times through the water without issue.” *Id.* at 21. The record does not establish on way or the other whether the trucks would be impeded by the water.

¹³ An odd defense, Respondent contends that “[t]he appreciable accumulations of water was [sic] confined to the entrance to Level 2 at Crosscut No. 18. *Id.* at 17. There is no limitation in the standard’s scope that excuses compliance to confined areas of an escapeway.

The only finding that can be made on that issue is that the MSHA inspectors, encountering water as they proceeded to the site of the hazard complaint, decided it was ill-advised to proceed further and for that reason the trip to the site was aborted.

Continuing with its position that MSHA created the water accumulation in the escapeway, the Respondent asserts that MSHA's actions interfered with normal mining operations. As the Respondent expressed it "[b]ut for the MSHA inspection, [the dewatering] would have occurred on June 21-22. Both [the] night shift on June 21 and [the] day shift on June 22 were held out of the mine to facilitate the MSHA inspection ... [n]o mining activities were occurring underground at the time of the inspection on June 22 [and] [a]ssuming continued normal mining operations, the pumps would have been fueled and activated and the mine dewatered before mining operations were to resume. Therefore, miners performing normal mining operations would not have been exposed to these conditions." *Id.* at 22. Respondent concludes that "[u]nder these circumstances, the S&S and gravity findings are inappropriate." *Id.* So too, Respondent adds, moderate negligence is also excessive. *Id.*

The Secretary notes that on the second day of MSHA's presence, the parties endeavored to travel to the underground location identified in the hazard complaint as the area of falling rocks. There is no dispute that, in attempting to reach that location, the parties, traveling in two pickup trucks encountered water in the escapeway. While the amount of water was disputed, it is true that the MSHA inspectors decided to abort the trip to the alleged hazard location because of that water and their decision that it was not safe to proceed further. The Court finds that the credible evidence is that McDowell acted prudently in making the decision to turn around and return to the surface. He described the concerns he held which led to that conclusion, as the Secretary notes:

McDowell was concerned about the depth of the water because a vehicle traveling in it could become stalled and not be able to navigate the water which would require the miners to get out of the vehicles and navigate the water on foot. He explained that a miner would have to travel the primary escapeway to exit the mine. He testified that a miner could travel the secondary escapeway; but the entire level two was flooded and both escapeways had the same situation. Inspector McDowell testified that there were substantial amounts of water coming from the mine roof and it was like standing outside in a rain shower.

Sec's Br. at 15, citing Tr. at 63.

Analysis of the alleged escapeway maintenance violation

On the first day of MSHA's appearance at the mine to investigate the hazard complaint, Hyatt informed the MSHA inspectors that it was near quitting time for the mine. MSHA then agreed to postpone its underground inspection regarding the alleged hazard until the following day. While it is undeniable that no closure order was issued, Inspector McDowell acknowledged that he expected that the mine would stay as is and that it was MSHA's expectation that miners would not go underground until they returned the next day. McDowell confirmed that when MSHA did return the next day there was no mining going on. He also agreed that, at least to

some degree, water had accumulated overnight because the pumps had not been running. He also agreed that after the pumps resumed functioning only a minimal amount of water remained.

MSHA Inspector Dycus's testimony was consistent with that of Inspector McDowell, as he confirmed that Hyatt made the decision to lock the gates and that everyone would come back in the morning to continue the matter. He agreed that it was MSHA's expectation that no work would be done between the time MSHA left at the end of the first day until they returned the next day and he affirmed that, when MSHA arrived on day 2, no mining was going on.

Based on the credible testimony, although the Court finds that escape routes were not being maintained in a safe, travelable condition, as explained below, that does not resolve whether there was a violation. In the Court's estimation, the expression "a pox on both your houses" applies. This view comes about because it was incumbent on both sides to communicate better on the issue of the mine's inherent characteristic of significant and chronic water inundation. Though MSHA did not issue a closure order, formal or otherwise, when the first day came to an end it was clear that the mine would not be in a production mode that evening.

Carmeuse had a responsibility to fully inform the MSHA inspectors that failure to fuel the pump generators would result in flooding underground overnight. MSHA in turn had the responsibility of making sure the operator understood that it was not precluding the mine from all activity. It seems clear that MSHA's overriding concern was that underground *mining* was not to continue until it had an opportunity to assess the hazard complaint. With both sides failing to adequately communicate and it being clear that the accumulation encountered the next day was attributable to the failure to keep the pumps running overnight, the Court can hardly find that the operator violated the standard under such unique circumstances. There was no *credible* testimony to support the idea that escapeway flooding was a common condition at the mine. All the evidence points to the conclusion that, at least for purposes of this matter, the escapeway would have been maintained in safe, travelable, condition but for the mutual miscommunication.

CONCLUSION

As discussed above, **the Court finds that the Respondent violated 30 C.F.R. § 57.18009, and as such, Citation No. 9701256 is AFFIRMED.** The violation was reasonably likely to occur and reasonably likely to result in a reasonably serious injury and accordingly was a significant and substantial violation. The violation was attributable to high negligence. **The Court imposes a civil penalty in the amount of \$3,022.00 for this violation.** In arriving at this penalty, the Court considered each of the other statutory factors, including the size of the operator, the history of violations, which was zero, the ability to continue in business and the good faith in abating the violation. Appendix and Exhibit "A."

Further, for the reasons set forth above, Citation No. 9701258 is VACATED.

ORDER

For the reasons set forth above, the Respondent is **ORDERED TO PAY the sum of \$3,022.00 for the violation of Citation No. 9701256** within 40 days of the date of this decision.¹⁴

William B. Moran

William B. Moran
Administrative Law Judge

Distribution:

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¹⁴ Penalties may be paid electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. It is vital to include Docket and A.C. Numbers when remitting payments.

APPENDIX

The parties entered joint stipulations before the hearing. The parties stipulated to the following:

(1) Jurisdiction exists because Carmeuse Lime, (“Respondent”) is an operator of a mine as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), and the products of the subject mine entered the stream of commerce or the operations or products thereof affected commerce within the meaning and scope of section 4 of the Mine Act, 30 U.S.C. § 803;

(2) Respondent is a “mine” as defined in § 3 (h) of the Mine Act, 30 U.S.C. § 802(h);

(3) Operations of the Respondent at the mine at which Citations 9701256 and 9701258 were issued were subject to the jurisdiction of the Mine Act;

(4) This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Sections 105 and 113 of the Mine Act;

(5) Respondent is the operator of Talona Mountain Mine (Mine ID No. 09-01228), which is subject to the Federal Mine Safety and Health Act of 1977 (the “Mine Act”) as amended;

(6) Respondent was the operator of Talona Mountain Mine at all times relevant to this matter beginning June 21, 2022;

(7) Payment of the total proposed penalty of \$3,931.00 for the two citations in this matter will not affect the Respondent’s ability to continue in business;

(8) The individual whose name appears in Block 22 of the Citation in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the Citations were issued;

(9) Citation Nos. 9701256 and 9701258 were issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time and place stated in the Citation as required by the Act;

(10) Exhibit “A” attached to the Secretary’s Petition in Docket SE 2022-0196 contains authentic copies of the Citations with all modifications or abatements, if any.

Finally, the exhibits offered by the Secretary and the Respondent were stipulated as authentic, but no stipulation was made as to their relevance or to the truth of the matters asserted.