June 2023

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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

June 20, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of JUAN SMITHERMAN v. WARRIOR MET COAL MINING, LLC	Docket No. SE 2021-0153-D

BEFORE: Jordan, Chair; Althen and Rajkovich, Commissioners[1]

DECISION

BY THE COMMISSION:

This proceeding arises from a discrimination complaint filed by the Secretary of Labor on behalf of Juan Smitherman, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2018) ("Act" or "Mine Act").[2] The Secretary alleges Smitherman was terminated for raising a ventilation safety complaint, while Warrior Met Coal Mining, LLC ("Warrior Met") claims the miner was discharged for violating work rules.

The Administrative Law Judge found that Smitherman had engaged in protected activity, that his subsequent termination was motivated by that protected activity, and that Warrior Met's alleged business justification was pretextual. 44 FMSHRC 72, 97-99 (Feb. 2022) (ALJ). The Judge issued a decision finding discrimination and assessing a civil penalty, and a subsequent order on additional remedies. *Id.*; April 25, 2022 Order. On appeal, Warrior Met challenges the Judge's findings of protected activity and improper motivation, and claims the Judge failed to consider the operator's affirmative defense.

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[1] Commissioner Timothy J. Baker has recused himself from this matter.

[2] Section 105(c)(1) of the Act provides in relevant part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

30 U.S.C. § 815(c)(1). Section 105(c)(2) provides that the Secretary shall file a complaint with the Commission on behalf of a miner if she determines that section 105(c)(1) has been violated.

For the reasons below, we affirm the Judge's decision. We conclude that substantial evidence supports the Judge's findings that Secretary established a prima facie case and that Warrior Met's affirmative defense was pretextual.

I.

Factual and Procedural Background

A. Factual Background

a. General Background and Early Incidents

At the time of the relevant events, Juan Smitherman was a roof bolter on the Owl Shift (11:00 p.m. to 7:00 a.m.) at Warrior Met's No. 4 Mine in Brookwood, Alabama. Section Foreman Zachary Salyers became Smitherman's supervisor in January 2021. I:129.[3]

Smitherman and Salyers had at least one safety-related dispute prior to the key events. In early February 2021, they had a disagreement as to whether dust bags were required for roof bolters.[4] Smitherman refused to work without dust bags, and Salyers ultimately provided them. Smitherman testified that Salyers pushed him to run the roof bolter without a dust bag, which Salyers contested. I:42-46, 130-33, 251-52; II:131.

Smitherman testified to three additional incidents. First, he related seeing Salyers walk past miners cutting without a curtain. He asked Salyers about it and Salyers said he had not noticed. Smitherman responded, "I know you saw them," Salyers asked why Smitherman had "a problem with everything," and it "got loud." I:138-39. Smitherman also recalled another incident where Salyers denied knowing that a curtain was down and a third incident where he accused Salyers of not properly dusting an entry. I:140-43. Salyers claims he and Smitherman had no safety-related disagreements other than the dust bag issue. I:48; II:132.

b. February 28th Owl Shift – Fly Pad Ventilation Complaint

During the February 28th Owl Shift, Smitherman decided to walk by the next face and saw that no drop board or fly pads had been installed.[5] He hung a drop board then went to lunch. When he returned, the fly pads still had not been installed and the other roof bolters on the shift (Jonathan Banks and Steven Volts) had started bolting. Smitherman told Banks and Volts that they were bolting without proper ventilation and needed to stop. They told Smitherman they

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[3] Transcript volumes one and two are cited as "I:--" and "II:--," respectively.

[4] Smitherman described dust bags as akin to a vacuum cleaner bag for the roof bolter's dust filter. I:131-32.

[5] Fly pads are temporary curtains that direct air while allowing people and equipment to pass through, akin to the plastic sheeting in industrial freezers. Fly pads are hung from a drop board, which is a long piece of wood mounted to the ceiling. I:49-51, 145.

would find Salyers and see what he wanted them to do.[6] Banks and Volts informed Salyers of the issue, and he had the ventilation controls in place within an hour. I:52-53, 144-49, 258.

Smitherman and Salyers disagreed on the content of Banks and Volts' conversation with Salyers. Salyers claimed they did not mention Smitherman. I:53; II:139. Smitherman was not present but testified that Banks and Volts recounted the conversation to him. According to Smitherman, they told Salyers "what [Smitherman] had said," that Smitherman refused to bolt without proper ventilation, and that they would not continue to bolt because Smitherman would "tell on them." I:150-51, 257. When interviewed by MSHA Supervisory Special Investigator Thomas O'Donnell, Volts stated that he did not mention Smitherman, and Banks said he could not remember. II: 69.

c. March 1st Owl Shift - Transfer Request

Before the start of the March 1st Owl Shift, Smitherman told Salyers that he wanted to transfer to a different section.[7] Smitherman did not explicitly identify a reason for his request, and Salyers did not ask. I:153-54, 261-62; II:141, 172. Smitherman claimed he told Salyers "I can't be up there with them doing what they did the day before," and assumed Salyers knew he meant the fly pad issue because there had not been any other serious incidents the previous shift. I:154, 262-63. Salyers claims Smitherman made no mention of "what happened the day before," and that he had no idea why Smitherman wanted to be moved. I:54, 96; II:142, 172.

Salyers raised Smitherman's transfer request with his supervisor, who directed Salyers to reassign Smitherman to the Lo-Trac. I:54-55; II:141-42. Salyers testified that Smitherman was reassigned because the usual Lo-Trac operator was absent. II:143. Smitherman conceded that the usual operator was absent and that he had relevant experience but testified that running the Lo-Trac is usually assigned to the service crew or a junior miner. Smitherman felt he had been reassigned because he slowed production when he stopped Banks and Volts from bolting but conceded he did not know for certain. I:158-62, 268-69.

d. March 1st Owl Shift – Lo-Trac Work

Smitherman's duties that night included bringing up some pallets of block and a bundle of water line and unloading supply cars. Smitherman claims Salyers also ordered him to bring up and load supplies for the roof bolter, though Salyers contests this. I:158, 162, 174, 271, 278-79; II: 149-50, 153.

According to Smitherman, he had a busy shift. He stocked the roof bolter, brought up pallets, unloaded supply cars, looked (unsuccessfully) for the water line, and brought up a rock duster at the request of the maintenance foreman. I:162-63, 174, 176, 280. He also testified to various complications such as grading issues that made it difficult to maneuver the Lo-Trac and had to be addressed, slowing his assigned work. I:164-65, 302-03. Finally, Smitherman stated that the rock duster tipped over and broke the pallet it was sitting on, so he had to wrestle the

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[6] Smitherman also looked for Salyers to discuss the fly pad issue but did not find him. I:150. Smitherman never directly mentioned the fly pad issue to Salyers. I:260.

[7] Smitherman had asked his shift foreman for a transfer a few days earlier. I:155-56.

rock duster onto the Lo-Trac, take it to a new pallet, then wrestle it off the Lo-Trac onto the pallet, at which point (around 6:00a.m.) he took a rest break in the supply hole. I:167-68, 178.

Salyers found Smitherman and asked after his progress during his 3:00 a.m. lunchbreak, and again (as discussed further below) around 6:00 a.m. in the supply hole. Salyers testified that he was not pleased with Smitherman's progress at either point, though he only said so during the 6:00 a.m. interaction. I:60-66, 168, 271, 282; II:154-58. Smitherman concedes that during these interactions he did not tell Salyers of the difficulties he encountered. I:270-73; II:155.

Smitherman testified that by the end of the shift he had finished bringing up the pallets and delivered everything except the water line, which he could not find. I:174, 182, 299, 305. Conversely, Salyers claims Smitherman completed none of his assigned tasks because he had only brought up some of the pallets (to the wrong location) and had not found the water pipes. I:60-63, II:154-56.

e. March 1st Owl Shift - Supply Hole Confrontation

Salyers claims that, on March 2 at approximately 6:00 a.m., he found Smitherman in the supply hole, slumped over with the machine off, his hardhat and glasses off, and his cap light off. Salyers claims he shined a light in Smitherman's eyes with no response, moved to within twenty feet and called Smitherman's name, which "startled" him. Salyers concluded that Smitherman had been sleeping. II:155-57.

Smitherman claims he was not asleep and was only taking a break after wrestling with the rock duster. He explained that he turned off the Lo-Trac because the supply hole had poor circulation and the heat and exhaust fumes would have been unpleasant. He denied taking off his headlamp or turning off his light and made no mention of being startled. I:167-68, 179-81.

The outline of the ensuing conversation is uncontested: Salyers asked Smitherman what he was doing, and Smitherman said he was taking a break. Salyers asked Smitherman why he hadn't finished more of his work and threatened to write him up (without specifying the charge), and Smitherman told Salyers to "do what he had to do." I:168; II:158. However, the accounts vary as to specifics and tone.

According to Salyers, when Smitherman said he was taking a break, Salyers told Smitherman he had already had his lunch break and asked why he hadn't gotten anything done. Smitherman responded, "I told you I didn't want to work for you." At that point, Salyers told Smitherman the transfer hadn't been his decision and he was going to write him up. II:155-58.

According to Smitherman, Salyers asked why he had not brought up all the supplies, and Smitherman said he was "not done." Salyers started yelling and threatened to write Smitherman up. Smitherman claims Salyers' surprise at his lack of progress was "nonsense" because Salyers had seen Smitherman working several times before lunch and had assigned him additional tasks such as loading the roof bolter. Because Smitherman believed Salyers was just "messing with [him]," he told Salyers to "do what you got to do." I:168-69, 282. Smitherman claims he tried to explain everything that happened during the shift, but Salyers talked over him. I:300.

Shortly after, Salyers informed his supervisor that Smitherman had been sleeping. The issue was passed on to mine manager Chris Thielen, who asked HR manager Sherry Sterling and general mine foreman Jason Lee to meet with the miners involved. I:35-36; II:162, 188, 271.

f. Subsequent Investigation and Adverse Action

Sterling testified that her normal disciplinary investigation process involves speaking with witnesses, getting a written statement if the issue is sufficiently complex, and making credibility determinations. She does not normally take notes or issue reports. Disciplinary decisions are made by the mine manager (Thielen) with Sterling's assistance. II:179-84, 224-25.

Sterling and Lee interviewed Smitherman and Salyers after the end of the March 1st owl shift. They met with Smitherman first. Sterling claims Smitherman denied falling asleep but conceded that he had not completed his assigned work. Smitherman gave Sterling the names of two miners he claimed had seen him working shortly before 6:00 a.m., expressed unhappiness with the safety culture at the mine, and (either during the interview or a later phone call) informed Sterling that people had been bolting without proper ventilation. I:184, 187-89, 192, 208, 212; II:188, 193. She did not speak with Smitherman again until the union meeting. II:209.

Sterling and Lee next met with Salyers, who told them he had found Smitherman "slumped over with his lights off . . . asleep, and that he didn't complete [his] assignments." II:189-90. They asked Salyers to give a written statement, which provided a similar description but did not use the word "sleeping." I:77. Sterling claims she asked for a written statement from Salyers (but not Smitherman) because Salyers' allegation was "detailed" while Smitherman's account was "simple"—he was not sleeping and did not complete his tasks. II:190, 224-25. Salyers had no further involvement other than a brief call with a union representative. I:98.

Smitherman was suspended pending investigation. II:191-92. Sterling and Thielen then conducted various interviews. They spoke with the two miners Smitherman claimed had seen him working: according to Sterling they said they had not seen Smitherman that shift, while according to Thielen they said they saw someone running the Lo-Trac and assumed it was Smitherman. Sterling and Thielen also asked Banks about the fly pad incident, and asked others on the section what they thought of Salyers. II:18-19, 26, 193-97, 201-04, 274-76, 280.

Sterling and Thielen also reviewed Smitherman's personnel file and discovered that he had been suspended in 2018 for sleeping (dozing near the end of an owl shift). I:122, 127-28; II:197. The resulting disciplinary agreement stated that "any further violations of work rules . . . will result in immediate discharge." Gov. Ex. 14.

On March 8, Smitherman was issued a 5-day suspension with intent to discharge. Gov. Ex. 4. The relevant paperwork lists a violation of Work Rule 1 (wasting time, loitering, neglect of duties) and a violation of Work Rule 5 (sleeping on the premises).

Thielen and Sterling claimed that the loafing violation was uncontested because Smitherman conceded he had not completed his assigned tasks. II: 221, 242, 281. Specifically, Smitherman was disciplined for not working while tasks remained undone, i.e., taking an "unauthorized break." I:192; II:230, 281. Sterling testified that miners should not take a break before completing their assignments. However, she was unable to point to a written policy on breaks and could not recall any prior discipline for taking a rest break. II:227-32. Smitherman

testified that he had never heard of an unauthorized break, never had to request permission for a break, or heard of any miner previously being disciplined for an unauthorized break. I:192-94.

Sterling and Thielen found the sleeping violation based on Salyers' account and Smitherman's previous suspension for sleeping. II:284-86. Sterling explained that she chose to believe Salyers' version of events because she found Smitherman to be untruthful, based on the two miners' failure to confirm that they had seen Smitherman working. II:243-44, 249-50.

Thielen, Sterling, and Smitherman met with union representatives on March 15, 2021, after which Thielen upheld his decision to discharge Smitherman. II:210-11.

B. Judge's Decision and Arguments on Appeal

The Judge analyzed this matter under the Commission's traditional *Pasula-Robinette* test, in which a miner establishes a prima facie case of discrimination by showing that he engaged in protected activity and was subject to an adverse action at least partially motivated by that protected activity, while operators may defend affirmatively by proving that the adverse action was also motivated by the miner's unprotected activity and would have been taken for the unprotected activity alone.[8] *E.g.*, *Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1919, 1923 (Aug. 2016). Neither party challenges the application of this test. Op. Br. at 21; Sec'y Br. at 3 n.1.

The Judge found that Smitherman engaged in protected activity primarily by raising the fly pad safety complaint during the February 28th owl shift. 44 FMSHRC at 97. Although the complaint was conveyed by other miners, the Judge found that Salyers made the "logical connection" to Smitherman given their history of safety disputes, the fact that Smitherman was working with the other roof bolters, and the coincidence in time between the complaint and Smitherman's transfer request. *Id.* at 73, 81, 98. The Judge also found a causal nexus between the complaint and Smitherman's termination, noting Salyers' knowledge of the complaint, the proximity in time between the "core events," and indicators of hostility. *Id.* at 98.

The Judge rejected Warrior Met's alleged business justification–that Smitherman was terminated for violating work rules—as pretextual. Procedurally, the Judge found the operator's investigation was cursory, superficial and biased. *Id.* at 99. Substantively, he found that the allegations were ambiguous and not supported by the record. *Id.* at 84, 87, 91, 93, 97.

The Judge found a section 105(c) violation, assessed a $20,000 civil penalty, and ordered backpay for the period between Smitherman's suspension and his temporary reinstatement and reimbursement of Smitherman's 401(k) early withdrawal fees. *Id.* at 100; April 25, 2022 Order.

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[8] *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). The Ninth Circuit has since rejected *Pasula-Robinette* in favor of a "but-for" standard. *Thomas v. CalPortland Co*., 993 F.3d 1204 (9th Cir. 2021). *Thomas* is not binding here, as Warrior Met's No. 4 Mine is not located in the Ninth Circuit. Nevertheless, the Judge noted that he would find discrimination under either standard. 44 FMSHRC at 97.

On appeal, Warrior Met challenges the Judge's findings of protected activity, causal nexus, and pretext.[9] The operator claims Smitherman never made a safety complaint to Salyers about the fly pads (either directly or indirectly), challenges the Judge's findings as to knowledge and animus, and claims that the disciplinary investigation had a reasonable basis for concluding that Smitherman was sleeping and loafing.

II.

Disposition

The Judge found that Smitherman engaged in protected activity, that the protected activity motivated his termination, and that Warrior Met's business justification was pretextual. A Judge's factual findings in the context of a discrimination proceeding are reviewed under the substantial evidence standard. *E.g.*, *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 822, 837 (May 1997). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). As discussed below, substantial evidence in the record supports his findings of protected activity, improper motivation and pretext. Accordingly, we affirm the Judge's conclusion that discrimination occurred.

A. Substantial evidence supports the Judge's finding of protected activity.

The Judge found that Smitherman engaged in protected activity by raising the February 28th fly pad complaint.[10] 44 FMSHRC at 97. As a preliminary matter, the ventilation issue reached Salyers indirectly, through Banks and Volts. I:150, 260-61. The Commission has found discrimination where an operator mistakenly believed a miner had engaged in protected activity. *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1480 (Aug. 1982). Applying the same

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[9] Warrior Met also briefly challenges aspects of the Judge's order regarding remedies in a footnote of its petition for discretionary review, without substantive discussion in either the petition or subsequent briefing. PDR at 32 n.10. Each issue raised in a petition must be "supported by detailed citations to the record . . . and by statutes, regulations, or principal authorities relied upon." 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(d). We find that Warrior Met's remedies arguments have been abandoned and decline to address them. *See RNS Services, Inc.*, 18 FMSHRC 523, 526 n.6 (Apr. 1996), *aff'd*, 115 F.3d 182 (3d Cir. 1997); *Asarco Mining Co.*, 15 FMSHRC 1303, 1304 n.3 (July 1993).

[10] The Secretary claims the earlier dust bag dispute and Smitherman's transfer request independently constitute protected activity. Sec'y Resp. at 18-19. The Commission has held that protected activity is not limited to the four corners of the initial complaint, noting the Secretary's authority to address issues uncovered during the investigation. *Sec'y on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1016-18 (June 1997). Here, however, the prior dispute and transfer request were not mentioned in either the initial complaint *or* MSHA's post-investigatory findings. Regardless, we affirm the Judge's finding that the "core charge" of the ventilation complaint is sufficient to establish protected activity. 44 FMSHRC at 97-98, 98 n.20.

framework, protected activity here turns on whether Salyers *believed* Smitherman was involved in raising the complaint.

The Judge discredited Salyers' claim that he was unaware of Smitherman's involvement in the ventilation complaint.[11] Noting the two men's history of friction and Salyer's awareness that Smitherman was on the section with Banks and Volts that shift, the Judge concluded that Salyers "made the logical connection between Smitherman and his fellow bolters' complaints." 44 FMSHRC at 73. In other words, the Judge inferred that Salyers believed Smitherman was involved in raising the ventilation issue because Salyers was aware Smitherman had both the propensity and clear opportunity to do so.

Elements of a prima facie case may be sustained by reasonable inferences drawn from the record. *Con-Ag Inc. v. Sec'y of Labor*, 897 F.3d 693, 700 (6th Cir. 2018). Such inferences are permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984).

Here, the record clearly establishes the underlying evidentiary facts. Salyers conceded that he and Smitherman had at least one prior disagreement regarding dust bags, and the Judge reasonably credited Smitherman's testimony regarding three additional incidents between the two men.[12] I:42-48; 44 FMSHRC at 80. Salyers also testified that he assigned Smitherman to assist Banks and Volts as the third "bolt man" on the February 28th owl shift. II:133. In sum, the record clearly shows that three roof bolters were working together on a shift, two of them raised a safety issue with their supervisor, the third roof bolter had a history of raising safety issues, and the supervisor was aware of all this. Given these evidentiary facts, it was reasonable for the Judge to infer Salyers' belief in Smitherman's involvement.

The record establishes that Salyers believed Smitherman had the predisposition and clear opportunity to be involved in the February 28th fly pad complaint. Based on those underlying evidentiary facts, the Judge reasonably inferred Salyers' belief that Smitherman was involved. Accordingly, we affirm the finding of protected activity.

B. <u>Substantial evidence supports a causal connection between the complaint and Smitherman's termination.</u>

The Commission looks to four indicia to establish whether an adverse action was motivated by protected activity: (1) knowledge of the protected activity, (2) hostility toward the

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[11] The Judge generally did not find Salyers credible, noting inconsistencies in his testimony and a "reluctance to answer straightforward questions." 44 FMSHRC at 75. Judges' credibility determinations are entitled to great weight and are only overturned for compelling reasons. *E.g.*, *KenAmerican Res., Inc.*, 42 FMSHRC 1, 3-6 (Jan. 2020) *aff'd*, 33 F.4th 884, 891-92 (6th Cir. 2022).

[12] The Judge noted that Smitherman described the incidents "in detail and with particularity." 44 FMSHRC at 80. While Smitherman did not provide dates or locations for these additional incidents, he did recall the relevant conversations in moderate detail. I:138-41.

protected activity, (3) coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complainant. *E.g.*, *Riordan*, 38 FMSHRC at 1919, 1923.

Here, the Judge found a causal connection between Smitherman's discharge and his fly pad complaint based on knowledge of the protected activity, coincidence in time, and hostility. 44 FMSHRC at 98. As discussed above, substantial evidence supports the Judge's conclusion that Salyers knew Smitherman was involved in the complaint. The coincidence in time—between one day and two weeks—is also well within the bounds of Commission precedent.[13] Finally, the record clearly indicates that at least some degree of safety-related hostility existed: Salyers and Smitherman's prior disagreement regarding dust bags is uncontested, and the Judge reasonably credited Smitherman's account of other safety-related disputes, including a ventilation-related confrontation that "got loud." *See supra* pp. 8, 8 n.12; I:138-40.

The Judge also points to two other potential indicators of hostility: Smitherman's reassignment from roof bolter to Lo-Trac operator, and the confrontation in the supply hole. 44 FMSHRC at 98; I:160-61, 168-69.

The record clearly establishes sufficient evidence to support findings on knowledge, coincidence in time, and a degree of hostility. The Commission has recognized that a coincidence in time between protected activity and an adverse action may alone be sufficient to establish discriminatory intent. *E.g.*, *Pendley v. Fed. Mine Safety & Health Review Comm'n*, 601 F.3d 417, 427-28 (6th Cir. 2010). Accordingly, substantial evidence supports the Judge's finding of improper motivation.

C. Substantial evidence supports the Judge's finding of pretext for the affirmative defense.

Warrior Met could have established an affirmative defense by showing that Smitherman's termination was also motivated by a belief that Smitherman had engaged in unprotected activity, and that he would have been terminated for that unprotected activity alone. *E.g.*, *Knox Creek*, 38 FMSHRC at 1919; *Pendley*, 601 F.3d at 426. Warrior Met claims Smitherman was legitimately discharged for violating work rules against sleeping and loafing. Smitherman's 2018 last-chance agreement clearly required his discharge in the event of a work rule violation. I:287; Gov. Ex. P14. Accordingly, the question is whether the alleged work rule violations credibly factored into Warrior Met's motivation, or whether the proffered business justification was pretextual. *See Chacon*, 3 FMSHRC at 2516.

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[13] The fly pad complaint occurred on the February 28th owl shift, the reassignment and supply hole confrontation occurred during the March 1 owl shift, and the decision to terminate was made on March 8. The Commission regularly finds a coincidence in time when the protected activity and adverse action are separated by a longer period, even a few *months* apart. *E.g.*, *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000); *Riordan*, 38 FMSHRC at 1924.

Substantial evidence supports the Judge's finding of pretext.[14] Two elements of the record particularly support this finding. First, as the Judge notes, there is a lack of clarity regarding the loafing charge. 44 FMSHRC at 93, 99, 99 n.23. The Commission has found pretext where a rule is applied "in a manner deliberately calculated to render compliance difficult or impossible." *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). Here, Smitherman was allegedly discharged for taking an "unauthorized break" before completing his tasks. I:192; II:277, 281, 287. However, the record shows this concept of an "unauthorized break" was not clearly or consistently applied. Sterling testified that employees should seek permission before taking a "breather," but that restroom and water breaks were permitted. She could not explain why only some breaks were permitted, conceded there was no written policy on breaks, and could not recall discharging any miner for taking a break. II:227-32. Smitherman had never previously heard of an unauthorized break or heard of other miners being discharged for taking a break. I:192-94. Without a policy or history of enforcement, Smitherman had no guidance as to what constituted an "unauthorized break."

Second, a conflict between Sterling and Thielen's testimony seriously erodes the legitimacy of the sleeping charge. Sterling testified that she chose to believe Salyers' account (Smitherman was sleeping) over Smitherman's (he was not) because Smitherman was untruthful on a related matter: he claimed two other miners saw him working shortly before Salyers found him in the supply hole, but they denied it when interviewed by Sterling and Thielen. II:243-51. Effectively, Sterling's conclusion that Smitherman violated Work Rule 5 depends on the two miners' statement that they *did not see Smitherman that shift*, because it convinced her to credit Salyers' version of events.[15]

According to Thielen, however, the miners claimed they saw someone operating the Lo-Trac *and assumed it was Smitherman*. II:275-76, 280, 295. Based on Thielen's testimony, Sterling loses her justification for crediting Salyers' sleeping allegation. As HR manager and mine manager, Sterling and Thielen were the two people responsible for deciding whether Smitherman had violated work rules. Yet their testimony regarding a *key justification* for finding the violation of Work Rule 5 is incompatible. This inconsistency supports the finding of pretext.

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[14] Warrior Met claims the Judge failed to analyze its affirmative defense. Op. Br. at 27-28. The Judge calls Warrior Met's argument a "rebuttal" but his analysis is consistent with an affirmative defense. *See* 44 FMSHRC at 99.

[15] The Judge appears to have fundamentally disagreed with Sterling's credibility-based approach, instead focusing on whether there was sufficient evidence to support Salyers' claims. II:216-17, 243-51; 44 FMSHRC at 91, 94-95. An investigation is not pretextual simply because a Judge disagrees with the investigatory approach. *See Chacon*, 3 FMSHRC at 2517. Insofar as the Judge found pretext because he would have required Salyers to prove his allegations rather than deciding the issue based on credibility, the Judge erred by imposing his own judgment as to the appropriate burden of proof. However, as discussed *supra*, there is reason to believe this *particular* credibility determination was pretextual.

The Judge took issue with other aspects of Warrior Met's investigatory process. While these additional factors do not necessarily establish pretext, neither do they contradict a finding of pretext.[16]

Ultimately, as discussed above, two key elements clearly establish pretext: the vagueness of the "unauthorized break" charge, and the inconsistencies in critical testimony regarding Sterling's justification for concluding that Smitherman was sleeping. The record contains sufficient evidence to support the Judge's finding of pretext. Accordingly, the Judge's rejection of Warrior Met's affirmative defense is affirmed.

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[16] The Judge took issue with the operator's investigation, finding it cursory and superficial. 44 FMSHRC at 99. Certainly, the quality of an operator's investigation may be considered in a pretext analysis. In this case, the record suggests that the operator followed its normal processes, and it is unclear the degree to which the cursory nature of *this* investigation supports a finding of pretext. *Cf. Con-Ag*, 897 F.3d at 704. The Judge also found evidence of bias in Sterling's search of Smitherman's personnel file. 44 FMSHRC at 91, 93, 99, 99 n.22. It is not improper for an investigator to check the file of someone under disciplinary investigation. Finally, in taking issue with Warrior Met's conclusion that Smitherman was loafing and/or sleeping, the Judge implied Warrior Met had the burden of showing that unprotected activity *in fact occurred*, and Warrior Met failed to do so. 44 FMSHRC at 84, 87. In the affirmative defense context, the Commission looks to the operator's actual belief at the time rather than the ultimate truth of the alleged unprotected activity. *Pendley*, 601 F.3d at 426; *Chacon*, 3 FMSHRC at 2517; *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998). We find that the Judge's additional considerations constitute harmless error at worst. *See* Fed. R. Civ. P. 61. Ultimately, given the preponderance of evidence as discussed above, none of these issues call into question the decision in this case.

III.

Conclusion

For the reasons stated above, substantial evidence supports the Judge's finding of discrimination. Accordingly, we affirm the Judge's decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 7, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. CENT 2022-0253
	A.C. No. 13-00032-559242
v.	
MILLER CONTRACTING SERVICES, LLC	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On September 26, 2022, the Commission received from Miller Contracting Services, LLC ("Miller"), a motion to reopen a final order of the Commission pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered to the operator on July 26, 2022, and became a final order of the Commission on August 25, 2022. Miller filed a short *pro se* motion to reopen stating that it timely filed to contest the penalty for Citation No. 9488618 and

attributing MSHA's non-reciept of the contest to the form becoming lost in the mail. MSHA states that it received a partial payment toward the penalty on August 25, 2023.

We note that although Miller's motion lacks details and documentation regarding the operator's attempt to timely file, Miller promptly filed to reopen shortly after learning that MSHA did not receive its contest form. Specifically, Miller filed its motion 32 days after the citation became a final order of the Commission. The Secretary does not oppose the operator's request.[1]

Having reviewed Millers's request and the Secretary's response, we find that Miller has demonstrated that its failure to timely file was the result of a mistake. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

[1] The Secretary represents that the operator timely contested the imminent-danger order that was issued in association with Citation No. 9488618. The parties further represent that they have reached a settlement agreement involving the imminent-danger order and the citation.

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June 7, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. MARFORK COAL COMPANY, LLC,	Docket No. WEVA 2023-0043 A.C. No. 46-09550-560358

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, 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. (2018) ("Mine Act"). On November 4, 2022, the Commission received from Marfork Coal Company, LLC ("Marfork"), a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 17, 2022. On September 16, 2022, the assessment became a final order of the Commission.

Marfork states that it emailed a notice of contest to MSHA, on September 26, 2022—after the order had become final—noting its intent to contest seven citations. The Secretary received a check directed toward the proposed assessment in the amount of $5,224 on October 5, 2022.[1]

Marfork then filed the subject motion to reopen the seven citations and penalties that it had tried to contest. Marfork states that an executive assistant at Marfork's parent company, Alpha Metallurgical Resources, Inc., made a mistake; she neglected to change the assessment status to "Ready for Review" after logging it into the company's internal processing system. As a result, the safety director did not review the citations until September 19, 2022, three days after the civil penalty assessment had become a final order of the Commission. Marfork promises that "[i]n the future, [the executive assistant] will more timely move the Proposed Assessment from 'New' to 'Ready for Safety Review,' so that the Safety Department has adequate time to contest the violations well within the 30-day period." Mot. at 3.

The Secretary opposes the operator's motion to reopen. The Secretary represents that the operator has not established good cause for its failure to timely contest the proposed assessment, but instead has identified uncorrected inadequate internal procedures which in the recent past have contributed to its failure to timely contested other proposed assessments.

In fact, several months prior to filing this motion, Alpha cited to the *exact same* clerical error in a motion to reopen filed by a different subsidiary. On June 27, 2022, Alpha represented to the Commission that Mammoth Coal Company failed to timely contest a proposed assessment because the same administrative assistant inadvertently neglected to change the proposed assessment status to "Ready for Safety Review" in the operator's internal processing system.[2] In granting Mammoth's motion to reopen, the Commission relied on "[t]he operator['s] promise[ ] that, in the future, the executive assistant will timely move all proposed assessments to 'Ready for Review' status." *Mammoth Coal Co*., Docket No. WEVA 2022-0426 (March 13, 2023) at 2.

In opposing Marfork's motion, the Secretary argues that "[t]he Commission should not reward operators who represent to the Commission that they have changed their procedures, but in fact have not." Sec'y Response at 6.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res.*, LLC, 33 FMSHRC 103. 104 (Feb. 2011); *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co*., 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008).

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[1] Marfork's payment of $5,224 equals the total civil penalty amount for the 13 unmarked penalties on the late filed contest form. Exhibit A. The Secretary applied Marfork's payment toward the first two citations listed chronologically on the proposed assessment form. *Id*.

[2] The Secretary represents that according to both motions to reopen the same Alpha personnel are responsible for processing proposed assessments for Marfork and Mammoth.

Alpha was put on specific notice of deficiencies in its internal processing system but failed to take adequate actions to remedy these deficiencies for months, despite promises to correct the problem. The operator did not reply to the Secretary's response.

We find that Marfork has not asserted good cause for its failure to timely contest the proposed penalties. *See Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3345 (Nov. 2013) (denying a motion to reopen when the operator was put on notice of and neglected to fix problems with its internal procedures). The motion is DENIED WITH PREJUDICE.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
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/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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June 8, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. STERLING MATERIALS	Docket No. KENT 2022-0127 A.C. No. 15-18068-548406

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY: Jordan, Chair; Althen and Rajkovich, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On September 9, 2022, the Commission received from Sterling Materials ("Sterling") a motion to reopen final orders of the Commission pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered to the operator on January 24, 2022 and became a final order of the Commission on February 23, 2022. Thereafter, MSHA received partial payment of the civil penalties. On April 12, 2022, MSHA sent the operator a delinquency notice. The operator then sent additional payments in satisfaction of the total assessed penalty for the six citations at issue in the assessment.

Sterling asserts that it intended to contest the civil penalty associated with Citation No. 9870856, but failed to timely file contest as a result of a clerical error. Sterling maintains that it confused the status of Citation No. 9870856 with the status of a similarly numbered citation (Citation No. 9870855). Sterling had previously timely filed to contest the proposed penalty for the similarly numbered citation.[1] The Secretary does not oppose the operator's motion to reopen.

Having reviewed Sterling's request and the Secretary's response, we find that Sterling demonstrated that its failure to timely file to contest the proposed penalty for Citation No. 9870856 was due to a mistake and clerical error. In the interest of justice, we hereby reopen the contest of this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

[1] Sterling's motion mistakenly states that Citation No. 9870855 was part of Docket No. KENT 2021-0129. In fact, Citation No. 9870855 was contained in Docket No. KENT 2021-0130.

Commissioner Baker, dissenting:

In this case, Sterling Materials failed to timely contest a proposed penalty and then paid the amount owed. For the reasons set forth in my dissent in *Omya Inc*., 45 FMSHRC___, 2023 WL 2559811 (Mar. 9, 2023), I do not believe it is accurate to characterize this action as a justifiable mistake or excusable neglect.

Therefore, I would deny its motion to reopen.

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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June 16, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. POCAHONTAS COAL COMPANY LLC,	Docket No. WEVA 2023-0092 A.C. No. 46-08878-565698

DIRECTION FOR REVIEW AND ORDER

The Petition for Discretionary Review filed by the Secretary of Labor on June 9, 2023 is GRANTED.

Briefing on this matter is held in abeyance pending further order by the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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June 16, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CONSOL MINING COMPANY LLC	Docket No. WEVA 2023-0141 A.C. No. 46-09569-568207

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On June 9, 2023, the Secretary of Labor's Mine Safety and Health Administration ("MSHA") filed a Petition for Discretionary Review seeking review of the Judge's May 11, 2023 Order denying the parties' motion to approve settlement of the captioned matter. The Judge stated that "[t]he parties should anticipate that the matters addressed by the motion will be resolved at hearing . . . ." Order at 2.

Although the Secretary titled her filing as a Petition for Discretionary Review, we conclude that her filing is more aptly described as a petition for interlocutory review. That is because the Judge's Order is not a final decision and thus the Commission is unable to consider a petition for discretionary review filed pursuant to section 113(d) of the Mine Act, 30 U.S.C. § 823(d) and Commission Procedural Rule 70.[1] *See Sec'y of Labor on behalf of Reuben Shemwell*, 35 FMSHRC 2056, 2057 (July 2013) ("[s]ection 113(d) of the Mine Act, 30 U.S.C. § 823(d), only allows for review of final decisions.").

However, pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76, the Commission may review a Judge's ruling, prior to the Judge's final decision in the case, if certain conditions are met. According to Rule 76(a)(1), the Judge must certify that his interlocutory ruling involves a controlling question of law and that immediate review will materially advance the final disposition of the proceeding. Or, in the alternative, the Judge must deny a party's motion for certification of the interlocutory ruling to the Commission, and then the party must file with the Commission a petition for interluctory review within 30 days of the Judge's denial of such motion. In the present case, the Judge has neither certified the case for

[1] Commission Procedural Rule 70 implements section 113(d) of the Mine Act and sets forth the provisions under which a party can seek relief before the Commission from a final order of an administrative law judge. 29 C.F.R. § 2700.70.

interlocutory review, nor has the Secretary initially sought such certification by first filing a motion with the Judge.

Accordingly, because the Secretary has filed for review of a Judge's interlocutory ruling with the Commission, prior to first filing a motion for certification with the Judge, we DENY the petition for interlocutory review without prejudice.[2]

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

---

[2] This case consists of a total of six citations. Currently pending before the Judge is a motion to bifurcate this matter into two cases: one case concerning the four citations which are the subject of the denied motion to approve settlement and the second case consisting of the two additional citations that are scheduled for hearing on July 25, 2023. Bifurcating this matter into multiple cases, with discrete docket numbers, would both facilitate potential Commission interlocutory review and prevent any unintentional delays leading up to the scheduled hearing on the unresolved citations.

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June 21, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CEMEX CONSTRUCTION MATERIALS SOUTH, LLC	Docket No. CENT 2021-0207 A.C. No. 41-04827-536222

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY: Jordan, Chair; Althen and Rajkovich, Commissioners:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On September 21, 2021, the Commission received from Cemex Construction Materials South, LLC ("Cemex") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

MSHA records indicate that the proposed assessment was mailed via the USPS to the operator on June 8, 2021. USPS recorded the date of delivery as June 16, 2021. On July 16, 2021, the proposed assessment was deemed a final order of the Commission because the operator

had not filed a Notice of Contest within 30 days. On August 31, 2021, MSHA mailed a delinquency notice to the operator.

Cemex does not dispute that the assessment was mailed to the correct address. However, Cemex has no record of receiving the assessment. The Secretary has provided a delivery confirmation, which contains "COVID" in the signature block. The exact method of delivery confirmation is unclear. The Secretary of Labor does not oppose the request to reopen.

We note that the motion to reopen was timely filed. The Commission has previously held that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.,* 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, the motion to reopen was filed on September 21, 2021, within 30 days of the operator's receipt of the delinquency notification, mailed on August 31, 2021. Therefore, the motion to reopen was filed within a reasonable amount of time.

Having reviewed Cemex's request and the Secretary's response, we find that Cemex has demonstrated good cause for its failure to timely respond and acted in good faith by timely filing its request to reopen. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

Commissioner Baker, dissenting:

I respectfully dissent.

In the past, the Commission has held that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment*. See, e.g., Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010).

As set forth in the majority opinion, the Secretary provided USPS documentation showing Cemex received its proposed assessment on June 16, 2021. On July 16, 2021, the proposed assessment was deemed a final order of the Commission. Following receipt of a delinquency notice, Cemex filed a Motion to Reopen. It concedes that the proposed assessment was delivered to the correct address but alleges that it has no record of the delivery. In short, after delivery the assessment was not routed to the person at Cemex responsible for its processing. Cemex provides no explanation for this failure.

Commission Procedural Rule 25, 29 C.F.R. § 2700.25, provides that "[t]he Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment."

The USPS receipts show Cemex, as an entity, received the assessments. Therefore, the Secretary delivered the assessments as required pursuant to Commission Procedural Rule 25. Once Cemex received the assessment, it was responsible for ensuring that it was reviewed by the appropriate personnel and processed in a timely manner. Its failure to do so demonstrates an inadequate or unreliable internal processing system.

Therefore, I would find that Cemex failed to establish good cause and deny Cemex's motion to reopen.

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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June 21, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CEMEX CONSTRUCTION MATERIALS SOUTH, LLC	Docket No. CENT 2022-0007 A.C. No. 41-02885-539820

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY: Jordan, Chair; Althen & Rajkovich, Commissioners:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On October 12, 2021, the Commission received from Cemex Construction Materials South, LLC ("Cemex") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

MSHA records indicate that the proposed assessment was mailed via the USPS to the operator on August 10, 2021. USPS recorded the date of delivery as August 16, 2021. On September 15, 2021, the proposed assessment was deemed a final order of the Commission because the operator had not filed a Notice of Contest within 30 days.

Cemex does not dispute that the assessment was mailed to the correct address. However, the method of delivery confirmation is unclear, and the safety manager attests that he did not personally receive the assessment until September 27, 2021, after the assessment had been deemed a final order of the Commission. The Secretary of Labor does not oppose the request to reopen.

We note that the motion to reopen was timely filed. The Commission has previously held that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.,* 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, the motion to reopen was filed on October 12, 2021, within 30 days of the final order of September 15, 2021. Therefore, the motion to reopen was filed within a reasonable amount of time.

Having reviewed Cemex's request and the Secretary's response, we find that Cemex has demonstrated good cause for its failure to timely respond and acted in good faith by timely filing its request to reopen. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

Commissioner Baker, dissenting:

I respectfully dissent.

In the past, the Commission has held that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *See, e.g., Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010).

As set forth in the majority opinion, the Secretary provided USPS documentation showing Cemex received its proposed assessment on August 16, 2021. On September 15, 2021, the proposed assessment was deemed a final order of the Commission. Cemex then filed a Motion to Reopen. Cemex concedes the proposed assessment was delivered to the correct address but alleges that it has no record of the delivery. The safety manager further concedes that he eventually received a copy of the assessment, albeit only after it had already been deemed a final order of the Commission. In short, after delivery, the assessment was not timely routed to the person at Cemex responsible for its processing. Cemex provides no explanation for their failure.

Commission Procedural Rule 25, 29 C.F.R. § 2700.25, provides that "[t]he Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment."

The USPS receipts show Cemex, as an entity, received the assessments. Therefore, the Secretary delivered the assessments as required pursuant to Commission Procedural Rule 25. Once Cemex received the assessment, it was responsible for ensuring that it was reviewed by the appropriate personnel and processed in a timely manner. Its failure to do so demonstrates an inadequate or unreliable internal processing system.

Therefore, I would find that Cemex failed to establish good cause and deny Cemex's motion to reopen.

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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June 27, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BENTON COUNTY STONE CO. INC.	Docket No. CENT 2022-0104 A.C. No. 03-01730-549529

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, 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. (2018) ("Mine Act"). On July 22, 2022, the Commission received from Benton County Stone Co. Inc. ("Benton") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On May 23, 2022, the Chief Administrative Law Judge issued an Order to Show Cause in response to Benton's failure to answer the Secretary of Labor's March 22, 2022 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on or about June 23, 2022, when it appeared that the operator had not filed an answer within 30 days.

Benton asserts that its failure to timely file occurred due to certain medical circumstances and the hospitalization of the Operator's Safety Director and MSHA Consultant. According to e-mail correspondence offered by the operator, MSHA had sent an email concerning the case to Benton's Safety Director on June 8, 2022, however he was hospitalized for surgery and on medical leave prior to this date. MSHA informed the operator on July 19, 2022 that the Order to Show Cause was deemed a Default Order, and the operator filed its motion to reopen on the same day. The Secretary does not oppose the request to reopen, but cautions that she may oppose future requests to reopen penalty assessments that are not contested in a timely manner.

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

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

Having reviewed Benton's request and the Secretary's response, we find that the operator acted with excusable neglect due to the medical circumstances and hospitalization surrounding the operator's safety director and MSHA consultant. In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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June 27, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. RIVER VIEW COAL, LLC	Docket No. KENT 2022-0102 A.C. No. 15-19374-554932

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, 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. (2018) ("Mine Act"). On July 21, 2022, the Commission received from River View Coal, LLC ("River View") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on May 23, 2022, and became a final order of the Commission on June 22, 2022. River View asserts that it inadvertently failed to timely file its notice of contest due to personnel changes involving a retirement and subsequent positions and duties being handled by different staff. Specifically, the mine's safety director asserts that he assumed the duties of contesting proposed assessments shortly after his

predecessor retired. However, there was a brief period when the assistant safety director at the mine was covering the role of contesting the assessments. During this period, the assistant safety director miscalculated the deadline for filing the notice of contest, therefore the operator failed to file its contest form in a timely manner.

Despite committing this error, the operator processed and mailed the contest form to MSHA one day after the final order date, on June 23, 2022. On July 15, 2022, the operator received correspondence from MSHA stating that although MSHA had received the contest on June 23, 2022, it was untimely as of June 22, 2022. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed River View's request and the Secretary's response, we find that the operator committed an inadvertent mistake due to its personnel changes and subsequent positions and duties being handled by different staff. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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June 29, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEVA 2022-0467 A.C. No. 46-06448-552209
v.	Docket No. WEVA 2022-0468 A.C. No. 46-06618-552210
ROCKWELL MINING, LLC	Docket No. WEVA 2022-0469 A.C. No. 46-09377-552216

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, 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. (2012) ("Mine Act").[1] On July 18, 2022, the Commission received from Rockwell Mining, LLC motions seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a), 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 orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. See 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); 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

[1] Rockwell filed similar motions to reopen relying upon the same reason as a basis for re-opening in three separate dockets. For the limited purpose of addressing the motions to reopen, we hereby consolidate docket numbers WEVA 2022-0467, WEVA 2022-0468, and WEVA 2022-0469, which involve similar procedural issues. *See* 29 C.F.R. § 2700.12.

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).

However, the Commission has also made clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital*, LLC, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res.*, LLC, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010). In examining the operator's asserted justifications for reopening a particular case, the Commission has also explored whether the operator has demonstrated a pattern of behaviors that are attributable to inadequate or unreliable internal processing systems in other cases. *See Oak Grove Res., LLC*, 33 FMSHRC 2378, 2379-80 (Oct. 2011).

The Department of Labor's Mine Safety and Health Administration ("MSHA") indicates that the proposed assessments were delivered to the operator on April 8, 2022. The assessments became final orders of the Commission on May 9, 2022, and MSHA issued delinquency notices on June 23, 2022.

Rockwell states that it is unclear exactly when it received the proposed assessments, but notes that near the deadline to file the notices of contest, its Corporate Safety Director, who usually files notices of contest, left the company on April 22, 2022. It contends that the outgoing Director did not file the required notices of contest, nor did he notify any other employee of the impending deadline. When a paralegal for Rockwell learned of the oversight, the operator quickly retained counsel to file the required contests. The Secretary does not oppose the requests to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed in accordance with MSHA's regulations at 30 C.F.R. § 100.7 and the Commission's procedural rules.

Having reviewed Rockwell's requests and the Secretary's responses, we find that due to mistake, inadvertence, or excusable neglect the penalty assessments were not timely contested. *See Noranda Alumina, LLC*, 39 FMSHRC 441, 445 (Mar. 2017) (when the safety director left the company unexpectedly, the failure to timely contest constituted an inadvertent mistake). Moreover, we note that Rockwell promptly filed its motions to reopen promptly upon notification that the penalties were delinquent.

Nonetheless, the Commission stresses that its decision that reopening was justified in this instance was a close call. In the last five years, Rockwell has requested reopening several times, citing a variety of justifications for their failure to timely contest penalties. *See e.g. Rockwell Mining, LLC*, 40 FMSHRC 1161 (Aug. 2018) (Rockwell alleged it mistakenly believed it had already responded to the penalty petition); *Rockwell Mining, LLC*, 40 FMSHRC 1155 (Aug. 2018) (Rockwell alleged that the penalty petition was sent to the wrong address); *Rockwell Mining, LLC*, 42 FMSHRC 796 (Oct. 2020) (Rockwell alleged that it failed to timely contest the assessments because the assessments were delivered while its safety manager was on vacation and was warned by the Commission that similar excuses would not be accepted in the future); and *Rockwell Mining, LLC*, 45 FMSHRC___, 2023 WL 2070349 (Feb. 10, 2023) (Rockwell alleged that a new office manager receptionist did not provide the proposed assessments to the safety director in a timely manner).

In each of those previous cases and in this instant matter, the Commission has found that Rockwell has demonstrated good cause for its failure to timely file to contest the proposed assessments. Nonetheless, we recognize that, cumulatively, these motions may indicate an inadequate or unreliable internal processing system. Rockwell must ensure that, in the future, it timely files to contest proposed assessments. The Commission will closely scrutinize any future motions to reopen filed by Rockwell for signs of an inadequate processing system. Any future request to reopen, which demonstrate that failure to timely file was due to an inadequate processing system and that fails to describe good faith measures to improve that system, will be denied.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 12, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. VULCAN CONSTRUCTION MATERIALS, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. SE 2022-0200 A.C. No. 31-00095-561140 Mine: 115 Quarry

DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Conference and Litigation Representative, ("CLR"), who is not an attorney, has filed a motion for settlement. The originally assessed total amount for the two citations issued was $316.00 and the proposed total settlement is $183.00, as reflected in the following table.

Citation/Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9872489	$133.00	$50.00	Negligence modified from Moderate to low **62 % penalty reduction**
9872490	$183.00	$133.00	Injury modified from Reasonably likely to unlikely & S&S to Non-S&S **27 % penalty reduction**
TOTAL	**$316.00**	**$183.00**	

Citation 9872489

For this now-conceded violation of 30 C.F.R. § 56.15001, which speaks to "First-aid materials," the standard provides that "*adequate* first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas. Water or neutralizing

agents shall be available where corrosive chemicals or other harmful substances are stored." (emphasis added).

The Citation asserted that the first aid kit had an expired bottle of eyewash. That the eyewash was out of date was not contested.

The CLR seeks to have the negligence for this citation reduced from moderate to low, producing a penalty of $50.00 (fifty dollars) stating that:

> The operator contends the citation was issued in error and should be vacated. The standard, 56.15001, states in part: "*Water or other neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled or used.*" This was a 4oz. bottle of eyewash that was sealed. It was out of date by only a few weeks. The eyewash was still safe to use. Nothing in the standard says anything about expiration dates on eyewash. The standard requires water or neutralizing agents to be available. If this was a violation, the operator contends the negligence should be lowered. The operator contends they provided multiple means for a miner to wash their eyes out and didn't realize the 4 oz. bottle of eyewash was out of date. The 4 oz. bottle was not part of the designated eyewash station and was not even required. It was part of a small first aid kit that had other first aid supplies in it. They contend that if the 4 oz bottle had not been in the first aid kit they still would have been in compliance with 56.15001 and a citation would not have been issued. The Secretary believes the operator was in violation of 56.150001 but recognizes that they have raised a legitimate factual or legal issue and agrees that Citation 9872489 should be modified from moderate to low negligence.

Motion at 3. (emphasis in original).

The standard doesn't directly speak to expired eye wash, but it does require that *adequate first-aid materials* shall be provided at places convenient to all working areas. The citation did not specifically assert a failure to have water or neutralizing agents available where corrosive chemicals or other harmful substances are stored, which is a separate requirement. The Court simply does not know if that separate aspect of the standard was being invoked by the inspector and, by Commission case law, it is not permitted to inquire about such issues in the context of settlement motions. Applying the Part 100 Criteria for Proposed Assessment of Civil Penalties, per Attachment A, the minimum penalty of $133.00 was derived. The Penalty Conversion Table with Part 100, Table XIV, lists that 60 penalty points *or fewer* results in the minimum penalty.

What the Court does know is that the $50.00 civil penalty sought in this motion is less than a parking meter violation in cities such as Los Angeles. https://www.csusm.edu/parking/adjudication/violationspenaltyamountsandpaymentinformation-.html To the Court, this raises the question of whether such a penalty is sufficient to deter operators from non-compliance. Congress has expressed that it wanted penalties to be of an order that it would be more expensive to not comply with the safety and health standards.

It is noted that, back in the day, in 1982, MSHA developed something it called the "single penalty assessment," a term that by itself was quite uninformative. However, its effect was not shrouded – it translated into a $20.00 (twenty dollars) civil penalty for all violations deemed to be timely abated and not significant and substantial. *Drummond*, 14 FMSHRC 661, 663 (May 1992). A bonus, until the United States Court of Appeals for the D.C. Circuit became involved, the original version of the 'single penalty' excluded those assessments from a mine operator's history of violations. *Coal Employment Project v. Dole,* 900 F.2d 367, (D.C. Cir. 1990)

It is interesting to note that $20.00 in 1982 translates into $60.92 in 2023. https://www.dollartimes.com/inflation/inflation.php?amount=20&year=1983 This means that the Secretary's proposed penalty today, at $50.00, is less than the 'single penalty' in 1982. To the Court, this does not seem to be progress.

The Court was unable to determine if settlements below the minimum penalty are unacceptable, although inferentially it would seem that MSHA's own Part 100 Criteria suggests they are not. Given the strictures upon Commission judges when reviewing settlements, it appears that there is no bottom figure. The Commission, of course, has the authority to direct review *sua sponte*, if it chooses. However, the Court's research has yielded that it is infrequently invoked, with that research indicating that it was last employed by the Commission nine years ago. *Mach Mining*, 36 FMSHRC 1525 (June 2014).

Citation 9872490

For this now-conceded violation of 30 C.F.R. §56.14132(a), addressing horns and backup alarms, and its rather clear requirement that "[m]anually-operated horns or other audible warning devices *provided on self-propelled mobile equipment as a safety feature* shall be maintained in functional condition," the operator contends the citation should be vacated or the gravity reduced. It is conceded that the backup alarm on the truck was not maintained in functional condition, as it failed to alarm when it was put in reverse motion. Thus, there is no question that the alarm on the truck was not functioning.

Here, the CLR seeks to have the violation modified from 'reasonably likely' to 'unlikely.' That change produces a **27%** reduction, bringing the dollar amount down to what, until the citation discussed above, Part 100 would list as the minimum penalty of $133.00.

In the support offered by the CLR, the motion advises that

> [t]he cited Ford shop truck was equipped with a back-up camera therefore it was not required to have a back-up alarm. Standard 56.14132(b)(1)(i) states, in part *"when the operator has an obstructed view to the rear, self-propelled mobile equipment shall have an automatic reverse-activated signal alarm."* The operator did not have an obstructed view to the rear due to having a back-up camera therefore an automatic reverse-activated signal alarm was not required. The standard that was cited, 56.14132(a) states: "Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained

in functional condition. Even though the truck was equipped with a back-up camera it was also provided with a back-up alarm. The standard requires audible warning devices provided on self-propelled mobile equipment to be maintained. The back-up alarm that was provided on the Ford truck is an audible warning device and therefore must be maintained as per the standard. The Secretary believes the operator was in violation of 56.14132(a) but recognizes that they have raised a legitimate factual or legal issue and agrees that Citation 9872490 should be modified from reasonably likely to unlikely and from S&S to Non-S&S.
Motion at 3.

The problem with the analysis is at least two-fold. First, the MSHA inspector, Jeffrey W. Brown, did not cite the Respondent with a violation of 30 C.F.R. § 56.14132(b)(1)(i). **He cited a distinct provision: 30 C.F.R. §56.14132(a), as set forth above**. That latter provision does not offer that the former standard may be relied upon in lieu of a non-functioning backup alarm. Further, as the Court has stated in many, many decisions involving settlement motions, all to no avail, that federal courts of appeals have rejected the 'alternative safety measures' argument raised by Respondents when analyzing the significant and substantial designation. Accordingly, redundant safety measures are not to be considered in evaluating a hazard.

For example, in *Knox Creek Coal*, 811 F.3d 148 (4th Cir. 2016), that Court observed: "[i]f mine operators could avoid S & S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply."…Such a policy would make such standards "mandatory" in name only. It is therefore unsurprising that other appellate courts have concluded that '[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the [S & S] inquiry.' *Cumberland Coal*, 717 F.3d at 1029; *see also Buck Creek*, 52 F.3d at 136. *Knox Creek Coal*, 811 F.3d 148, 162 (4th Cir. 2016).

Further regarding this issue, in *Consolidation Coal*, 895 F.3d 113, (D.C. Cir. 2018), the D.C. Circuit, referring to its decision in *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Commission*, 717 F.3d 1020 (D.C. Cir. 2013), noted that it:
interpreted the statutory text to focus on the "nature" of "the violation" rather than any surrounding circumstances. More to the point, the court held that "consideration of redundant safety measures,"—that is, "preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely"—"is inconsistent with the language of [Section] 814(d)(1)." *Id*. at 1028–1029.
Id. at 118-119.

In addition to the analytical flaws described above, the motion also misses the central point of the backup alarm – ***it's to warn others****, whether on foot or in other vehicles, of the potentially hazardous action underway*. A camera does not serve that purpose. At least the CLR seems to recognize this, as he asserts that the cited provision of the standard was violated. In spite of that recognition, the CLR mistakenly believes that a "legitimate factual or legal issue" has been raised and from that agrees to redesignating the violation to Non-S&S.

Despite the several identified concerns, the Court has considered the Secretary's Motion and approves it **solely on the basis of the Commission's decisions in** *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. Per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

Accordingly, the motion to approve settlement is **GRANTED** and the Citations in this docket are modified as reflected in the table above, with Citation No. 9872489 to be **MODIFIED** from moderate to low negligence and Citation No. 9872490 to be **MODIFIED** for the expected injury from reasonably likely to unlikely and from S&S to Non-S&S .

Per the settlement agreement as set forth in the Motion, the Respondent is **ORDERED** to pay the sum of **$183.00** within thirty days of this order.[1]

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

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[1] 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.

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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 57.1105l(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]

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

[1] The Joint Stipulations are set forth in the Appendix

[2] The MSHA trainees were Justin Vincent and Erastus Cardwell.

> 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 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.*

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[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 nor 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.

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.

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.*

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

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.

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

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[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.

> 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 line[6] 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.*

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.

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[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.

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 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

[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.

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.*

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

[9] Secondarily, 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

(continued…)

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 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

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[9] (…continued)
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).

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.'

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*

[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.

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

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[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.

[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

(continued…)

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.*

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[12] (…continued)
"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.

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. 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.*

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[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.

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 wase 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]

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

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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.

Distribution:

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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.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933
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June 21, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. JOHN S. LANE & SON INC, Respondent	CIVIL PENALTY PROCEEDING Docket No. YORK 2023-0051 A.C. No. 19-00014-571201 Mine: Westfield Quarry Plant 78

DECISION APPROVING SETTLEMENT

Before: Judge William Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Conference and Litigation Representative, ("CLR"), has filed a motion to approve settlement. The originally assessed amount was $747.00 and the proposed settlement is for $429.00. The amounts and modifications are reflected in the following table.

Citation/ Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9714863	$318.00	$143.00	Modify to low negligence **55% reduction in regularly assessed penalty**
9714864	$143.00	$0.00	Vacate
9714865	$143.00	$143.00	Modify to unlikely, not significant and substantial
9714866	$143.00	$143.00	No changes[1]
Total	$747.00	$429.00	**43% overall reduction in penalty**

[1] Citation No. 9714866, a paperwork recording violation, remained unchanged, and the Respondent agreed to accept it as issued and pay the assessed penalty. Motion at 4.

The Court is aware that the penalties in this docket, even as proposed, are of low dollar amounts. However, in the spirit of protecting the safety and health of our Nation's miners, the dollar amount is not the sole concern when reviewing settlements. Rather, the substance of the alleged violations matters too.

Citation No. 9714863

This Section 104(a) citation involves a now-admitted violation of 30 C.F.R 56.11001. That section, titled "Safe Access," provides: "Safe means of access shall be provided and maintained to all working places."

The citation, issued by MSHA Inspector Brandt L. Berryann, provided a detailed and excellent recounting of the hazard. That hazard was great, with the inspector stating that a permanently disabling injury was reasonably likely. To his great credit, Inspector Berryann, took photos of the hazardous condition. However, the Court is not permitted to see the photos, informative as they would likely be. The reason for this prohibition is unclear. The only reason the Court can discern is the "see no evil" approach[2] or that the *The American Coal Co*. and *Rockwell Mining, LLC*, decisions, cited below, preclude the need for photos.

The inspector recounted:

> Safe access was not provided to the transfer chute between conveyors CS and CS located at the Primary Plant. A miner **had accessed the chute for cleaning and maintenance by climbing a step ladder, egressing the ladder laterally by stepping onto the conveyor CS frame measuring 36-inches from the ladder by 39-inches high which was covered in hardened earthen material, climbing vertically to the top of the CS conveyor skirt boards measuring 64-inches high, onto the CS conveyor belt, climbing through an approximate 2.5- by 2.5-foot diameter access door at the discharge end of the chute, then climbed vertically up the interior of the chute, exiting through a removed access panel approximately 4-feet above the conveyor and directly below the CS conveyor catwalk**, where the miner then affixed the provided fall protection to the CS catwalk mid-railing while standing on a stone step within the chute, with the upper torso of the miner extending through the exterior of the chute, and the miner operating a pneumatic chipping hammer inside the chute to free hardened material within the chute falling to the CS conveyor below increasing the likelihood of an accident/ injury to occur. This condition exposed the miner to a slip/ trip/ fall hazard. In the event a miner were to slip// trip/ fall hazard. **In the event a miner were to slip/trip/ fall *while accessing the chute* a permanently disabling injury would be expected**. **Photo taken**.

[2] Dating back to the Muromachi period of Japan, 1338-1573, this expression is now often used to mean to ignore bad behavior by pretending not to hear or see it. https://www.britannica.com/event/Muromachi-period, https://www.macmillandictionary.com/us/dictionary/american/hear-no-evil-see-no-evil-speak-evil

Petition for Civil Penalty at 6. (emphasis added).

To terminate the citation, the inspector recorded the following:

The miner was removed from the chute with a boomlift, the mine operator developed and implemented a standard operating procedure for safe access to working at heights, conducted a toolbox talk with all miners, and conducted task training on these procedures with the affected miner terminating this citation. **Photo taken**. *Id*. at 7.

Analysis: A model of brevity, the Secretary offered the following in support of its view that the negligence should be considered 'low,' stating: "Respondent will argue that management had no direct knowledge of the observed practice, and a man-lift was on site and available for elevated tasks, indicating the negligence was somewhat lower than originally evaluated by the inspector." Motion at 3.

In the Court's view, the Secretary has presented paltry support for this egregious violation. In no way does it provide considerable mitigating information. It cannot be passed off as *low* negligence simply on the basis of the claim that the operator had no '*direct* knowledge' of the hazardous action. Even if the knowledge was indirect, it was obvious and there are people known as foremen to oversee work. Further, the operator only then developed a standard operating procedure for safe access to working at heights, a serious failure, contradicting any justification to award 'low' negligence. It should not be overlooked that the inspector had already, generously in the Court's estimation, called the negligence 'moderate,' meaning there was some mitigation awarded.

Although, respecting the Commission case law cited below, the settlement must be approved, the Court does not believe that the small penalty of $143.00, an amount tantamount to the minimum penalty under Part 100, is consonant with Congress' concern that penalties are to be of an amount sufficient to make non-compliance more expensive than compliance.

Citation No. 9714864

This citation, invoking 30 C.F.R. § 56.12068, is plain and direct. Titled "providing: Locking transformer enclosures, it provides in clear language: "Transformer enclosures shall be **kept locked** against unauthorized entry." (emphasis added)

Issuing Inspector Berryann, recorded in his citation:

> An energized stepdown enclosed transformer was not kept locked against unauthorized entry providing 480-VAC to the Powerhouse North Pump Building. The transformer access door handle was provided with a means to lock and secure the transformer, but was not utilized. This condition exposed the miner to a shock/ burn hazard. In the event a miner were to enter the transformer a fatal shock would be expected. Photo taken.

Petition for Civil Penalty at 8

Even though the Court is not permitted to view the photograph, it still compliments the inspector for his diligent effort to record his observation.

The Secretary announces that this violation is vacated in an exercise of his prosecutorial discretion.

Analysis:

Although the Court recognizes that the Secretary presently has the authority to vacate citations without presenting any reason for such a decision, it is hard to understand this decision to vacate. What is not hard to understand is that a non-utilized handle to lock the transformer enclosure was found and that an unlocked transformer enclosure is not a locked transformer. Confirming that there was in fact a violation, Inspector Berryman informed in terminating the violation, "a keyed lock was installed on the transformer door handle terminating the citation." Again, to his continued credit, Inspector Berryann took a photo of action reflecting the installation of the keyed lock. Given the very low proposed penalty, at $143.00, and at that barely more than the minimum penalty, the decision to vacate is a mystery.

Citation No. 9714865

For this citation, Inspector Berryann cited a violation of 30 C.F.R.§56.14025. It applies to machinery, equipment, and tools and, like the other standards mentioned above, it too is understandable to persons of ordinary intelligence, with its clear requirement that "Machinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer where such use may create a hazard to persons."

In this instance, the inspector's description of the condition and practice recounted:

> A Spedecut 3-inch cut-off wheel was used beyond the design capacity intended by the manufacturer where such use created a hazard to persons located on a pneumatic die grinder in the black Craftsman toolbox in the Maintenance Shop. The cut-off wheel was attached to the die grinder with no installed flange guard as required. The cut-off wheel was used/ returned in this condition, and held by hand when used increasing the likelihood of an accident/ injury to occur. This condition exposed the miner to contact with or being struck with a fragmenting cut-off wheel hazard. In the event a miner were to come into contact or were struck with a fragmenting wheel a permanently disabling injury would be expected. **Photo taken**

Petition for civil penalty at 9

The inspector believed that an accident was reasonably likely to occur and that if it did, it would be permanently disabling. Accordingly, he listed it as significant and substantial. The negligence was marked as 'low' by the inspector.

To terminate the citation, the Inspector noted:

The cut-off wheel was removed from the die grinder and the miner was given a safety talk terminating this citation. Photo taken. Further, the mine operator was put-on-notice that should the die grinder be observed with an attachment installed requiring a guard, with no guard installed, that this would be considered aggravated conduct constituting more than ordinary negligence.

Analysis:

It appears, clearly, that the inspector had it quite right. Miners should appreciate his perceptive observation of the hazard the cited condition presented. Norton Abrasives[3], in an article titled "Cut-Off Wheels and Die Grinders – A Dangerous Combination," explains that "the difference between a cut-off tool and a die grinder [is] [s]imple – cut-off tools come equipped with a guard and proper mounting flanges designed for cut-off wheels, and the speed is compatible with the cut-off wheel. … While die grinders may look similar to cut-off tools, they are not. They are unguarded tools without flanges and should NEVER be used with cut-off wheels. **It is simple to remember: if the tool does not have a guard, do not use a cut-off wheel.** https://www.nortonabrasives.com/en-us/resources/expertise/cut-wheels-and-die-grinders-dangerous-combination (emphasis in original, bold print added).

In what the Court views as an unintentional lack of understanding on the part of the CLR, Mr. Jakubauskas, in his motion states: "The unguarded cut-off tool **was not observed in use**, so an accurate determination of the hazards present could not be qualified to support reasonably likely. The miner owned tool was in storage at the time of inspection, and no visible physical damage to the cutoff wheel was observed, further lessening the likelihood of an injury." Motion at 3.

The remarks cited above from the manufacturer demonstrate that the CLR was incorrect. That ill-founded assertion was compounded by two more inaccurate remarks. The establishment of a violation does not require that the condition be observed in use. Such a prerequisite would be ludicrous. The second inaccuracy is the CLR citing *Am. Aggregates of Michigan, Inc*., 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996) as authority permitting the Secretary with *discretion* to modify an *extant* significant and substantial designation. Those cases do not stand for that claim. The Court recognizes that CLRs, not being attorneys, just echo what they are told to say on that score, but just following orders, repeating what someone else (the Solicitor) directs one to assert doesn't make it true.

Accordingly, the CLR improperly asserted his discretion to turn the violation into a non-significant and substantial violation, an assertion contrary to the hazard presented and contrary to current Commission decisional law.

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[3] Norton Abrasives has been in the abrasives business for more than 130 years. https://www.nortonabrasives.com/en-us

Conclusion

In spite of all the identified inadequacies, the motion must be approved. This is because the Court is obligated, and does, honor Commission case law regarding a judge's review of settlement motions. On that account, the Court has considered the Secretary's Motion and approves it *solely* on the basis of the Commission's decisions in *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. Per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that **Citation No. 9714863** be **MODIFIED** to low negligence and **Citation No. 9714865** be **MODIFIED** to unlikely, and by that redesignation as unlikely, modified to not significant and substantial. The reduced penalties are reflected in the table above.

The Respondent is **ORDERED** to pay the sum of **$429.00** within thirty days of the final order.[4] Upon receipt of payment, this case is **DISMISSED**.

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

Distribution:

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[4] 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.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 23, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. CENT 2022-0176 A.C. No. 16-00970-554937
v.	
MORTON SALT INC, Respondent.	Mine: Weeks Island Mine and Mill

DECISION AND ORDER

Appearances: Tyler Nash and Josh Bernstein, U.S. Department of Labor, Office of the Solicitor, 525 S. Griffin Street, Suite 501, Dallas, TX 75202, for Petitioner

Donna Vetrano Pryor, Husch Blackwell LLP, 1801 Wewatta Street, Suite 1000, Denver, CO 80202, for Respondent

Before: Judge Simonton

I. INTRODUCTION

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (MSHA), against Morton Salt Inc ("Morton Salt" or "Respondent") pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("Mine Act"). This docket contains 14 citations and orders issued to Morton Salt, seven of which were settled before hearing. The parties presented testimony and evidence at a hearing held in Lafayette, Louisiana on January 24-25, 2023, and subsequently submitted post-hearing briefs.[1] For the reasons discussed below, I affirm Citation No. 9649679 as written, affirm Citations Nos. 9649663 and 9649667 with modifications, and vacate the four remaining citations and orders. I assess a total penalty of $12,161.00 for the seven citations and orders that were litigated.

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[1] In this decision, the joint stipulations, transcript, Secretary's exhibits, Respondent's exhibits, Secretary's post-hearing brief, and the Respondent's post-hearing brief are abbreviated as "Jt. Stip.," "Tr.," "Ex. S–#," "Ex. R–#," "Sec'y Br.," and "Resp. Br.," respectively. Respondent's rebuttal exhibits are abbreviated as "Ex. R-R#".

II. STIPULATIONS OF FACT

1. Respondent is an operator within the meaning of the Mine Act.

2. Morton Salt, Weeks Island Mine and Mill, Mine I.D. No. 16-00970, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

3. The Administrative Law Judge has jurisdiction in this matter.

4. The total proposed penalty of $40,786.00 for Docket No. CENT 2020-0176 will not affect Respondent's ability to continue in business.

5. The citations were properly served by a duly authorized representative of the Secretary upon an agent of Morton Salt, on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. Respondent is engaged in mining activities, and its mining operations affect interstate commerce.

7. The parties have settled Citations Nos. 9647379, 9647388, 9649660, 9649668, 9649670, 9649672, and 9649680.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Morton Salt operates the Weeks Island Mine and Mill, a large underground salt mine located near Lafayette, Louisiana. Morton Salt miners descend over one thousand feet underground to access and extract salt from a subterranean rock formation known as a salt dome. Tr. 81. The Weeks Island mine is a "gassy" mine with a history of liberating methane from pockets of gas embedded within the salt dome. Tr. 81. MSHA categorizes the Weeks Island mine as a Subcategory II-A mine due to its documented history of methane outbursts. Tr. 198; *see* 30 C.F.R. § 57.22003.

In March of 2022, MSHA personnel arrived at the Weeks Island mine to conduct a quarterly safety and health inspection pursuant to 30 U.S.C. § 813(a). The citations and orders discussed below were among the actions issued during this quarterly inspection. Morton Salt contested these citations and orders on June 9, 2022.

A. Training (Orders Nos. 9649653, 9649654, and 9649655)

Three of the actions at issue in this case involve Morton Salt's training practices. Specifically, these three orders allege that Morton Salt failed to properly train its miners with regard to its Femco phone communication system.

i. Factual Background for Orders Nos. 9649653, 9649654, and 9649655

Femco phones are a basic means of communication underground in the Weeks Island mine. They operate on a separate power supply to ensure that they continue to function even if the mine's primary power supply fails. Ex. R-R1.[2] The phones may be used as a means of two-way communication or as an intercom. The Femco phones at the Weeks Island mine also have orange or amber lights installed above them. Mine management uses these lights and the Femco intercom feature to warn miners in the case of an emergency. Tr. 119, 489.

MSHA Inspector Brandon Olivier issued three orders on March 10, 2022, with regard to the Femco lights. Inspector Olivier testified that, on that date, he was conducting his inspection on the 1500-foot level of the mine while accompanied by miner representative Classie Charles and Morton Salt safety specialist Kellie Munger. He noticed an orange light flashing above a Femco phone and asked three nearby miners—Larry Welch, Kennedy Tauriac, and Randy Jackson, Jr.—if they knew what the flashing light signified. Tr. 201-02. Welch and Tauriac said that they did not know. Jackson said that the light signified a dead battery. Tr. 204-05.

Later, Inspector Olivier encountered miners Kelly Huval and Doug Freeman and asked them if they knew the meaning of the flashing Femco light. At hearing, Huval testified that he had learned in his new miner training that the flashing light could signify a methane or non-methane emergency. Tr. 352, 363. Huval noticed the flashing light earlier in his shift and asked the more-experienced miner Jackson whether the light signaled an emergency. Jackson told him no, that someone on the previous shift had relayed that the flashing light simply indicated a dead battery. Huval took Jackson's word for it and answered Inspector Olivier's question by saying that the flashing Femco light signified a dead battery.[3] Tr. 225. Freeman told Inspector Olivier that he did not know the significance of the flashing light. Tr. 225.

Inspector Olivier then met with several experienced miners. Among the miners, Inspector Olivier determined that Wendell Brown, Bryson Ford, and Ryan Lovett did not know that a flashing light signified a mine emergency, even though all three miners had just received training the previous day. Tr. 230. Brown told Inspector Olivier that the flashing light signified a dead battery after learning this from a veteran miner earlier in the day. Tr. 30, 230. Brown testified that in all previous evacuation drills, there was always an audible alarm or audible direction to evacuate the mine emanating from the Femco phone, repeated over and over again. Tr. 41.

Inspector Olivier withdrew these eight miners from the mine, and Morton Salt immediately began retraining the miners on the Femco system to terminate the order. Landon Olivier, mine safety trainer, testified that he questioned the cited miners when they came to the

[2] Ex R-R1 denotes a rebuttal exhibit.

[3] Huval also testified that after Inspector Olivier told him that the light did not signify a dead battery, Huval was about to tell him it could signify an emergency when his miner's representative jumped in and said that the light signified methane. Inspector Olivier quickly told the representative, "No, you can't tell him." Huval felt nervous after that and did not offer any further comments. Tr. 361-62.

surface about the meaning of the light and "as a group, it was blurted out, 'Well, it depends. It's methane, emergency, evacuation. It could mean a number of things.'" Tr. 485.

At hearing, Morton Salt offered evidence of its training program. Landon Olivier testified that Morton Salt trains all of its miners regarding the Femco phones and their role in the mine's emergency protocol. He pointed to the mine's safety handbook, which expressly outlines that the "evacuation alarm" consists of either a "loss of electrical power in conjunction with flashing lights and an audible alarm from all Femco phones" or "[f]lashing lights and an audible alarm from all Femco phones without a loss of electrical power." Ex. R-A at 2; Tr. 481-82. Landon Olivier verbally reviews this portion of the handbook with all new miners and experienced miners, and for refresher training. Tr. 481; *see* Ex. R-A (video exhibit marked Morton 00050). Morton also presents a site-specific video for all miners that explains the Femco system and reviews the evacuation procedure: "In the event that it becomes necessary to evacuate the mine, there will be an emergency sounding of sirens and the flashing of amber lights. Upon hearing and seeing the signal or in the event of a power failure, everyone must evacuate the mine immediately." Ex. R-R1.

Landon Olivier testified that Morton Salt also provides hands-on training. Training officials have a disconnected Femco phone that is used to demonstrate how to use the underground communication system. Tr. 477. He said that Morton Salt provides "step-by-step hands-on training" in the field when giving mine tours to miners. Tr. 482.

ii. Fact of Violation (Order No. 9649653)

Order No. 9649653 alleges a violation of 30 C.F.R. § 48.8(b)(2), which requires in relevant part that an operator's "annual refresher training program for all miners shall include . . . instruction on . . . the use of the mine communication systems [and] warning signals." The order describes a violation of section 48.8(b)(2) as follows:

> Three miners working in the mine have not received adequate annual refresher training on the communication systems. The course shall include instruction on the procedures and the use of the mine communication systems, and warning signals. Refresher training was last given to these miners in October 2021. The training that the miners received on the escape and evacuation plan was inadequate. The mine operator was aware of the training requirements. The operator is hereby ordered to withdraw the 3 miners from the mine until they have received the required training. The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to himself and to others.

Pet. for Assessment of Civ. Penalty at 19 (hereinafter "Pet."). Inspector Olivier found that the operator's inadequate refresher training regarding the Femco phones was reasonably likely to produce an injury or illness that could be expected to be fatal. Pet. 19. He designated this order as significant and substantial ("S&S") and moderate negligence. Pet. 19.

The Secretary acknowledges that Morton Salt provided refresher training, and that the training involved information on the Femco phones. This training is well documented. *See* Ex.

R-A at 5-16. The Secretary argues, however, that the training was inadequate because "it did not ensure Larry Welch, Kennedy Tauriac, and Randy Jackson [Jr.] knew the flashing [F]emco lights signaled an evacuation." Sec'y Br. at 15.

The Secretary's argument falters for two reasons. First, the Secretary's finding of inadequate training rests entirely upon the inspector's conversations with miners. According to Inspector Olivier, eight of the roughly thirteen miners that he polled failed to identify that flashing Femco lights could signal an emergency. This method (an informal polling of miners) is not an ironclad way to determine the adequacy of miner training. As Judge Miller notes in a similar case, "there is not sufficient evidence for me to determine whether the miners initially received adequate training, but simply did not recall the training when asked" days or months later by the inspector. *Foothill Materials*, 35 FMSHRC 495, 499 (Feb. 2013) (ALJ). A miner's response may also be influenced by other factors, such as his subjective feelings toward the inspector or toward MSHA in general. For instance, Huval testified that his response to Inspector Olivier was affected by the inspector's admonishment of Huval's miner representative. Tr. 361-62. Answers gleaned from polling miners are "not dispositive" of training adequacy, *Foothill Materials* at 498, and the Secretary has failed to adduce any further evidence or testimony to show that Morton Salt's training was insufficient.

Second, and more crucially, the Secretary has failed to show by a preponderance of the evidence that a flashing Femco light, by itself, signals an emergency. Testimony from experienced miners agrees with the mine's written policy: a mine emergency is signaled by the combination of flashing Femco lights and an audible alarm. Tr. 127, 147, 461, 470, 489-90, 543; Ex. R-A at 23-24. A flashing Femco light by itself can indicate a dead battery—a fact that Inspector Olivier only learned after issuing the three training orders. Tr. 281-82. The inspector admitted that there was no actual emergency on the date of inspection. Tr. 278. The orders were therefore issued under a false understanding of the Femco lights and their functionality.

The Secretary argues that miners should recognize the flashing lights, alone, as a signal of an emergency because the audible component of the Femco phones has previously failed at the Weeks Island mine. *See* Sec'y Br. at 20; *see also* Tr. 213-14 (Inspector Olivier's testimony about previous Femco phone failures). This point, while well-taken, seems to find flaw more in the mine's emergency protocol rather than its training protocol. The written procedure at the Weeks Island mine is that an emergency is signaled by flashing lights with an audible alarm, and the miners were trained on this procedure. *See* Ex. R-A (video exhibit marked Morton 00050); Ex. R-A at 2.[4] If the Secretary finds this emergency procedure to be deficient, she can cite Morton Salt under the appropriate standard. *See, e.g.*, 30 C.F.R. §§ 57.4360, 57.11053. But she cannot shoehorn a substantive critique of Morton Salt's emergency procedures into this alleged training violation.

Ultimately, the Secretary bears the burden of proving this alleged training violation by a preponderance of the evidence. *See RAG Cumberland Resource Corp.,* 22 FMSHRC 1066, 1070 (Sep. 2000). The evidence before me shows that Morton Salt provided adequate refresher

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[4] A printed version of Respondent's safety handbook is in the record referenced as Ex. R-O.

training for the three miners in question. Morton Salt has adduced evidence of its training manual which details the Femco phone system and the emergency warning system. The company has also presented a video showing the training director discussing the emergency warning protocol in a training session. Morton Salt's training plan was submitted to, and approved by, MSHA pursuant to 30 C.F.R. § 48.4. *See* Tr. 508; Ex. R-T. The Secretary has not introduced enough evidence to prove that the training was in any way inadequate. The Secretary has therefore failed to satisfy her burden of proof, and Order No. 9649653 is **VACATED**.

iii. Fact of Violation (Order No. 9649654)

Order No. 9649654 alleges a violation of 30 C.F.R. § 48.5(b)(3), which requires that mine operators provide new miners with training that "shall include instruction on . . . the use of the mine communication systems [and] warning signals." The order describes a violation as follows:

> Two miners working in the mine have not received adequate new miner training on the communication systems. The course shall include instruction on the procedures and the use of the mine communication systems, and warning signals. New Miner training was last given to these miners in February 2022. The training that the miners received on the escape and evacuation plan was inadequate. The mine operator was aware of the training requirements. The operator is hereby ordered to withdraw the 2 miners from the mine until they have received the required training. The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to himself and to others. Entering and leaving the mine; transportation; communications.

Pet. 20. Inspector Olivier found a violation of this standard that was reasonably likely to cause a fatal injury, and he marked the alleged violation as S&S and moderate negligence. Morton Salt terminated the order one day after its issuance by providing "additional training on the Femco, Communication and lighting procedures." Pet. 20.

The Secretary again admits that Morton Salt did provide the relevant training. She alleges, however, that the training provided was inadequate, "because it did not ensure Doug Freeman and Kelly Huval understood that the flashing [F]emco light signaled an evacuation." Sec'y Br. at 16. This argument fails for the same reasons outlined in the section above.[5] The claim of inadequate training rests exclusively on polling miners about the flashing Femco light, and the Secretary has not proven that a flashing Femco light alone actually signals an emergency. In this case, the flashing light signaled a battery or wiring issue. Tr. 281. Meanwhile, the Respondent has introduced evidence that Freeman and Huval did receive new miner training on the topics of mine communication systems and warning signs. *See* Ex. R-B. Further, Huval testified that he received training on the flashing Femco light and knew that it was part of the emergency protocol, but that he did not communicate this information to the inspector for contextual reasons. *See supra*, Section III.A.ii. Aside from the inspector's informal polling, the

[5] The facts, analysis, and findings discussed *supra* in sections III.A.i and III.A.ii are incorporated by reference here.

Secretary has submitted no further evidence showing that the training was inadequate. The Secretary has failed to show by a preponderance of the evidence that Morton Salt has violated section 48.5(b)(3). Accordingly, Order No. 9649654 is **VACATED**.

iv. Fact of Violation (Order No. 9649655)

Order No. 9649655 alleges a violation of 30 C.F.R. § 48.6(b)(4), which requires an operator to provide training for experienced miners that "shall include instruction in . . . the use of the mine communication systems [and] warning signals." The order describes a violation as follows:

> Three miners working in the mine have not received adequate experienced miner training on the communication systems. The course shall include instruction on the procedures and the use of the mine communication systems, and warning signals. Experienced miner training was last given to these miners in March 2022. The training that the miners received on the escape and evacuation plan was inadequate. The mine operator was aware of the training requirements. The operator is hereby ordered to withdraw the 3 miners from the mine until they have received the required training. The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to himself and to others.

Pet. 21. Inspector Olivier determined that the violation of this standard was reasonably likely to produce an injury that could be expected to be fatal. He marked the order as S&S and moderate negligence. Morton Salt terminated the order on the date of issuance by providing the three miners with additional training. Pet. 21.

Once again, the Secretary admits that Morton Salt provided the relevant training but claims that the training was inadequate because the miners polled did not know that a flashing Femco light signaled an evacuation. Sec'y Br. at 16. And once again, I disagree.[6] The Respondent has introduced documentary and testimonial evidence showing that the three miners did receive training on mine communication systems and warning signals. *See* Ex. R-C. Wendell Brown acknowledged at hearing that he received these trainings. Tr. 44-48. A miner's remark that, "I think we could have gotten a little bit more training on it," does not prove that the training was inadequate. There is simply more evidence in the record supporting the adequacy of the training than showing its inadequacy. I find that the Secretary has again failed to establish a violation by the preponderance of the evidence. Order No. 9649655 is **VACATED**.

B. Ventilation Doors (Citation No. 9647382)

On March 16, 2022, MSHA Inspector O'Neal Robertson issued Citation No. 9647382 alleging a violation of 30 C.F.R. § 57.8531(c), which requires that "[v]entilation doors shall be . . . [m]aintained in good condition." The citation describes a violation as follows:

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[6] The facts, analysis, and findings discussed *supra* in sections III.A.i, III.A.ii, and III.A.iii are incorporated by reference here.

> The large door to access the #3 shaft station on the 1400' level was found not fully constructed all the way to re-establish normal ventilation to the working places. The door when closed allowed air to pass through the cracks. This condition exposes miners working in the mining areas to bad air or the lack of. Miners access this area as needed.

Pet. 16. Inspector Robertson designated the alleged violation of this standard as non-S&S and moderate negligence. He found that the cited conduct was unlikely to cause an injury or illness that could cause lost workdays or restricted duty. Pet. 16.

i. Factual Background

Inspector Robertson issued the citation after conducting an inspection on the 1400-foot level of the Weeks Island mine. During the inspection, Inspector Robertson referenced the mine map provided by Morton Salt. Tr. 173. Morton Salt had last updated this mine map on December 20, 2021. *See* Ex. S-5 at 1. The map showed a door near the No. 3 Production Shaft that was labelled "D/R." Ex. S-5 at 1. The map's legend indicated that "D" signified a "Door Airlock" and "R" signified a "Regulator." Ex. S-5 at 1. These two different types of doors—an airlock and a regulator—perform opposite functions. An airlock door is designed to completely seal a doorway when closed, and a regulator door is designed to permit some airflow when desired. Tr. 419.

Inspector Robertson examined the door at this location and determined that, contrary to the mine map, the door near the No. 3 Production Shaft was not an airlock door. Accordingly, he issued Citation No. 9647382. Within two days of this citation's issuance, Morton Salt terminated the action by issuing a new mine map that indicated this door on the map only as "D" and changed the legend to indicate that "D" represented a "Door." Pet. 17; Ex. R-E at 2; Tr. 179-80. No physical modifications to the door were required to terminate the citation. Tr. 188.

Eric Gaudreau, mine engineer, testified that the door in question was installed next to the No. 3 shaft, which is on the exhaust side of the mine. Morton Salt installed the door for use as a regulator to control air flow through the area. Tr. 419. The door was specifically designed with extra slots to allow air to travel through. Tr. 421; *see also* Ex. S-3 at 1. Gaudreau testified that the door was in good condition at the time of inspection and that it has not been physically changed or modified after issuance of the citation. Tr. 422. Gaudreau admitted that the door was mislabeled as an airlock door on the map. Tr. 420.

ii. Fact of Violation

The Secretary argues that the cited standard "requires operators to maintain ventilation doors according to their designation within a ventilation plan." Sec'y Br. at 11. I disagree. Section 57.8531 is entitled "Construction and maintenance of ventilation doors." The text of the standard, excepted above, requires in full that:

> Ventilation doors shall be—(a) Substantially constructed; (b) Covered with fire-retardant material, if constructed of wood; (c) Maintained in good condition;

(d) Self-closing, if manually operated; and (e) Equipped with audible or visual warning devices, if mechanically operated.

30 C.F.R. § 57.8531. Clearly, this standard governs the physical construction and maintenance of mine ventilation doors. Nowhere does the standard reference a ventilation plan or require that the door's construction match the plan's designation. The standard is not ambiguous, and it therefore cannot accommodate the Secretary's far-reaching interpretation.[7]

The Secretary has alleged a violation of section 57.8531(c) but has failed to introduce any evidence that the door was maintained in poor condition. The door was simply mislabeled on the mine map. This error has nothing to do with the maintenance of the door. The Secretary has therefore failed to prove a violation under the cited standard. Accordingly, Citation No. 9647382 is **VACATED**.

C. Ground Conditions (Citation No. 9649663)

On March 16, 2022, Inspector Olivier issued Citation No. 9649663, which alleges a violation of 30 C.F.R. § 57.3200. The cited standard requires that, "[g]round conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area" and that, "[u]ntil corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry." 30 C.F.R. § 57.3200. The citation described the violation of the standard as follows:

> There was loose ground found along the north rib behind the [E]lectrical equipment in 11C. The area had caution tape up with 2 tags identifying the scales. One tag was dated January 2021 and the other dated June 2021. It is evident from the footprints in the area that the miners were still traveling around the caution tape into the hazardous area. This condition exposes miners to serious injuries if the scales were to fall while the miners are in the area. Standard 57.3200 was cited 52 times in two years at mine 1600970 (52 to the operator, 0 to a contractor).

Pet. 23. Inspector Olivier found that the cited conduct was reasonably likely to produce an injury that could reasonably expected to be fatal. He marked it as S&S and high negligence.

i. Factual Background

The area in question is adjacent to the MCC, which is a control room containing the breakers and power controls for the equipment in the screen plant. Tr. 87. Two miners staff the MCC building during each shift. Tr. 87. The MCC is accessed via the mine roadway. Tr. 165. Just down the road, the mine had constructed a berm to protect against a steep drop-off. Tr. 139.

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[7] To the extent that the Secretary seeks deference for her interpretation of this standard, I find that it is not warranted. The text of the standard is not "genuinely ambiguous" and therefore does not merit deference. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019).

Between the berm and the MCC sat a freestanding transformer box and a wooden storage box. Tr. 139, 245.

Inspector Olivier testified that he observed "loose ground"[8] on the wall behind the transformer and the wooden storage box. Tr. 239. He documented a 20'x20' slab of salt that had separated from the wall. Tr. 243, 309; Ex. S-10. At least two sides of the slab were "not intact." Tr. 309. Inspector Olivier testified that, in general, scale needs to be taken down when it is broken or cracked on more than one side because the cracking could impact its stability. Tr. 241. According to Inspector Olivier, certain conditions such as the looseness of the material might contribute to a scale falling, but such events are often unpredictable. Tr. 241.

Inspector Olivier also testified that the area near this scale was not fully barricaded and had been recently accessed by miners. About "half" of the area between the berm and the MCC was taped off, according to Inspector Olivier. Tr. 239. The other half remained unbarricaded. Tr. 239. During his inspection, Inspector Olivier encountered footprints leading from the roadway to the area behind the MCC, near a table and storage box. Tr. 244. He also documented evidence showing that a miner had recently urinated in the area near the storage box. Tr. 249; Ex. S-12. Inspector Olivier testified that the urine mark was "pretty much right under where the scales was located." Tr. 249-50. He opined that if the scale had fallen, the area marked by footprints and urine would have been within the "zone of danger" presented by the ground conditions. Tr. 252. Further, he testified that the transformer box was roughly 15 feet from the edge of the scale and also fell within the zone of danger. Tr. 252.

Lee Franks, the mine's safety supervisor, testified that the area had been barricaded due to the presence of scale dating back to January 2021. Tr. 95-96. Franks identified two separate "substantial scales" in the area. Tr. 95. Franks described the scale closer to the MCC building as a "substantial bulge" with a "crack on one side of the scale." Tr. 96. He said "[t]here was no crack on top of the other side" of this first scale. Tr. 96. The second scale was located closer to the berm. Tr. 95.

According to Franks, Morton Salt identified the "potential scales" at least fourteen months before the citation was written. Tr. 96. Morton Salt did not descale the area immediately due to the presence of the transformer. The company's electricians did not typically work on this transformer, and so Morton Salt needed to hire outside contractors to move the transformer before the descaling work could be done. Tr. 96. Franks testified that during the COVID-19 pandemic, it became very difficult to get an outside contractor to perform the necessary work. So, Franks testified, Morton Salt decided to close off the area until the contract work could be procured. Tr. 96-101. Morton Salt used "red danger tape" to effectuate the closure and hung a tag indicating the "actual hazard" in the area. Tr. 101, 158. The tape ran from the berm area to a small table between the berm and the MCC. Tr. 160; ex. R-R2. Franks testified that roughly 8 to 10 feet of area remained unbarricaded because it was "easiest" to secure the end of the tape to the table. Tr. 159-160.

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[8] The court reporter erroneously transcribed this phrase as "lose ground." Tr. 239.

Franks accompanied Inspector Olivier as he inspected the scales. Tr. 86. He witnessed the footprints and the urine mark documented during the inspection. Tr. 109, 137. Franks testified that the urine mark was approximately 40-45 feet from the scale closest to the berm and 25 feet from the scale closest to the MCC. Tr. 140-41. He also testified that no miner should need to access the transformer or anything else in the area unless there was a major electrical issue with the "whole mine power," because "any electrical work they would have done to get anything in the screen plant running again would have been done in the MCC." Tr. 146.

Franks also described the subsequent descaling efforts in the area. In order to terminate Citation No. 9649663, Morton Salt removed the transformer from the area so that the scales could be addressed. Tr. 144. Franks testified that the scale closest to the MCC was "bar tight," meaning that no material was loosened from the wall when he tried to pry it off with a 6-foot or 12-foot scaling bar. Tr. 143; *see also* Tr. 133. Franks and his team had to scrape the material off with a mechanical scaler. Tr. 145. According to Franks, descaling resulted in about "two, two and a half buckets" of salt being loosened from the wall. Tr. 144.

ii. Fact of Violation

In order to prove a ground control violation, the Secretary must prove by a preponderance of the evidence (1) that a ground control hazard existed and (2) that the operator failed to address the hazard by taking it down, supporting it, or posting it against entry and barricading it while unattended. *See* 30 C.F.R. §57.3200. I find that the Secretary has successfully made such a showing here.

First, I find that the Secretary has shown the existence of a hazard. Inspector Olivier testified that he encountered a 20'x20' slab of scale that was separating from the wall on at least two sides.[9] Tr. 243, 309; Ex. S-10. This is supported by photographic evidence. Ex. S-13. In Inspector Olivier's professional opinion, scale that is separating or cracked on more than one side presents a hazard and should be removed. Tr. 241. Inspector Olivier further testified that blasting, which takes place three to five times a week, could shake rock loose and thus contribute to the hazard. Tr. 241-42. Inspector Olivier has conducted over 500 inspections, including over 50 at the Weeks Island mine, during his 13 years as an inspector with MSHA. Tr. 195-97. Before joining MSHA, he worked in production at another underground salt mine. Tr. 195. An experienced MSHA inspector's opinion that a hazard exists is entitled to substantial weight. *Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Harland Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998). Accordingly, I credit Inspector Olivier's testimony.

Morton Salt argues that no hazard existed because there was no loose rock, as evidenced by Lee Franks' testimony that the scale was "bar tight." Resp. Br. at 43. While I find Franks' testimony to be largely credible, I do not believe an operator's plain statement that the material was "bar tight" can defeat the inspector's hazard determination. Franks admitted that "there [were] two scales that[] I would consider substantial scales." Tr. 95. Morton Salt's own training

[9] Franks testified that the scale was only cracked on one side. Tr. 96. The photographic evidence tends to support the inspector's contention that the scale was separating from the wall on at least two sides. Ex. S-13. I credit the inspector's testimony on this point.

materials recognize that the "inability to predict when they may fall makes scales one of the most serious hazards in mining." Ex. S-41 at 7. This comports with Inspector Olivier's testimony regarding the unpredictability of scales in a salt mine. Tr. 241. Given the presence of scales and the unpredictable nature of salt scales, it is possible for a hazard to exist even when the operator alleges the scale was "bar tight."

The inspector relied on objective indicators of looseness (the number of cracked sides) and documented the hazard to the extent possible. In my analysis, I have considered the "visible fractures" and the "operating experience of the mine" to determine whether the ground conditions are hazardous. *Asarco, Inc.*, 14 FMSHRC 941, 952 (June 1992). This mine has been cited 52 times in two years for hazardous ground conditions, and the scale here was fractured in two places which, in the inspector's experience, was unsafe. I therefore find that the ground conditions were indeed hazardous.

Second, I find that Morton Salt failed to install a sufficient barrier to impede unauthorized entry to the hazardous area. It is undisputed that Morton Salt failed to barricade at least 8-10 feet of the area and that miners were traveling in the area. A miner could (and at least one miner did) freely walk into the section of the mine that featured hazardous ground conditions. Therefore, the second prong of the test has been met. Citation No. 9649663 is **AFFIRMED** as modified below.

iii. Gravity and S&S

Inspector Olivier determined that the mine's failure to barricade the hazardous condition was reasonably likely to cause an injury, and that the injury could be expected to be fatal. He marked the citation as S&S.

I affirm the finding that the expected injury would be fatal. Inspector Olivier testified that the scale was comprised of a 20'x20' slab of rock. Lee Franks testified that two and a half buckets worth of material fell when the area was descaled. Miners had been traveling in the zone of danger in the event that the scale fell, according to Inspector Olivier. If multiple buckets of salt fell on an individual, the anticipated injury is reasonably categorized as fatal.

However, I disclaim the inspector's likelihood finding. There are too many factors showing the remoteness of the possible injury. Miners did not regularly access the area for their work. Tr. 146. Some of the area was barricaded, making miner ingress less likely. Tr. 100. Although at least one miner chose to relieve himself in this area, there was a portable toilet nearby that could have been used instead. Tr. 146, 165. According to Franks' testimony, the scaled salt needed to be loosened by a mechanical scaler. Tr. 144. In view of all of this evidence, I find that a fatal or even serious injury was unlikely.

In order to establish that a violation of a mandatory safety standard is S&S, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would

be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020). The Commission has explained that "the proper focus of the second step of the [S&S] test [is] the likelihood of the occurrence of the hazard the cited standard is designed to prevent." *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 n.8 (Aug. 2016).

The Secretary has established a violation and therefore satisfies step 1. But the Secretary has failed to satisfy step 2 because she has not shown that the occurrence of a loose-ground hazard is reasonably likely. The danger to miners presented by the scales remained relatively remote given the facts discussed above. Accordingly, the ground-control violation was not S&S.

iv. Negligence

Under the Mine Act, operators are held to a high standard of care and must "be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d). The Commission and its judges determine whether an operator has met its duty of care using a traditional negligence analysis, considering the "totality of the circumstances holistically," including "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015).

Inspector Olivier determined that this violation was due to Morton Salt's high negligence because "the scale was identified two times over [one] year [and] the company did not take any steps or measures to eliminate people from entering this area." Tr. 257.

The mine operator clearly recognized a possible hazard in the area. It erected partial barricades over a year before the citation was issued. However, Morton Salt never completed the barricade during the fourteen months of its existence, due to the inconvenience of extending the tape a few more yards. Tr. 160. I find that Morton Salt was aware of the hazard, and that its reasons for not adequately barricading the hazard are weak and unavailing. I affirm the inspector's finding of high negligence.

D. Evacuation Plan (Citation No. 9649667)

On March 17, 2022, Inspector Olivier issued Citation No. 9649667 alleging a violation of 30 C.F.R. § 57.11053(c). The cited standard requires that a mine operator maintain "an escape plan for each working area in the mine [that] include[s] instructions showing how each working area should be evacuated" and mandates that "[e]ach such plan shall be posted at appropriate shaft stations and elsewhere in working areas where persons congregate." 30 C.F.R. § 57.11053(c). The citation describes a violation as follows:

> The posted escape and evacuation plan is not accurate. The primary and secondary routes for the 1200' level is not accessible. Miners are still accessing the crusher area and the road to ladder is berm[ed] and #3 shaft is not accessible for escape. Miners do not have an escape route pass #4 shaft. This condition exposes miners to

serious injuries if they have to escape in an emergency. Standard 57.11053(c) was cited 1 time in two years at mine 1600970 (1 to the operator, 0 to a contractor).

Pet. 24. Inspector Olivier determined that the cited conduct was reasonably likely to cause an injury, and that the resultant injury could be expected to be fatal. He found that the operator was highly negligent and that the violation was S&S.

i. Factual Background

Inspector Olivier performed an inspection of the 1200-foot level of the Weeks Island mine on March 17. Production had ceased on this level of the mine years before the date of the inspection, according to Inspector Olivier. Tr. 269. He nevertheless inspected this level because it was still utilized for escape purposes and accessed by miners on a regular basis. Tr. 265. Inspector Olivier testified that miners accessed the 1200-foot level "weekly" or "at least three times a month" in order to conduct methane readings, to control ventilation for the 1000-foot level, and to inspect escape routes. Tr. 265.

Inspector Olivier reviewed the mine's posted evacuation plan step-by-step and discovered that portions of the designated escapeways were "not travelable." Tr. 259. Inspector Olivier read the written plan for the primary escape route, which directed miners located at the stockpile/crusher area to "proceed up the ramp along No. 6 Belt to the crusher, turn left and continue along No. 2 and No. 1 Belts to the No. 3 exhaust shaft." Ex. S-17 at 2. His inspection revealed that the ramp was closed and that an escaping miner would not be able to proceed up the ramp and turn left as instructed. Tr. 263. Inspector Olivier also read the written plan for the secondary escape route, which instructed miners to "proceed to the ladder opposite the stockpile." Ex. S-17 at 2. His inspection revealed the presence of a berm that prevented access to the ladder. Tr. 261. Inspector Olivier did not find fault with escape maps posted by Morton Salt, only the written instructions. Tr. 312.

Lee Franks, mine safety supervisor, accompanied Inspector Olivier during his inspection and agreed that the written evacuation instructions were incorrect. Tr. 116. Franks testified that a berm prevented access to the ladder indicated on the secondary escapeway. Tr. 115. He said that miners "wouldn't normally be on the 1200-foot level" since there was "no running equipment in that area anymore" since the stockpile fell out of use in 2019. Tr. 118-19. Franks admitted the level may be accessed by electricians or mechanics performing maintenance or by supervisors performing roads and grounds inspections. Tr. 118.

Franks testified that the map attached to the evacuation plan was accurate. Tr. 152. He did not expect miners to read the 18-page written plan in an emergency. Tr. 154. Miners receive hands-on mine evacuation training where management physically drives them through the mine and shows the miners the proper escape routes. Tr. 150. Franks called this the "best" way for miners to learn the escape routes because "a lot of people remember things they do more than [what] they read." Tr. 150. Franks identified at least three other ways for miners to exit the 1200-foot level during an emergency and said that miners would "know where to go" during an evacuation. Tr. 154-55.

Eric Gaudreau, mine engineer, also agreed that the "wording was incorrect" on the written escape plan in March 2022. Tr. 427. Gaudreau explained, however, that there were at least three viable escapeways from the mine at the time the citation was issued. The primary route would be to access the No. 4 shaft on the 1200-foot level, which is in fresh intake air. Tr. 429. The secondary route would be to descend to the 1500-foot level to evacuate out of the No. 3 exhaust shaft. Tr. 429. (Both of these options were listed on the post-citation evacuation plan. Tr. 429). A third route would be to ascend to the 1000-foot level and access the No. 4 shaft from there. Tr. 430. Gaudreau testified that few miners accessed the 1200-foot level aside from him, who would perform inspections or pass through the level to access the 1000-foot level. Tr. 437.

Gaudreau testified that he began his position as mine engineer in 2020, and that it would have been the previous mine engineer's job to update the plan after the stockpile was closed in 2019. Tr. 438. He explained that he would only make changes to the plans upon a change in mining operations, and said that he "would not look at" the wording for the 1200-foot level since there was no active production on that level. Tr. 443. Gaudreau testified that he "had not seen" the evacuation plan for the 1200-foot level at the time the citation was written. Tr. 444.

ii. Fact of Violation

Morton Salt does not dispute the fact of violation in its brief. Its witnesses admitted at hearing that the mine escape plan did not give miners accurate "instructions showing how each working area should be evacuated," as required by 30 C.F.R. § 57.11053(c). The Secretary has therefore proven a violation of the cited standard, and Citation No. 9649667 is **AFFIRMED** as modified below.

iii. Gravity and S&S

Inspector Olivier found that the cited conduct was reasonably likely to cause an injury that could be expected to be fatal, and that the violation was S&S. I affirm his finding regarding a fatal injury. An inexperienced miner on the 1200-foot level would be required to rely on the evacuation plan if an emergency occurred. The time wasted following incorrect directions could be the difference between life and death—especially because no correct escape route was laid out in the document.

However, such an injury is not likely. The witnesses agreed that miners rarely accessed the 1200-foot level. Since there was no ongoing work there, the visits to the level would have been infrequent and short. It is therefore unlikely that a miner—let alone an inexperienced miner that lacked sophisticated knowledge of mine exits—would be caught on the 1200-foot level during an emergency.

When determining whether a violation of an emergency standard is S&S, a judge must assume the existence of an emergency. *See Cumberland Coal Res*., LP, 33 FMSHRC 2357, 2367 (Oct. 2011), *aff'd* 717 F.3d 1020 (D.C. Cir. 2013); *Savage Zinc, Inc.*, 17 FMSHRC 279, 290 (Feb. 1995) (in the context of metal/nonmetal mines). But this violation cannot be S&S because, even assuming the emergency, it is unlikely that a hazard would occur. Miners were rarely on this level. Alternate escapeways existed and were known by experienced miners, they were

simply not described adequately on the evacuation plan. Tr. 117, 429. It is unlikely that a novice miner would find himself on the 1200-foot level during an emergency and would have to rely upon the 18-page written escape plan for guidance. Therefore, the Secretary has failed to prove step 2 of the S&S standard.

iv. Negligence

Inspector Olivier found that Morton Salt was highly negligent for its faulty escape plan. I affirm the finding of high negligence. Franks and Gaudreau both admit that the escape plan was not updated after the stockpile on the 1200-foot level was decommissioned in the middle of 2019. Tr. 115, 427. The error in the plan therefore persisted for nearly three years. Gaudreau, the mine engineer, testified that he had not even seen the evacuation plan before Morton Salt was cited for it. Tr. 444. This is a massive and unjustifiable oversight. MSHA mandates that operators inspect their escape routes on a regular basis, *see* 30 C.F.R. § 57.11051, and Morton Salt therefore should have caught its error much earlier than it did. I find that the company was highly negligent for allowing this error to persist for years.

E. Materials Storage (Citation No. 9649679)

Inspector Olivier issued Citation No. 9649679 alleging a violation of 30 C.F.R. § 57.16001, which mandates that "[s]upplies shall not be stacked or stored in a manner which creates tripping or fall-of-material hazards." The citation describes the violation as follows:

> There were several boxes of filters stacked on the overhead bin in the storeroom that were about to fall down. The boxes were approximately 10ft high and had already slid to the edge of the bin where miners travel daily. The boxes were stored here about a week ago. This condition exposes the miners to injuries if the filters were to fall on miners while traveling in the area. Standard 57.16001 was cited 1 time in two years at mine 1600970 (1 to the operator, 0 to a contractor).

Pet. 32. Inspector Olivier alleged that this conduct was reasonably likely to injure a miner and cause lost workdays or restricted duty. He designated the citation as moderate negligence and S&S. Morton Salt terminated the citation on the date of issuance by restacking the filters and eliminating the fall hazard. Pet 32.

i. Factual Background

On March 23, 2023, Inspector Olivier conducted his inspection of the mine's surface supply room, which is a large warehouse-type room typically staffed by an attendant and a supervisor. Tr. 61-62. During the inspection, Inspector Olivier noticed that several metal canister filters were haphazardly stacked atop a supply shelf. Tr. 271-272; Ex. S-24. Inspector Olivier photographed the condition. *See* Ex. S-24. He testified that, subsequently, a Morton Salt representative called the supply room attendant over to re-stack the boxes and that as "soon as [the attendant] put his hand on a box, the box fell right where we had just passed." Tr. 271. Inspector Olivier testified that he saw "several people" come through the supply room during his

inspection. Tr. 272. He said that storeroom attendants would sometimes walk with the miners through the aisles of the storeroom to locate the parts they were seeking. Tr. 272.

Tommy Viator, general foreman of surface maintenance, accompanied Inspector Olivier during his inspection of the supply room. Viator testified that he and Inspector Olivier walked past the stacked metal canister filters without noticing them, and that Inspector Olivier only caught sight of the filters as the two men were talking near the exit of the supply room. Tr. 393. Viator testified that he measured the height of the shelf, 8 feet, and the weight of each filter, 9.5 pounds, after the citation was issued. Tr. 392. On cross examination, Viator admitted that the stacked boxes rose higher than 8 feet since they were stacked on top of each other. Tr. 413. But Viator opined that the filter box would not have fallen if the storeroom attendant had not nudged it. Tr. 393-394. In his 15 years of overseeing the supply room, Viator has had no knowledge of another box falling from a shelf. Tr. 397.

Viator also provided testimony about who may access the storeroom. He said that a total of three people worked in the supply room at any given time. Tr. 394. According to Viator, the supply room requires badge access and that "the only people authorized are the storeroom attendant and managers." Tr. 395. If someone without badge access needs to come in, a storeroom attendant will escort the individual through the supply room. Tr. 395. All employees are required to wear hardhats, steel-toe boots, and safety glasses in the supply room. Tr. 395. Viator also testified to the training provided to miners regarding housekeeping matters and the discipline administered for violations of the company's housekeeping policies. Tr. 397-402.

Beau Landry, surface miner and union representative, also accompanied Inspector Olivier during his supply room inspection. Landry testified that he witnessed the metal canister filters stacked on the top shelf in the supply room as indicated in the photograph taken by the inspector. *See* Ex. S-24. Landry witnessed the storeroom attendant inadvertently knock a box down when rearranging the stacked filters. Tr. 65. He testified that the shelf was roughly 8 feet tall. Tr. 72-73.

Landry testified that the storeroom attendants would sometimes walk with the miners and together find the parts needed on the shelves. Tr. 62. In his experience, miners on Landry's team typically needed to visit the supply room once daily. Tr. 60. According to Landry, the shelf in question abutted a passageway that is typically traveled by miners who enter the supply room. Tr. 73.

ii. Fact of Violation

Morton Salt does not dispute the fact of violation in its brief. The testimony and photographic evidence in this case indicates that the stacked filters caused a fall-of-material hazard. Accordingly, the Secretary has proven a violation of 30 C.F.R. § 57.16001, and Citation No. 9649679 is **AFFIRMED**.

iii. Gravity and S&S

Inspector Olivier found that this violation was reasonably likely to cause an injury that could be expected to cause lost workdays or restricted duty. I affirm the inspector's findings. The photographic evidence clearly demonstrates a fall risk. Ex. S-24. One of the filters did in fact fall when touched by the storeroom attendant. Tr. 271. Further, based on that photograph, it is not hard to imagine three or four of these filters falling. If a nearby miner or equipment accidentally nudged the shelf, the filters could cascade onto the miner and—while each individual filter only weighs 9.5 pounds, Tr. 392—the collective impact could be thirty or forty pounds falling from 8-10 feet. The impact from one or several filters falling even with the use of a hard hat and steel toed boots could cause injury to a miner's shoulders, back, head, arms, or legs. See Tr. 275. It could further cause a trip hazard. Tr. 275. Given that storeroom staff regularly walk down these aisles and other miners sometimes accompany them, I find these risks reasonably likely, and the anticipated injury could certainly cause lost workdays.

I also affirm the inspector's S&S finding. First, I have affirmed a violation of section 57.16001. Second, the violation was reasonably likely to cause a fall of material, the hazard against which the regulation is directed. *See* 30 C.F.R. § 57.16001 ("Supplies shall not be stacked or stored in a manner which creates *tripping or fall-of-material hazards*.") Third, falling metal canister boxes are reasonably likely to cause an injury to miners' shoulders, backs, heads, arms, or legs especially given the location and frequency of miners passing below. And finally, there is a reasonable likelihood that the injury would be serious, given the fact that multiple boxes of filters may fall. The Secretary has therefore satisfied all elements of the *Peabody Midwest* standard and has proven that the violation is S&S. *See* 42 FMSHRC at 38.

iv. Negligence

Further, I find that Morton Salt was moderately negligent for allowing this condition to persist. The hazard was obvious, as shown in the photograph, and it was located at the end of an aisle and visible from at least two directions. It should have been addressed before the inspection. However, the supply room itself was otherwise in good condition, and Inspector Olivier had not encountered issues there previously. Additionally, maintenance supervisor Viator credibly testified as to the training and disciplinary policies on housekeeping, further mitigating the negligence. Moderate negligence is appropriate.

IV. PENALTY

Commission judges assess de novo civil penalties for violations of the Mine Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that judges consider six statutory criteria when assessing a 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).

For Citation No. 9649663, the Secretary proposed a regularly assessed penalty of $17,565.00. Pet. 7. Morton Salt has an extensive history of ground control violations, including 52 violations of this standard in the past two years. Morton Salt stipulates that the total proposed penalty of $40,786.00 will not affect its ability to continue in business. Jt. Stip. ¶ 4. This non-S&S violation of section 57.3200 was unlikely to cause fatal injury, but it was avoidable and was caused by Morton Salt's high negligence. Morton Salt did correct the violation in a reasonable amount of time after the citation was issued. Based on these factors, I assess a penalty of $9,500.00.

For Citation No. 9649667, the Secretary proposed a regularly assessed penalty of $7,285.00. Pet. 7. This standard has only been cited once in the previous two years. The penalty will not affect Morton Salt's ability to continue in business. Jt. Stip. ¶ 4. This is another non-S&S violation that was unlikely to cause fatal injury, but again was avoidable and caused by Morton Salt's high negligence. Morton Salt did swiftly correct the violation. Based on all of these factors, I assess a penalty of $2,000.00.

For Citation No. 9649679, the Secretary proposed an assessment of $661.00. Pet. 7. Morton Salt had no other housekeeping violations cited in the two years before this citation. This is an S&S violation that was reasonably likely to cause lost workdays, and it was caused by Morton Salt's moderate negligence. The assessed penalty would not affect the company's ability to stay in business. Jt. Stip. ¶ 4. I therefore assess a penalty of $661.00.

V. PARTIAL SETTLEMENT

The parties have filed a motion to approve partial settlement regarding the seven settled citations. The originally assessed amount for these seven actions was $6,283.00 and the settlement amount is $2,888.00. The settlement includes:

Citation/ Order No.	Originally Proposed Assessment	Settlement Amount	Modifications
9647379	$1,593.00	$1,593.00	Affirm as Issued
9647388	$133.00	$0.00	Vacate
9649660	$1,188.00	$0.00	Vacate
9649668	$133.00	$133.00	Affirm as Issued
9649670	$909.00	$909.00	Affirm as Issued
9649672	$2,194.00	$120.00	Modify gravity from "Reasonably Likely" to "Unlikely," modify negligence from "High" to "Moderate," and modify Significant and Substantial from "Yes" to "No"
9649680	$133.00	$133.00	Affirm as Issued
TOTAL	**$6,283.00**	**$2,888.00**	

The parties have submitted facts in support of the proposed changes. I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve partial settlement is **GRANTED**, the citations contained in this docket are **MODIFIED** as set forth above.

VI. ORDER

It is hereby **ORDERED** that Citation No. 9649663 is **AFFIRMED**, as modified to reduce the likelihood of injury or illness to "Unlikely" and to remove the S&S designation; that Citation No. 9649667 is **AFFIRMED**, as modified to reduce the likelihood of injury or illness to "Unlikely" and to remove the S&S designation; that Citation No. 9649679 is **AFFIRMED** as issued; and that Orders Nos. 9649653, 9649654, and 9649655 and Citation No. 9647382 are **VACATED**. Respondent is **ORDERED** to pay the Secretary $12,161.00 within 40 days of this order.

The Secretary's motion to approve partial settlement is **GRANTED**. It is further **ORDERED** that the Respondent pay an additional $2,888.00 within 40 days of this order. A grand total of $15,049.00 is due to the Secretary.

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 23, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0123 A.C. No. 46-09514-567090
v.	
CLAY TRUCKING, INC, Respondent	Mine: Muddy Bridge

DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the Court upon petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion to Approve Settlement. The Respondent has agreed to the proposed changes. The originally assessed total amount was $26,260.00, and the proposed settlement amount is $16,079.00.

The proposed settlement terms are reflected in this table:

Citation/Order No.	MSHA'S Proposed Penalty	Settlement Amount	Modifications
9568922	$12,754.00	$2,573.00	Modify gravity from "Reasonably Likely & S&S" to "Unlikely & Non-S&S" **80% reduction in penalty**
9568923	$234.00	$234.00	Affirmed as issued and assessed
9568924	$518.00	$518.00	Affirmed as issued and assessed
9568925	$12,754.00	$12,754.00	Affirmed as issued and assessed
TOTALS	**$26,260.00**	**$16,079.00**	39% overall reduction in penalty

Citation No. 9568922, for which the Secretary seeks an 80% reduction in the penalty.

On September 19, 2022, **per Citation No. 9568922,** MSHA Inspector Emory Pack issued a section 104(a) citation alleging a violation of 30 C.F.R. §77.1606(c). That standard titled "Loading and haulage equipment; inspection and maintenance," provides at subsection (c): "**Equipment defects affecting safety shall be corrected *before* the equipment is used**."

Inspector Pack stated in the condition section of his citation the following:

> The following equipment defects affecting safety were not corrected ***before*** the company No. 041 Peterbilt 18 wheeler coal truck was placed into operation:
> **The Brake canisters located on the front axle of the tractor was leaking air and could be heard over the truck and surrounding noise levels.** The air leaks caused the air tank to empty when tested. Defects effecting safety shall be corrected before the equipment is used. **This truck was being operated on steep grades throughout the mine property.**

Petition for Civil Penalty at 11 (emphasis added)

The violation was terminated after the defective brake canisters were replaced with new ones. Following that replacement, the canisters were no longer leaking air. *Id.*

Citation No. 9568923

On the *same* day, **per Citation No. 9568923**, the *same* coal truck was cited for a violation of 30 C.F.R. § 77.1605(d). That provision, under the same title, "Loading and haulage" states: "Mobile equipment shall be provided with audible warning devices. Lights shall be provided on both ends when required." The inspector stated that the truck was not provided with a working reverse light on the trailer finding that the light provided was not operative when checked. The violation was terminated upon the reverse light being replaced with a new one.

Petition for Civil Penalty at 12

Citation No. 9568924

Yet again on the same day, **per Citation No. 9568924**, the inspector cited another violation of 30 C.F.R. § 77.1605(d), this time recording "The company No. 024 18-wheeler coal truck (Trailer No.48) was not provided with a working signal lights on the right rear and the front right. Also, the head lights would not work on high beam when checked. The lights provided is not operative when checked."

Petition for Civil Penalty at 13

That violation was terminated on September 26, 2022, with the inspector noting: "The company No. 024 18-wheeler coal truck has been provided with a working signal lights on the right rear and the front right. Also, the head lights dimmer switch was replaced with a new one and will now work on high beam when checked."

Id. at 14.

Citation No. 9568925

Last, again on the same day as the other citations described above, September 19, 2022, Inspector Pack issued the fourth citation in this docket, Citation No. 9568925. Involving the same standard identified in Citation No. 9568922**,** 30 C.F.R. §77.1606(c), this one involved the same truck cited in Citation No. **9568924**. This time in the condition section of the citation, the Inspector listed the following:

> The following equipment defects affecting safety were not corrected before the company No.024 (Trailer No.48) Peterbilt 18-wheeler coal truck was placed into operation:
>
> (1) The turtle valve fitting for the tractor has a broke fitting and is leaking air bad and can be heard over the truck and surrounding noise levels.
>
> (2) **The right rear brake canister was also leaking air when tested**.
>
> (3) The crossover bar for the 5th wheel was broke into on the front side.
>
> Defects effecting safety shall be corrected before the equipment is used. This truck was being operated on steep grades and sharp curves throughout the mine property. The truck was removed from service immediately.
>
> Petition for civil penalty at 15.
>
> On September 26, 2022, the violation was terminated with the inspector recording:
>
> The following equipment defects affecting safety have been corrected on the company No.024 Peterbilt 18-wheeler coal:
>
> (1) The turtle valve fitting for the tractor has been replaced with a new fitting and is no longer leaking air.
>
> (2) **The right rear brake canister was replaced with a new canister**.
>
> (3) The 5th wheel bracket has been replaced.

Id. at 16.

Thus, this docket involves four, now-conceded, violations, all dealing with truck safety defects, two each on two coal haul trucks and the two cited trucks had leaking brake canisters. Three of the four citations were paid as per the regular assessment process.

After noting in the motion the condition of leaking air from the front axle brake canisters, as found by the MSHA Inspector Pack, as described above, the claimed justification for designating the injury from the admitted defect as 'unlikely' stated:

> The Respondent does not dispute that the canisters/brake chambers on the front axle of the tractor may have been leaking air to some extent but not at a rate which compromised the capability of the braking system. The MSHA-inspector determined the fitness of the braking system was adversely affected based on noise level of the air leak coming from brake chambers and the leakage allegedly causing the actuator tank to empty. Therefore, the braking capacity was evaluated as being diminished to a point as to create a safety hazard that would result in a serious injury.[1] The Respondent would argue at hearing that with the truck's engine running at idle when tested, the truck's air compressor for the braking system would be supplying air continuously to the actuator tank. It is highly unlikely the actuator tank would ever be void of compressed air, empty. Unless, there was a malfunction with the compressor, however, there was no evidence of this at the time of issuance. The Respondent further argue [sic] that *the inspector failed to show any defects*, based on criteria in MSHA's Inspection Procedure for Coal Haulage Trucks, page #4, Steering Axle Brakes: 1) an absence of braking action on either of the two brake chambers; 2) that there existed a mismatch across the two power units (air chamber size or in the slack adjuster length) and; 3) that the brake linings or pads on the steering axle of the power units were compromised (pads are not firmly attached to the brake shoe, oil seepage into or out of the brake lining/drum, or brake pads less than 3/16 inch in thickness). Moreover, with condition as alleged, MSHA's protocol is to request the company representative to "Perform Brake Tests" on an area of the haul road of moderate to steep slope with the truck fully loaded to determine the actual braking capability of the vehicle. This request, possibly to resolve the alleged braking issue, was not even considered by the inspector. The Respondent asserts there is no practical data/evidence provided to support the alleged condition based on the quasi-brake test performed by the inspector. The previous pre-op inspection conducted on the coal haul truck reflected the braking capacity was adequate to control the truck at all times and there is no evidence contrary to this contention. The Respondent further asserts the inspector's rationale in evaluating the alleged condition is speculative.
>
> The Secretary agrees that the facts support a modification of the likelihood from reasonably likely to unlikely.
> Motion at 3-4.

[1] Depending on one's meaning of a 'serious injury,' Inspector Pack evaluated that the an injury would be reasonably likely to result in lost workday or restricted duty. Petition for Civil Penalty at 11.

Analysis for Citation No. 9568922

For this now-admitted violation, regarding Citation No. **9568922**, the Secretary's representative seeks to have the penalty reduced by **80% (eighty percent)**, on the basis that the likelihood of the injury occurring should be classified as "unlikely." Motion at 2, 3. For the reasons which follow, the Court believes that there is not legitimate support for an 'unlikely' designation and that the mine operator's support for that designation improperly shifts the burden of proof on the MSHA mine inspector and that the admitted condition, air leaking from canisters/brake chambers, was serious and warranted correction without delay.

To begin, air brake chambers are round metal containers, located at each wheel, where compressed air is converted into mechanical force to apply the brakes and stop the vehicle. Air is supplied to the brake chambers on each wheel through brake valves. It is controlled by the driver, who can determine how intense the braking should be.[2]

The Federal Motor Carrier Safety Administration, Department of Transportation speaks to the subject of this admitted violation, noting at APPENDIX A TO PART 396—MINIMUM PERIODIC INSPECTION STANDARDS, "**A vehicle *does not* pass an inspection** if it has one of the following defects or deficiencies: "… (4) **Audible air leak at brake chamber** (Example-ruptured diaphragm, loose chamber clamp, etc.)." (emphasis added).

As noted above, the mine operator's justification attempts to shift the burden of proof on the MSHA mine inspector beyond his findings that the brake canisters/brake chamber, on the front axle were leaking air to the extent that the air leakage could be heard over the noise levels created by the truck itself and the surrounding noise. The inspector's hearing alerted him to the leaking air and though that was sufficient, as "[a] brake chamber should never leak air out of the service or parking brake system,"[3] he then found that "the air leaks caused the air tank to empty when tested." Petition for Civil Penalty at 11. The air tank is important as "an air braking system includes an air tank that holds sufficient energy to stop a heavy vehicle if the compressor fails. So, an air brake system is designed with enough fail-safe capacity to stop a truck safely, even

[2]https://www.google.com/search?q=brake+chambers+explained&rlz=1C1GCEB_enUS954US954&ei=lFiPZLSzAduw5NoPuf,-NiA4&oq=brake+chamber+and+%22vital+part%22&gs_lcp=Cgxnd3Mtd2l6LXNlcnAQARgAMgsIABCKBRCGAxCwAzILCAAQigUQhgMQsANKBAhBGAFQAFgAYIcZaAFwAHgAgAEAiAEAkgEAmAEAwAEByAEC&sclient=gws-wiz-serp;
https://www.theengineerspost.com/air-brake-system/

[3] https://www.thetruckersreport.com/truckingindustryforum/threads/brake-chamber-leaking-from-rear-when-brakes-applied.510651/ Further, to the question whether one can drive with a leaking brake chamber, it is advised it is "[n]ot a good idea to drive with a leaking brake line. The possibility will exist that when you apply your brakes the leaking part could rupture and the brake line will give way completely and you will lose braking power all together.
https://www.quora.com/Can-you-drive-with-a-leaking-brake-line#:~:text=Not%20a%20good%20idea%20to,lose%20braking%20power%20all%20together.
More will be said about leaking brake air canisters in the body of this decision.

when leaking." https://www.repairsmith.com/blog/air-brake-system/ Here, Inspector Pack found that "[t]he air leaks caused the air tank *to empty* when tested." *Id.* at 11 (emphasis added).

Turning to the Respondent's assertions in support of its claim that an accident was not likely to occur, the Respondent's argument that truck's air compressor for the braking system would be supplying air continuously to the actuator tank sidesteps the inspector's finding that the air leaks caused the air tank to empty when he tested it. Although the Respondent contends that it would be "highly unlikely the actuator tank would ever be void of compressed air," as long as there was no malfunction with the compressor, it does not challenge the inspector's finding that the leaks caused the air tank to empty.

More importantly, the Respondent's argument distracts from the underlying issue – the brake canisters on the truck's front axle were leaking air and to an extent that the noise from the air leaks could be heard over the truck's noise and the surrounding noise as well. Anyone who has ever been at a gas station and heard an 18-wheeler idling can attest that it is noisy. The point is that an air leak noise of the order found by the inspector is significant.

A serious flaw in the parties' assertion is that it ignores that the test for likelihood is measured under continued normal mining operations, without any assumptions as to abatement therefore it is not limited to the moment at hand. *See, for e.g., Consol Pennsylvania Coal*, 44 FMSHRC 691,697 (Dec. 2022), citing *U.S. Steel Mining,* 7 FMSHRC 1125, 1130 (Aug. 1985). The leaking brake canisters were an accident waiting to happen, especially so because, as Inspector Pack noted without contradiction, the truck was being operated on steep grades throughout the mine property.

The balance of the Respondent's claim that an injury was unlikely to occur is all about its protest that *the inspector*, <u>but not the operator itself</u>, should have performed additional testing. Further, additional testing would not change the fact that the canisters *were leaking air* and loudly at that. Perhaps the best evidence that the inspector's ears and the test he performed told the story, is that the operator replaced the canisters with new ones and voila, the air leaking stopped.[4] In short, had the inspector taken on the burden that really belonged to the operator, not MSHA, all that the best-case scenario would have established is that, *at that moment*, the brakes might function, even as they were leaking air. Again, that is *not the test.*

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[4] Hearing an audible air leak is not to be discounted in establishing that a brake system was not functioning properly. *Oil-Dri Production*, 40 FMSHRC 876 (June 2018) (ALJ Zane Gill). That case involved a metal/nonmetal provision, which is tantamount to the same requirement that – "All braking systems installed on the equipment shall be maintained in functional condition."

Mining fatality investigations have also implicated service brake chambers where brake actuators had an air leak. https://www.msha.gov/data-reports/fatality-reports/2022/january-28-2022-fatality/finalreport#:~:text=On%20January%2028%2C%202022%2C%20at,they%20were%20in%20lost%20control%2C

It is noteworthy that Clay Trucking's recent problems with brake chambers were not limited to this instance. In this very docket Citation No. 9568925, issued the same day as Citation No. 9568922, another 18-wheeler truck was also found by Inspector Pack to have a rear brake canister leaking air when tested. Petition for Civil Penalty at 15. The leaking air canister was but one of three defects identified by the inspector in issuing his citation for the now-admitted violation of 30 C.F.R. §77.1606(c). As with Citation No. 9568922, the remedy was to replace the right rear canister with a new one. *Id*.

In a separate earlier instance, per Docket No. WEVA 2023-0124, Clay was cited with yet another violation of the same standard, 30 C.F.R. §77.1606(c). Brake canisters were part of the defects in that matter. Issued earlier in the same year as this matter, in March 2022, a different MSHA Inspector, Andrew D. Bell, found a host of defects affecting safety with Clay's No. 026 coal truck. As pertinent here, Inspector Bell found that "[b]oth canisters (brake chambers) [on the No. 026 coal truck] on the middle tandem of the trailer are not providing adequate braking capacity. The air lines on the passenger side middle tandem canister were hooked up backwards; the passenger side middle tandem canister is out of adjustment; the driver side rear tandem canister on the tractor is out of adjustment; the driver side front brake canister is out of adjustment." For that violation, the Secretary believed that a 50% reduction in the penalty was justified.[5]

Based on the evidence of record and recognizing that the Commission does not allow its judges to make reasonable inquiry when presented with settlement motions, the Court concludes that the unlikely designation is unjustified. This is particularly troublesome because Citation No. 9568922 was regularly assessed. Given the concerns expressed above, there is a question whether the 80% penalty reduction is consonant with Congress' goal of imposing penalties that make non-compliance more expensive than compliance. If afforded the authority to make reasonable inquiry, a judge's concerns may be allayed and a settlement then approved in good conscience. To the Court, respectfully, settlements reviewed under the present structure, such as this, lay bare the conundrum faced by its judges. Unable to make reasonable inquiry, the Court is faced with either blindly accepting the parties' remarks, in which case it is reduced to a titular role or pointing out the apparent deficiencies in a given settlement, as it has done here.

While rejecting the former approach, that is not the end of the settlement review, because even when faced with problematic settlements as here, the Court is to consider the Secretary's Motion on the basis of the Commission's decisions in *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. Per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented

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[5] Although it was this Court which approved the settlement in Docket No. WEVA 2023-0124, it did so "solely on the basis of the Commission's decisions in *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act." Decision Approving Settlement at 3.

in this settlement motion is sufficient for approval. Accordingly, the settlement must be approved, but again, as with this Court's recent approval in the other Clay Trucking case described above, the approval here is also based *solely* on those Commission decisions addressing settlements.

Given the present limited review parameters, the motion to approve settlement must be, and is, **GRANTED** and the Citations in this docket are modified, as reflected in the table above. As such, it is **ORDERED** that for Citation No. 9568922 the gravity is **MODIFIED** from "Reasonably Likely" to "Unlikely," and as a consequence of that, S&S finding is replaced as "Non-S&S."

It is **ORDERED** that the Respondent is to pay a civil penalty of **$16,079.00**.

Further, per the terms of the settlement motion, the civil penalty for this docket is to be paid in five (5) consecutive monthly payments of **$2,680.00** and one (1) final payment of **$2,679.00** for the violation(s) in Docket No. **WEVA 2023-0123.** The first payment shall be made on or before the first day of the month following the issuance of an Order approving this settlement.[6]

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

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[6] 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.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

June 29, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
	Docket No. PENN 2022-0011 A.C. No. 36-07416-543019
v.	
CONSOL PENNSYLVANIA COAL COMPANY LLC, Respondent.	Mine: Enlow Fork Mine

DECISION

Appearances: Sharon H. McKenna, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Patrick W. Dennison, Esq., Fisher & Phillips LLP, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Paez

This docket is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815.[1] In dispute is a single significant and substantial ("S&S")[2] section 104(a) citation issued to CONSOL Pennsylvania Coal Company, LLC for an alleged violation of an escapeway standard.

To prevail, the Secretary must prove any cited violation "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom.*, *Sec'y of Lab. v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

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[1] In this decision, the original hearing transcript, the supplementary hearing transcript, the Joint Exhibit, the Secretary's exhibits, and the Respondent's exhibits are abbreviated as "Tr.," "II Tr.," "Jt. Ex. #," "Ex. P–#," and "Ex. R–#," respectively.

[2] The S&S terminology comes from section 104(d)(1) of the Mine 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 . . . ." 30 U.S.C. § 814(d)(1).

I. STATEMENT OF THE CASE

Citation No. 9204482 alleges CONSOL violated section 75.380(d)(1) by failing to maintain an escapeway in safe condition to assure passage of anyone, including disabled persons. 30 C.F.R. § 75.380(d)(1). The Commission has held the phrase "maintained in a safe condition" to mean an escapeway must allow miners to "expeditiously escape a dangerous underground environment in an emergency." *Am. Coal Co.*, 29 FMSHRC 941, 950 (Dec. 2007). Specifically, the Secretary alleges six hoses protruding from a pump car obstructed the escapeway, thus preventing escaping miners from effectively and safely using the escapeway in the event of an emergency. The Secretary proposed a penalty of $2,844.00. CONSOL timely answered the petition and contests the issuance of the citation.

I held an in-person hearing in Pittsburgh, Pennsylvania. At the hearing, the Secretary presented testimony from MSHA Inspector Allan Jack, and CONSOL presented testimony from its Safety Inspector, Joseph Bartolotto. One of CONSOL's witnesses, Steven Barr, Longwall Coordinator, was ill on the date of the original hearing and unable to attend. With the agreement of counsel, I held a remote Supplementary Hearing the following week to elicit his testimony. Both parties submitted post-hearing briefs and reply briefs.

II. ISSUES

The Secretary argues Citation No. 9204482 must be upheld as S&S and is the result of at least a moderate degree of negligence. (Tr. 21:10–13; Sec'y Post-hr'g Br. 11–23.) CONSOL contests the fact of the violation, the S&S designation, the negligence determination, and the penalty. (Resp't Post-hr'g Br. 5–25.) Accordingly, the following issues are before me: (1) whether CONSOL violated the provisions of section 75.380(d)(1) as alleged in Citation No. 9204482; (2) whether the citation was properly designated as S&S; (3) whether CONSOL's negligence was correctly determined as "moderate"; and (4) whether the assessment of a penalty is appropriate.

For the reasons set forth below, Citation No. 9204482 is **AFFIRMED** as written.

III. FINDINGS OF FACT

A. Parties' Stipulations

At the hearing, the parties, in a joint exhibit, stipulated to the following items, verbatim:

1. The Respondent was an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. § 802(d), at the mine at which the Citation at issue in this proceeding was issued.
2. Enlow Fork Mine 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 the Citations were issued are subject to the jurisdiction of the Mine Act.

4. This Citation [Penalty][3] proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
5. Enlow Fork Mine is owned by the Respondent.
6. Payment of the total proposed penalty of $2,844.00 for the one citation in this matter will not affect the Respondent's ability to continue in business.
7. The individual whose name appears in Block 22 of the Citation in contest, Allan Jack, was acting in an official capacity and as an authorized representative of the Secretary of Labor when the Citation was issued.
8. Citation No. 9204482 contained in Docket No. PENN 2022-0011 was 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.
9. Exhibit "A" attached to the Secretary's Petition in Docket No. PENN 2022-0011 contains an authentic copy of Citation No. 9204482 with all modifications or abatements, if any.

(Jt. Ex. 1.)

B. <u>Operations at the Enlow Fork Mine</u>

CONSOL operates the Enlow Fork Mine in Washington County, Pennsylvania and mines bituminous coal underground using the longwall retreat mining process. (Sec'y Post-Hr'g Br. 6; Tr. 41:15–19, 43:13–15, 112:19–113:5.) Enlow Fork Mine is considered a gassy mine because it liberates high amounts of methane requiring ventilation spot checks every five days. (Tr. 55:2–24; II Tr. 38:21–39:23.) Ignitions have occurred at this mine where an accumulation of coal dust or methane ignited with one such ignition resulting in an explosion knocking out ventilation controls and changing the air flow. (Tr. 56:1–57:25.)

Three different entries provide access underground to the longwall sections of the mine: the primary escapeway, the No. 2 Entry (secondary escapeway), and the belt entry. (Tr. 66:9–20, 220:13–15; II Tr. 9:25–10:4.) On a daily basis, most of the mining crew travel along the No. 2 Entry to reach the working face. (Tr. 132:20–134:7.) The preshift examiner also travels the No. 2 Entry. (Tr. 133:14–22.) The No. 2 Entry is also called the track entry, due to the track which traverses down one side of this entry. (Tr. 66:17–20, 68:8–69:5, 86:10–18.) Looking toward the mine exit, the track traverses the No. 2 Entry mostly along the right side, hereinafter the "track side" (Tr. 95:7–21; II Tr. 40:9–23), so miners can walk along the left side, hereinafter the "rib side." (Tr. 77:18–20, 95:7–18; II Tr. 40:9–23.) A lifeline hangs on the rib side paralleling the track. (Tr. 67:15–17, 141:18–19.) Railcars, known as "pump cars," transport supplies along the track to the working face. (Tr. 66:17–20, 68:8–69:5, 86:10–18.) One such pump car supplies "pressurized emulsion" through its six hoses for the operation of the longwall. (Tr. 69:1–23, 86:13–18; II Tr. 11:11–22:18; Ex. R–7.) The pump car remains stationary on the track until the longwall face retreats from the original working face to a new crosscut, at which time the pump car moves with the longwall. (Tr. 109:9–16, 113:1–5, 115:13–15.) Because the timing of the longwall's retreat depends on the rate of mining, the timing of the pump car's move also varies

[3] The parties incorrectly list this as a "Contest" proceeding in Item 4 of their stipulations.

based on the rate of mining. (Tr. 109:9–11, 112:19–113:18, 114:1–16, 156:22–24, 217:9–15.) The pump car moves on average once per week. (Tr. 114:4–25.)

In the event of an emergency, CONSOL instructs miners to don their ten-minute Self-Contained Self-Rescuers ("SCSRs")—oxygen masks that miners carry underground which allow a miner to breathe for up to ten minutes in smoky or low-oxygen conditions. (Tr. 102:16–22, 107:4–8, 125:22–126:4.) Miners also use an escapeway lifeline containing directional cones indicating the mine's exit merely through touch. (Tr. 130:10–19, 227:16–23, 258:6–10.) CONSOL teaches miners to use the lifeline to guide them to a designated location—usually an emergency cache of longer-use SCSRs and tethers—and then to exit the mine. (Tr. 102:9–13.) The longer-use SCSRs allow miners to breathe in smoky or oxygen-scarce conditions for up to an hour. (Tr. 102:13–22, 125:22–126:4.) CONSOL instructs the miners to use the tethers (ropes) to hook themselves together in an emergency, so if a miner loses the lifeline another miner can quickly guide the miner back. (Tr. 102:1–103:12, 201:21–22, 202:23–203:3, 249:9–13.) As required by MSHA, CONSOL trains miners on specific emergency procedures in yearly smoke room trainings where CONSOL fills a room with smoke to simulate an emergency, and miners navigate obstacle courses. (Tr. 34:1–20, 244:1–252:25; II Tr. 49:23–50:4.)

C. Conditions at Intersection of Entry No. 2 and Crosscut 15.5 on August 17, 2021

Crosscut 15.5 of the No. 2 Entry (secondary escapeway) is sixteen feet wide and eight feet high. (Tr. 75:21–24, 84:25–85:16, 164:19–21; Ex. P–4.) The pump car measures ten to twelve feet wide, leaving four to six feet between the pump car and the rib side of the No. 2 Entry. (Tr. 85:4–13, 86:19–21, 135:25–136:2, 164:19–25; Ex. P–4.) On August 17, 2021, six rubber, high-pressure (Tr. 225:8–12) hoses protruded from the side of the pump car and extended into the walkway of the escapeway, as represented by the red lines in Exhibit R–7.[4] (Tr. 66:18–23, 74:4–20, 87:15–88:2, 220:22–221:2; II Tr. 9:25–10:15; Ex. R–7.) At the time, the pump car sat across from crosscut 15.5 (Tr. 119:7–17; II Tr. 14:6–15:18) allowing the hoses to extend across the No. 2 Entry and into Crosscut 15.5 to link up to the longwall. (Tr. 157:15–20.)

Two of the six hoses sat rigidly on the mine floor and varied in size but spanned two to four inches in diameter, roughly the size of a baseball or softball. (Tr. 82:11–18, 164:16–17; II Tr. 45:24–47:1.) These two hoses (the hoses closest to the working face) were lying across the mine floor (Tr. 74:4–15), while the remaining four hoses protruded from the pump car extending in the air into the escapeway. (Tr. 73:18–23*,* 74:4–15; II Tr. 45:6–23; Ex. P–2-2.) Measuring directly below the lifeline (Tr. 79:9–21), these four protruding hoses hung at heights of 29", 28", 15", and 12" from the mine floor, depending on the height from which each protruded from the pump car, as depicted in Exhibit P–2. (Tr. 73:18–23*,* 74:4–15, 169:1–24; II Tr. 45:6–23; Ex. P–2-2.) These protruding hoses extended across the full width of the No. 2 Entry and into Crosscut 15.5, eventually falling onto the mine floor approximately eight or ten feet from the pump car. (Tr. 82:14–18, 83:11–84:3, 91:11–23.) Measuring perpendicularly to the direction the hoses

[4] The photographs in Exhibit R–5 do not depict the cited condition and were not taken the day the citation was issued. They were entered into evidence to show a "general idea" of similar conditions, and depict, among other conditions, high pressure hoses protruding into a track entry. (Tr. 12:19–14:16, 225:18–232:12; Ex. R–5.)

protruded, these four suspended hoses spanned six feet along the walkway of the No. 2 Entry. (Tr. 74:4–6.) This means a miner in the escapeway would need to traverse over six feet of protruding hoses. (Tr. 74:4–6.) Thus, a miner attempting to escape in the event of an emergency would first encounter the two rigid pump hoses lying on the mine floor, then the four suspended hoses at heights of 15", 29", 28", and 12" from the mine floor, respectively, over six feet of the escapeway. (Tr. 81:5–82:10.)

The No. 2 Entry (escapeway) lifeline hung from the roof approximately 66 inches above the mine floor (Tr. 75:15–18; II Tr. 25:17–21, 47:6–10; Ex. R–7) on the rib side directly above the pump car hoses. (Tr. 67:15–17, 74:19–20, 219:17–220:12, 233:12–14; II Tr. 48:7–11.) When tugged away from the rib, the escapeway's lifeline provided about six to seven inches of slack before getting caught on power cables, preventing it from stretching into Crosscut 15.5 where the pump hoses dipped to the mine floor. (Tr. 71:1–8, 83:13–84:3, 88:21–89:13, 171:1–173:3; II Tr. 23:21–24:11, 48:12–16.)

D. MSHA Inspection, Issuance of Citation No. 9204482, and Abatement

MSHA Inspector Allan Jack arrived at the Enlow Fork Mine on August 17, 2021, for a regular semiannual roof control inspection. (Tr. 44:8–19, 48:10–25.) According to Inspector Jack, Enlow Fork Mine experienced a reduced rate of mining that day due to roof issues. (Tr. 114:4–7, 194:1–11, 270:1–16.) Joseph Bartolotto, Safety Inspector for CONSOL, escorted Inspector Jack underground to Crosscut 15.5. (Tr. 59:17–61:2, 70:10–15; Exs. P–2, R–1.) Using his cap light (Tr. 84:4–16), Inspector Jack observed hoses protruding from the pump car, crossing the width of the No. 2 Entry (escapeway), and proceeding into Crosscut 15.5, whereby he issued Citation No. 9204482. (Tr. 70:15–23, 74:19–20, 79:9–21, 83:11–19, 93:15–94:13, 100:16–101:19.)

In the narrative portion of Citation No. 9204482, Inspector Jack wrote:

> The alternate escapeway was not being in a safe condition to always assure passage of anyone in the G2 longwall section (MMU-011-0) at 15.5 crosscut in the No.2 entry. Longwall pump hoses were hindering the escapeway because they were installed between 29 and 12 inches off the mine floor where the lifeline was coursed over the hoses causing a tripping hazard to those who have to use the escapeway.
>
> Standard 75.380(d)(1) was cited 4 times in two years at mine 3607416 (4 to the operator, 0 to a contractor).

(Ex. P–1.)

Inspector Jack issued this citation at 10:40 a.m. for failure to maintain the escapeway in a safe condition per section 75.380(d)(1). (Tr. 119:23–120:25, 149:15.) He found the violation to be S&S, reasonably likely to lead to an injury resulting in lost workdays or restricted duty, and due to CONSOL's moderate negligence. (Tr. 105:1–11, 129:17–24, 130:20–25; Ex. R–1.)

Inspector Jack determined the hazard in question could affect three persons because miners are usually tethered together during an emergency escape, so when one miner trips and falls on a hose that miner is "going to pull a couple people down . . . behind him because they're all connected together." (Tr. 101:2–16, 122:21–124:1–15.) Inspector Jack noted that the lifeline went directly over the six hoses at the heights documented in the citation. He determined that miners could not avoid the hoses without letting go of the lifeline because the lifeline contained little slack and was "bow string tight." (Tr. 79:13–21, 259:5–20.) Letting go of a lifeline in smoky conditions or poor visibility could result in a miner becoming disoriented, wandering down a crosscut, and being unable to find the lifeline again. (Tr. 108:9–14.)

To abate the violation and allow Inspector Jack to terminate the citation, CONSOL moved the No. 2 Entry lifeline into Crosscut 15.5 where the hoses laid on the mine floor due to their greater distance from the pump car. (Tr. 93:17–22, 135:12–141:22; Ex. P–1.) To achieve this, CONSOL added fifteen feet of slack to the lifeline. (Tr. 141:7–15.) This resulted in the lifeline running along the No. 2 Entry (escapeway) rib, extending about eight feet into the opening of Crosscut 15.5 where all six hoses laid on the mine floor, providing miners easier passage, and then continuing along the rib side of the No. 2 Entry on the opposite corner of Crosscut 15.5. (Tr. 177:15–24.) After moving the lifeline, CONSOL placed rock dust bags in front of and between the hoses to create a small bridge over them. (Tr. 93:17–22, 135:12–141:22; Ex. P–1.) This approximately two-foot-wide (II Tr. 29:18–24) "rock dust bag" bridge sat in Crosscut 15.5, approximately eight to ten feet from where the hoses exited the pump car. (Tr. 83:17–84:3, 142:18–20; II Tr. 86:9–87:18.) This "rock dust bag" bridge stood approximately a foot high at its highest point. (Tr. 139:23–140:4.)

IV. ADDITIONAL FINDINGS OF FACT, PRINCIPLES OF LAW, ANALYSIS, AND CONCLUSIONS OF LAW

A. 30 C.F.R. § 75.380(d)(1) – Failure to Maintain Escapeway in Safe Condition

Per section 75.380(d)(1) the following is required of escapeways in bituminous and lignite mines: "Each escapeway shall be [m]aintained in a safe condition to always assure passage of anyone, including disabled persons." 30 C.F.R. § 75.380(d)(1). The Commission defines "maintained in a safe condition," to mean escapeways that allow miners to "expeditiously escape a dangerous underground environment in an emergency." *Am. Coal Co.*, 29 FMSHRC 941, 950 (Dec. 2007) ("[T]he test with respect to the use of an escape route is not whether miners have been safely traversing the route under normal conditions, but rather the effect of the condition of the route on miners' ability to *expeditiously* escape a dangerous underground environment in an emergency.") (emphasis added) (citing *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 560 (Aug. 2005)); *see Maple Creek Mining, Inc.*, 27 FMSHRC 555, 562–63 (Aug. 2005) (upholding the ALJ's finding that "the conditions created a slip and fall hazard that precluded swift passage through that portion of the escapeway" in affirming the violation); *see, e.g.*, *Mill Branch Coal Corp.*, 34 FMSHRC 2090 (Aug. 2012) (ALJ) ("There is no dispute that escapeways are needed for miners to *quickly* exit an underground mine and that impediments to a designated escapeway may prevent miners from being able to do so.") (emphasis added); *see also* 61 Fed. Reg. 9764, 9810–11 (Mar. 11, 1996) (preamble to section

75.380 stating purpose is "to enable miners, including disabled persons, to escape quickly in an emergency" and "no delay in escape assures that there is no reduction in safety.").

The Secretary alleges that CONSOL violated section 75.380(d)(1), because miners attempting to use the escapeway in an emergency would need to navigate over the hoses protruding across the No. 2 Entry. Escaping miners would first encounter the two rigid hoses lying on the mine floor and then attempt to hurdle the 15"-high hose, followed by the 29"-high hose, the 28"-high hose, and finally the 12"-high hose over the course of six feet. (Tr. 81:5–82:10.) In emergency conditions,[5] Inspector Jack determined the "first miner in the [line] would hit these hoses, would trip, would pull two or three miners behind him over as he falls." (Tr. 104:11–24, 107:9–22.) Inspector Jack noted that subsequent miners would also struggle because once one miner fell, others would stack on top of the first miner, creating a chain reaction. (Tr. 122:21–123:2, 124:1–15.) When miners trip, they may sustain injuries from the fall itself, as well as lose valuable time needed to escape from the mine. (Tr. 108:9–14, 128:19–25.)

CONSOL argues that no violation of section 75.380(d)(1) occurred. CONSOL points to section 75.380(d)(4)(iii) which mentions a "stretcher test" and asserts that disabled miners could safely escape because a stretcher could fit through the escapeway and, thus, no escapeway violation exists. (Resp't Post-hr'g Br. 10, 11, 23.) Not only is this argument inapposite but it misinterprets and misapplies the Commission's stretcher test rule. The stretcher test under section 75.380(d)(4) requires that a stretcher with an injured miner be able to fit through the escapeway. 30 C.F.R. § 75.380(d)(4)(iii). Inspector Jack issued Citation No. 9204482 for hoses obstructing the escapeway, not for an insufficiently wide escapeway—which the exceptions like the stretcher test under section 75.380(d)(4) are meant to address. Indeed, the Commission found that sufficient width, while necessary for a safe escapeway, is insufficient, on its own, to assure the safe escape of disabled persons. *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 560 (Aug. 2005) (finding the escapeway inadequate where additional miners were required to guide a stretcher through the escape route by pointing out obstacles along the way.) While the parties here agree the No. 2 Entry (escapeway) was wide enough for a stretcher, it did not assure safe passage for a stretcher. (Tr. 167:2–8.) Inspector Jack emphasized that if a team of miners needed to carry a miner on a stretcher, the team's unexpected navigation over the protruding and uneven hoses would create a "mess," by endangering those carrying the stretcher and delaying medical attention for the injured miner. (Tr. 151:10–11.) I am not persuaded by CONSOL's argument regarding the stretcher test and reject it as misplaced.

Rather than addressing the safety issue created by the protruding hoses, CONSOL makes arguments as to why section 75.380(d)(1) should not apply under the circumstances. (Resp't Post-hr'g Br. 5–7.) Among these, CONSOL argues for no violation because: (1) the Secretary cited the wrong standard; (2) the Secretary added requirements to the regulation; (3) an exception to the standard applies; and (4) abatement did not improve the condition. (*Id.*)

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[5] CONSOL submitted its Examination of Electrical Equipment and the Longwall Section On-shift Dust Parameter Examination Record. (Exs. R–3, R–4.) While coal dust and electrical equipment maintenance may affect the likelihood of an emergency, this information does not affect my analysis of the existence of a violation because emergency conditions are assumed. *Am. Coal Co.*, 29 FMSHRC at 950.

First, CONSOL argues that the Secretary cited the wrong standard and should instead have cited a lifeline standard. (Resp't Post-hr'g Br. 12.) However, the Commission held that whether an alternate standard could have been cited for a condition does not negate the applicability of the cited standard. *CONSOL Pa. Coal Co.*, 44 FMSHRC 691, 696 n.10 (Dec. 2022) (holding "[w]hether or not a different subsection of the standard would have also been applicable, has no bearing on whether the Secretary established a violation of [the cited standard]. . . ."). Here, the position of the lifeline has no bearing on the fact that hoses protruded from the pump car creating an unsafe condition by hampering passage along the No. 2 Entry (escapeway) that could injure and/or delay miners from expeditiously escaping a dangerous underground environment in the event of an emergency.

Second, CONSOL asserts that the Secretary added requirements to section 75.380(d)(1), arguing Inspector Jack issued the violation for the lifeline hanging over the pump car hoses, which adds requirements on the placement of the lifeline. (Resp't Post-hr'g Br. 8, 12; Resp't Reply Br. 5.) Yet again, CONSOL's argument strains logic because Inspector Jack did not issue the violation for the presence of the lifeline above the hoses but rather because the hoses created unsafe conditions for use of the escapeway in the event of an emergency.[6] (Ex. P–1.)

Third, CONSOL argues that no violation existed because the pump car hoses were "essential to the ongoing operation of [the] longwall section" and, therefore, the exception under section 75.380(d)(4)(iv)[7] applies. (Tr. 153:5–156:11; II Tr. 65:21–25; Resp't Post-hr'g Br. 10, 11; Resp't Reply Br. 2–4.) However, CONSOL mischaracterizes section 75.380(d)(4)(iv) in that a plain reading reveals that such "essential" equipment only provides an exception to the requirement that an escapeway be maintained to a width of six feet (which is not an issue in this case). 30 C.F.R. § 75.380(d)(4)(iv). Section 75.380(d)(4)(iv) is not an exception to the requirement that the escapeway be maintained in a "safe condition," as required by section 75.380(d)(1). Thus, the "essential" nature of the hoses to the longwall operation does not excuse CONSOL from ensuring the pump car hoses are situated in a manner so the escapeway is maintained in a safe condition to assure passage expeditiously in the event of an emergency. *See*

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[6] The citation's focus is properly on the obstruction as evident by the way Inspector Jack allowed CONSOL to abate the citation. The abatement focused on the obstruction of passage, which corresponds to the proper standard: section 75.380(d)(1). CONSOL laid bags filled with rock dust between the hoses to create a bridge to eliminate or reduce any tripping hazard and redirected the lifeline into Crosscut 15.5 where the hoses laid flat on the mine floor, allowing miners to safely use the passageway. (Tr. 93:17–22, 135:12–141:22; Ex. P–1.)

[7] Section 75.380(d)(4)(iv) states: "Each escapeway shall be maintained at least 6 feet wide except where mobile equipment near working sections, and other equipment essential to the ongoing operation of longwall sections, is necessary during normal mining operations, such as material cars containing rock dust or roof control supplies, or is to be used for the evacuation of miners off the section in the event of an emergency. In any instance, escapeways shall be of sufficient width to enable miners, including disabled persons, to escape quickly in an emergency. When there is a need to determine whether sufficient width is provided, MSHA may require a stretcher test where 4 persons carry a miner through the area in question on a stretcher." 30 C.F.R. § 75.380(d)(4)(iv).

30 C.F.R. § 75.380(d)(1). Consequently, the pump car hoses can remain in the escapeway *so long as they are situated in a "safe condition*," which was not the case here as described above. (Tr. 153:5–9, 164:2–7.)

Finally, CONSOL contends no violation existed because abatement did not improve the hazard, as the rock dust bags themselves could trip miners or cause miners to hit their heads. (Resp't Post-hr'g Br. 15–17, 24; Resp't Reply Br. 4–6, 24; II Tr. 28:14–29:7, 31:8–21.) The Commission, however, has rejected such arguments. *See CONSOL Pa. Coal Co.*, 44 FMSHRC 691, 696 (Dec. 2022) (holding "[w]hether or not abatement occurs has no bearing on the underlying violation . . . ."); *Western Indus. Inc*., 25 FMSHRC 449, 453 (Aug. 2003) (holding the abatement method is irrelevant in determining whether a violation occurred). Though Inspector Jack observed that the approximately one-foot-tall bridge is "still a little rough," he opined "it's a lot better than the condition we found." (Tr. 139:19–140:17.) Indeed, CONSOL's witness Steven Barr confirmed that he had used similar "rock dust bag" bridges in the past. (II Tr. 28:1–11.) Creating a bridge over the hoses, as well as rerouting the lifeline into Crosscut 15.5 to reduce tripping hazards and maintain a safe passageway out of the mine, improved the conditions along the escapeway that miners would encounter in the event of an emergency. Thus, I reject CONSOL's argument that abatement failed to reduce the hazard, and I find CONSOL's other arguments altogether unpersuasive.

In considering the fact of a violation, I found Inspector Jack's testimony at hearing to be well reasoned and based upon his many years of experience as a miner and as an inspector of underground coal mines. In applying the facts to the applicable standard and Commission case law, I determine that CONSOL violated section 75.380(d)(1). The pump car hoses were situated in such a way as to impede safe passage of persons, including disabled persons, from expeditiously escaping the mine through the No. 2 Entry (escapeway) during emergency conditions. Therefore, I conclude that CONSOL violated section 75.380(d)(1) by failing to maintain the escapeway in a safe condition to always assure passage of anyone.

B. Significant and Substantial Determination

A violation is 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). To establish an S&S violation, the Secretary must prove:

> (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature.

Peabody Midwest Mining, 42 FMSHRC 379, 383 (June 2020) (citing *Newtown Energy*, 38 FMSHRC 2033, 2037–38 (Aug. 2016)); *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d

133, 135–36 (7th Cir. 1995) (affirming the application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Lab.*, 861 F.2d 99, 103–04 (5th Cir. 1988) (affirming the application of the *Mathies* criteria).

1. Underlying Violation of a Mandatory Safety Standard

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. I have determined that CONSOL violated section 75.380(d)(1), because it failed to maintain the secondary escapeway in a safe condition to always assure passage of anyone, including disabled persons, and assure expedient passage in the event of an emergency. *See* discussion *supra* Part IV.A. Thus, I determine that the Secretary has satisfied the first element of the *Mathies* test.

2. Likelihood of Causing the Occurrence of the Discrete Safety Hazard Against Which the Standard Is Directed

For the second *Mathies* element, the Secretary must establish that "there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy*, 38 FMSHRC 2033, 2038 (Aug. 2016). Here, the hazard is the possibility of miners tripping on or falling over the hoses in the escapeway during an emergency, resulting in injury and/or delayed exit from the mine. (Tr. 129:17–24.) The relevant analysis is whether miners could expeditiously traverse the hoses during emergency conditions. *See Spartan Mining Co.*, 35 FMSHRC 3505, 3508–09 (Dec. 2013) (holding that S&S for escapeway citations must be considered in the context of an emergency in affirming the ALJ's determination of significant and substantial violation of 30 C.F.R. section 75.380(d)(1)).

Inspector Jack attested that during emergencies miners act unpredictably, and emergencies alter the environmental conditions that miners face. (Tr. 107:12–13, 123:9–11.) Specifically, Inspector Jack stated that during emergency situations, miners may panic. (Tr. 107:12–13, 123:9–11.) He stated, "[w]hen you're in an emergency event like that people act differently. They don't think straight. They're in a panic. The only thing they want to do is get out . . . that could lead to people running, pushing, shoving" which "sometimes . . . come[s] at the cost of other individuals who are escaping" at the same time. (Tr. 125:4–17.) CONSOL's witness Steven Barr[8] noted miners may temporarily lose their sense of hearing (II Tr. 49:2–22) and did not dispute the hoses could impede miners. (II Tr. 49:23–54:11.) Miners feel disoriented (Tr. 108:9–14), panic (Tr. 107:12–13, 123:9–11), feel confused (Tr. 257:9–12), or may lose their vision due to blackout conditions. (Tr. 123:9–25, 249:20–23.) CONSOL's Joe Bartolotto who worked for CONSOL for seven years noted that miners would not be able to see more than two feet in front of their face in smoky conditions. (Tr. 212:23– 213:1, 249:20–23.) Inspector Jack added a miner's cap light would be "useless" if it was smoky. (Tr. 123:9–25.)

Inspector Jack has worked for over twenty-four years in the mining industry. (Tr. 38:17–20.) He has worked for MSHA for the last 15 years, including eight years as a coal mine

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[8] Barr has worked in many different positions in his twenty-one years with CONSOL, including stints as longwall coordinator and general mine foreman. (II Tr. 5:17–7:1.)

inspector and seven years as a roof control specialist. (Tr. 29:7–30:17.) Before his employment with MSHA, Inspector Jack worked at CONSOL's Enlow Fork Mine as an underground miner for approximately eight years (Tr. 32:1–2, 33:14–19), including working on longwalls and on the installation of a bridge over pump car hoses. (Tr. 191:10–192:12.) For his General Mine Service training, Inspector Jack received instruction on emergencies, escapeways, and navigating the mine. (Tr. 32:20–33:12.) Considering Inspector Jack's extensive experience and credible insights on the witness stand, I give great weight to his testimony.

CONSOL argues that miners would know of the hoses in Crosscut 15.5 and be able to navigate them. (Resp't Post-hr'g Br. 22.) But according to Inspector Jack, miners escaping an emergency situation would likely be panicky and somewhat disoriented (Tr. 107:12–13, 108:9–14, 123:9–25, 249:20–23, 257:9–12) and would not likely know they were approaching the hoses at Crosscut 15.5. (Tr. 153:1–157:25, 224:15–225:7; Ex. R–7; Resp't Post-hr'g Br. 8, 9, 22.) The miners would be tethered together and would contact the protruding hoses at heights of 12" to 29" off the mine floor. Inspector Jack, who is 5'10" tall (Tr. 78:17–79:2, 169:6–8), observed that the suspended 29" hose reached his mid-thigh, the 15" hose hung just below his kneecap, and the twelve-inch hose hung mid-shin. (Tr. 80:6–19.) Therefore, the positions of the hoses would likely trip miners and, as Inspector Jack observed, the "first miner in the [line] would hit these hoses, would trip, would pull two or three miners behind him over as he falls." (Tr. 104:11–24, 107:9–22.) Because miners are tethered together, when one miner falls, other miners will "stack," where one miner falls and the next falls on top of the first miner, and the chain reaction continues. (Tr. 122:21–123:2, 124:1–15.)

Even if the miners successfully navigate past one of the hoses, the miners must successfully traverse over five more hoses of differing heights spanning six feet of the escapeway (Tr. 82:8–10, 83:6–10), like hurdling at a track meet. Any one of the obstructions could reasonably trip up any of the individual miners, likely bringing down other miners and delaying the entire group. When miners fall, they may sustain injuries from the fall itself. (Tr. 107:23–108:14.) Even if they were to come through a fall unscathed, a miner's SCSR could be torn from their face by the force of the fall or collision with other miners, or they could let go of and lose the lifeline. (Tr. 108:9–14, 128:23–25.) Any of these scenarios would delay the miners from expeditiously escaping the mine. Miners losing hold of the lifeline would likely lose time struggling to find it again due to poor visibility or being disoriented and, if they were lucky enough to find the lifeline, would nonetheless lose time feeling around in the dark searching for it. (Tr. 108:9–14.) Any delay from stumbling or searching for the lifeline or short-term SCSR could prevent a miner from reaching the cache of long-term SCSRs before running out of time on the ten-minute SCSR they originally donned. (Tr. 125:22–126:3, 128:21–22.)

CONSOL posits that an emergency would not likely occur because Inspector Jack found no raised methane levels at the time of his inspection. (Tr. 197:25–198:7; *see* Exs. R–3, R–4.) However, the Commission has found the lack of raised methane levels irrelevant to the S&S analysis because the existence of an emergency is assumed. *Cumberland Coal Res.*, 33 FMSHRC 2357, 2366 (Oct. 2011) (overturning ALJ's non-S&S determination for violations of the evacuation standard under section 75.380(d)(7)(iv) where ALJ improperly considered testimony regarding the likelihood of a mine fire or explosion).

CONSOL attempts to focus this case on the lifeline. (Resp't Post-hr'g Br. 5–6, 8, 11.) As discussed above, the lifeline is irrelevant to the fact of a violation under section 75.380(d)(1). Yet, the Commission does consider the positioning of a lifeline in relation to the escapeway when analyzing whether an escapeway violation is S&S. *See Mill Branch Coal Corp.*, 37 FMSHRC 1383, 1394 (July 2015) (considering fact that obstructions were directly under the lifeline in upholding as S&S a violation of section 75.380(d)(1)). Here, the lifeline hung directly above the pump car hoses. (Tr. 79:9–21.) Miners could not circumvent the hoses without letting go of the lifeline because the lifeline contained little slack and was "bow string tight." (Tr. 79:13–21, 259:5–20.) Thus, miners could not both hold onto the lifeline—the "saving grace to getting outside"—and circumvent the hoses. (Tr. 130:16–19; *see* Resp't Post-hr'g Br. 4.)

Given the record as a whole, I determine it is reasonably likely that miners—tethered together in emergency conditions—would trip or fall over the hoses impeding their passage, which would delay their quick exit from the mine. Therefore, I determine the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed, and the Secretary has satisfied the second element of *Mathies*.

3. Likelihood the Occurrence of the Hazard Would Cause Injury

Regarding the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood that the occurrence of the hazard would result in an injury. Inspector Jack stated, and CONSOL's witnesses did not refute, that tripping over the hoses, would "reasonably likely cause an accident, and that would be a trip and fall, breaking bones, tearing a rescuer off, sprains, [and] strains." (Tr. 104:25–105:3, 107:9–22, 108:1–2, 121:15–122:2, 151:16–17.) Inspector Jack also noted that mine disasters, whether it be a fire or explosion, emit high concentrations of carbon monoxide. (Tr. 122:4–5, 123:9.) If a miner loses his SCSR, even for a short period, the miner could reasonably "be overcome by carbon monoxide before they're ever able to recover their mask," (Tr. 122:4–16) especially if compounded by mobility issues such as broken limbs, torn ligaments, or disorientation from losing the lifeline. (Tr. 104:25–105:3, 107:9–22, 108:1–2, 121:15–122:2, 129:1–10, 151:16–17.) Losing the lifeline or a SCSR would also prevent a miner from reaching the next cache of longer-use SCSRs. (Tr. 105:3–5, 129:1–10.) Therefore, even if a miner sustained no immediate injuries during the fall, delayed escape causes a miner to use up more oxygen or breathe in more noxious gases than they would with a more expedient escape, and lose valuable time needed to get to the cache of long-term SCSRs. Consequently, I determine that tripping on or falling over the hoses themselves contributes to an injury or delayed escape, particularly for disabled miners, and the resulting delay is reasonably likely to lead to injury, thus satisfying the third element of the *Mathies* test.

4. Likelihood Resulting Injury Would Be of Reasonably Serious Nature

Lastly, under the fourth *Mathies* element, the Secretary must prove a reasonable likelihood that the resulting injury would be of a reasonably serious nature. An injury of a "reasonably serious nature" does not require a specific type of injury, and a mere sprain or strain resulting from a trip and fall may be "reasonably serious." *S & S Dredging Co.*, 35 FMSHRC 1979, 1981–82 (July 2013) (holding the ALJ erred in requiring the Secretary to demonstrate an injury that would result in hospitalization, surgery, or a long period of recuperation to satisfy the

fourth *Mathies* element); *see, e.g.*, *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 562–63 (Aug. 2005) (affirming the ALJ's determination that reasonably serious injury, such as a leg or back injury, would reasonably arise from the failure to maintain the walkway in a safe condition); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 918 (June 1991) (affirming ALJ's conclusion that a trip-and-fall would result in reasonably serious injuries such as "sprains, strains or fractures").

CONSOL's witnesses did not dispute Inspector Jack's testimony that injuries would likely include broken bones, sprains, strains, torn ligaments, or fatality (Tr. 105:1–11, 109:9–22, 129:1–10, 151:16–25), which all are of a reasonably serious nature. If a miner loses his SCSR in a fall, he is reasonably likely to inhale and succumb to poisonous gases on the spot. (Tr. 104:25–105:3, 107:9–22, 108:1–2, 121:15–122:2, 151:16–17.) Otherwise, if the miner gets disoriented, loses the lifeline, and cannot find the mine exit or is delayed in exiting and cannot reach the cache of long-term SCSRs in sufficient time with the oxygen he has, the miner is reasonably likely to die—or, in Inspector Jack's words, is "done"—due to inhalation of the poisonous gases. (Tr. 104:25–105:3, 107:9–22, 108:1–2, 121:15–122:2, 151:16–17.) I determine that the injuries expected to result from tripping on the hoses or delayed escape are reasonably likely to be of a reasonably serious nature, thus satisfying the fourth *Mathies* element. For the same reasons, I affirm the Inspector's gravity determination as reasonably likely to result in lost workdays or restricted duty.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I conclude that Citation No. 9204482 is appropriately designated as S&S.

C. <u>Negligence</u>

Commission Judges determine negligence under a traditional analysis rather than relying on the Secretary's regulations at 30 C.F.R. § 100.3(d). *Mach Mining, LLC v. Sec'y of Lab.*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (quoting *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015)). This analysis asks whether an operator has met "the requisite standard of care—a standard of care that is high under the Mine Act." *Id.* In evaluating these factors, the negligence determination is based on the "totality of the circumstances holistically," including factors such as the protective purpose of the regulation, and what actions would be taken by a reasonably prudent person familiar with the mining industry. *Mach Mining*, 809 F.3d at 1264 (quoting *Brody Mining, LLC*, 37 FMSHRC at 1702).

Inspector Jack assigned moderate negligence to Citation No. 9204482. (Tr. 101:2–4, 130:20–131:9.) At hearing, the Secretary argued the record may show high negligence and asserts in her post-hearing brief that the "violation resulted from at least moderate negligence." (Sec'y Post-hr'g Br. 22–23; Tr. 21:10–19.) In support, the Secretary asserts CONSOL knew or should have known about the obstructions in the escapeway. (Tr. 130:23–25, 132:3–11; Sec'y Post-hr'g Br. 23.) CONSOL was cited under the same standard at Enlow Fork Mine in the past two years (II Tr. 53:11–14), which the Secretary argues should have put CONSOL on notice that the condition in this citation violates the mandatory safety standard. (Sec'y Post-hr'g Br. 23; *see* Ex. P–5.) The hoses protruded from the pump car at the cited location from approximately August 12–17, 2021. (Tr. 132:7–15, 148:8–24, 269:13–270:12; II Tr. 43:6–44:7, 54:6–11; Ex. R–6 at 49.) Since a mine examiner was required to inspect the entire track at least three times a

day—before each shift—CONSOL's mine examiner thus had multiple opportunities to observe the condition but did not make any notations concerning the cited condition. (Tr. 134:13–15, 148:8–24, 264:25–265:8, 269:13–270:12; II Tr. 36:9–38:2; Exs. P–3, R–2.) Further, CONSOL's witness Steven Barr previously constructed bridges to cover hoses in an alternate escapeway and therefore knew of this safer option. (II Tr. 28:1–11.) Inspector Jack observed that placing the hoses in the cited condition was "very avoidable" because CONSOL could run the lifeline on the opposite side of the pump cars and power centers, where no hoses laid across the escapeway. (Tr. 146:7–15, 148:8–24.) CONSOL argues that no negligence is appropriate, claiming it did not breach the standard of care but does not give specific facts to support its position. (Tr. 23:13–14, 27:4–6; Resp't Post-hr'g Br. 25.) I determine that CONSOL should have known of the violative condition, and that this violation runs on the high end of moderate negligence. Considering the totality of the circumstances, I conclude that a designation of moderate negligence is appropriate.

D. Penalty

The Secretary proposes a penalty of $2,844.00. The Commission is not bound by the Secretary's proposal and reviews penalty assessments *de novo*. *Mach Mining*, 809 F.3d at 1263–64. Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

CONSOL is a large operator with a low to moderate violation history. In the two years preceding the issuance of this citation, MSHA issued one violation of section 75.380(d)(1) to CONSOL's Enlow Fork Mine that became a final order of the Commission. (Ex. P–5 at 3.) I determined CONSOL's negligence to be moderate. CONSOL has not alleged that the proposed penalties would adversely affect its ability to continue in business. I also determined the gravity of the violation to be S&S. Finally, CONSOL demonstrated good faith by quickly moving the escapeway's footpath into the crosscut and constructing a "rock dust bag" bridge over the hoses to comply with the cited standard. (Tr. 93:17–22, 135:12–141:22, 148:5–13, 177:15–24; II Tr. 57:10–11; Ex. P–1.) In considering the criteria set forth in section 110(i) of the Mine Act and all the relevant facts, I hereby assess a penalty of $2,844.00.

V. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 9204482 is **AFFIRMED** as written.

Respondent CONSOL Pennsylvania Coal Company, LLC is hereby **ORDERED** to **PAY** a penalty of $2,844.00 within 40 days of this decision.[9]

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

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/gw

[9] Please pay penalties 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. Please include Docket and A.C. Numbers.