

April 2015

TABLE OF CONTENTS

COMMISSION DECISIONS

04-07-15 BLACK BEAUTY COAL COMPANY LAKE 2008-378-R Page 687

COMMISSION ORDERS

04-03-15 BLEDSOE COAL CORPORATION KENT 2011-835 Page 699

04-17-15 THE AMERICAN COAL COMPANY LAKE 2007-171 Page 700

04-30-15 PETE LIEN & SONS, INC. CENT 2014-82-M Page 703

04-30-15 BILLY JACK'S SAND & GRAVEL CENT 2014-6-M Page 705

04-30-15 MACH MINING LLC LAKE 2014-8-M Page 707

04-30-15 BARRICK GOLD U.S., INC. WEST 2014-57-M Page 709

04-30-15 PREMIER MAGNESIA, LLC WEST 2014-108-M Page 711

04-30-15 GATEWAY EAGLE COAL
COMPANY WEVA 2014-1 Page 713

04-30-15 ROCKSPRING DEVELOPMENT,
INC. WEVA 2014-175 Page 715

04-30-15 SPARTAN MINING COMPANY,
INC. WEVA 2014-176 Page 717

ADMINISTRATIVE LAW JUDGE DECISIONS

04-01-15	KERNEOS, INC.	VA 2013-0029-M	Page 719
04-08-15	ROCKHOUSE ENERGY MINING	KENT 2012-0891	Page 727
04-08-15	DAVID DUQUETTE EXCAVATING and JESSICA RUSSELL	YORK 2012-303-M	Page 744
04-09-15	ALDEN RESOURCES, LLC	KENT 2014-251	Page 753
04-24-15	SEC. OF LABOR O/B/O J. DON ARNOLD v. BHP NAVAJO COAL COMPANY, AND ITS SUCCESSORS	CENT 2013-541-D	Page 780
04-24-15	REGENT ALLIED CARBON ENERGY, INCORPORATED	VA 2013-0404	Page 830
04-27-15	WAKE STONE CORP.	SE 2010-0095-M	Page 868
04-27-15	DULIN CONSTRUCTION INC.	WEST 2014-655-M	Page 872
04-28-15	HECLA LIMITED	WEST 2012-760-M-A	Page 877
04-29-15	VIRGINIA DRILLING COMPANY, LLC	KENT 2011-1466R	Page 897
04-29-15	MIDWEST FUELS, INC.	LAKE 2013-0046-RM	Page 924
04-30-15	SEC. OF LABOR O/B/O SEAN MILLER v. SAVAGE SERVICES CORPORATION	WEST 2014-404-DM	Page 936

ADMINISTRATIVE LAW JUDGE ORDERS

04-01-15	POCAHONTAS COAL COMPANY, INC.	WEVA 2014-1160	Page 963
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04-08-15	JACOBS FIELD SERVICES	WEST 2014-96-M	Page 967
04-09-15	ALPHA HIGHWALL MINING, LLC, and REVELATION ENERGY, LLC	KENT 2012-1207-R	Page 970
04-17-15	SHAMOKIN FILLER COMPANY, INC.	PENN 2009-736-RM	Page 974

Review was granted in the following case during the month of April 2015:

Secretary of Labor v. Knight Hawk Coal, LLC Docket Nos. LAKE 2014-120-R, et al (Judge Miller, March 18, 2015)

Review was not denied in any case during the month of April 2015.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 7, 2015

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

v.

BLACK BEAUTY COAL COMPANY

Docket Nos.: LAKE 2008-378-R
LAKE 2008-379-R
LAKE 2008-380-R
LAKE 2008-643
LAKE 2009-72

Before: Cohen, Nakamura, and Althen, Commissioners¹

DECISION

BY THE COMMISSION:

In these consolidated contest and civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), an Administrative Law Judge affirmed Citation No. 6672658, issued to Black Beauty Coal Company by the Mine Safety and Health Administration (“MSHA”). The citation alleged that the operator altered the scene of an accident without MSHA’s permission, in violation of 30 C.F.R. § 50.12. The Judge also vacated Order No. 6681047, which alleged an inadequate on-shift examination of a belt in violation of 30 C.F.R. § 75.362(b). The Judge further verbally approved the parties’ joint settlement motion regarding the remaining citations and orders but did not specify the terms of the settlement agreement in his final decision. 34 FMSHRC 436, 437, 445 (Feb. 2012) (ALJ).

The parties filed cross-petitions for discretionary review, and the Commission granted both petitions. Black Beauty contends that the Judge erred with respect to his finding of a violation for Citation No. 6672658, and in his recitation of the parties’ settlement agreement because he failed to memorialize the terms of the settlement in his decision. The Secretary maintains that the Judge’s decision to vacate Order No. 6681047 is not supported by substantial evidence and should be reversed.

For the reasons stated below, we conclude that the Judge prematurely terminated the hearing regarding Citation No. 6672658, and we vacate and remand the Citation to the Judge with directions to reopen the record. We also conclude that the Secretary did not raise before the Judge the theory of liability for Order No. 6681047 that he is presenting to the Commission;

¹ Chairman Mary Lu Jordan and Commissioner Michael G. Young assumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Chairman Jordan and Commissioner Young have elected not to participate in this matter.

therefore, we decline to reach the merits of this argument on appeal. Accordingly, the Judge's decision vacating the order is affirmed. We also describe and affirm the terms of the parties' settlement agreement as approved by the Judge.

I.

Disposition

A. Citation No. 6672658

1. Factual Background

Black Beauty operates the Air Quality No. 1 Mine in Knox County, Indiana. On Saturday, April 5, 2008, at approximately 8:05 p.m., roof bolter Harold Driskill was struck in the head and torso by a fallen slab of rock that measured approximately 7 feet long, 4 feet wide, and 8 inches thick. The slab hit Driskill in the head, slid down his body, and pinned him against the mine floor and the roof bolter. Driskill stood up with assistance, walked to a mantrip, and was taken to the surface of the mine where he was transported to the hospital by ambulance. Int. Stip. 3 at 1 and 3; Gov. Exs. 15, 16, 18, 19; 34 FMSHRC at 438.

Black Beauty employee Steve Elliot reported the event to MSHA at 8:23 p.m., pursuant to the requirements of 30 C.F.R. § 50.10.² At the time the incident was reported, Elliot did not know the nature and extent of Driskill's injuries. MSHA Field Office Supervisor Ron Stalhut learned of the accident at approximately 9:41 p.m., at which time MSHA official Michael Rennie issued a verbal order, pursuant to section 103(k), 30 U.S.C. § 813(k), prohibiting Black Beauty from resuming mining operations at the accident site.³ Elliot sent out messages over the mine's Personal Emergency Device to Second Shift Manager Terry Courtney advising him that a section

² 30 C.F.R. § 50.10 provides that:

The operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred involving:

- (a) A death of an individual at the mine;
- (b) An injury of an individual at the mine which has a reasonable potential to cause death;
- (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or
- (d) Any other accident.

³ 30 U.S.C. § 813(k) states that:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary . . . may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative . . . of any plan to . . . return affected areas of such mine to normal.

103(k) order had been issued and to shut down the unit. Jnt. Stip. 3 at 4, 6 – 8; Gov. Ex. 17; 34 FMSHRC at 438.

MSHA Inspector Sylvester DiLorenzo arrived at the mine at approximately 10:50 p.m. for the purpose of securing the accident site and initiating an accident investigation. Upon arrival, he discovered that normal mining operations had resumed, that the fallen rock had been broken up when it was run over by the roof bolter, and that the cut had been bolted. Courtney and Acting Superintendent Rick Carie advised DiLorenzo that the call to MSHA was a misunderstanding. DiLorenzo also learned that Driskill had been sent to the hospital. DiLorenzo was presented with conflicting evidence as to the nature of his injuries. Courtney had decided that mining could resume. However, the mine had not received authority from the District Manager to continue its mining operations. Because Black Beauty had resumed mining and altered the accident site without MSHA's permission, DiLorenzo issued Citation No. 6672658, alleging a violation of 30 C.F.R. § 50.12.⁴ Jnt. Stip. 3 at 5, 7, 9, 12-14; Gov. Exs. 1, 3 (at 2 and 6), 14; 34 FMSHRC at 438-39.

According to Driskill's medical records, he suffered abrasions to the arm and rib cage. Although Driskill was initially cleared to return to work two days after the accident without significant physical restrictions, the record indicates that three weeks later on April 28, 2008, Driskill's doctor advised that he not roofbolt for two weeks due to significant right shoulder pain and inflammation, and that he continue taking pain and anti-inflammatory medicine. He was cleared to return to work again with no restrictions on May 9, 2008. Gov. Exs. 18, 43, 45, 46; 34 FMSHRC at 439.

On the first day of the hearing, mid-way through the Secretary's direct examination of his first witness (Inspector DiLorenzo), the Judge called a brief recess to confer with counsel in chambers. When the hearing resumed, the Judge announced that the parties would attempt to resolve Citation No. 6672658 through other means and that they would explore this alternative resolution the following day. In a bench decision the next day, the Judge heard and granted a motion for summary decision by the Secretary affirming the citation. Tr. 272-325.⁵ Consequently, Black Beauty did not cross-examine the Secretary's witness, nor did it present witness testimony regarding the citation. The Secretary did not complete direct examination of his witness. Tr. 272-325.

In his final written decision of February 10, 2012, quoting his bench decision, the Judge found that although Driskill experienced pain and discomfort, according to the evidence, "Driskill's injuries were not life threatening." 34 FMSHRC at 439. While he concluded that no

⁴ 30 C.F.R. § 50.12 provides: "Unless granted permission by a MSHA District Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment."

⁵ The Secretary did not move for summary decision until the morning of the second day of trial. Tr. 278. It appears that the Secretary made the motion in response to a suggestion by the Judge during the conference with counsel in chambers the previous day. Tr. 272.

life threatening injury had occurred, the Judge nonetheless affirmed the citation on the basis of Black Beauty's call to MSHA reporting an accident. *Id.* In considering the requirement of section 50.12 that an operator refrain from altering an accident site without the permission of MSHA, the Judge reasoned that:

The report of an accident, rightly or wrongly, is the condition precedent to the application of the provisions of section 50.12. Having reported an accident, Black Beauty's unilateral decision to resume operations constituted a violation of section 50.12. However, it is a mitigating factor that Black Beauty had correctly determined that the scene was not an "accident site" in that serious injury was not sustained.

Id.

2. Analysis

a) **The occurrence of an accident, not its reporting, triggers the prohibition on altering an accident site.**

The Judge erred as a matter of law in ruling that the reporting of an accident, by itself, is sufficient to trigger section 50.12. The Judge was instead required to determine whether an "accident" within the meaning of section 50.2(h)(2) had taken place. In accordance with the standard's language and controlling Commission precedent, it is the *occurrence* of an accident that is the condition precedent to the application of section 50.12, not the *reporting* of one.

Here, however, the Judge erroneously concluded that it is "*the report* of an accident" that triggers the application of section 50.12. 34 FMSHRC at 439 (emphasis added). The standard, in fact, makes no mention of the "reporting" of an accident. Section 50.12 simply prohibits an operator from altering an "accident site" without MSHA's permission. The Commission has explicitly held that the requirements of section 50.12 are triggered by the "occurrence" of an accident. An "accident" is defined in section 50.2(h)(2), 30 C.F.R. § 50.2(h)(2), in relevant part, as "[a]n injury to an individual at a mine which has a reasonable potential to cause death." *Cougar Coal Co.*, 25 FMSHRC 513, 520 (Sept. 2003). Thus, the Judge's reliance on the phone call to MSHA was misplaced.

b) **The evidentiary record is incomplete.**

Because of his legal error, the Judge prematurely terminated the hearing and incorrectly truncated the evidentiary record with respect to Citation No. 6672658. The Secretary did not finish the direct examination of his first witness or any other witnesses. Further, the operator was not given the opportunity to cross-examine the Secretary's witness or to present any testimonial evidence in support of its case. Indeed, the record demonstrates that the injured miner Driskill, was scheduled to testify. He could have provided much clarification on how the incident

occurred and the nature and extent of the injuries he suffered. The Judge's actions prevented the entry of testimonial evidence necessary to resolve the factual and legal questions presented.⁶

Consequently, we vacate and remand the case to the Judge for further consideration. On remand, the Judge is directed to reopen the record to permit the parties to present evidence on the question of whether Driskill's injuries had a "reasonable potential to cause death," thereby making the event an "accident" within the meaning of section 50.2(h)(2) and making the site an "accident site" under section 50.12.⁷

Accordingly, we hereby vacate the Judge's decision on Citation No. 6672658 and remand to him this part of the case.

B. Order No. 6681047

1. Factual Background

The on-shift regulation the Secretary alleges was violated only requires an examination during a shift on which coal is produced. 30 C.F.R. § 75.362(b). On the date of the Order, there were two production shifts at Black Beauty's mine – the day production shift from 7:00 a.m. to 3:00 p.m., and the afternoon production shift from 3:00 p.m. to 11:00 p.m. There was a third shift, the midnight maintenance shift, which began at 11:00 p.m. and ended at 7:00 a.m. Tr. 85; 34 FMSHRC at 440.

On the afternoon of September 10, 2008, at 6:30 p.m., Black Beauty performed an on-shift examination. Tr. 676; 34 FMSHRC at 442. The September 10 afternoon shift overlapped with the midnight shift of September 11, 2008, in that the incoming midnight shift miners left the portal to go underground at 11:40 p.m. and the outgoing afternoon shift miners arrived at the portal to exit the mine at 1:30 a.m. R. Exs. 47-A, 47-B. The last car of coal for the afternoon shift was dumped at the feeder at 1:00 a.m. Tr. 85-89, 523-25; R. Ex. 47-A. The first coal of the

⁶ An Administrative Law Judge should not interrupt the presentation of testimonial evidence to suggest to a party that it file a motion for summary decision. *See* Commission Procedural Rule 67, 29 C.F.R. § 2700.67. However, this is what appears to have happened. *See* Tr. 120-22, 260, 272-78.

⁷ The evidence should be considered within the parameters outlined by the Commission in *Signal Peak Energy, LLC*, 37 FMSHRC ___, slip op. at 6, No. WEST 2010-1130 (Mar. 4, 2015) and *Cougar Coal*, 25 FMSHRC at 520-21. Specifically, because the separate reporting requirement in section 50.10 demands a prompt determination of whether an injury "has a reasonable potential to cause death," readily available information, such as the nature of the accident, is highly relevant in determining whether an injury constitutes an "accident." Similarly, operators cannot wait for medical or clinical opinions before determining whether an "accident" under section 50.2(h)(2) has occurred. An operator, in determining whether it is required to notify MSHA under 30 C.F.R. § 50.10, "must resolve any reasonable doubt in favor of notification." *See Signal Peak*, 36 FMSHRC ___, slip op. at 6-7; *Cougar Coal*, 25 FMSHRC at 520-21.

September 11 day shift was dropped on the feeder at 7:30 a.m. Tr. 526 (testimony of Mine Superintendent Gary Campbell); *see also* R. Ex 47-C.

On the morning of September 11, MSHA Inspector Glenn Fishback observed extensive accumulations of combustible materials in the form of loose coal, coal fines, and float coal dust, which ran along the energized 2 Main East conveyer belt header inby to the number 48 crosscut. 34 FMSHRC at 440; Gov. Exs. 32, 33. Cleaning up the accumulations required approximately 20 employees shoveling each shift for a total of 18 hours and the use of six 3,500-pound tanks of rock dust. 34 FMSHRC at 440. As a result of his observation, Fishback issued a section 104(d)(2) Order No. 6681046 citing a violation of section 75.400,⁸ and section 104(d)(2) Order No. 6681047 citing a significant and substantial (“S&S”) violation of the on-shift examination requirement of 30 C.F.R. § 75.362(b) that was also alleged to be the result of an unwarrantable failure.⁹ Order No. 6681047 states:

An inadequate onshift examination was conducted for the 2 Main East belt conveyor for the 4:30 AM to 7:30 AM examination on 9/11/2008. Obvious and extensive accumulations of combustible materials in the form of loose coal, coal fines, and float coal dust were observed by MSHA on this date. The accumulations of combustible materials were cited today in 104(d)(2) Order No. 6681046. The examination record for the 4:30 AM to 7:30 AM examination of the 2 Main East belt showed no hazards listed.

34 FMSHRC at 441; Gov. Ex. 32.

The Judge vacated the order, finding that given the non-production status of the mine during the maintenance shift, the Secretary failed to demonstrate that an on-shift examination,

⁸ Order No. 6681046 was assigned to a different judge and is the subject of *Black Beauty Coal Co.*, 34 FMSHRC 677, 685-90 (Mar. 2012) (ALJ). That order is not at issue here.

⁹ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, and establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.” *Id.* If an MSHA inspector finds that a violation is S&S and due to the operator’s unwarrantable failure, the citation is to be issued pursuant to section 104(d)(1), which can lead to more stringent enforcement measures.

pursuant to 30 C.F.R. § 75.362(b),¹⁰ was required. He found it significant that the Secretary did not “explicitly contend” or produce any documentary evidence that coal was produced during the midnight shift on September 11. 34 FMSHRC at 442. The Judge was also persuaded by Fishback’s inability to recall whether coal was produced on the midnight shift. *Id.* (citing Tr. 458-60). He further noted that although it was reasonable to assume that the extensive accumulations existed during the on-shift examination on the afternoon of September 10, the Secretary did not seek to amend the order to include that shift. The Judge declined to do so *sua sponte*. 34 FMSHRC at 442-43 (citing *Cumberland Coal Res.*, 32 FMSHRC 442, 447 (May 2010)).

2. Analysis

The Secretary argues that the Judge’s decision is not supported by substantial evidence. He maintains that based on the undisputed fact that the conveyor belt was transporting coal until 1:00 a.m. during the midnight shift and that miners were working underground, the cited maintenance shift was a “coal producing” shift that required an on-shift examination. He further contends that, based on the operator’s own admission that an on-shift examination was not performed during the midnight shift, Black Beauty violated section 75.362(b).

Black Beauty responds that the Secretary’s argument that a separate on-shift examination was required due to the coal produced during the two-hour overlap between the production shift and the maintenance shift is a new legal theory advanced by the Secretary on appeal and was not raised before the Judge. It maintains that an on-shift examination was not required during the maintenance shift, and that the brief overlap of the afternoon shift and the midnight shift does not transform the maintenance shift into a production shift.

We conclude that the Secretary failed to present for the Judge’s consideration his theory that the coal produced during the two-hour shift overlap constituted coal production on the maintenance shift for purposes of section 75.362(b).

Section 113(d)(2)(A)(iii) of the Mine Act provides that “[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass.” 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(d). The petitioner’s actions cannot conflict with the basic

¹⁰ Section 75.362(b) provides that:

During each shift that coal is produced, a certified person shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (a)(3) of this section along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

30 C.F.R. § 75.362(b) (emphasis added).

principle that parties in Mine Act cases must first present their evidence and advance their legal theories before the Judge, and not for the first time on appeal. *Oak Grove Res., LLC*, 33 FMSHRC 2657, 2664 (Nov. 2011) (citing *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992)).¹¹

The Commission has also recognized that a matter urged on review may have been implicitly raised below or is so intertwined with something tried before the judge that it may properly be considered on appeal. *See, e.g., Oak Grove*, 33 FMSHRC at 2664 (citing *Beech Fork*, 14 FMSHRC at 1321); *San Juan Coal Co.*, 29 FMSHRC 125, 130 (Mar. 2007); *Freeman United Coal Mining Co.*, 6 FMSHRC 1577, 1580 (July 1984). An issue that is “sufficiently related” to one raised before the judge satisfies these criteria. *BHP Copper, Inc.*, 21 FMSHRC 758, 762 (July 1999) (quoting *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10 n.7 (Jan. 1994)) (internal quotations omitted). If none of these criteria are met, an issue may be heard on appeal only upon a showing of “good cause.” 30 U.S.C. § 823(d)(2)(a)(iii). The Commission’s practice has been to resolve these “opportunity to pass” questions on a case-by-case basis. *See, e.g., Ozark-Mahoning Co.*, 12 FMSHRC 376, 379 (Mar. 1990).

A review of the record reveals that the Secretary did not present to the Judge the theory that the maintenance shift was a “coal producing” shift that required a separate on-shift examination by virtue of the 1-2 hour shift overlap. The Secretary quite clearly laid out the entirety of his argument in his Post-Hearing Brief. Specifically, he argued that the Judge should uphold the inadequate examination order because: (1) Black Beauty failed to record the obvious and extensive accumulations for at least a week prior to the issuance of the underlying accumulations Order; and (2) Black Beauty failed to complete an adequate on-shift examination of the entire beltline during the midnight shift even though the belts were running and miners were working in the section. *See* S. Post-Hrg. Br. at 2. He then specifically framed the issue for the Judge by stating that “the question for this Court to resolve is straightforward; did the examination records . . . identify the conditions on the . . . beltline.” *Id.* at 11. The Secretary’s assertions at trial did not address the threshold issue that to prove a violation of 30 C.F.R. § 75.362(b), the Secretary must establish that coal was produced during the shift in question.

The Secretary also failed to address this necessary element of the alleged violation at the hearing. In his opening statement, the crux of the Secretary’s argument involved the deficiencies identified by Inspector Fishback in Black Beauty’s exam records. Counsel stated that “the exam records are, in Mr. Fishback’s estimation, totally inadequate because they simply failed to identify the condition that, in his estimation, had to have been present, his testimony will show, for at least a week.” Tr. 35. Moreover, the direct and cross-examination by the Secretary provided little or no discussion about the possibility of coal production during the midnight shift, not even in the context of the two-hour shift overlap. Instead, the Secretary only elicited testimony that would prove the magnitude and duration of the accumulations and Black Beauty’s alleged failure to record them. Tr. 395-458, 488-89, 490, 547-73, 582-85, 612-19, 621-28, 689-704.

¹¹ This explicit statutory limitation on the scope of Commission review may be raised by an objecting party or, *sua sponte*, by the Commission itself, at any appropriate time during the Commission review process. *E.g., Beech Fork*, 14 FMSHRC at 1320 (finding that the judge “had not been afforded an opportunity to pass” on the legal theory raised on review by petitioner).

Counsel for Black Beauty raised the issue of coal production during his cross-examination of Inspector Fishback and again in Black Beauty's post-hearing brief in which he plainly argued that coal had not been produced. Tr. 459-60; BB Post-Hrg Br. at 9. Even then, the Secretary made no attempt to rebut, assert, or address the issue of coal production except to say that "Black Beauty's examination records show that the . . . beltline was running during the nearest so-called maintenance shift . . . even if the mine maintains that it did not produce coal during the shift." S. Post-Hrg Br. at 6. Moreover, the Secretary failed to submit or assert any record evidence in support of a theory that coal was produced on the midnight shift. *See* 34 FMSHRC at 442. The Judge recognized the Secretary's failure to proffer the argument of coal production in his decision. *Id.* ("Significantly, the Secretary does not explicitly contend, nor does any documentary evidence reflect, that coal was produced on the midnight shift on September 11, 2008").

Thus, at no point did the Secretary's case before the Judge rely on coal being produced after 11:00 p.m. on September 10 as part of his proof that a violation of the standard had occurred. Instead, he chose a litigation strategy that hinged on factors unrelated to the issue of coal production.

Moreover, we fail to see where the Secretary's coal production theory was implicitly raised or how it is "so intertwined with something tried before the judge that it may properly be considered on appeal." *See Beech Fork*, 14 FMSHRC at 1321; *San Juan Coal Co.*, 29 FMSHRC at 130. As stated above, the Secretary's presentation of evidence, through pleadings and testimony, was limited to the adequacy of the exam records and the extent and duration of the coal accumulations – lines of proof completely distinct from that which it now seeks to raise on appeal. We also fail to see "good cause" for why the Commission should entertain this new litigation strategy.

Accordingly, we conclude that the Judge was never "afforded an opportunity to pass" on the question of whether the coal produced after 11:00 p.m. by the afternoon shift constituted coal production during the separate maintenance shift that required a separate on-shift examination. Therefore, this argument has not been preserved for Commission review, and in accordance with section 113(d)(2)(A)(iii) of the Mine Act, it will not be considered. The Judge's decision regarding this order is affirmed.

II.

Terms of Settlement

Prior to the hearing, the parties settled 18 of the 20 citations and orders contained in Docket No. LAKE 2008-643, and 11 of the 14 citations and orders in LAKE 2009-72. 34 FMSHRC at 437; Tr. 9-10. The terms of the agreement were set forth in a Joint Motion to Approve Settlement Agreement and a draft Decision Approving Settlement, which the Judge admitted at hearing as Joint Exhibit 1. 34 FMSHRC at 437; Tr. 24. The Judge approved the settlement terms on the record and stated that he would incorporate them into the final decision.

Tr. 24; 34 FMSHRC at 437. While the Judge included the total penalty amounts in his final written decision, he did not specify the agreed upon modifications.¹² 34 FMSHRC at 437.

The parties request that this issue be remanded to the Judge for the purpose of memorializing the terms of the settlement agreement.

In the interest of judicial economy, the terms of the parties' settlement agreement as outlined in Joint Exhibit 1 and as approved by the Judge are memorialized in the charts below. The citations, modifications, initial assessments, and the agreed upon settlement amounts are contained herein.¹³

A. LAKE 2008-643

Citation/ Order No.	Modification	Initial Assessment	Agreed Assessment
6672419	From: High Negligence To: Moderate Negligence	\$23,229.00	\$15,000.00
6672424	From: 3 persons affected To: 1 person affected	\$23,229.00	\$15,100.00
6672429	From: High likely To: Reasonably likely From: Section 104(d)(2) order To: Section 104(a) citation	\$17,301.00	\$11,250.00
6672444	From: High Negligence To: Moderate Negligence	\$6,996.00	\$4,000.00
6672454	From: High Negligence To: Moderate Negligence From: 13 persons affected To: 3 persons affected From: Section 104(d)(2) order To: Section 104(a) citation	\$15,971.00	\$6,000.00
6672475	From: 2 persons affected	\$9,634.00	\$6,744.00

¹² Commission Procedural Rule 31(g) provides in pertinent part that “[a]ny order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record.” 29 C.F.R. § 2700.31(g).

¹³ The hearing commenced with five violations at issue. Prior to the close of the record, the Secretary agreed to vacate Citation No. 6672659 (LAKE 2008-643), and the parties agreed to settle Order No. 6672674 (LAKE 2009-72) by modifying it from a section 104(d)(2) order to a section 104(a) citation and reducing the penalty, and Order No. 6676919 (LAKE 2009-72) by modifying it from S&S to non-S&S and reducing the penalty. Tr. 307-09, 322-23, 539-41. The settlements of these violations were approved by the Judge at hearing and again in his final written decision of February 10, 2012. Tr. 307-09, 322-23, 539-41; 34 FMSHRC at 437.

	To: 1 person affected		
6672481	From: High Negligence To: Moderate Negligence	\$4,689.00	\$3,000.00
6672490	Accept as Written	\$11,500.00	\$11,500.00
6672491	Penalty Reduction Only	\$40,300.00	\$30,000.00
6677676	Accept as Written	\$15,570.00	\$15,570.00
6677725	From: 3 persons affected To: 1 person affected	\$3,405.00	\$2,200.00
6678019	Accept as Written	\$3,143.00	\$3,143.00
6678028	From: S&S To: non-S&S From: Reasonably likely To: Unlikely	\$2,473.00	\$1,731.00
6678030	Accept as Written	\$946.00	\$946.00
6678214	From: S&S To: non-S&S From: Reasonably likely To: Unlikely	\$2,678.00	\$2,142.00
6678217	Penalty Reduction Only	\$3,996.00	\$3,197.00
7639417	From: High Negligence To: Moderate Negligence	\$7,300.00	\$5,110.00
7639418	From: High Negligence To: Moderate Negligence	\$9,800.00	\$6,860.00

B. LAKE 2009-72

6669352	Penalty Reduction Only	\$3,996.00	\$3,000.00
6670740	Penalty Reduction Only	\$6,458.00	\$5,166.00
6670744	From: Fatal To: Lost workdays	\$3,996.00	\$2,797.00
6670754	From: Fatal To: Permanently Disabling	\$6,996.00	\$5,597.00
6670756	From: Fatal To: Permanently Disabling	\$6,996.00	\$4,897.00
6672692	Accept as Written	\$3,405.00	\$3,405.00
6678092	From: S&S To: non-S&S From: Reasonably likely To: Unlikely	\$3,996.00	\$3,000.00
6681049	From: High Negligence To: Moderate Negligence From: 10 persons affected	\$40,180.00	\$20,000.00

	To: 2 persons affected		
7493437	Accept as Written	\$4,000.00	\$4,000.00
7493438	Accept as Written	\$4,000.00	\$4,000.00
7493439	Accept as Written	\$4,000.00	\$4,000.00

WHEREFORE, as **ORDERED** by the Judge, Citation Nos. 6672490, 6677676, 6678019, 6678030, 6672692, and Order Nos. 7493437, 7493438, and 7493439 are **AFFIRMED**, as issued; and the remaining Citations and Orders are modified as outlined above.

III.

Conclusion

In summary, we vacate the Judge’s decision regarding Citation No. 6672658 and remand the case with instructions to reopen the record to receive additional evidence. We further conclude that, regarding Order No. 6681047, the Judge did not have the opportunity to pass on the Secretary’s theory of coal production asserted for the first time on appeal. Therefore, in accordance with section 113(d)(2)(A)(iii) of the Mine Act, we decline to reach the merits of this argument, and the Judge’s decision is affirmed. Lastly, we incorporate and affirm herein the terms of the parties’ settlement agreement regarding the remaining citations and orders.

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

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

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 3, 2015

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

v.

BLEDSON COAL CORPORATION

Docket Nos. KENT 2011-835
KENT 2011-1162
KENT 2012-34
KENT 2011-972-R

Before: Nakamura, Acting Chairman; Cohen and Althen, Commissioners¹

ORDER

BY THE COMMISSION:

The parties in this proceeding have filed a joint motion to dismiss their respective appeals of the captioned matters.

Upon consideration by the Commission, the motion is granted and the captioned matters are dismissed.

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

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

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

¹ Chairman Jordan and Commissioner Young assumed office after the parties' motion had been considered by the Commission. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficiency, Chairman Jordan and Commissioner Young have elected not to participate in this matter.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 17, 2015

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

Docket Nos. LAKE 2007-171, et al.¹

v.

THE AMERICAN COAL COMPANY

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

ORDER

BY THE COMMISSION:

These captioned proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), are before the Commission pursuant to the granting of The American Coal Company’s petition for discretionary review.² Subsequent to our granting of review, we stayed briefing pending further order by the Commission.

¹ The additional docket numbers at issue are set forth in the attached Appendix.

² Commissioner Cohen notes that these proceedings involve decisions approving settlement of more than 70 citations. The parties moved for approval of settlement of the citations during a conference call with the Judge. 33 FMSHRC 2574, 2593-94 (Oct. 2011) (ALJ); Unpublished Order at 2 n.1 (Oct. 2011); Unpublished Order at 2 (Nov. 2011). “The written motion [for settlement] consists of a spreadsheet setting forth the terms of the settlement reached by the parties.” Unpublished Order at 2 n.1 (Oct. 2011); *see also* Unpublished Order at 2 (Nov. 2011). That spreadsheet lists the originally proposed penalty and the agreed upon amended penalty for each citation. Overall, the penalties were reduced by 46.7%, from \$362,515 to \$193,330. The spreadsheet indicates that every one of the penalties was reduced. The only justification for the reductions noted on the spreadsheet was that one of the citations, Citation No. 6683836 in Docket No. LAKE 2009-546, was “modif[ied] to Permanently Disabling.” No justification at all was provided for the reduction of the other penalties.

The Judge’s reasons for accepting the proposed settlement do not appear in the record. Perhaps they were set forth during the conference call. Unfortunately, no transcript was made of the conference call, and so the Commission has no basis for knowing the Judge’s consideration in accepting the settlement.

On March 31, 2015, American filed an unopposed motion to dismiss its appeal of these proceedings and represented that it has agreed to pay penalties “consistent with [Judge] Manning’s October 24, 2011 Decision Approving Settlement, October 24, 2011 Decision, and November 9, 2011 Decision Approving Settlement.” Mot. at 1. American indicated in its motion that it agreed “to amicably resolve any issues that remain regarding the safeguard-related violations in these matters.” *Id.* Upon consideration of the motion, the Commission dismisses the review of these cases and remands the proceedings to the Administrative Law Judge for further proceedings, as appropriate, with respect to “any issues that remain regarding the safeguard-related violations in these matters.” *Id.*

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

Appendix

Docket Nos. LAKE 2007-215-R
LAKE 2007-216-R
LAKE 2007-172
LAKE 2007-202
LAKE 2007-205
LAKE 2008-004
LAKE 2008-037
LAKE 2008-080
LAKE 2008-082
LAKE 2008-120
LAKE 2008-139
LAKE 2008-140
LAKE 2008-141
LAKE 2008-143
LAKE 2008-231
LAKE 2008-232
LAKE 2008-234
LAKE 2008-235
LAKE 2008-239
LAKE 2008-526-A
LAKE 2008-528
LAKE 2008-529
LAKE 2008-531
LAKE 2008-582
LAKE 2008-583
LAKE 2008-584
LAKE 2008-585
LAKE 2008-624
LAKE 2008-625
LAKE 2008-626
LAKE 2009-007
LAKE 2009-008
LAKE 2009-206
LAKE 2009-445
LAKE 2009-546

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2015

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

Docket No. CENT 2014-82-M
A.C. No. 39-00020-332183

v.

PETE LIEN & SONS, INC.

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On December 5, 2013, the Commission received from Pete Lien & Sons (“Pete”) 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).

¹ Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on September 18, 2013 and became a final order of the Commission on October 18, 2013. Pete asserts that it had made a partial payment of \$2,730.00 for the uncontested penalties on October 18, 2013 but acknowledges that it inadvertently failed to include MSHA Form 1000-179, which indicates which penalties it intended to contest. The Secretary does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Pete's request and the Secretary's response, 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, Chairman

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2015

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

v.

BILLY JACK'S SAND & GRAVEL

Docket No. CENT 2014-6-M
A.C. No. 41-04844-316151

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 7, 2013, the Commission received from Billy Jack's Sand and Gravel ("Billy Jack") 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).

¹ Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on March 19, 2013, and became a final order of the Commission on April 18, 2013. On June 3, 2013, MSHA mailed a delinquency notice to Billy Jack, and upon receiving no response, MSHA sent the case to the U.S. Department of Treasury for collection on September 19, 2013.

Billy Jack asserts that it timely contested the proposed assessment through MSHA's EGov online filing system on April 9, 2013. Although Billy Jack has provided a copy of an email verifying the submission of an unspecified form through EGov, the Secretary submits that the verification is for the submission of a Quarterly Mine Report, not the contest of a proposed assessment. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Billy Jack's request and the Secretary's response, 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, Chairman

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2015

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

v.

MACH MINING LLC

Docket No. LAKE 2014-8-M
A.C. No. 11-03141-322996

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On October 2, 2013, the Commission received from Mach Mining LLC (“Mach”) a motion seeking to reopen Citation No. 8449103 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).

¹ Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment involving 23 citations was delivered on June 4, 2013. Nine citations were timely contested and the remaining uncontested citations became final orders of the Commission on July 5, 2013. Mach asserts that it inadvertently failed to mark Citation No. 8449103 for contest. Mach paid the assessments for all other uncontested citations. It did not pay the assessment for the contested citations or for Citation No. 8449103. After Mach received a delinquency letter from MSHA on or about August 28, 2013, Mach maintains that it promptly contacted MSHA to correct the mistake. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Mach's request and the Secretary's response, 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, Chairman

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2015

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

v.

BARRICK GOLD U.S., INC.

Docket No. WEST 2014-57-M
A.C. No. 26-01842-328683

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On October 31, 2013, the Commission received from Barrick Gold U.S., Inc. (“Barrick”) 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).

¹ Commissioner Althen was recused from this case. Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 6, 2013, and became a final order of the Commission on September 5, 2013. Barrick asserts that it explained to MSHA Field Officer Supervisor Gary Hebel that it intended to contest Citation Nos. 8701559, 8701765, and 8701772, but requested that the Proposed Assessment be placed "on hold" until after the inspection close-out conference. MSHA acknowledges that Hebel believed that the 30-day deadline to contest proposed penalties could be suspended for the duration of the inspection and that this mistaken belief may have contributed to the confusion resulting in Barrick's untimely contest on September 24, 2013. The Secretary does not oppose the request to reopen, but urges the operator and counsel to take steps to ensure that future penalty contests are timely filed.

Having reviewed Barrick's request and the Secretary's response, 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, Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2015

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

Docket No. WEST 2014-108-M
A.C. No. 26-00002-330163

v.

PREMIER MAGNESIA, LLC

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On December 4, 2013, the Commission received from Premier Magnesia, LLC, (“Premier”) 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).

¹ Commissioner Althen was recused from this case. Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 22, 2013 and became a final order of the Commission on September 23, 2013. Premier asserts that it timely contested ten citations and mailed payment for nine uncontested citations on September 18, 2013. Premier further states that it only discovered a problem with the contest after receiving a delinquency letter from MSHA on or about November 7, 2013 and promptly contacted MSHA's Civil Penalty Compliance Office to inquire about the status of the contest. Although the Secretary has no record of receiving Premier's contest, MSHA received a check dated September 18, 2013 for an unspecified number of proposed penalties. The Secretary does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Premier's request and the Secretary's response, 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, Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2015

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

v.

GATEWAY EAGLE COAL COMPANY

Docket No. WEVA 2014-1
A.C. No. 46-08637-329022

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On October 15, 2013, the Commission received from Gateway Eagle Coal Company (“Gateway”) 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).

¹ Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 8, 2013, and became a final order of the Commission on September 9, 2013. Gateway asserts that due to an internal mail sorting error, the Notice of Contest was filed on September 10, 2013. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Gateway's request and the Secretary's response, 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, Chairman

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2015

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

v.

ROCKSPRING DEVELOPMENT, INC.

Docket No. WEVA 2014-175
A.C. No. 46-05121-283802-02

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On November 18, 2013, the Commission received from Rockspring Development, Inc. (“Rockspring”) a motion seeking to reopen Citation Nos. 8150547 and 8142619 that became 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).

¹ Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that on April 2, 2012, Rockspring timely contested 21 proposed penalty assessments that had been issued on March 15, 2012. On April 9, 2012, Rockspring sent an amended contest to MSHA indicating that it wished to contest an additional two penalties. MSHA acknowledges that it received both contests but states that the amended contest was ignored because MSHA believed it to be a duplicate. Rockspring asserts that the amended contest was timely filed and should have been docketed with the other citations. The Secretary does not oppose the request to reopen.

Having reviewed Rockspring's request and the Secretary's response, we find that Rockspring timely contested Citation Nos. 8150547 and 8142619 and, therefore, they did not become a final order of the Commission. Accordingly, the request to reopen is dismissed as moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2015

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

v.

SPARTAN MINING COMPANY, INC.

Docket No. WEVA 2014-176
A.C. No. 46-01544-331181

BEFORE: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On November 18, 2013, the Commission received from Spartan Mining Company, Inc. (“Spartan”) 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).

¹ Commissioner Cohen has elected not to participate in this matter.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on September 10, 2013, and became a final order of the Commission on October 10, 2013. Spartan asserts that due to a clerical error it contested the proposed assessment on October 11, 2013. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.²

Having reviewed Spartan's request and the Secretary's response, 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, Chairman

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

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

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

² We note that this is the fourth time in two years that Spartan has requested reopening of a penalty assessment because of its untimely filing of a notice of contest. *See Inman Energy*, 35 FMSHRC 26 (Jan. 2013); *Spartan Mining Co.*, 35 FMSHRC 1298 (May 2013); *Spartan Mining Co.*, 35 FMSHRC 2052 (July 2013).

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

April 1, 2015

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

v.

KERNEOS, INC.,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. VA 2013-0029-M
A.C. No. 44-05046-302469

Docket No. VA 2013-0082-M
A.C. No. 44-05046-305615

Docket No. VA 2013-0120-M
A.C. No. 44-05046-308052

Docket No. VA 2013-0183-M
A.C. No. 44-05046-310655

Mine: Chesapeake Plant

DECISION AND ORDER

Appearances: Thomas Grooms, U.S. Department of Labor, Office of the Solicitor,
Nashville, TN, for Petitioner;

Margaret S. Lopez, Ogletree, Deakins, Nash, Smoak & Steward, P.C.,
Washington, DC, for Respondent.

Before: Judge L. Zane Gill

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”) involves 104(a) citations, 30 U.S.C. § 814(a), issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Kerneos, Inc. (“Kerneos” or “Respondent”) at its Chesapeake Plant. Kerneos alumina and quicklime make a specialty calcium aluminate cement. (Tr. 127: 4; Tr. 145:3-16; Tr. 255:23-24; Ex. S-16; Ex. S-35)

The parties presented testimony on September 8, 2014, in Washington, D.C., regarding the sole issue of MSHA’s asserted jurisdiction over the Chesapeake Plant. For the reasons stated below, I find that MSHA does have jurisdiction over the Kerneos Chesapeake Plant.

Background History

In 2008, James R. Petrie, the Northeast District Manager for MSHA, notified Thomas Green, the President of Kerneos, that MSHA was relinquishing jurisdiction over the Chesapeake Plant, which would thereafter be under the jurisdiction of the Occupational Safety and Health Administration (“OSHA”). (Ex. S-9) This determination was made in the course of a penalty proceeding, *See Kerneos, Inc.*, VA 2007-0076 and VA 2007-0077.

Lewis Harvey Kirk, III¹ first learned of the transfer of jurisdiction from MSHA to OSHA in 2011 in the course of a conversation he had with Derek Goossens.² (Tr. 118:20 – 119:20) Kirk then discussed this with his supervisor, Bill Wilson, who knew of the transfer, but disagreed with the removal of jurisdiction. (Tr. 119:24 – 120:8) Both Wilson and Kirk spoke to the Administrator and Deputy Administrator of the metal/non-metal branch about the change in jurisdiction, which resulted in Mike Davis, the Southeast District Manager, getting involved.³ (Tr. 120:11-16)

At that point Davis informed Kirk that an inquiry needed to be made and offered Judith Etterer's assistance to investigate the Chesapeake Plant. (Tr. 121:9-23) Kirk joined Etterer in her investigation at the plant in late May, 2011.⁴ (*Id.*; Tr. 122:10-11) Kirk testified that he was at the plant to see what materials, equipment, and processes were being used, to determine if MSHA had jurisdiction over the plant. (Tr. 124:16-21) The investigation resulted in MSHA's determination that the Kerneos plant was under its jurisdiction. (Mike Davis Dep. at 10:2-17) Kerneos objects to this assertion of jurisdiction and argues that it should be under OSHA's jurisdiction.

¹ At the time of the hearing, Kirk had been employed at MSHA since 2003. (Tr. 102:20 – 103:1) Kirk obtained a BS in civil engineering from the University of Delaware in 1969. (Tr. 103:6-13) Kirk worked for Lehigh Portland Cement for approximately 30 years. (Tr. 103:16 – 104:2) Since Kirk began with MSHA in 2003, he has worked in the safety division. His title at the time of the hearing was senior mine safety and health specialist. As part of his job, he performs jurisdictional investigations to determine MSHA jurisdiction over facilities. (Tr. 110:13 – 111:4)

² At the time of the hearing, Goossens had been employed by MSHA since 2007 inspecting metal/non-metal mines. (Tr. 20:16 – 21:4) He has been in the metal/non-metal industry since 1972, approximately 42 years. (Tr. 21:8-22) Goossens received his undergraduate degree from University of England, with a major in extractive metallurgy, and concentrations in mathematics and mechanical engineering. (Tr. 22:5-8) Goossens began employment at Lafarge, Kerneos' predecessor, in 1989. (Tr. 23:3-4) Goossens worked for Lafarge from 1994-2005, and from 1994-1996 he was the production manager. (Tr. 23:25 – 24:8) By 2003, Goossens was the plant manager. (Tr. 115:9-11)

³ At one point the Chesapeake Plant was regulated by the northeast district, but was then transferred to the southeast district. (Tr. 120:19-23)

⁴ Etterer prepared a report of her findings. (Tr.121:24 – 122:7)

Definition of a Mine

Section 4 of the Mine Act provides, in part, that “[e]ach coal or other mine ... shall be subject to the provisions of this Act.” 30 U.S.C. § 803. “Coal or other mine” is defined in section 3(h)(1) of the Act as:

(A) an area of land from which minerals are extracted [...], (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, *structures, facilities, equipment, machines, tools, or other property* [...] or used in, or to be used in, *the milling of such minerals, or the work of preparing coal or other minerals* [...] In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 802(h)(1) (emphases added).

This Section defines a “mine” to include “structures” and “facilities” used in “milling” or “the work of preparing [...] minerals.” *Id.* “It does not require that those structures or facilities be owned by a firm that also engages in the extraction of minerals from the ground or that they be located on property where such extraction occurs.” *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984). The Commission has also recognized this, observing that “‘milling’ and ‘preparation’ can be perceived as words used, in a loose sense, interchangeably to describe the entire process of treating mined minerals for market.” *Id.* at 1551 (internal citations omitted).

The language in Section 3(h)(1)(C) “gives the Secretary discretion, within reason, to determine what constitutes mineral milling, and thus indicates that his determination is to be reviewed with deference both by the Commission and the courts.” *Id.* at 1552. The *Donovan* court went on to state that, “[i]n this highly technical area deference to the Secretary's expertise is especially appropriate.” *Id.* at n.9; *See Magma Copper Co. v. Secretary of Labor*, 645 F.2d 694, 696–98 (9th Cir.), *cert. denied*, 454 U.S. 940 (1981); *National Industrial Sand Ass'n v. Marshall*, 601 F.2d 689, 703 (3d Cir.1979).

Indeed, when the Mine Act was enacted, the report of the Senate Committee on Human Resources specified that

[T]here may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the *broadest possibl[e] interpretation*, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 95-181 at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978) (emphasis added).

***Chevron* Deference**

In reviewing MSHA's interpretation of a statute, I must first inquire “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984); *Watkins Eng'rs & Constructors* 24 FMSHRC 669, 672-73 (July 2002). If the statute is clear and unambiguous, effect must be given to its language. *Id.* When a statute is ambiguous or silent on the point in question, a further analysis is required to determine whether an agency's interpretation of the statute is a reasonable one. *Id.* Deference is accorded to “an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable.” *Energy W. Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). “The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected.” *Watkins* 24 FMSHRC at 673 (citations omitted).

In *Watkins*, the Commission reached the following conclusion:

The Supreme Court recently recognized that *Chevron* deference is appropriately applied to an agency's interpretation of a statute when Congress delegated authority to the agency to speak with the force of law when it addresses ambiguity or “fills in a space” in the statute and the agency's interpretation claiming deference was promulgated in the exercise of that authority. *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 229 (2001). Section 3(h)(1) contains an express delegation of authority to the Secretary to determine what constitutes milling. *See In re: Kaiser Aluminum and Chem. Co.*, 214 F.3d 586, 591 (5th Cir. 2000) (“Congress expressly delegated to the Secretary ... authority to determine what constitutes mineral milling”) (internal quotations omitted), *cert. denied*, 532 U.S. 919 (2001). Thus, Congress explicitly left a gap for the Secretary to fill with respect to the definition of milling. Under *Mead*, 533 U.S. at 227, the Secretary's interpretation of milling is entitled to acceptance if it is reasonable. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone Coal*, 16 FMSHRC at 13.

24 FMSHRC at 673.

“Milling” is not defined in the Mine Act, but it is defined in the Interagency Agreement between MSHA and OSHA (“Interagency Agreement”) published in 1979. The Interagency Agreement defines milling as “the separation of one or more valuable desired constituents of the crude from the undesirable contaminants with which it is associated.” Mine Safety and Health Administration and the Occupational Safety and Health Administration Interagency Agreement,

44 Fed. Reg. 22,827, 22,829 (April 17, 1979), *amended by* 48 Fed. Reg. 7,521 (Feb. 22, 1983).⁵ Appendix A to the Interagency Agreement provides a detailed description of the kinds of operations included in mining and milling. The Agreement defines the term “milling” in Appendix A, as follows:

Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated. A CRUDE is any mixture of minerals in the form in which it occurs in the earth's crust. An ORE is a solid crude containing valuable constituents in such amounts as to constitute promise of possible profit in extraction, treatment, and sale.

44 Fed.Reg. at 22,829; Ex. S-5 at 4. Appendix A further provides that “milling” consists of *one or more* of the following processes: *crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching, and briqueting. Id.*; Ex. S-5 at 6 (emphasis added). Additionally, Appendix A provides that MSHA has authority to regulate the “mining” of “alumina” and “lime.” *Id.* Further, the Interagency Agreement explicitly states that “MSHA[’s] jurisdiction includes [...] alumina and cement plants.” 44 Fed.Reg. at 22,828; Ex. S-5 at 2.

It is important to note that the Secretary realized that “[n]otwithstanding the clarification of authority provided by Appendix A, there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and beginning of the manufacturing cycle.” *Id.* at 22; 828 Ex. S-5 at 2. The Interagency Agreement also states that the “scope of the term milling may be expanded to apply to mineral product manufacturing processes where those processes are related, technologically or geographically, to milling.” *Id.*

Analysis under *Chevron* of the Secretary’s interpretation of “milling”

The question to be answered is whether the Secretary's interpretation of “milling” is based on a “permissible construction of the statute,” *Chevron*, 467 U.S. at 842, and is reasonable, *Mead*, 533 U.S. at 227. In *Watkins*, the Commission held that the Secretary’s interpretation of “milling” was reasonable when MSHA adopted the view that the term “milling” can apply to cement plants even if the facility does not separate waste from valuable material. *Watkins*, 24 FMSHRC at 674. The Commission further found that:

The Secretary's interpretation of “milling” is consistent with the general usage of the term within the mining industry and with

⁵ The interagency agreement was originally reported in 39 Fed. Reg. 27,382 (1974), and the current agreement is published in 44 Fed. Reg. 22,827 (1979).

ordinary usage. Within the industry, milling is defined as: “The grinding or crushing of ore. The term *may* include the operation of removing valueless or harmful constituents ...,” while mill is defined as a “mineral treatment plant in which crushing, wet grinding, and further treatment of ore is conducted.” *DMMRT* at 344 (emphasis added); *see also Alcoa Alumina & Chems., L.L.C.*, 23 FMSHRC 911, 914 (Sept. 2001) (using *DMMRT* to determine usage in mining industry). The ordinary meaning of “to mill” is “to crush or grind (ore) in a mill,” and the term “a mill” is defined as “a machine for crushing or comminuting some substance.” *Webster’s Third New Int’l Dictionary (Unabridged)* 1434 (1993); *see also Nolichecky Sand Co.*, 22 FMSHRC 1057, 1060 (Sept. 2000) (“Commission ... look[s] to the ordinary meaning of terms not defined by statute”). These definitions are consistent with the Secretary’s interpretation that milling includes processes such as grinding and crushing [...] The legislative history of the Mine Act also supports the Secretary’s interpretation of “milling.” Congress clearly intended that any jurisdictional doubts be resolved in favor of coverage by the Mine Act. S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) (“*Legis. Hist.*”) (“[I]t is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.”).

24 FMSHRC 669, 674-76

The court in *Watkins* also held that “in light of the explicit delegation of authority granted to the Secretary in section 3(h)(1) to define milling, that the Secretary’s definition of milling was reasonable.” *Watkins*, 24 FMSHRC at 676 (citing *In re Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 592-93 (5th Cir. 2000)). The court in *Kaiser* held that “the Interagency Agreement expressly includes alumina plants within the jurisdiction of MSHA. Despite some general language ceding regulation of ‘refining’ to OSHA, the Agreement could not be more clear that ‘[p]ursuant to the authority in section 3(h)(1) to determine what constitutes mineral milling ... MSHA jurisdiction includes ... alumina and cement plants.’” *Kaiser*, 214 F.3d at 592 (citing Interagency Agreement at 22,827).

I agree with the reasoning cited above and find the Secretary’s interpretation of “milling” under the Interagency Agreement to be reasonable and entitled to deference.⁶

MSHA has jurisdiction over Kerneos’ Chesapeake Plant

⁶ Kerneos argues that the Secretary’s current interpretation, being in conflict with its previous position, is entitled to considerably less deference. *See Watt v. Alaska*, 451 U.S. 259, 273 (1981); *See General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976). I find this argument to be unavailing. Even if the Secretary was given less deference in its interpretation of what constitutes “milling,” I still find the Secretary’s interpretation to be reasonable.

The issue now becomes whether it was reasonable for the Secretary to conclude that the Chesapeake Plant is a “mine” engaging in “milling.” Kirk concluded that the Chesapeake Plant should be subject to MSHA's jurisdiction because they used alumina and lime materials and applied milling processes such as grinding, crushing, sizing, kiln treatment, and sintering to make cement. (Tr. 186:1 – 187:4) I agree with this assessment and for the foregoing reasons find that the Interagency Agreement supports the Secretary's determination the MSHA has jurisdiction over the Chesapeake Plant.

The Respondent argues its Chesapeake Plant is the only calcium aluminate cement manufacturing plant in the U.S. and is not a “mine” engaged in “milling.” (Resp. Br. at 1; Tr. 248:5-7) Kerneos states that no material is extracted at the plant and it does not handle raw, mined materials. (*Id.* at 1-2; Tr. 288:16-17) Kerneos argues that the materials used at the plant have “already undergone significant chemical and physical changes through processes performed at other facilities” and is “performing manufacturing of consumer-ready products at its plant,” and therefore, there is no treatment of “the crude crust of the earth.” (*Id.* at 2, 13; Tr. 288:13-15)

I find these arguments unconvincing. The raw materials being sintered at the Chesapeake Plant are alumina and quicklime. (Tr. 31:15-17; 255:23-24) Alumina and lime are listed among the items that are under MSHA's jurisdiction in the Interagency Agreement. (Tr. 128:14-25; 44 Fed. Reg. at 22,829) Indeed, the materials were included in the list codified by MSHA and OSHA even though both alumina and lime are not “crude crust[s] of the earth” that require processing.

Kerneos also argues that it is not a “cement” plant but is a “specialty” cement plant that makes calcium aluminate cement. (Resp. Br. at 19) Kerneos further establish that it is not a “cement” plant by comparing itself to Portland cement plants, which are under MSHA's jurisdiction. It claims that its plant is smaller, uses a different type of kiln, its raw mills are smaller, there are no preheaters, they do not perform some of the processes that are listed on the Interagency Agreement,⁷ and its finished product differs substantially from Portland cement plants. (Resp. Br. at 19-21; Tr. 204:2; Tr. 206:2-3; Tr. 207:1-6) These arguments are equally unconvincing. The size of the plant, and its production and operation capacities does not negate the fact that its processes are similar to the Portland cement plants, and that its processes are listed in the Interagency Agreement. Additionally, stating that the Kerneos plant is a “specialty cement plant” simply establishes that the Kerneos plant is a “cement plant” that produces a very expensive product. (Tr. 276:8-13)

Goossens testified at the hearing that crushing (Tr. 130:9; Tr. 132:9), grinding (Tr. 132:13-25; 134:3), sizing (Tr. 134:18-21), sintering (Tr. 135:20), and kiln treatment (Tr. 136:19)

⁷ Concentrating (Tr. 207:12), washing (Tr. 207:13-14), drying (Tr. 207:15-16), pelletizing (Tr. 210:8-10), and evaporation (Tr. 210:11-12) are some of the processes not used at the Kerneos plant. This, however, is not relevant in my analysis of whether the processes that are used at the plant are included under the Interagency Agreement because “[m]illing consists of one or more of the [...] processes” listed in the Interagency Agreement. 44 Fed. Reg. at 22,829.

all occur at the Chesapeake plant. Graham Reid⁸ admitted at the hearing that at the Chesapeake Plant, the raw mill blends and mixes and *reduces the size* of particles by *grinding*. (Tr. 295:21 – 296:14) He further admitted that *sintering* occurs in the rotary *kiln*. (Tr. 270:13-14; 296:19-21) Reid then admitted that from the kiln, the materials go into a cement mill where a *grinding* process occurs. (Tr. 298:2-13) Reid testified at the hearing that he does not think what Kerneos does with the air separator fits under the sizing definition in the Interagency Agreement because it is not a process that uses a screen. (Tr. 266:17 – 267:2) However, Reid later admitted that the air separator cannot be removed out of the process because the “particle size distribution would not be the same shape.” (Tr. 306:16-20) This shows that the air separators at the Chesapeake Plant do in fact perform a sizing function despite the Respondent’s arguments to the contrary.

Kerneos’ Chesapeake Plant is a cement plant that mills lime and alumina and performs grinding, sizing, sintering, and kiln treatment processes. It is a “mine” under MSHA’s jurisdiction as contemplated in the Interagency Agreement. I conclude that the Kerneos Chesapeake plant is subject to the jurisdiction of the Mine Act.

It is **ORDERED** that the parties immediately confer regarding the possibility of settlement pursuant to 29 C.F.R. § 2700.53, and within sixty (60) days of the filing of this decision the parties shall provide a status report to the court if a settlement has not been reached.

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

Distribution:

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Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Steward, P.C., 1909 K Street, N.W., Suite 1000, Washington, DC 20006

⁸ At the time of the hearing, Reid had been the plant manager at Kerneos’ Chesapeake plant since 2005. (Tr. 234:13-20) Reid has a master's degree in chemical engineering from the University of Cambridge in England. (Tr. 236 :22-24) For the first six years of his career, he worked for a chemical company called Imperial Chemica in the UK, like DuPont in the U.S. (Tr. 237:4-10) Reid then worked for Lafarge in London since 1999. (Tr. 238:17 – 239:2) He was promoted to production manager in two and a half years, and then became plant manager when he was transferred to Kerneos' plant in Virginia in 2005. (Tr. 239:9-25)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 8, 2015

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

v.

ROCKHOUSE ENERGY MINING,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. KENT 2012-0891
A.C. No. 15-17651-284668

Mine: Mine # 1

DECISION AND ORDER

Appearances: Brian Mauk, Esq., Office of the Solicitor, U.S. Department of Labor,
Nashville, TN, for Petitioner;

Jeffrey K. Phillips, Esq., Steptoe & Johnson, PLLC, Lexington, KY, for
Respondent.

Before: Judge L. Zane Gill

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves two section 104(a) citations, 30 U.S.C. § 814(a), issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Rockhouse Energy Mining (“Rockhouse” or “Respondent”) at its Mine # 1 mine. The parties presented testimony on July 16, 2013 in Pikeville, Kentucky.

For Citation No. 8260352:

- Rockhouse violated § 75.202(a) of the Mine Act.
- Rockhouse was not negligent.
- The injury was unlikely to result in lost workdays or restricted duty.
- The citation was not properly designated as significant and substantial.
- I assess a penalty in the amount of \$100.00.

For Citation No. 8260354:

- Rockhouse did not violate § 75.360(a)(1) of the Mine Act.
- The citation is vacated.

Stipulations

The parties submitted the following stipulations at the hearing: (Tr. 15:21 – 16:18)

1. Respondent is subject to the Federal Mine and Safety Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission;
2. The presiding administrative law judge has the authority to hear this case and issue a decision;
3. Respondent has an effect on commerce within the meaning of Section 4 of the Federal Mine and Safety Health Act of 1977;
4. Respondent operates Mine #1, Mine ID No. 15-17651;
5. The citations in this docket are complete, authentic, and admissible;
6. The inspector notes for the citations identified in paragraph 5 are complete, authentic, and admissible;
7. Mine #1 produced 605,866 tons of coal in 2010; 598,636 tons of coal in 2011; and 283,483 tons of coal in 2012;
8. The penalty will not affect Respondent's ability to remain in business;
9. The Respondent abated the citations involved herein in a timely manner and in good faith; and
10. The parties have also stipulated to the authenticity of each parties' exhibits.

Basic Legal Principals

Significant and Substantial

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

Resources, Inc., 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) (“The Secretary’s burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.”)

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

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

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

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

Negligence

Negligence is relevant in cases under the Mine Act, but since the Act creates a strict liability enforcement model,¹ negligence is not an essential part of the calculus to determine

¹ “If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator.” 30 U.S.C.A. § 814(a) (emphasis added). This Court has held that “[t]he Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of
(continued...)

whether an operator is at fault. When an MSHA inspector observes conditions that create mine hazards or otherwise fall short of the Act's requirements, a citation is required, irrespective of fault.² Negligence is, however, central to the assessment of civil penalties and to the evaluation of the enhanced enforcement elements of S&S, unwarrantable failure, and flagrant violation.

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

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

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

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

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

¹ (...continued)

fault." *Brody Mining, LLC*, 33 FMSHRC 1329, 1335 (May 2011) (ALJ Gill) (citing *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)). In *Asarco*, the Commission concluded that "the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." 8 FMSHRC 1632 at 1636.

² The logic of this is borne out by reference to the standard citation form used by MSHA, MSHA form 7000-3. Section 11 of that form lists an option for those circumstance when there is no negligence underlying the issuance of the citation. (*See Ex. S-1*)

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), “is often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator’s conduct with respect to that standard, in the context of the Mine Act’s purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ Fauver). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Penalty

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

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

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

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator

negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC at 725 (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving “extreme gravity” and/or “gross negligence,” or, as stated in the former section of 105(a), “an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances,” may dictate higher penalty assessments. See 30 C.F.R. Part 100 Final Rule, 72 Fed. Reg. 13592-01, 13,621.

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

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

Special Assessment

Through notice and comment rulemaking, the Secretary promulgated regulations specifying the “Criteria and Procedures for Proposed Assessment of Civil Penalties.” 30 C.F.R. Part 100. Those regulations provide two options for determining the amount of a civil penalty to be assessed by the Secretary: regular assessment and special assessment. 30 C.F.R. §§ 100.3, 100.5(a), (b). Penalties for the vast majority of violations are determined through the “regular assessment” process whereby penalty points are assigned pursuant to criteria and tables that reflect the factors specified in sections 105(b) and 110(i) of the Act. 30 C.F.R. §100.3.

The regulations also allow MSHA to bypass the regular assessment process if it determines that conditions warrant a special assessment. 30 C.F.R. §100.5(a), (b). The regulations do not further explain what conditions may warrant a special assessment.³ Nor do they identify how the amount of a special assessment will be determined, other than to state that

³ In 2007, the Secretary substantially amended the penalty regulations, significantly increasing penalties for most violations, eliminating the single penalty assessment, and deleting language from section 105(a) that specified eight categories of violations that would be reviewed to determine whether a special assessment is appropriate including, violations involving an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances. 72 Fed. Reg. at 13,621.

“the proposed penalty will be based on the six criteria set forth in 100.3(a). All findings shall be in narrative form.” *Id.* The narrative findings for special assessments are typically brief and conclusory. The lack of transparency in the Secretary's special assessment process coupled with the Secretary's refusal to disclose the bases for specially assessing a penalty, can frustrate attempted explanations. However, whether the Secretary proposes a regularly or a specially assessed penalty is of little consequence and is not binding on the Commission because the Commission imposes civil penalties *de novo*.

Citation No. 8260352

On August 8, 2011, at 3:06 p.m., MSHA Inspector Billy Ray Meddings⁴ issued Citation No. 8260352 to Rockhouse Energy's Mine #1, alleging a violation of 30 C.F.R. § 75.202(a) pursuant to Section 104(a)⁵ of the Mine Act. The regulation requires that “[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” 30 C.F.R. § 75.202(a). Section 75.202(a) is a mandatory safety standard. The citation alleges:

The roof, face and ribs of areas where persons work or travel is [*sic.*] not being supported or otherwise controlled to protect persons from hazards related to fall of the roof, face or ribs on active 010-0 MMU (#3 Section) Starting two X-cut out-by Survey Spad # 30396 and extending to the working face including all six entries, loose ribs and over hanging brows exist at several locations in the affected area. This section produced coal two shifts per day and average of five days a week. A non-fatal accident involving a roof bolter operator also occurred today on this section from falling rib. This condition exposes miners working on this section to hazards associated with fall of roof and rib.

Ex. S-1.

The Violation

The citation alleges reasonably likely injury that could be expected to result in lost workdays or restricted duty, the violation was significant and substantial, one person could be affected, and the operator's negligence was moderate. *Id.* Meddings initially alleged moderate

⁴ At the time of the trial, Meddings had worked for MSHA as a coal mine inspector for approximately six years. (Tr. 17:5-12) Meddings had the initial 20 week training in 2008. He has received investigation training, and refresher training. (Tr. 17:18 – 18:9) Meddings was in the coal industry for 25 years before joining MSHA, (Tr. 18:16-25) had worked exclusively in underground coal mines his entire career, and was a foreman for 20 of those 25 years. (Tr. 19:1-22)

⁵ All citations are 104(a) citations, and therefore, no analysis is necessary to determine if unwarrantable failures existed.

negligence but later amended the citation to allege high negligence. (Tr. 54:14-18; Ex. S-1) Respondent does not contest the gravity of the violation or its S&S designation, however it takes issue with the negligence designation and the special assessment penalty. (Tr. 11:16-21; Tr. 54:8-12) It can be inferred by this that it also does not contest the fact of the violation.

According to FMSHRC's Procedural Rule 69(a), a judge's "decision shall [...] include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion *presented by the record* [...]" 29 C.F.R. § 2700.69 (emphasis added). Additionally, the Commission has made clear that "[a] judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision." *Broken Hill Mining Co.*, 19 FMSHRC 477, 478 (Mar. 1997) (citing *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994)); *see also L & J Energy Co.*, 18 FMSHRC 118 (Feb. 1996). Therefore, despite the fact that Respondent does not contest certain aspects of the citation, my decision is based on my review of the record and is not limited to what the Respondent conceded at trial. Notwithstanding, substantial record evidence supports the conclusion that there was no operator negligence, and that the S&S designation is not warranted.

There is case law specific to Section 75.202(a) violations regarding liability. In *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998), the Commission held that:

The adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard.

(citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987))⁶

Meddings was at the mine to conduct a quarterly E01 inspection. (Tr. 22:16-23) During his inspection, he was informed by mine foreman John Stanley that an accident had occurred in a different section of the mine, Section 2 in the Number 10 unit. (Tr. 23:10-14; Tr. 23:17-21; Tr. 28:8-9) Meddings went to the accident site, 30 to 40 minutes away. (*Id.*; Tr. 25:1-3) Another

⁶ I am aware of the recent Commission decision, *Jim Walter Resources*, Se 2007-203-R and SE 2007-0294 (Mar. 31, 2015), however, this decision is not relevant to the case and facts now before me.

MSHA Inspector, Darrell Hurley⁷, arrived at the mine later that morning, August 8, 2011, to investigate the rib roll accident at issue here. (Tr. 119:2-7; Tr. 125:17-21)⁸

When Meddings arrived at the accident scene, he was informed that a roof bolter, William Maynard, had been struck by rocks from a rib roll as he was spot bolting Section 2. (Tr. 25:16-22; Tr. 35:5-12; Tr. 127:9-15) Two rocks fell on Maynard; one struck him the face, resulting in lacerations, the second fell on top of him, pinning him down until two miners lifted the rock off him. (Tr. 31:17 –32:12; Tr. 119:19-25)⁹ While these background facts shed light on the events that occurred on August 8, 2011, and why Meddings was in the area in question, Meddings testified multiple times that the citations were not issued merely because the accident occurred. (Tr. 86:3-10; Tr. 90:20-21)

The area in question had been idle for approximately two to three years. The operator had been rehabilitating the area for approximately three weeks prior to August 8, 2011, in preparation for resumed production, by cleaning, scooping, and spot bolting. (Tr. 36:3-12; Tr. 37:6-13; Tr. 121:2-6; Tr. 164:20 – 165:11; Tr. 207:9-18) Meddings testified that if an area of the mine is left unattended, under normal wear and tear and due to weather conditions, the roof and ribs deteriorate, and some sections may fall. (Tr. 36:17 – 37:3) Hurley also believed the alleged violative conditions were caused by weathering and the amount of time that this area had not been mined. (Tr. 132:16-21)

The Secretary's position is based on Meddings' testimony that he observed poor conditions in the area, including areas where the rib material and brows (overhangs) were loose. (Tr. 40:3-9; Tr. 53:19-22) He claimed he inspected rib areas in Sections 2, 5, 6, and 7, and found sections of loose or fallen material ranging in thickness from one to 19 inches. (Tr. 46:5-9) Meddings issued Citation No. 8260352 for violating Section 75.202(a) for those loose rib area and brows. (Tr. 53:6-14)

According to Hurley, the violating conditions were obvious, such that a casual observer would recognize the rib issues, and extended through two crosscuts comprising approximately six to eight entries. (Tr. 143:18 – 144:2; Tr. 131:1-6)

⁷ At the time of the hearing, Hurley had worked at MSHA since 1999 and had been a roof control specialist since 2002. (Tr. 115:25 – 116:7) Part of Hurley's duties as a roof control specialist is to investigate roof falls and roof accidents. (Tr. 119:11-14) Hurley had additional roof control specialist training in addition to his regular mine inspection training, and yearly refreshers for both. (Tr. 116:12-24) Before joining MSHA, Hurley spent 29 years working in underground coal mines, the majority of which was spent in Kentucky, and he worked as a foreman or a supervisor for 23 of those years. (Tr. 117:5-12; Tr. 118:1-4)

⁸ Hurley and James Tackett, a Commonwealth of Kentucky mine inspector, traveled underground together to investigate the accident site. (Tr. 120:12-14)

⁹ Meddings drew a picture of the rock and measured its size. He testified that the rock measured 4-12 inches thick and ranged from 11-36 inches in height. (Tr. 29:17-23; Ex. S-3)

Meddings', and to a certain extent Hurley's, testimony is undercut by the evidence presented by Respondent's witnesses.

Jonah Puckett¹⁰ testified that at the time of the accident he had not drawn up a cut plan to begin mining coal, which was his responsibility. Production mining was not to start until the rehabilitated Sections had been checked for hazards. (Tr. 207:23 – 208:4; Tr. 215:9-19) That morning, Puckett brought his crew down to the sections to check for hazards and to address any they found before production was to begin. (Tr. 209:4 – 210:10) During this process, Puckett saw a wide corner and told a roof bolter to spot bolt it. (Tr. 210:11-14) He did not notice any loose rib material in the area, but he did pull down a small amount of draw rock from the roof. (Tr. 216:5 – 217:5)

David Scott¹¹ was in charge of rehabilitating Sections 1-7 and testified that as part of the rehabilitation process his crew pulled down loose rib material and spot bolted the surrounding area. (Tr. 166:8-16; Tr. 167:15 – 168:4; Tr. 207:9-18) On the morning of the accident, Maynard was setting up a roof bolter to continue rehabilitating the area by adding more roof support. (Tr. 128:3-6) Scott testified that in Section 3, the roof and ribs had some sloughage, but he did not see any hazards. (Tr. 169:20 – 170:4).

Day shift mine foreman Ricky Mays¹² testified that before the accident, he had been to Section 3 to help John Stanley, the mine foreman. According to Mays, it looked “pretty good” and only needed spot bolting. (Tr. 224:22 – 225:20) Mays did not think the rib conditions were bad; there was only some scaling. (Tr. 228:14-25)

¹⁰ At the time of the hearing, Puckett was a section boss at Process Energy for Alpha Natural Resources. (Tr. 205:19-20) Additionally, at the time of the hearing, Pucket had been in the coal industry for 10 years. (Tr. 205:21-22) Puckett received his foreman's certification in 2006. (Tr. 206:1-3) On August 8, 2011, Puckett was the section foreman at Mine #1. (Tr. 206:15-18)

¹¹ At the time of the accident, Scott was employed at Rockhouse Energy Mining, but is currently employed by Process Energy. (Tr. 163:24 – 164:3) At the time of the hearing, Scott had been mining since November, 1998, and was a certified mine foreman and an underground EMT. (Tr.164:4-8). In August, 2011, Scott was the general mine foreman for the second shift. (Tr. 164:12-14)

¹² At the time of the hearing, Mays had been in the mining industry for 23 years and was working at Process Energy Sydney Coal plant. (Tr. 221:7-14) Mays got his foreman certification in 1998 and had been bossing since then. (Tr. 221:22 – 222:3) At the time of the accident, Mays was employed by Rockhouse Energy Mining as mine foreman for the day shift. (Tr. 221:18-21; Tr. 239:13-14)

Mine superintendent Jonah Varney¹³ testified that the ribs and roof were intact but just looked flaky. He did not believe it posed a hazard of injury to a miner. (Tr. 248:4-17)

Additionally and importantly, Terry Coleman,¹⁴ a Kentucky mine examiner and unaffiliated witness, was in the area near the section where the accident occurred. Coleman had inspected Section Nos. 1, 2, 3, 4, and 5 before the accident occurred. (Tr. 99:11-14; Tr. 101:7-10; Tr. 181:24 – 182:5) He did not recall noticing any roof or rib problems that would rise to the level of a citable hazard, and at the time of his inspection, he did not issue any citations for the area. (Tr. 186:3-18)

My evaluation of the record evidence relating to this citation derives from a thorough weighing of the evidence, some of which is in conflict on key points. In particular, I find that Meddings' testimony about and documentation of areas of loose ribs and hanging brows is substantially contradicted and undercut by the testimony of the other persons who were in the area prior to the accident and who were tasked with the same responsibility to look for and document any hazardous conditions. I am also convinced that Meddings felt obligated to write a citation that matched the seriousness of the incident, even though there was objectively no way to anticipate or prevent it and the resulting injury. Starting from a desire to justify what he felt was an appropriate response to the event, Meddings documented conditions that were not evident to equally competent and neutral pre-incident observers. Starting with a predetermined degree of seriousness in mind makes it tempting to find "evidence" to support the desired outcome. I am sure it seemed inadequate to write a simple "technical" violation of the roof control plan based on the mere fact that the incident occurred (strict liability) and equally appropriate to reach for facts that would justify a penalty commensurate with the seriousness of the accident. However, that is what happened in my view.

I find that the violative conditions that Meddings and Hurley testified about were exaggerated. This finding is due in large part to the testimony of the third party witness Coleman, who was present on and near the section before and after the accident, who did not believe there was any hazard requiring the issuance of a citation. I also find that a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would not have found a violation of the standard here. Therefore, because the Respondent conceded the violation, and because of the strict liability nature of the Mine Act, I find that there was a violation of Section 75.202(a).

¹³ At the time of the hearing, Varney had been in the mine industry for 25 years and obtained his foreman certification in 1993. (Tr. 241:12-18). At the time of the issuance of the citation, Varney was the mine superintendent. (Tr. 242:12-14).

¹⁴ At the time of the hearing, Coleman had been working for the Office of Mine Safety and Licensing for Kentucky as an underground safety analyst for five years. (Tr. 179:7 – 108:1) Coleman had been in the coal industry for 37 years. *Id.* Coleman testified that as a safety analyst, he observed employees through a cycle of their work and made corrective suggestions if he saw anything wrong, or if there was poor job performance. (Tr. 181:3-10)

Negligence

Meddings assessed the violation at high negligence because of the numerous locations where he claimed to find loose rib material, his belief that the section was active, and the fact that a preshift examination was performed in the area. (Tr. 54:19 – 55:5; Tr. 56:1-7) Meddings did not note any mitigating circumstances, nor did he mention that mine management had claimed any. (Tr. 64:19-23).

At the trial, counsel for the Secretary stressed repeatedly that the area where the incident occurred was in production and active. Whether the section was active is immaterial to my conclusions here. In an earlier iteration, Section 75.202(a) limited its coverage to “active” areas in a mine, i.e. “active underground roadways, travelways and working places,” Safety Standards for Roof, Face and Rib Support, 53 Fed. Reg. 2354-01, 2355. Section 75.202(a) was amended to broaden its protective scope to include areas where “persons work or travel.” 30 C.F.R. § 75.202(a). Therefore, whether the section was “active” is of no importance here.

Scott testified that during rehabilitation, he was looking for hazards and directed his crew to fix any problem areas. (Tr. 169:10-19) On August 8, 2011, Scott traveled through the section where the accident occurred and did not observe any dangers or hazards. (Tr. 170:17-22) Additionally, in the preshift examination conducted by Ralph Lockard¹⁵ the morning of the accident, loose rib material in the Number 3 Section and draw rock in the Number 5 Section were pulled, indicating that the mine was actively looking for hazardous roof and rib conditions in the rehabilitated area. (Tr. 82:23 – 83:2; Tr. 84:13-23; Tr. 107:11-13; Ex. S-3). In addition to Lockard pulling loose rib material and draw rock, Scott instructed miners to spot bolt, and Puckett instructed miners to spot bolt and pull draw rock, all on the day in question and before the citation was issued.

As a Kentucky mine examiner, Coleman is tasked to look for rib and roof issues during an imminent danger inspection. (Tr. 185:6-10) If he sees a violation, like MSHA inspectors, he must issue a citation. (Tr. 188:24 – 189:13) Coleman testified that while he did find a small area where there was some loose rib material, he did not believe the area was hazardous and did not issue a citation. Because the sections had been inspected by Coleman, and no hazards were found, the Respondent is not expected to know that there was a hazard. Additionally, as discussed further below, there was an adequate preshift examination performed on the section. Thus, I conclude that the Secretary failed to prove by a preponderance of the evidence that Respondent was highly negligent.

Low negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” 30 C.F.R. § 100.3(d). No negligence is when “[t]he operator exercised diligence and could not have known of the

¹⁵At the time of the hearing, Lockard worked for Process Energy and was no longer employed by Rockhouse Energy. (Tr. 194:8-10) Lockard had been in the mining industry since 1993. (Tr. 194:11-14) Lockard received his foreman certification in 2007. (Tr. 194:15-23) Lockard testified that he began performing preshift examinations in 2007 and was trained by his mentor, the previous foreman. (Tr. 194:24 – 195:7)

violative condition or practice.” *Id.* The nature of the violation was exaggerated by the Secretary, its scope was limited based on Coleman’s testimony, and Meddings’ testimony was not credible regarding the extent of the violation. It is clear that the citation was written in response to the fact that a serious rib roll incident happened and not because of an identifiable hazard in the rehabilitated area of the mine. Respondent was actively rehabilitating the section and had been pulling loose ribs and roof material during the preceding three weeks of rehabilitation, during the preshift examination on the morning of August 8, 2011, and before production began on the section on August 8, 2011. Indeed, the mine decided to forego immediate production in the interest of safety. (Tr. 209:4 – 210:10; 210:11-14; 216:5 – 217:5) I cannot find that the operator knew or should have known that a violating condition existed. There were also considerable mitigating circumstances. The operator exercised reasonable diligence in assuring the rehabilitated area was safe for its employees. I conclude that the Respondent was not negligent.

Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Meddings testified that he marked the citation as lost work days or restricted duties because the miner in the accident was injured. (Tr. 57:21 – 58:3) He further stated that, at a minimum, a miner would suffer lost workdays or restricted duty from a rib roll. He was aware of miners sustaining injuries such as broken ankles or ribs, even permanently disabling injuries, from rib rolls. (Tr. 58:7- 59:1) The citation also alleged that one person would be affected. (Ex. S-1) I find and concur that an injury from a rib roll is serious in nature and could result in lost work days or restricted duty.

Significant and Substantial

There was a violation of a mandatory safety standard. There is a reasonable likelihood that an injury of a reasonably serious nature, i.e. broken bones, could result from such a violation. The rib conditions here did not contribute to a discrete measure of danger of injury to a miner that the operator could have foreseen. This alone prevents this violation from being S&S. In addition, the evidence did not establish a reasonable likelihood that the conditions observed by Meddings would result in an injury. The violation was not S&S.

Penalty

The Secretary specially assessed the penalty for Citation No. 8260352 at \$42,000.00. Mine #1 produced 605,866 tons of coal in 2010, 598,636 tons of coal in 2011, and 283,483 tons of coal in 2012. Rockhouse’s business would not be significantly affected even if the full special assessment were imposed. Meddings recommended that the citation be specially assessed “to protect the miner.” (Tr. 66:3-6) Hurley testified that from June 1, 2011, through August 7, 2011, Rockhouse received only one 75.202(a) citation. (Tr. 148:24 – 150:2; Ex. R-3) Rockhouse was not negligent. According to the parties’ stipulations, Rockhouse demonstrated good faith in abatement of the violative condition. The violation is not S&S.

The Secretary failed to prove the magnitude of the gravity necessary to sustain a special assessment. Operator negligence was neither gross nor extreme. There were no unique or

aggravating circumstances to warrant a higher or “special” penalty assessment. I assess a penalty of \$100.00.

Citation No. 8260354

On August 9, 2011,¹⁶ at 10:45a.m., Inspector Meddings issued Citation No. 8260354, alleging a violation of 30 C.F.R. § 75.360(a)(1) pursuant to Section 104(a) of the Mine Act. The regulation requires that “[e]xcept as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8–hour interval during which any person is scheduled to work or travel underground [...]” 30 C.F.R. § 75.360(a)(1). Section 75.360(a)(1) regulates a mandatory safety standard. The citation alleges:

The operator failed to conduct an adequate exam of the active 010-0 MMU (# 3 Section) on 08/08/2011. Several loose ribs and brows exist starting 2 X-cuts outby survey spad #30396 and extending to the work faces, including all 6 entries. The foreman’s date, time and initials are in the area showing preshift was conducted between 05:00 to 05:38. This mine produces coal two shifts per day and average of five days per week. A non-fatal accident also occurred on this MMU on 08/08/2011 involving a roof bolter operator being stuck [*sic.*] by rib roll in the preshifted area. In order to abate this citation the operator must conduct and record additional training for all examiners at this operation on hazard recognition and proper steps when hazards are observed. The operator must start this training immediately with each on-coming shift examiners until all three shifts have been trained.

Ex. S-2.

The Violation

The citation alleges that injury was reasonably likely; the injury could reasonably be expected to result in lost workdays or restricted duty; the violation was significant and substantial; nine persons could be affected; and the violation resulted from high negligence. *Id.* Meddings cited the Respondent under Section 75.360(a)(1), which requires operators to conduct a preshift exam mine three hours before a shift begins in working and travel areas of the mine. (Tr. 67:22 – 68:9) Meddings issued Citation No. 8260354 for an inadequate preshift examination because of the loose ribs and brows present in the violative area. (Tr. 67:4-13)

To establish a Section 75.360(a)(1) violation, the Secretary must prove that violating conditions existed at the time of the pre-shift examination and were obvious. *CONSOL Penn.*

¹⁶ The citation was issued the day after the alleged violating condition occurred. (Tr. 72:10-15) Meddings testified that he did not review the preshift examination books before he left the accident site, but reviewed them the next day when he returned to the mine. (Tr. 73:11-16)

Coal. Co., 32 FMSHRC 545, 552 (May 2010)(ALJ Bulluck). A violation exists where “a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that hazardous condition that the standard seeks to prevent.” *Canon Coal Co.*, 9 FMSHRC at 668.

Lockard conducted a preshift examination between 5:00 and 5:38 a.m. on August 8, 2011. (Tr. 84:8-12; Tr. 144:3-5; Ex. S-2) Meddings reviewed the preshift paperwork which had been completed three hours prior to start of the shift. No hazards were noted in the preshift exam records. (Tr. 57:13-18; Tr. 67:4-19; Tr. 68:3-4; Tr. 70:8-11; Tr. 74:1-5)¹⁷ Meddings concluded that the miners were exposed to loose ribs and brows which were not corrected, and that the oncoming foreman was not notified of the alleged hazards. (Tr. 70:25 – 71:6)

The weight of the evidence does not support this version. Meddings’ own contemporary notes, his own testimony, and the testimony of other witnesses at the hearing contradict this. In his notes taken on August 9, 2011, Meddings wrote: “[a]lso, preshift conducted on 8/8/11 between 5 a.m. and 5:38 a.m. Shows loose rib in Number 3 and draw rock in Number 5. Loose rib and draw rock was pulled.” (Tr. 82:23 – 83:2; Ex. S-3). Meddings noted and testified on cross examination that Lockard noticed a loose rib in Section 3 and addressed the situation by pulling it down. (Tr. 84:13-18; Tr. 107:11-13). Meddings also stated that Lockard had mentioned draw rock in Section 5 in his exam notes, which was pulled down. (Tr. 84:19-23) Lockard confirmed this. He saw some loose rib material in the Number 3 and 5 entries and used a slat bar to pull it down to make the area safe. (Tr. 197:21 – 198:2)

Meddings testified that based upon his 25 years of mining experience, the violating conditions existed at the time of the preshift examination and it would take more than few minutes, a few hours, or even an entire shift for the amount of loose rib and brow material that was present to occur. (Tr. 68:10 – 69:7; Tr. 79: 16-25; Tr. 109:11-19) Hurley also believed that the conditions cited across the sections occurred over a longer period of time. (Tr. 144:6-12) The categorical nature of these statements is contrary to Meddings’ testimony that, in his experience, he had seen a rib roll occur in an area that had appeared fine, but burst seconds later. He testified of other instances where rib and roof conditions had changed in seconds. (Tr. 78:18-25; Tr. 92:20-22) Hurley also agreed that poor rib conditions could develop instantly. (Tr. 156:20-23) Also, Meddings did not testify at a prior deposition nor did he put in his notes that these conditions existed for several shifts. (Tr. 81:2-6)

Most importantly, Meddings did not inspect the sections until almost 10 hours after the preshift examination had occurred and hours after the accident happened. (Tr. 77:13-18; Tr. 92:11-19) Casting further doubt on his testimony, Meddings testified that the area in question had been rock dusted, but that he did not recall if there was rock dust in the cracks. (Tr. 98:4-10) Hurley’s notes confirm this, and indicate that the area was clean and well rock dusted. (Tr.

¹⁷ If the preshift examiner had noticed hazardous conditions, Meddings testified he could have closed the area off with signs to make sure no one traveled the area, and corrected the conditions. (Tr. 71:7-12) This, however, is unconvincing because of Medding’s testimony on cross examination and his own notes taken on August 9, 2011, which are discussed in more detail below.

161:2-4) The testimony and contemporaneous records indicate that whatever issues Meddings claimed to have with the ribs and roofs, occurred after the area was rock dusted, and presumably after the preshift examination was done.¹⁸

Lockard testified that when he performs a preshift examination, he looks at the ventilation and air flow, checks for methane accumulations, spillage, curtain issues, loose ribs, and draw rock -- anything that could hurt miners. (Tr. 195:21 – 196:3) He takes his job seriously and would not want to expose any of the miners to potential harm. (Tr. 196:8-17) Lockard testified that when he saw the two rib issues mentioned in his preshift records he addressed them right away. He did not think he left any hazardous conditions behind. (Tr. 198:11 – 199:21)

Additionally, Coleman was present near the section when the accident occurred and had inspected entries Number 1, 2, 3, 4, and 5 before the accident occurred. At the time of his inspection, Coleman did not recall there being any roof or rib problems, other than a small section between Sections 1 and 2. He did not issue a citation because the area was small and he did not believe it to be hazardous. (Tr. 185:11-20; 185:22 – 186:2) This, coupled with the fact that Lockard had pulled loose ribs and draw rock during his preshift and did not believe he left any hazards behind, evidences the adequacy of the preshift examination.

The Secretary did not prove that the alleged conditions were present at the time of the preshift examination, nor did the Secretary prove that the condition was obvious. A reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would not have considered the small section of loose rib in between Sections 1 and 2 a hazard warranting protection under this standard. The Secretary failed to prove that the Respondent violated Section 75.360(a)(1). Thus, I vacate Citation No. 8260354.

WHEREFORE, it is **ORDERED** that Rockhouse pay a penalty of \$100.00 within thirty (30) days of the filing of this decision.

It is further **ORDERED** that Citation No. 8260354 be **VACATED**.

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

¹⁸ It must be noted that the Secretary in his brief points out that because the roof was spot bolted during the shift, this is evidence of an inadequate preshift examination. (Resp. Br. at 11) However, the Respondent was cited for loose ribs and brows, not inadequate roof support, i.e. inadequate roof bolting. (Ex. S-2)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004

April 8, 2015

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

v.

DAVID DUQUETTE EXCAVATING
and JESSICA RUSSELL,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. YORK 2012-303-M
A.C. No. 19-01232-296289

Mine: Extec 6000S S/N 5045

**DECISION GRANTING RESPONDENT’S MOTION
FOR SUMMARY DECISION**

Before: Judge Feldman

This matter presents the issue of whether the extracting and scalping of earthen material by David Duquette Excavating (“Duquette”) for use as land fill in its excavation business is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, as amended, U.S.C. § 801 *et seq.* (“Mine Act”). On October 25, 2012, the Secretary of Labor (“Secretary”) filed a Petition for Assessment of Civil Penalty. On November 20, 2012, Duquette, appearing *pro se*, filed an Answer to the Petition, asserting lack of jurisdiction by the Mine Safety and Health Administration (“MSHA”).¹ Duquette maintains that its earthen material extraction site is exempt from MSHA jurisdiction because it is a “borrow pit.” On October 6, 2014, the Secretary moved for summary decision of the jurisdictional issue. As discussed below, I construe Duquette’s continuing objections to jurisdiction in this matter as a cross-motion for summary decision on the issue of jurisdiction.

I. Background

As specified below, the parties have stipulated to the material facts in this case. In May 2012, MSHA Inspector Zane Burke was traveling near Hinsdale, Massachusetts, when he observed screening equipment at Duquette’s extraction site. (Stip. 1). Having not previously encountered or inspected Duquette’s operation, Burke stopped at the site and observed a truck driver loading earthen material from the site into a dump truck bearing the name “Duquette Excavating”. (Stip. 2). The material was loaded into the dump truck in preparation for

¹ The civil penalty matter in Docket No. YORK 2014-4-M concerning David Duquette Excavating involves the identical jurisdictional issue. YORK 2014-4-M has been stayed pending resolution of the present case.

transportation to a Duquette residential excavation construction site where it was to be used as land fill. (Stip. 23, 25-27).

Burke was uncertain whether Duquette's extraction activities were subject to Mine Act jurisdiction and sought the opinion of his supervisor, who advised him that there was "MSHA jurisdiction because the material was going into interstate commerce." (Stip. 11-12). Thereafter, Burke conducted an inspection of the extraction site and issued nine citations, six of which were designated as non-significant and substantial (non-S&S) in nature. The violations concerned maintenance of the dump truck and of a front-end loader, as well as berm conditions and Duquette's failure to notify MSHA of commencement of its operations. Burke required David Duquette to complete a mine operation identification form. (Stip. 14). MSHA ultimately designated Duquette's extraction site as Mine ID No. 19-01232. The Secretary proposes a \$908.00 civil penalty for the nine citations.

II. Stipulations

The Secretary relies upon the following stipulated facts in support of his motion for summary decision on jurisdiction:

1. In May 2012, Zane Burke, a safety inspector employed by MSHA's Field Office in Albany, New York, was traveling in Western Massachusetts when he saw two screens in a pit he had not previously encountered.
2. Mr. Burke drove into the pit area and observed that Milton Blakely, a truck driver, was loading a Mack dump truck bearing the name "Duquette Excavating" and a telephone number "413-623-5517".
3. Mr. Burke learned from Mr. Blakely that the owner was not present.
4. While he was on the pit site, Mr. Burke observed Mr. Blakely stock piling material at the Extec screen plant.
5. Mr. Burke drove to a garage on the site which had a telephone number for Mr. Duquette and called him. He identified himself as being from MSHA and said that he wanted to speak to Mr. Duquette about his pit.
6. Mr. Duquette arrived and Mr. Burke explained that MSHA had jurisdiction over his single deck screen.
7. For some period of time previously, MSHA did not inspect single screens, but in May of 2012 the policy in effect was to inspect single as well as double decked screens.

8. Mr. Duquette replied that he had purchased the screen two years previously and that an MSHA inspector had told him (Duquette) that he (Duquette) was not under MSHA jurisdiction.
9. Mr. Burke told Mr. Duquette that there was a provision that if you did not run 200 hours, then you would be taken off the list. Mr. Duquette told Mr. Burke that the pit was in service less than 200 hours.
10. Mr. Burke was told that after scalping was done, that the material that was dug was used in Mr. Duquette's excavation business as fill.
11. Mr. Burke then called a supervisor at the Metal/Non-Metal District Office, Dennis Yesko, to discuss MSHA's jurisdiction.
12. Mr. Yesko informed Mr. Burke that the plant and the pit were under MSHA jurisdiction because the material was going into interstate commerce.
13. Mr. Burke relayed what Mr. Yesko had told him (Burke) to Mr. Duquette.
14. Mr. Burke then presented a mine identification card to Mr. Duquette and asked him to fill it out.
15. Mr. Duquette stated that he did not have time to fill it out but would call Mr. Burke in the morning.
16. At a telephonic conference with Judge Feldman, Mr. Duquette was asked whether any of the material he excavated from his pit was moved off site as part of the excavation business Mr. Duquette engaged in.
17. Mr. Duquette stated that material excavated from his pit is used to provide fill when foundations are dug off site as part of his excavation business.
18. Mr. Duquette has claimed that prior to Mr. Burke's inspection of his pit in May of 2012, that an MSHA inspector, John Moon, told Mr. Duquette that MSHA did not have jurisdiction over his pit because only one product was in use at the pit, and after scalping the material off the boulders, little scalped material was staying on site.

[The parties omitted a stipulation number 19.]

20. Mr. Duquette has also claimed that there is no MSHA jurisdiction over his pit because his pit is a "borrow pit."
21. In 2012, Mr. Duquette had a total of himself, plus one employee working for his excavation company.

22. Mr. Duquette took material off-site three (3) times.
23. Mr. Duquette took bank-run raw material[] and loaded [it] on a dump truck.
24. The material was generally clean fill.
25. The material was then transported off site in Mr. Duquette's dump truck.
26. The purpose was to fill in a back yard to level it out.
27. It was beneficial to the home owner because the yard was made more usable.
28. Material (transporting) in 2011 and 2012 was done very infrequently as the economy around Berkshire County was not very good. It occurred approximately three (3) times in 2011 and 2012.

Parties' Agreed Statement of Facts (Oct. 6, 2014).

III. Procedural History

The Secretary has moved for summary decision on the jurisdictional question. As noted, Duquette is appearing *pro se*. The Commission has long-facilitated the participation of parties appearing *pro se* in Commission proceedings. *See, e.g., Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (explaining special considerations for *pro se* litigants); *see also* 29 C.F.R. §§ 2700.3(b), 2700.4 (permitting participation in Commission proceedings without counsel).

In *Kanaval's Excavating & Gravel*, 36 FMSHRC 2795, 2797 (Oct. 2014) (ALJ), Judge Paez construed a *pro se* respondent's silence as a failure to participate in a summary decision motion where the *pro se* respondent had wholly failed to participate in the proceedings despite the judge's repeated efforts to elicit a response from the respondent. Unlike in *Kanaval*, Duquette's jurisdictional objection has been consistent and its position has been acknowledged in the Secretary's filings. As such, I construe Duquette's previous objections to the citations at issue based on a lack of MSHA jurisdiction over the subject activities as a cross-motion for summary decision.

IV. MSHA/OSHA Interagency Agreement

Section 3(h)(1) of the Mine Act defines a "mine" as "excavations . . . resulting from, the work of extracting . . . minerals from their natural deposits . . . [and/or] the milling of such materials." 30 U.S.C. § 802(h)(1)(C). As a general proposition, it has been held that the screening of earthen material to enhance its value, by satisfying market specifications, gives rise to Mine Act jurisdiction. *See, e.g., Drillex Inc.*, 16 FMSHRC 2391, 2395-97 (Dec. 1994) (holding that the drilling, blasting, rock excavation, and crushing of stone to be used as fill for embankment and road base purposes in furtherance of road construction constitutes "mineral extraction and milling," giving rise to Mine Act jurisdiction). However, as discussed below, the

Secretary has recognized an exception to such jurisdiction when the extraction of earthen material constitutes a “borrow pit.”

A “borrow pit” generally is defined as:

- (a) The source of material taken from some location near an embankment where there is insufficient excavated material nearby on the job to form the embankment. Borrow-pit excavation is therefore a special classification, usually bid upon as a special item in contracts. It frequently involves the cost of land or a royalty for material taken from the land where the borrow pit is located; it also often requires the construction of a suitable road to the pit. This type of excavation therefore usually runs higher in cost than ordinary excavation.
- (b) An excavated area where borrow has been obtained.

Dictionary of Mining, Mineral and Related Terms 62 (2nd ed. 1997).

In 1979, MSHA and the Occupational Safety and Health Administration (“OSHA”), divisions of the Department of Labor, entered into an interagency agreement to provide guidance to affected employers on the principles and procedures for distinguishing between Mine Act jurisdiction and Occupational Safety and Health Act jurisdiction over “borrow pits.” Paragraph B.7 of the 1979 Interagency Agreement delineated the parameters for a “borrow pit.” The Interagency Agreement provides:

“Borrow Pits” are subject to OSHA jurisdiction except those borrow pits located on mine property or related to mining. (For example, a borrow pit used to build a road or construct a surface facility on mine property is subject to MSHA jurisdiction). “Borrow Pit” means an area of land where the overburden, consisting of unconsolidated rock, glacial debris, other earthen material overlying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.

44 Fed. Reg. at 22828 (“Interagency Agreement”) (emphasis added).

MSHA adopted interpretive guidelines in 1996 to clarify the 1979 Interagency Agreement with respect to borrow pits. The interpretive guidelines provide, in pertinent part:

. . . [I]f earth is being extracted from a pit and is used as fill material in basically the same form as it is extracted, the operation is considered to be a “borrow pit.” For example, if a landowner has a loader and uses bank run material to fill potholes in a road, low places in the yard, etc., and no milling or processing is involved, except for the use of a scalping screen, the operation is a borrow pit. The scalping screen can be either portable or stationary and is used to remove large

rocks, wood or trash. In addition, whether the scalping is located where the material is dug, or whether the user of the material from the pit is the owner of the pit or a purchaser of the material from the pit, does not change the character of the operation, as long as it meets the other criteria.

MSHA *Program Policy Manual*, Section 4, I.4-3 (1996) (“Interpretive Guidelines”) (emphasis added).

V. Analysis

a. *Elam* Test

As a threshold matter, I recognize that the statutory definition of a mine should be broadly construed. *See, e.g., Marshall v. Stoudt’s Ferry Prep. Co.*, 602 F.2d 589, 592 (3rd Cir. 1979); *Cyprus Indus. Minerals Corp.*, 3 FMSHRC 1, 2-3 (Jan. 1981), *aff’d* 664 F.2d 1116 (9th Cir. 1981), *citing* S. Rep. No. 181, 95th Cong., 1st Sess. 15 (1977). However, it is also true that questions of Mine Act jurisdiction should be resolved on the basis of: (1) whether the subject activities are normally performed by a mine operator; and (2) whether the activities performed are undertaken to make the extracted material suitable for a particular use or to meet market specifications. *Oliver M. Elam*, 4 FMSHRC 5, 8 (Jan. 1982). Obviously, the extraction of bulk fill dirt necessary for commercial or residential construction is not a process that is normally viewed as mining. Moreover, the bulk material extracted by Duquette lacks intrinsic value because is not uniquely suitable for a particular purpose that can satisfy market specifications. Consequently, as a general matter, Duquette’s activities do not satisfy the Commission’s *Elam* criteria for Mine Act jurisdiction.

Notwithstanding *Elam*, the Secretary’s stipulation that interstate commerce may be a relevant consideration in resolving the jurisdictional issue despite the plain meanings of the 1979 Interagency Agreement and MSHA’s 1996 Interpretive Guidelines begs the question. (*See* Stip. 12). The Commerce Clause provides the authority for Congress’ promulgation of the Mine Act. The Commerce Clause, alone, cannot confer Mine Act jurisdiction. Whether the activities sought to be regulated by the Mine Safety and Health Administration can be reasonably construed to constitute mining is not an inconsequential matter.

b. *Kerr* Case

I have previously addressed the circumstances under which the extraction and screening of earthen material provide a basis for Mine Act jurisdiction in *Kerr Enterprises, Inc.*, 26 FMSHRC 953 (Dec. 2004) (ALJ). In *Kerr*, the material extracted by the operator consisted of clay, sand, topsoil, and a sand/clay mix, which occurred naturally in the soil. *Id.* at 955. Extraction occurred by means of backhoes or front-end loaders. *Id.* The only “processing” that was performed at the facility was through the use of a power grid or scalping screen on about twenty percent of the materials in order to remove roots and other wood debris. *Id.* No sizing of materials was otherwise performed. *Id.* The material extracted from the site was sold to more than fifty unaffiliated customers. *Id.* The customers included landscape companies, refinery contractors, construction contractors, and concrete companies. *Kerr*, 26 FMSHRC at 955.

In *Kerr*, the operator’s attempt to elude Mine Act jurisdiction by asserting that its excavation activities constituted a borrow pit was rejected. Rather, the full-time continuous extraction and commercial sale to numerous customers to fulfill their specific needs, based on the material’s extrinsic value, such as topsoil for landscapers, and sand and clay for concrete companies and refinery contractors, was held to be “a far cry from the one time, or intermittent, local fill dirt activity contemplated for OSHA jurisdiction [of a borrow pit] in the Interagency Agreement.”² *Id.* at 957.

c. *Duquette* Jurisdictional Question

Turning to the circumstances in this case, unlike *Kerr*, *Duquette*’s operation essentially falls squarely within the parameters for a borrow pit set forth in the Secretary’s Interagency Agreement and Interpretive Guidelines. Namely:

(1) *Duquette*’s extraction of earthen material “occur[red] only intermittently as need occur[red].” *See* Interagency Agreement.

The parties have stipulated that *Duquette* transported its screened bulk material off-site sporadically (approximately three times in two years). (Stip. 22, 28). This is clearly distinguishable from the “full-time continuous” material extraction and transportation held to be mining in *Kerr* and comports with the Interagency Agreement’s requirement that material be extracted “only intermittently as need occurs.”

(2) The material extracted by *Duquette* was “fill material” used “in the form in which it [was] extracted” and “used [by *Duquette*] more for its bulk than its intrinsic qualities.” *See* Interagency Agreement.

The Secretary does not allege, nor does the record reflect, that there was any increase in the intrinsic value of the subject earthen material as a result of *Duquette*’s scalping. Rather, the parties stipulate:

23. Mr. *Duquette* took bank-run raw material[] and loaded [it] on a dump truck.

² For example, as distinguished from fill dirt, the Commission has held that the Alaska Department of Transportation’s extraction and screening of sand and gravel from roadside pits constitutes “open pit mining” of “[s]and and [g]ravel” that is subject to Mine Act jurisdiction. *State of Alaska, Dept. of Transp.*, 36 FMSHRC 2642 (Oct. 2014) (remand decision). Similarly, a Commission ALJ has held that the extraction and transportation of sand for stockpiling at an airport for use winterizing runway surfaces contemplated the sand’s intrinsic value, rather than its bulk, and thus cannot be exempt from Mine Act jurisdiction as a borrow pit. *State of Alaska, Dept. of Transp.*, 33 FMSHRC 1550, 1553 (Jun. 2011) (ALJ). Likewise, the open pit extraction of sand used for its abrasive qualities to control ice on local road surfaces has been held to be subject to Mine Act jurisdiction. *New York State Dept. of Transp.*, 2 FMSHRC 1749, 1759 (Jul. 1980) (ALJ).

24. The material was generally clean fill.

(Stip. 23, 24).

(3) “No milling [was] involved [in Duquette’s extraction operation] except for use of a scalping screen to remove large rocks, wood and trash.” *See* Interagency Agreement.

The parties have stipulated that the material extracted by Duquette was generally clean fill. (Stip. 24). Scalping was performed as necessary to remove debris to make the material suitable for bulk fill usage. (Stip. 10, 24). In other words, Duquette’s scalping activities alone do not provide justification for Mine Act jurisdiction.

(4) Duquette used “bank run material to fill . . . low places in the yard.” *See* Interpretive Guidelines.

In this regard, the parties have stipulated that:

23. Mr. Duquette took bank-run raw material[] and loaded [it] on a dump truck.

26. The purpose was to fill in a back yard to level it out.

27. It was beneficial to the home owner because the yard was made more usable.

(Stip. 23, 26, 27).

(5) The location of the scalping is not determinative because “whether [or not] the scalping is located where the material is dug . . . does not change the character of the operation, as long as it meets the other [borrow pit] criteria.” *See* Interpretive Guidelines.

The parties have stipulated that the extracted earthen material was transported off-site by dump truck for use as fill when foundations were dug and for grading yards, in furtherance of Duquette’s excavation business. (Stip. 17, 25, 26). Thus, the fact that the scalping occurred at the extraction site, rather than where the fill was ultimately used, does not preclude consideration of Duquette’s extraction site as a borrow pit.

Finally, the thrust of the Secretary’s argument is that Duquette’s extraction site does not constitute a borrow pit because it is unclear whether the extracted material was being used “on land which is *relatively near* the borrow pit,” as required by the Interagency Agreement. Sec’y Mem. in Supp. of Mot. for Summ. Dec., at 4-5 (Oct. 6, 2014). Since it is clear that borrow pit scalping can occur at the extraction site or off-site, the transportation of the bulk material, in and of itself, does not negate a borrow pit characterization. Obviously, “relatively near” connotes an unspecified range of distance. The Secretary bears the burden of establishing Mine Act jurisdiction. The Secretary has not provided any evidence that Duquette’s excavation project sites were so far removed from its extraction site that they undermine Duquette’s assertion that its extraction site should be classified as a borrow pit. Rather, the overwhelming balance of the

evidence reflects that Duquette's extraction site constitutes a borrow pit, as contemplated by the Secretary in his Interagency Agreement and Interpretive Guidelines.

VI. Conclusions of Law

Commission Rule 67(b) provides that a motion for summary decision shall be granted only if there is no genuine issue as to any material fact, and the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b); *see also Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 8-9 (Jan. 2007) (citations omitted). Moreover, in determining if a motion for summary decision should be granted, the court must construe the undisputed material facts in the light most favorable to the opposing party. *Hanson*, 29 FMSRHC at 9.

I have construed the evidence in the light most favorable to the Secretary with respect to the stipulations proffered by the Secretary and agreed to by Duquette. In evaluating Duquette's cross-motion for summary decision on the jurisdictional question, it is clear that Duquette's extraction facility satisfies the borrow pit criteria contained in the Secretary's Interagency Agreement and Interpretive Guidelines. As such, Duquette's extraction facility is not subject to Mine Act jurisdiction.

ORDER

In view of the above, **IT IS ORDERED** that David Duquette Excavating's cross-motion for summary decision **IS GRANTED**. Accordingly, **IT IS FURTHER ORDERED** that Docket No. YORK 2012-303-M **IS DISMISSED** for lack of Mine Act jurisdiction.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution: (Regular and Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 9, 2015

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

v.

ALDEN RESOURCES, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2014-251
A.C. No. 15-17691-340648

Docket No. KENT 2014-471
A.C. No. 15-17691-347147

Mine: Mine #3

DECISION AND ORDER

Appearances: Thomas A. Grooms, Esq., U.S Department of Labor, Office of the Solicitor, Nashville, TN for the Secretary

Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, KY for Respondent

Before: Judge Andrews

STATEMENT OF THE CASE

This case is before the undersigned Administrative Law Judge on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, Alden Resources, LLC (“Respondent” or “Alden”) pursuant to Section 104(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(d).

PROCEDURAL HISTORY

MSHA inspector Charles E. Broughton participated in an inspection of Respondent’s Mine #3 that stretched at least from November 4, 2013 to November 13, 2013. On November 4, 2014 he conducted an inspection of Respondent’s continuous miner and issued, *inter alia*, Citation No. 8410021 under Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 (“the Act”). On November 13, 2013 he conducted an inspection of Respondent’s communication and tracking systems and issued Citation No. 8410032 under Section 104(a) of the Act. Respondent contested these citations and each was placed in a separate civil penalty docket (KENT 2014-471 and KENT 2014-251, respectively). The total assessed penalty for these citations was \$6,381.00. These proceedings were consolidated on December 10, 2014. A hearing was held in London, KY on December 18, 2014 at which the parties submitted testimony

and documentary evidence. After the hearing, the each party submitted two post-hearing briefs, and Respondent submitted a reply brief.

STIPULATIONS

At hearing, the parties stipulated to the Commission's jurisdiction. (Transcript at page 7).¹ Those stipulations include the following:

1. Alden Resources, LLC is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.

CITATION NO. 8410021

I. Summary of Testimony

Charles Earsel Broughton² was at the mine on November 4, 2013 for an E01 inspection during the day shift.³ (Tr. 25, 36). Broughton's electrical supervisor, Randy Lewis, and Respondent's maintenance foreman, Ted Harrell⁴, were also present. (Tr. 26, 33, 132). At the surface, Broughton inspected the weekly examination book and saw that on the preceding shift the continuous miner on the 007 MMU was examined. (Tr. 26-27, 67-68, 109). This exam occurred between 9:00-9:30 p.m. the previous night. (Tr. 111). This was the only continuous miner in use at the mine. (Tr. 27). The exam showed that a lens had been broken on a light but no other problems were listed. (Tr. 27-28, 109, 114). There was no indication in the book that this examination was incomplete and it was signed by the examiner, Rodney Wilder.⁵ (Tr. 28).

¹ Hereinafter the transcript will be cited as "Tr." followed by the page number.

² Broughton was present at hearing and testified. (Tr. 15). He had worked for MSHA for 13 years and at the time of the hearing he was a coal mine inspector and electrical specialist. (Tr. 15). Broughton worked at several underground mines doing various jobs including supervising electrical and mechanical repairman as a foreman. (Tr. 17-19). As an MSHA electrical inspector, Broughton checked underground and surface electrical installations. (Tr. 19-20). He was a certified electrician in Kentucky and had been around 20 years. (Tr. 61).

³ An E01 is a regular, mandated quarterly inspection of an underground coal mine. (Tr. 25).

⁴ Ted Harrell, Sr. was present at hearing and testified. (Tr. 130). At all relevant times, Harrell was employed by Respondent as an electrician. (Tr. 131). In that capacity he did day-to-day upkeep and maintenance on electrical issues. (Tr. 131). He had 12 years of underground mining experience and was a certified electrician and underground foreman. (Tr. 131-132).

⁵ Rodney A. Wilder, Jr. was present at the hearing and testified. (Tr. 104). At the time of
(continued...)

Wilder testified he routinely conducted a weekly exam once a week on equipment at the mine. (Tr. 121-122, 133). He would check lights, permissibility, fire suppression, and conduct a visual exam. (Tr. 108). No lids were removed from the equipment. (Tr. 108). To check permissibility, an examiner would check bolts, lock washers, and the flame path lids with a feeler gauge. (Tr. 108). A feeler gauge is a piece of metal that is placed into gaps; if it will not go in then it is permissible, but if it goes into the gap there is a problem. (Tr. 108-109). Repairmen Rodney Tipton and James Lewis were also involved in the exam but Wilder signed the book. (Tr. 109-110, 124). By the time Wilder left for the day, the miner was being used though maybe not yet mining. (Tr. 126-127). The mine produced coal before Broughton's inspection. (Tr. 134). At hearing, Fred Shannon⁶ reviewed the production reports (RX-1)⁷ and saw that on the first production shift after the examination they mined nine cuts or 480 feet of coal. (Tr. 149-151, 157). They also changed bits, which only occurred with mining. (Tr. 151).

After looking at the weekly examination book, Broughton went underground.⁸ (Tr. 29). Eventually, he inspected the continuous miner and found several conditions that Wilder had not reported. (Tr. 29-31). Wilder did not see any of the conditions cited. (Tr. 122, 124-125, 134). The only thing he saw was the lens that he reported. (Tr. 122).

Broughton issued a citation, No. 8410018, because he found the left-side headlight on the miner was missing and wires were exposed. (Tr. 31-32, 70, 112, 137). Harrell said the light was 120 volts AC but did not explain how it was broken. (Tr. 33-34, 112). Broughton did not check to see if the light was 120 volts, he relied on what he was told. (Tr. 83). Wilder's report did not note that the light was missing and he would have been placing himself in legal peril had he

⁵ (...continued)

the hearing he worked for Hubble Mining. (Tr. 104-105). Before that he worked for Respondent for three years as a repairman. (Tr. 105). In total, he had around nine years of experience in mining. (Tr. 105-106). He received electrical training on the job and was a certified Kentucky electrician (and had an MBT card). (Tr. 106-107). Electrical certification required 90 hours of classroom training, endorsement from someone already certified, and a test. (Tr. 107).

⁶ Fred Lee Shannon was present at hearing and testified. (Tr. 148). At all relevant times, Shannon was employed by Respondent as Underground Mine Manager. (Tr. 148). He focused on productivity and safety. (Tr. 149). He started in the mining industry in 1984 and held many jobs at several different operators. (Tr. 148). He was certified as an underground foreman, surface foreman, MUT, instructor of service underground, and rescue. (Tr. 149). Shannon was not present for the inspection and did not observe the conditions. (Tr. 154-155).

⁷ Hereinafter the Secretary's Exhibits will be referred to as "GX" and Respondent's Exhibits will be referred to as "RX."

⁸ Broughton took notes of his observations (GX-5) during the inspection. (Tr. 32). In those notes he recorded the comments of supervisory employees. (Tr. 32). Wilder probably made notes during his examination but he no longer had them. (Tr. 122-123). Wilder remembered the exam, but not all of the details. (Tr. 126). No one requested his notes. (Tr. 123-124). He took notes underground and then transferred them to the book on the surface. (Tr. 128-129, 133). He did not recall anything in his notes that he did not place in the book or vice versa. (Tr. 129, 134).

lied.⁹ (Tr. 71). Wilder testified that he did not see the condition during his exam and he and Harrell agreed it was not the kind of condition that could be missed. (Tr. 113, 140-141, 153). Harrell did not believe Wilder would note the broken lens but ignore the missing light. (Tr. 141).

In addition to the cited weekly examination, equipment operators were required to conduct pre-operational examinations. (Tr. 152). Wilder and Harrell testified that they often had to fix things noted on a pre-op exam and believed that if the light was missing the operator should have seen it even if Wilder did not. (Tr. 119, 136, 140). Broughton did not know if a pre-op exam was performed. (Tr. 68). Robbins said he was told, presumably by the previous shift, that the miner was ready to operate. (Tr. 36).

The miner operator and the section foreman, Reggie Robbins, denied that he knocked the light off during operation. (Tr. 34, 71, 153, 156). Shannon recalled Robbins saying that he did not know if he broke the light and was not certain, though Shannon did not hear what the operator told Broughton. (Tr. 156). The miner was remote controlled and the operator stood on the back right side out of the “red zone” (the area between the cutting head and the end of the boom).¹⁰ (Tr. 70-71, 86). If the left light was knocked out it would be the most difficult one to see. (Tr. 71, 137-138, 152). Respondent often replaced headlights that were knocked off during mining and it was usually the left light. (Tr. 113-114, 137, 140). Shannon believed it was possible that the light was present during the pre-op exam but the operator knocked it off without realizing it. (Tr. 153, 155). The missing light would not create a noticeable dark spot, as it did not affect illumination in that way. (Tr. 155-156). Further, if the light broke near the end of the shift, there would be less time for the operator to realize it was out. (Tr. 157). Harrell spoke with electricians (but not the miner operator) and he believed that this happened. (Tr. 141-142).

Broughton believed it would be noticeable if the light was knocked off during mining, but did not know if the operator would notice. (Tr. 71). He did not know if the miners would use equipment if they saw on a pre-op exam that the light was knocked off and the leads exposed. (Tr. 69). If it was in that condition, it never should have been put in the coal. (Tr. 68-69). However, when Broughton was a miner he would have followed an order to put a continuous miner into coal in this condition, but it never came up. (Tr. 68-70). Harrell and Shannon did not believe anyone would mine if the miner was in that condition or that a foreman would order them to do so. (Tr. 136-137, 153-154). Shannon believed Respondent would fire any foreman for such an action. (Tr. 154).

⁹ Broughton did not know if MSHA conducted a 110(c) investigation into Wilder’s actions but took no action. (Tr. 72). He was also not aware of anyone going to jail recently on a 110(c). (Tr. 72). Wilder recalled being interviewed by MSHA. (Tr. 119-121).

¹⁰ The boom was usually 36-38 feet from the miner so the operator would usually be that far from the face if an ignition of a methane pocket occurred. (Tr. 86-87). However, there were lots of places that the operator might be, not just the area 36-38 feet behind the cutting face on the right side. (Tr. 87). Sometimes the operator would be close enough to touch the machine (though he would be in the red zone if he did). (Tr. 85-86).

Broughton also found that the lid on the master station on the right side of the miner had an opening exceeding the 0.004 inch limit; in fact it was over 0.005 inches.¹¹ (Tr. 39-40, 73, 114). This was a permissibility violation.¹² (Tr. 39). The limitations on gaps are designed to prevent a methane ignition in the box.¹³ (Tr. 40). A gap beyond that limit would be a flame path because methane could enter. (Tr. 40-41). Once methane entered the box it could be ignited by the normal operation of a miner. (Tr. 41). A master station contains several electrical components, including switches and relays. (Tr. 39). Switches are a set of contacts through which current flows that can be opened or closed causing small arcs. (Tr. 39-41). If an arc occurs while 5% methane is in the box, the opening would allow the ignition to exit and ignite the atmosphere. (Tr. 41-42).

Mine #3 mines from the Blue Gem seam. (Tr. 53, 63). This seam was low, likely 40 inches with a 28-30 inch coal seam and 12-14 inches of rock. (Tr. 48-49, 135). Generally, the Blue Gem seam liberates some, but not a large, amount of methane. (Tr. 53-54). The mine had no history of methane. (Tr. 57, 140). However, small quantities of liberated methane were detected in sample bottles. (Tr. 55). Also, mines, including Blue Gem mines, can have “pockets” of methane where the gas is trapped in the coal seam and released while mining. (Tr. 54). Such a pocket can have more methane than would normally be liberated at the mine. (Tr. 54). Broughton inspected Kentucky Darby Mine which had never had issues with gas, but it had a methane ignition and five men were killed. (Tr. 55). However, he conceded that Darby occurred in a sealed area where methane was allowed to accumulate into the explosive range for years, not in an active area. (Tr. 55-56).

Wilder did not note the gap during his exam. (Tr. 115). But, he believed that it would only take a jar to cause a gap to open. (Tr. 115). Blue Gem coal is very hard and the rock,

¹¹ He used a 0.005 feeler gauge but did not use a 0.006-inch feeler. (Tr. 50, 74).

¹² Any mining equipment used in by the last open cross cut must be “permissible” to prevent ignition of methane or coal dust. (Tr. 20). Manufacturers submit components to MSHA for testing and, if they meet the requirements, they receive approval. (Tr. 20-21). Electrical equipment must be maintained in the approved condition. (Tr. 20). Pieces of equipment contain numbered “explosion proof enclosures” or “XP enclosures.” (Tr. 21).

¹³ Methane is a gas found in coal mines that is explosive when it has a 5-15% concentration and an 18-20% concentration of oxygen, but it will burn at lower percentages. (Tr. 21, 25, 57-58). Broughton was trained on methane and air mixture and how they relate to explosions in underground coal mines. (Tr. 22). He did not know the exact levels of methane below five percent that would burn, but it could happen if the conditions were right. (Tr. 53). Methane ignitions can suspend and ignite coal dust, causing an extremely violent explosion. (Tr. 22). However, not all methane ignitions result in explosion. (Tr. 22). Ignition can occur when a continuous miner finds a pocket of methane and the ventilation does not carry it away. (Tr. 22-23). In that case, there will be flames but it will burn itself out immediately. (Tr. 23). Under MSHA regulations, any equipment that cuts or hauls coal from the face must have methane monitors. (Tr. 23-24, 52). If a monitor detects one percent methane a light will flash to warn the equipment operator and he must cease mining. (Tr. 23-24, 52). Between 2 and 2.5 percent methane the machine automatically cuts off. (Tr. 24, 52).

generally sandstone, is even harder. (Tr. 134-135). The low seam meant rock had to be cut to reach the coal. (Tr. 116). Wilder and Harrell testified they had seen the miner jump, bounce, buck, and shake while mining. (Tr. 115, 135-136). Harrell testified that blue gem coal would cause tremendous wear from the vibrations. (Tr. 134). The vibration could cause gaps to occur in the time it took to do a normal cut. (Tr. 138). Even in softer coal it is necessary to tighten things on routinely and with the rock it was more necessary. (Tr. 115-116). Harrell testified that he and his crew had to continuously tighten bolts during 8-hour shifts. (Tr. 138). However, Respondent did not conduct extra exams to account for these problems and left it up to section foreman to determine how to handle the hard coal. (Tr. 143-144). If a problem existed that required immediate attention, it would be locked and tagged out. (Tr. 143). Broughton conceded that Blue Gem was very hard. (Tr. 63). He did not know what type of bits were used on the continuous miner but would not be surprised that they used sturdier rock bits. (Tr. 64, 135). He knew that the hard coal could cause a miner to vibrate. (Tr. 63). But he did not believe that mining, even nine cuts, would cause a gap to open, even 0.001-inches. (Tr. 74-75).

Broughton also found the right-side XP enclosure was missing the upper right corner bolt needed to fasten the lid. (Tr. 42, 87-88, 117). This condition could allow a gap of more than 0.004 inches, creating the same issue as the master station condition. (Tr. 42). Here no gap was exposed but all bolts were still required to be tightened. (Tr. 88-89). However, the metal of the box would expand and contract from the heat. (Tr. 42, 88-89). Harrell testified that any bolt on the machine would need to be tightened three or four times a shift and that he had seen them loosened by vibration. (Tr. 139). Again, Broughton did not believe vibration could loosen bolts or open gaps even by 0.001 inches. (Tr. 65, 67). Instead, he believed the condition occurred when the panels were removed for work and improperly tightened. (Tr. 66). If panels were not opened they would not be loose. (Tr. 66-67). Wilder testified he never saw this condition on his exam and that it would have been easy to replace the bolt if he had. (Tr. 117).

Additionally, Broughton found the miner was missing two or three hose conduits. (Tr. 43, 118). Hose conduits protect cables in the electrical wiring of machines. (Tr. 43). When a hose conduit is damaged, the cable can be damaged. (Tr. 43). The hose conduit is different from the outer jacket of the cable, it is additional protective material. (Tr. 43). The outer jacket was not damaged and there was no reason to believe the inner jackets that covered the leads were damaged. (Tr. 79). Conduits can be damaged quickly and Broughton could not remember if there were indications of how long the conduits had been damaged. (Tr. 79-80).

Broughton also cited Respondent for failing to properly pack the 995 VAC trailing cable. (Tr. 43). That cable continuously provided power to the miner (even when the miner pulled out of the cut) and went to the power center. (Tr. 43-44, 102). An XP box was located where this cable entered the miner. (Tr. 44). The cable is installed into the box with a packing gland. (Tr. 44). The packing gland was checked with a feeler gauge or by loosening the restraining clamp and pulling the cable. (Tr. 76-77). If the cable slides out or can be pushed in then it is not properly packed. (Tr. 77). Without the gland, methane can go into the box. (Tr. 44). A reasonable weekly examiner would check the packing gland with a visual examination but in doing so would probably not see that the gland was damaged. (Tr. 77-78). A normal weekly examination would not involve removing the cover and looking at the clamps. (Tr. 80-81, 118). As a result,

Wilder would not have seen the damaged cable in his examination and therefore this condition was not a basis for the inadequate exam citation. (Tr. 78-79).

Further, Broughton cited a missing shield on top of the machine designed to protect components underneath. (Tr. 44-45). The condition could have damaged the power wire going to the scrubber motor. (Tr. 45). The miner operator said that this condition had occurred while he was mining and therefore was not part of the inadequate exam citation. (Tr. 45, 79).

Finally, Broughton found an accumulation of combustible material. (Tr. 38, 110). He did not measure the accumulation with a ruler as he had been trained to do. (Tr. 89-91). Due to the amount of oil, he did not believe this condition was caused solely by the mining process. (Tr. 81-82). This belief was informed by his experience. (Tr. 82). When coal is packed, oil-soaked, and greasy, it shows the accumulation took time to form. (Tr. 82). If the oil was clean, it might have been more recent and caused by a blown hose, though it would still be combustible material. (Tr. 82). However, Broughton agreed that someone in the mine every day would have a better idea about the normal level of accumulation. (Tr. 83). Harrell believed that miners were immediately covered in oil and coal dust during mining and needed to be sprayed off daily. (Tr. 139-140, 144). Further, employees cleaned the miner each time it backed out of a cut, a couple of times a shift. (Tr. 144-145). The accumulation citation was later amended to non-S&S. (Tr. 81). Wilder testified that during his examination he did not see any more combustible material than he would expect under normal mining conditions. (Tr. 110, 112). There was some oil and dust, but no puddles of oil. (Tr. 111). The material was not hazardous so he did not put it in the book. (Tr. 112). The miner was used after the exam but before Broughton's inspection and Wilder did not see the level of material on the miner when it was cited. (Tr. 111-112).

As a result of missing headlight, the 0.005 inch gap, the missing bolt, and the combustible material, Broughton issued Citation No. 8410021 (GX-2). (Tr. 25, 81). Broughton told Harrell about the citation on the surface. (Tr. 146). Harrell could not recall if he told Broughton how quick the conditions occurred or if they conferenced the citation. (Tr. 146-147).

The citation was marked as permanently disabling because of the exposed wires and the shock hazard. (Tr. 33, 37-38, 45-46). The wires from the missing light could shock miners that contacted them while standing on the wet floor. (Tr. 33, 37). Electricity can travel on the skin or through the nervous system. (Tr. 37). If it travels through the skin there will only be a shock, but if it goes through the central nervous system, heart rhythm and breathing can be affected. (Tr. 37, 46). A miner could be permanently disabled or killed. (Tr. 38). Broughton knew of miners injured by shocks to the nervous system. (Tr. 38). It only takes a few milliamps, not 120 volts, to kill a person. (Tr. 37, 46, 83-84). He did not read the amperage, but a light bulb was present and it would need at least one amp. (Tr. 83-84). Electricity inside of the body can also burn organs and cause damage that is not apparent until later. (Tr. 46-47). Harrell testified that the missing headlight was not a serious issue unless the leads were exposed. (Tr. 140).

With respect to ignition hazard, Broughton conceded that without methane there was no likelihood of fire or explosion. (Tr. 60-61). The fact that the area was wet also lessened the likelihood. (Tr. 61). He also testified he did not cite Respondent for problems with rock dusting

and that he would have if appropriate. (Tr. 62-63). Rock dusting is conducted to decrease the likelihood of a fire and explosion. (Tr. 62).

The underlying citations were marked as reasonably likely but the inadequate examination was marked as highly likely because Broughton considered the conditions cumulatively. (Tr. 84-85). The conditions were left for an oncoming shift and more people would be exposed. (Tr. 85). Broughton marked the citation as S&S because the hazard could cause serious injury. (Tr. 47). Broughton believed two miners would be affected; the miner operator at his work station and the man hanging curtains near the miner. (Tr. 48, 85).

Broughton believed this condition was an unwarrantable failure and high negligence because these extremely obvious issues were not noted by Wilder. (Tr. 49, 146). Wilder had to have seen these conditions and no equipment other than feeler gauges were needed. (Tr. 49-50). Based on Broughton's experience, these conditions could not have occurred in the time between the exam and his inspection. (Tr. 50-51). For instance, bolts are just placed and tightened, they do not simply fall out. (Tr. 51). Also, the miner operator and foreman said they had nothing to do with light being torn from the miner. (Tr. 51). However, Broughton conceded that it was possible some conditions occurred during mining. (Tr. 75). The cut in the conduit, the broken light, and damage to the trailing cable could occur in an instant. (Tr. 76, 137, 139).

Broughton believed there was a poor maintenance program at Respondent because they were not proactive and did not observe and correct obvious conditions. (Tr. 100-101). Jackson was required to cite several conditions on the surface to make the transportation used to enter the mine and reach to the unit possible. (Tr. 100-101). These were maintenance issues, which are not the same as the examination procedure at issue here. (Tr. 101).

The production notes indicated that the miner was taken out of service until the violations were corrected. (Tr. 151). The second shift abated all of the cited conditions. (Tr. 151).

At hearing, Broughton reviewed several other citations that were not considered part of the inadequate weekly examination. (Tr. 95-100). Those violations were recorded in Citation No. 8410012 through 8410015 and included problems with a pump hose and a faulty circuit breaker. (Tr. 95-99). Most of these conditions would be covered by the monthly exam. (Tr. 95-97). The violations were not in the electrical book but Broughton had no reason to believe there was an inadequate exam because he did not know how much time had elapsed since the conditions occurred. (Tr. 95-96). For that reason, Broughton did not cite Respondent for an inadequate monthly exam and did not believe the conditions reflected a pattern of inadequate exam. (Tr. 95-97). Similarly, the condition with the circuit breaker would be covered by the weekly exam, but given the time frame Broughton did not believe it was inadequate. (Tr. 99-100). If the record book stated the equipment was examined the cited shift and everything was great, he would have placed it in the citation. (Tr. 100).

II. Contentions of the Parties Regarding Citation No. 8410021

With respect to Citation No. 8410021, the Secretary asserts that Respondent violated 30 C.F.R. §75.512, that this violation was Highly Likely to result in Permanently Disabling injuries

to two miners, that the violation was S&S, and that it resulted from High Negligence and an Unwarrantable Failure to comply. (GX-2)(Secretary's Post-Hearing Brief at 9-10). The Secretary believes that the proposed penalty of \$3,405.00 is appropriate. (*Id.* at 10).

Respondent questions the gravity and negligence findings in Citation No. 8410021. (*Respondent's Post-Hearing Brief* at 13 and 18). Specifically, it argues that no injury was reasonably likely to occur as a result of the violation and that it was not S&S. (*Id.* at 17-18). It also argued that its actions did not display high negligence or an unwarrantable failure to comply. (*Id.* at 12-16). Finally, Respondent believes that the penalty should be reduced pursuant to its proffered gravity and negligence determinations.

III. Findings of Fact and Conclusions of Law Regarding Citation No. 8410021

The findings of fact in this, and other sections, are based on the record as a whole and the Administrative Law Judge's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the ALJ has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the ALJ has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the ALJ's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

A. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §75.512.

On November 4, 2013, Inspector Hargrove issued a 104(d)(1) Citation, No. 8410021, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

The operators [sic] record and examination of the Joy miner being used on the 007 MMU is incomplete and inadequate. The operators [sic] record indicates that the exam was done on 11/3/2013 and the only hazard recorded was a busted lens in an area light. An inspection conducted by MSHA on 11/4/2013 found multiple permissibility issues that were very obvious and appear to have existed for multiple shifts. The miner is also found to have accumulations of combustible materials that are also very obvious and appear to have existed for multiple shifts. Citation # 8410018 and citation # 8410019 are being issued in conjunction with this citation. The examination of the miner was conducted by an agent of the operator. This is an unwarrantable failure to comply with a mandatory standard.

Standard 75.512 was cited 10 times in two years at mine 1517691 (10 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

(GX-2).

The cited standard, 30 C.F.R. §75.512 (“Electric equipment; examination, testing and maintenance.”), provides the following:

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

30 C.F.R. §75.512.

As Judge Feldman noted, “[i]n resolving whether a mine operator has violated section 75.512, the proper inquiry is whether the subject electrical examination has been adequately performed.” *Cam Mining, LLC*, 34 FMSHRC 2965, 2977 (Nov. 2012)(ALJ) *citing RAG Cumberland Resources LP*, 26 FMSHRC 639 (Aug. 2004), *aff’d* 171 Fed.Appx. 852 (D.C. Cir. 2005). Further, “[d]espite the essential role that examinations have in promoting mine safety, as noted, the Secretary bears the burden of demonstrating that the facts surrounding the examination evidence a violation.” *Id.* at 2976-2977 *citing Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). Finally, Judge Feldman articulated the test as asking “whether the electrical examination was performed in accordance with accepted mining industry practice and procedures.” *Id. citing Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

Any examination that fails to find existing hazards cannot be adequate or in accordance with mining industry standards. At hearing, the Secretary presented credible evidence to support the issuance of Citation No. 8410021. Inspector Broughton found that Respondent’s continuous miner had several permissibility issues. Specifically, he cited a missing headlight with exposed wires, an impermissible gap in a master station, a loose bolt on an explosion-proof enclosure, a missing packing gland, damaged conduits, a missing lid, and an accumulation of combustible material on the miner. (Tr. 31-32, 38-40, 42-45, 70, 73, 87-88, 110, 112, 114, 117-118, 137). It is undisputed that Wilder conducted a pre-shift examination the previous night and that the only condition recorded was a broken lens on an area light. (Tr. 27-28, 109, 114). Broughton also testified he believed that some of these conditions would have existed at the time of the pre-shift examination. (Tr. 25, 29-31, 81). In light of this testimony, I find that the examination was inadequate.

At hearing, Respondent conceded that the validity of the citation was not in contest. (Tr. 12). However, in its brief it implied that the citation should be vacated because it presented evidence that the cited conditions occurred during the shift and were not present for Wilder’s examination. (*Respondent’s Post-Hearing Brief* at 13 and 18). As noted *supra*, there was evidence that showed that at least some of the conditions were present at the time of the pre-shift examination. The exact nature of those conditions and their obviousness will be discussed in the negligence discussion *infra*. Regardless, there is sufficient evidence to support the validity of this citation.

Respondent stipulated to the validity of the citation at the start of the hearing. (Tr. 12). By doing so, Respondent failed to give notice to the Secretary that this issue would be raised or briefed. Respondent's action at hearing could have reasonably led the Secretary to ignore or deemphasize the issue of validity in the presentation of the case. *See 73 Am. Jur. 2d Stipulations* § 7 (2015) ("One may be estopped by an agreement or stipulation made in a judicial proceeding, and it has been said that the case for estoppel by stipulation is greatly strengthened where the stipulation has been acted upon, and the adverse party would be injured if it were not given effect.") (footnotes omitted). In fact, the Secretary's Brief stated only "Alden did not dispute the finding by Inspector Broughton that an adequate weekly examination was not conducted." (*Secretary's Post-Hearing Brief* at 9). Fundamental concepts of fairness and notice bar consideration of Respondent's arguments regarding the validity of the citation.

b. The Violation Was Unlikely to Result in a Permanently Disabling Injury And Was Not Significant And Substantial In Nature.

Inspector Broughton marked the gravity of the cited danger in Citation No. 8410021 as being "Highly Likely" to result in a "Permanently Disabling" injuries to two persons. (GX-2). With the exception of the likelihood designation, these determinations are supported by a preponderance of the evidence. Broughton also determined that the violation was S&S. (GX-2). This determination was not supported by the preponderance of the evidence.

Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is S&S "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

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

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

Regarding the first element of S&S - the underlying violation of a mandatory safety standard - it has already been established that Respondent violated 30 C.F.R. § 75.512.

The second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was not met. Inspector Broughton testified that there were essentially three discrete safety hazards that were contributed to by the inadequate exam. The Secretary claimed there was a fire hazard from the accumulation of combustible material, an ignition hazard from the gap in the lid and the missing bolt, and an electrocution hazard from the headlight. (Tr. 33, 37-38, 40-42, 45-46, 110). I will consider each alleged hazard in turn.

With respect to the accumulation of combustible material, there was no evidence on record as to the size or extent of the oil and oil soaked coal. The Secretary presented no evidence to show how this material would ignite or the ignition point of the oil. Perhaps most importantly, the parties settled the underlying Citation, No. 8410019 (GX-4) as being Non-S&S (and therefore, not reasonably likely to occur). (Tr. 81). Since the underlying condition was not S&S, the failure to find that condition during an examination was also not S&S.

With respect to hazards from the gap in the master station and the missing bolt, there was no evidence to suggest that conditions were present to create an ignition. In fact, Broughton testified that there was no methane in the area and that he had never detected methane in the working area of the mine. (Tr. 57, 140). He also conceded that without methane there was no likelihood of ignition. (Tr. 60-61). The fact that the area was wet and properly rock dusted also lessened the likelihood. (Tr. 61-63). Further, unlike other low methane mines that suffered ignitions (like Kentucky Darby) the cited condition did not occur in a sealed area where methane could accumulate. (Tr. 55-56). While this miner clearly had permissibility issues, these issues would not contribute to an ignition because the Secretary did not establish there was a fuel source.

The final alleged safety hazard, electrocution from the missing headlight, likely did not exist at the time of the pre-shift examination. The Secretary argued in his Brief that this condition could not have occurred during the shift and must have been present during the examination. (*Secretary's Post-Hearing Brief* at 9). However, this conclusion rested solely on the word of the miner operator who stated he had not broken the light. (Tr. 34, 71, 153, 156). I credit the testimony of Respondent's witnesses that the head light could easily have been broken during the shift and that the operator was simply mistaken when he stated that he did not break it or did not realize it had occurred. (Tr. 71, 137-138, 141-142, 152-157). This was especially true in light of the position of the miner operator relative to the boom during operation and the extensive amount of mining that occurred during the shift. (Tr. 70-71, 85-87). It is particularly important that Broughton did not take the simple step of checking the pre-operational examination record to confirm his suspicion that the headlight had been missing since the pre-shift examination. (Tr. 68). While it is possible that the light was broken before the examination, the Secretary did not demonstrate that was the case by a preponderance of the evidence. In light of the Secretary's burden, Broughton's hunch is insufficient to establish the fact. It is also noted roughly 17 hours elapsed between the examination and the inspection. As a result, the missing headlight cannot be considered as part of the hazard contributed to by the inadequate pre-shift examination.

Having determined that this situation does not meet the second prong of the *Mathies* test and is therefore not S&S, it is not necessary to consider the third or fourth prong. However, for the purpose of determining the gravity of this violation, it is still necessary to consider the severity of the injury that would result if miners were affected. If a methane ignition or an ignition of combustible material were to occur, the evidence and common sense establish that two miners would suffer at least permanently disabling injuries. (Tr. 33, 37-38, 45-46, 48). In short, the citation was non-S&S and unlikely occur, but if it did occur it would result in permanently disabling injuries.

c. Respondent's Conduct Is Best Characterized As "Moderate" Negligence rather than "High" Negligence and an Unwarrantable Failure.

In the citation at issue, Inspector Broughton found that the operator's conduct was highly negligent in character and the result of an unwarrantable failure. (GX-2).

Standard 30 C.F.R. §100.3(d) provides the following:

(d) Negligence. Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.

In 30 C.F.R. §103(d), Table X, the category of high negligence is described thusly: "The operator knew or should have known of the violative condition or practice and there are no mitigating circumstances." Conversely, moderate negligence is shown when "[t]he operator knew or should have known of the violative condition or practice, but there are some mitigating circumstances." Low negligence is reserved for situations where there are "considerable" mitigating circumstances.

I find that Respondent should have known about the violation and that there were some mitigating factors. With respect to knowledge, well-settled Commission precedent recognizes that the negligence of an operator's agent is imputed to the operator for penalty assessments and unwarrantable failure determinations. *See Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189, 194-197 (Feb. 1991); and *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-1464 (Aug. 1982). An agent is defined as someone with responsibilities normally delegated to management personnel, has responsibilities that are crucial to the mine's operations, and exercises managerial responsibilities at the time of the negligent conduct. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-638 (May 2000). Further, "in carrying out... required examination duties for an operator, an examiner... may appropriately be viewed as being 'charged with responsibility for the operation of . . . part of a mine,' and, therefore, the examiner constitutes the operator's agent for that purpose." *Rochester and Pittsburg Coal Co.*, 13 FMSHRC at 194 *quoting* 30 U.S.C. §802(e).

In the instant matter, Wilder was Respondent's pre-shift examiner and, as a result, was its agent. (Tr. 28). Inspector Broughton cited several issues on the miner, including a missing headlight, gaps at the master station, a missing bolt, accumulations of combustible material, and various problems with electrical cord and trailing cables. (Tr. 31-32, 38-40, 42-45, 70, 73, 87-88, 110, 112, 114, 117-118, 137). He credibly testified that some of these conditions existed at the

time of the examination. (Tr. 25, 81). Wilder testified some accumulation was present. (Tr. 110-112). Further, at hearing, Respondent's attorney conceded there was an inadequate examination. (Tr. 12). In so doing, Respondent also conceded that at least some conditions were present at the examination but not recorded. In light of the existence of these conditions Wilder, and therefore Respondent, knew or should have known that the examination was inadequate. Therefore, Respondent was negligent. The question that remains is the degree of that negligence.

In the citation at issue, Inspector Broughton found that the operator's conduct was highly negligent in character and the result of an unwarrantable failure to comply. (GX-2). The evidence does not support this designation as there are some mitigating circumstances.

Specifically, Broughton conceded that all but four of the conditions present (the accumulation, the bolt, the master lid, and the head light) could have occurred on the shift. (Tr. 25, 81). However, for the reasons discussed in the gravity section, *supra*, the preponderance of the evidence does not establish that the broken headlight was present during the pre-shift exam.

I credit Broughton's testimony that the three remaining conditions were present at the time of the examination. (Tr. 25, 81). At hearing and in its brief, Respondent presented evidence that these conditions may have arisen after the examination. (*Respondent's Post-Hearing Brief* at 13). Specifically, it stated that the conditions could have resulted from the intense vibrations of the mining process. (Tr. 115-116, 135-136, 138). I credit the testimony of Inspector Broughton that the machines would not have suffered the gaps and missing bolts from vibrations. (Tr. 74-75). These machines were designed for use in tough environments and it would take an exceptional amount of vibration to cause a screw to turn backwards all the way out of its channel and become lost. It is far more likely that these conditions already existed and were simply not noticed. With respect to the accumulations, Wilder conceded that they were present during his examination. (Tr. 110-112)

However, while these conditions existed and Wilder should have found them, I find the fact that the gaps and bolt were small, easily overlooked conditions somewhat mitigates Wilder's failure. The Secretary did not present any evidence to substantiate the size or extent of the combustible accumulation. Therefore, it is impossible to say whether the condition obvious such that an examiner would be highly likely in failing to notice it. The gap in the master station was perhaps a few thousandths of an inch from compliance and might not have been noticeable. Similarly, a single missing bolt on a large and complex machine that had not yet allowed a gap to occur might not have been particularly noticeable. While nothing *excuses* Respondent's failure to conduct an adequate pre-shift examination, a finding of "high" negligence would be inappropriate given the inconspicuous or unsubstantiated nature of the cited conditions.

The Commission has recognized the close relationship between a finding of unwarrantable failure and a finding of high negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007) *see also Consolidation Coal Company*, 22 FMSHRC 340, 353 (2000) (holding that if there is mitigation, an unwarrantable failure finding is inappropriate). *Emery Mining Corp.*, defines an unwarrantable failure, as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987). Such conduct may be characterized as reckless disregard, intentional misconduct, indifference, or serious lack of

reasonable care. *Id.* at 2004; *see also Buck Creek Coal*, 52 F.3d 133, 135-136 (7th Cir. 1995). The Commission formulated a six-factor test to determine aggravating conduct. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1350-1351 (Dec. 2009). While each factor does not need to be present in order to find unwarrantable failure, all six factors must be considered. The Administrative Law Judge will consider each of those factors in turn:

1. Extent Of The Violative Condition

There were several conditions on the miner, as discussed *supra*. There seemed to be problems in several areas on the miner, including in explosion proof enclosures and the trailing cables. (Tr. 31-32, 38-40, 42-45, 70, 73, 87-88, 110, 112, 114, 117-118, 137). This was Respondent's only continuous miner at the mine. (Tr. 27). However, many of the conditions, including most of the conditions that had existed at the time of the examination, were small in size. The instant violation therefore was only somewhat extensive.

2. The Length of Time of the Violation Existed

As discussed *supra*, the evidence showed that some of the conditions, in particular the gaps and the missing screw, had likely existed at the time of the last examination. It is not clear how long they had existed before that time, but considering the fact that they were missed on one examination it could have been for some time. Therefore, the condition was sufficiently lengthy.

3. Whether the violation is obvious or poses a high degree of danger

As discussed *supra*, the violation at issue was not particularly obvious and did not pose a considerable danger. As discussed with respect to the negligence designation, the conditions that existed at the time of the examination were small and size and may have been overlooked. The cited gaps were very small, a single bolt was missing, and the size of the accumulation was never established. Of the other conditions that occurred later, only the headlight would be obvious. But, as I found that condition occurred after the examination, responsibility for it cannot fall on that examination. As a result, none of the conditions at the time of the examination were particularly obvious. As noted in the gravity discussion, this condition was unlikely to occur and was not S&S. However, if the danger was realized it would be serious, as two miners could be permanently disabled.

4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.

There is no evidence on record to show that Respondent was on notice of the need greater effort. The only relevant evidence on that point was that Respondent had received past citations (10 of them) for similar violations. (GX-2). Past citations are relevant to the issue of whether Respondent had notice. *IO Coal* at 1353-1355. However, the Secretary presented no evidence to show that Respondent had trouble with its miners that would indicate a need for increased scrutiny during examinations. The cited standard is very broad. No testimony about the nature of these previous citations was offered to show they actually gave relevant notice. As a result,

Respondent did not have notice that greater efforts were necessary with respect to weekly examinations of the miner.

5. The operator's efforts in abating the violative condition

No evidence was submitted regarding the abatement of this condition.

6. Operator's knowledge of the existence of the violation

“It is well-settled that an operator's knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition.” *IO Coal Co.*, 31 FMSHRC at 1356-1357 (citing *Emery*, 9 FMSHRC at 2002-2004). A supervisor's knowledge and involvement is an important factor in an unwarrantable failure determination. See *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) citing (*REB Enterprises, Inc.*, 20 FMSHRC 203, 224 (Mar. 1998) and *Secretary of Labor v. Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984). In fact, a supervisor's actual knowledge can be imputed to the Respondent for purposes of determining an unwarrantable failure, in addition to the penalty. *Wayne Supply Co., supra*; *Rochester & Pittsburgh Coal Co., supra*; and *Southern Ohio Coal Co., supra*. As discussed *supra*, the preponderance of the evidence shows that Wilder knew or should have known about the inadequacy of his examination because he should have seen the cited conditions.

In light of the lack of notice, the fact that the cited conditions were not obvious or likely to occur, and the fact that Respondent's actions were best characterized as “moderate” negligence, I find that this violation was not an unwarrantable failure on the part of the operator.

d. Penalty

In this matter, the Secretary proposed a penalty of \$3,405.00 for Citation No. 8410021. The Commission has affirmed that ALJs are not bound the Secretary's proposals. *Sec. v. Performance Coal Co.*, (Docket No. WEVA 2008-1825 (8/2/2013) (*see also* 30 U.S.C. §820(i) and 29 C.F.R. §2700.30(b)). The Commission also held that, although there is no presumption of validity given to the Secretary's proposed assessments, substantial deviation from the Secretary's proposed assessments must be adequately explained using §110(i) criteria. (*Id.* at p. 2). (*see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000)). I find that a deviation from the Secretary's proposed assessment is warranted herein and will evaluate the factors contained in 30 U.S.C. §820(i) to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – in the two years preceding this violation the Plant was cited 10 times for this condition. (GX-2). However, as stated earlier, these earlier citations may not have been comparable.

(2) The appropriateness of the penalty compared to the size of the Operator's business – Mine #3 produced 37,173 tons of coal. According to MSHA's penalty assessment guidelines this gives Mine #3, 6 “mine size points” out of a possible 15. See 30 CFR §100.3(b). Further, even if Respondent produced 540,345 tons of coal, giving it 6 “controller size points” out of a possible

10. *see* 30 CFR § 100.3(b). Thus, Respondent is an above-average sized operator with moderate-sized mine.

(3) Whether the Operator was negligent – As previously shown, the operator exhibited moderate negligence.

(4) The effect on the Operator’s ability to remain in business – Respondent presented no evidence indicating the proposed penalty would affect its ability to stay in business.

(5) The gravity of the violation – As previously shown, this violation was unlikely to result in permanently disabling injuries to two miners and it was not S&S.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – There is no evidence regarding abatement or reason to believe it was tardy.

In light of the decision to modify the negligence of the citation from “High” and “Unwarrantable Failure” to “Moderate” and to remove the Unwarrantable failure designation and to modify the gravity from “Highly Likely” and “S&S” to “Unlikely” and “Non-S&S,” a reduction in the assessed penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$100.00.

CITATION NO. 8410032

I. Summary of Testimony

Nine days after he issued Citation No. 8410021, Inspector Broughton continued the E01 inspection at Respondent’s mine and worked on an initiative to check all underground mines for tracking and communication system issues. (Tr. 167-168, 173-174). MSHA wanted to ensure operators were in compliance with emergency response plans (“ERPs”).¹⁴ (Tr. 168). Broughton traveled with Harrell. (Tr. 175). During the inspection, Broughton found deficiencies with both the communication and tracking systems and issued Citation No. 8410032. (Tr. 175).

ERPs deal with communication and tracking. (Tr. 168). Communication at the mine was conducted with handheld radios that used the “leaky feeder” as an antenna. (Tr. 169, 171). A leaky feeder is a piece of flexible, insulated wire that can be used to carry a signal. (Tr. 169, 171, 196). Not everyone was assigned a radio, but a group or someone working alone would have one. (Tr. 171). There was no formula to determine who got a radio. (Tr. 171). MSHA required communication capability within 200 feet of the working face. (Tr. 169, 187).

¹⁴ Broughton’s notes for the day were on pages 1-12 of his notepad. (Tr. 176). Page 13 of the notes contains the form he used for the initiative. (Tr. 176). Pages 14-16 contained pages from Respondent’s emergency response plan (GX-25). (Tr. 177).

Tracking was achieved by giving each miner a numbered tag that was read by tag readers (or nodes) in the primary and secondary escapeways.¹⁵ (Tr. 172, 179-180, 226). Under the plan, nodes must be no more than 2,000 feet apart and they must track miners within 200 feet of the working section. (Tr. 172-173). The working section started at the outby end of the low-low and ended at the face. (Tr. 201). The primary and secondary tracking systems were tied together to create redundancy. (Tr. 180). If one cable was damaged, the system bypassed the damaged area and continues to track. (Tr. 180-183). Outside of the escapeways, miners were tracked manually. (Tr. 226-227). To do this, miners call outside and state that they are entering an area without nodes and give the location so they can be found in emergency situations. (Tr. 226-227). Tracking ensured miners could be located even if communications were not possible. (Tr. 196). Without tracking miners can be lost or trapped and cannot be located. (Tr. 196-197).

During his inspection, Broughton cited five deficiencies with the communication and tracking systems. (Tr. 179-193). The first issue noted in the citation was that there were no tracking readers supplied to the 007 MMU. (Tr. 187). Page 16 of Broughton's notes indicated this violated the ERP, page 5, Subsection 6 (Performance), number 1. (Tr. 188).

The second issue noted on the citation was that communication was not provided throughout the working section. (Tr. 188-189, 193). Page 15 of Broughton's notes indicated this violated the ERP, page 3, number 2, coverage area 2A, which required communications on each working section of the mine. (Tr. 189). Broughton tried the radios at the last open crosscut around the face and traveled outby. (Tr. 193). The radios never worked in the primary escapeway. (Tr. 193). There was very weak signal in the secondary escapeway about 200 feet outby the low rail when they actually held the radio against the cable itself. (Tr. 193, 207-208).

The third issue noted on the citation was that the primary tracking system was disconnected near the #3 Head Drive and at another location inby the first tag reader. (Tr. 189-190, 201, 215). Harrell explained that the cable was disconnected because a new system was being installed and that he believed this was proper because the secondary system was still working. (Tr. 205-206). This condition did not affect tracking because of the system's redundancy. (Tr. 202). In fact, Broughton's notes (starting at Page 17) contained the "history by tag report" showing where he tracked himself. (Tr. 179-181, 202). Broughton was tracked at the last point where a reader was located near the five head drive, past the area where the cable was disconnected. (Tr. 202-204, 206, 215). There was also a working tracker about 100 feet outby the low-low. (Tr. 210-211). Regardless, Broughton was concerned that if the secondary system was interrupted there would be no tracking. (Tr. 206).

The fourth issue noted on the citation was that miners were not being tracked within 200 feet of the working face. (Tr. 190). Page 16 of Broughton's notes indicated that this violated the ERP, page 5, number 1 (Performance), under 1AI. (Tr. 190). He did not find any readers within

¹⁵ Primary escapeways are installed in the fresh intake air and have lifelines. (Tr. 184). In an emergency, miners go to the primary escapeway. (Tr. 184). If there is a problem with the primary escapeway, another escapeway exists and is separated by stoppings. (Tr. 184-185). Air in the secondary escapeway traveled inby along the belt but was dumped into the return by a check curtain at the low rail instead of going to the face. (Tr. 185).

200 feet of the face.¹⁶ (Tr. 187, 192-193). The tracking records indicated he was not being tracked within 200 feet of the face because the reader was positioned by the low rail.¹⁷ (Tr. 181).

Respondent conceded that the tracking was behind the section and therefore technically a violation. (Tr. 219-220). However, Shannon argued that the tracking system was working on the section. (Tr. 220). The plan required tracking within 200 feet of the face and Shannon estimated that, at the farthest, the #5 Head Drive was 400-450 feet from the face. (Tr. 220-221). The low-low was three breaks in by the #5 Head Drive and was 200 feet long. (Tr. 221). He believed they were tracking 350 feet of the face. (Tr. 221). Broughton did not know how far the section had advanced past the last tracker. (Tr. 209). If it was 350 feet, then Respondent had exceeded the acceptable distance by about 150 feet. (Tr. 211). He did not know if the 350-foot estimate was correct, but he knew that they could not communicate or track at the face. (Tr. 211).

With respect to the nature of tracking, the system did not work in “real time,” but instead just noted when a miner moved past a node. (Tr. 212, 219). The system did not note how far a miner was from each node. (Tr. 219). Once a miner moved past the last node, the miner’s exact location would not be known. (Tr. 212). Shannon noted at hearing that even if the tracker was placed correctly, no one would know exactly where the miners were, only that they were in the vicinity of the last node passed. (Tr. 227). The difference would be whether the miner was known to be in a 200 foot area from the face or a 350 area from the face. (Tr. 227). Broughton was concerned that if a miner entered the face and then left by a different entry or return where there were no trackers, the miner would go missing. (Tr. 212-214). Whether a miner in such a situation would be found would be based on the placement of coal and stoppings. (Tr. 214).

The final issue was that the ERP called for an eight-man chamber but Respondent installed a 30-man chamber and failed to update the plan. (Tr. 191, 206, 222). Broughton and Shannon agreed that this was a paperwork violation and everyone was trained on the new chamber. (Tr. 191, 206-207, 222). Shannon believed the larger unit was better. (Tr. 222).

Broughton explained that in assessing this citation he considered the fact that this was an emergency standard and evaluated the gravity as though an emergency had occurred or that something had caused the implementation of the relevant parts of the ERP. (Tr. 194-195). For instance, he might consider a fire or something blocking an escapeway. (Tr. 195). Miners without communication or tracking could be lost in the smoke and die. (Tr. 195-196, 198). Lost miners are exposed to the hazards of the mine, including smoke, water, and coal bursts. (Tr. 197). As a result, he determined that an injury was reasonably likely. (Tr. 195).

Broughton believed the injuries here would be reasonably likely to be fatal because of exposure to carbon monoxide, fire, or noxious gases. (Tr. 197).

¹⁶ To advance a tracking system, the mine would install new wired and wireless readers ahead of the old ones. (Tr. 213). Broughton did not recall seeing the most recently installed trackers (though he was tracked outby). (Tr. 213). He was told they did not like to use trackers in that area because the equipment would damage them and they were expensive. (Tr. 213).

¹⁷ The low rail was part of the belt that continuously transported coal to the surface. (Tr. 182).

The citation was marked as S&S because in the event of an emergency, tracking and communication are essential to locate miners and render aid. (Tr. 198-199). Knowing where miners are located allows rescuers to direct rescue efforts, ventilate areas quickly, and direct miners to rescue alternatives. (Tr. 199). Even if the disconnected tracking system were the only condition at the mine, the citation would still be S&S. (Tr. 204-205). This was true even though he did not believe that all ERP violations were S&S. (Tr. 205). If an incident occurred in the secondary escapeway there would be no path to the surface and no tracking. (Tr. 205). On the other hand, if the 30-man chamber violation was the only issue, it would not be S&S. (Tr. 207). Without the training (which he was told about on the surface) it would be S&S. (Tr. 207).

The citation was marked as affecting eight people because there were eight on the section who would face fatal injury. (Tr. 199-200, 216).

Respondent raised several issues that could have made fatal injuries to eight miners less likely. (Tr. 208-209, 215-217, 223-224). The mine had alternative means of emergency communication including mine phones on the section, emergency phones on the intake roadway, phones in the refuge chambers, and various other phones throughout the mine. (Tr. 208-209, 223-224). The radio and phone systems were totally independent and in different escapeways. (Tr. 223). The mine had compliant, intact lifelines in both escapeways that could be used for escape in the event of an explosion or fire. (Tr. 215, 223). The mine contained sufficient and compliant SCSRs in two different locations on the section that could be used with the lifeline during escape. (Tr. 215-216, 223). There was also a working refuge chamber where miners could wait to be rescued. (Tr. 216, 223). There only issue with the chamber was the paperwork problem. (Tr. 216). However, even with all the other safety precautions, Broughton still believed it was reasonably likely that all eight men would die in an emergency situation. (Tr. 216-217).

With respect to the failure to track miners, Shannon did not believe the additional 150 feet would be reasonably likely to result in fatal injury to eight people. (Tr. 221-222). This was a technical violation like the rescue chamber violation and no one would be killed or injured. (Tr. 222). Respondent was still tracking at the drive location. (Tr. 222). This meant that they would know that a miner was at the face, even if they did not know the exact location. (Tr. 222). But they would not know the exact location even if the system was completely compliant. (Tr. 222). Shannon further elaborated that he had an instructor's card for mine rescue and participated on a mine rescue team for thirty years. (Tr. 224). From that perspective, the tracking, communication, and haven systems were important for knowing where miners were located. (Tr. 225-226). In past catastrophic events, like Sago, the mine rescuers would have to start at the drift and work their way in. (Tr. 225). It would have saved considerable time at Sago if the rescuers knew the miners had never left the section drive and lives could have been saved. (Tr. 225-226). In this case, he knew the miners were in by as far as the drive and in the event of a catastrophe they would have known where to start. (Tr. 226).

The citation was marked as "moderate" negligence because Broughton did not believe that Respondent was intentionally violating the standard. (Tr. 200). The operator had made an effort to comply, albeit an inadequate attempt, and as a result it was not "highly" negligent. (Tr. 200). The system did not come within 200 feet of the face as required by the plan. (Tr. 200).

II. Contentions of the Parties Regarding Citation No. 8410032

With respect to Citation No. 8410032, the Secretary asserts that Respondent violated 30 U.S.C. §876(b)(2)(A), that this violation was Reasonably Likely to result in Fatal injuries to eight miners, that the violation was S&S, and that it resulted from Moderate Negligence. (GX-23)(*Secretary's Post-Hearing Brief* at 10-11). The Secretary believes that the proposed penalty of \$2,976.00 is appropriate. (*Id.* at 11).

Respondent argues that the condition was not reasonably likely to result in significant injury or illness and was not S&S. (*Respondent's Post-Hearing Brief* at 18-19). Respondent presumably believes that the penalty should be reduced pursuant to its proffered gravity determinations.

III. Findings of Fact and Conclusions of Law Regarding Citation No. 8410032

a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 U.S.C. §876(b)(2)(A).

On November 13, 2013, Inspector Broughton issued a 104(a) Citation, No. 8410032, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

The operator is not following the approved Emergency Response Plan (November 2, 2012). The following deficiencies were observed during this inspection.

- 1) Two return tracking readers are not being supplied for the 007 MMU. There is one reader that is father outby at the #3 head drive.
- 2) Communications are not proved throughout the working section (007 MMU). The secondary (belt line) leaky deeder was only being maintained to the outby end of the Lo-Lo and was barely gaining reception unless a radio was placed near the cable. The primary leaky feeder cable was not working in the adjacent primary escapeway entry.
- 3) The primary tracking system was disconnected near the #3 Head Drive and another location inby the first tag reader.
- 4) Miners are not being tracked within two hundred feet of the working section as shown on page 29. There was only one reader working at the mouth of the working section.
- 5) The operator has installed a 30 man A.L. Lee Rescue chamber (model 3236-30, S# RC11838) and has not updated the Emergency Response Plan to show so.

(GX-23).

The cited section, 30 U.S.C. §876(b)(2)(A). (“Communications and Emergency Response Plans”), provides the following:

Not later than 60 days after June 15, 2006, each underground coal mine operator shall develop and adopt a written accident response plan that complies with this subsection with respect to each mine of the operator, and periodically update such plans to reflect changes in operations in the mine, advances in technology, or other relevant considerations. Each such operator shall make the accident response plan available to the miners and the miners’ representatives.

30 U.S.C. §876(b)(2)(A).

In *Twentymile Coal Company*, the Commission explained the legislative history of this section of the Mine Act:

[It] requires underground coal mine operators to develop and submit for MSHA approval and periodic review an emergency response and preparedness plan (“Emergency Response Plan” or “ERP”). *See* 30 U.S.C. § 876(b)(2)(A). The basic goals of an ERP are twofold: to evacuate miners who are endangered by a mine emergency; and to maintain miners who are trapped underground and are not able to evacuate. *Id.* at § 876 (b)(2)(B)(i) and (ii). The MINER Act specified that operators were to develop ERPs within 60 days after the date of the statute's enactment (June 15, 2006) and then submit them for approval by the Secretary. *Id.* at § 876(b)(2)(A) and (C).

30 FMSHRC 736, *1 (Aug. 2008) (footnotes omitted). The Commission further noted that Congress intended “that the principles governing the process of formulating ERPS be similar to those governing other plans under the Mine Act. *Id.* at *9. Therefore, ERPs, like ventilation or roof control plans, must address specific conditions of a particular mine. *Id.* citing *Peabody Coal Co.*, 15 FMSHRC 381, 386 (Mar. 1993).

In the instant matter, Secretary’s counsel presented credible evidence to show that Respondent failed to conform to the submitted and approved plan. Specifically, Respondent had failed to install proper readers, the communication system did not work in the primary escapeway and barely worked in the secondary escapeway, the primary tracking system was disconnected, Respondent had failed to advance trackers within 200 feet of the working section, and a paperwork error occurred with respect to the rescue chamber. (Tr. 179-193). In all of these instances, Respondent failed to comply with the Act. Respondent did not contest the citation. (Tr. 162). As a result of these facts, I find that the citation as validly issued.

b. The Violation Was Reasonably Likely to Result in Lost Workday/Restricted Duty Injury To Five Miners And Was Significant And Substantial In Nature.

Inspector Broughton marked the gravity of the cited danger in Citation No. 8410032 as being “Reasonably Likely” to result in “Fatal” injuries to eight miners. (GX-23). The inspector

also found this violation was S&S. (GX-23). These determinations are supported by a preponderance of the evidence.

Before discussing the particular facts of the case with respect to the *Mathies* S&S analysis, it is important to note that “a Judge is to consider the S&S nature of [emergency safety standards] violations within the context of an emergency.” *Big Ridge, Inc.*, 36 FMSHRC 1115, 1117 (May 2014) *citing Cumberland Coal Resources, LP v. FMSHRC*, 717 F.3d 1020, 1027-1028 (D.C. Cir. 2013)(providing that “assuming the existence of an emergency” when evaluating the S&S nature of emergency safety measures is consistent with *Mathies*). Essentially, the D.C. Circuit held that the likelihood of an emergency occurring is irrelevant under *Mathies* and the issue is the nature of the violation itself. *Id. citing Cumberland* at 1027 and *Sec’y of Labor v. FMSHRC*, 111 F.3d 913, 917 (D.C. Cir. 1997). The ERP issues cited here is an emergency safety measure and, as a result, in conducting the *Mathies* analysis, it is appropriate to presume the existence of an emergency necessitating the implementation of that plan. (*See Secretary’s Brief* at 10 and *Respondent’s Brief* at 19).

Regarding the first element of S&S - the underlying violation of a mandatory safety standard – it has already been established that Respondent violated 30 U.S.C. §876(b)(2)(A).

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation was also met. In the event of an emergency situation, the cited conditions would contribute to the hazard of miners being lost or unable to escape. Perhaps most serious would be the faulty communication system. As Broughton noted, the emergency communication system was down in the primary escapeway (the first place miners would attempt to make their escape) and could only be used in the secondary escapeway when the radio was actually touching the feeder. (Tr. 193, 207-208). In an emergency, miners would not be able to communicate with the surface and this could slow or hinder efforts to rescue. (Tr. 198-199).

At hearing, Respondent presented several redundant systems in the mine that it claimed neutralized any hazard contributed to by the cited communication violation. Specifically, Respondent’s witnesses testified about a separate phone system and other safety measures like SCSRs and lifelines. (Tr. 208-209, 215-217, 223-224). However, as Respondent conceded its brief, consideration of other safety measures is inappropriate. (*Respondent’s Post-Hearing Brief* at 19 *citing Cumberland*, 717 F. 3d at 1029). As the D.C. Circuit noted, “assuming the existence of an emergency in which [an emergency safety measure] would be necessary also assumes an emergency in which all of the redundant safety measures [the operator] seeks to rely on have failed.” *Cumberland*, 717 F. 3d at 1028-1029. The focus of the analysis is on the instant violation because “Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards.” *Id.* at 1029 *citing Sec’y of Labor v. FMSHRC*, 111 F.3d at 917. As a result, the only consideration here is whether the cited communication system contributed to a hazard. For the reasons discussed *supra*, the cited issues made it more likely that a miner would be missing in an emergency situation.

In its brief, Respondent also argued that the communication system still worked, it just had a weak signal. (*Respondent’s Post-Hearing Brief* at 19). Respondent’s characterization

severely understates the magnitude of the issue. Broughton credibly testified that the communication system was completely down in the primary escapeway. (Tr. 193). Further, the secondary communication system was barely working, miners had to actually touch their radios to the antenna to get reception. (Tr. 193, 207-208). This testimony was not challenged by Respondent's witness. In an emergency situation, miners in the primary escapeway would be unable to communicate. Further, those in the secondary escapeway would have to make laborious efforts to communicate. This is insufficient and does not, as Respondent argues, eliminate the hazard.

As with the communication system, the disruption in the primary tracking system would also contribute to a safety hazard. In the event of an emergency, something could occur that would disrupt the secondary tracking system. Since the primary escapeway was already disconnected, that would mean that all tracking would be lost from the point of the disconnected area forward. (Tr. 205). I credit Broughton's testimony that the disconnected tracking system was enough, on its own, to be S&S. (Tr. 204-205). In short, the disconnected tracking system would contribute to the hazard of miners getting lost in an emergency situation. (Tr. 198-199).

In its brief, Respondent argued that while the tracking system was disconnected, the system was designed such that even if the system was down in parts of one escapeway, the other, redundant system, would still track the miner. (*Respondent's Post-Hearing Brief* at 19). It noted the Broughton was tracked even though the primary system was down. (*Id.*). This is fundamentally similar to Respondent's argument with respect to the communications system. Redundancy was built into the system to ensure that it would continue to work even in the event of an emergency that caused other measures to fail. If one half of the system was not working during normal mining operations, Respondent was not ready in the event of a crisis. If something occurred in the secondary escapeway, all tracking would be lost because redundancy was already absent before the emergency occurred. Therefore, the fact that the tracking system was still working during a non-emergency situation did not neutralize the hazard.

The missing tracking readers and the lack of tracking within 200 feet of the face would also contribute to a hazard, albeit to a lesser extent. It is uncontested that Respondent's ERP required tracking within 200 feet of the face. (Tr. 172-173, 220-221). Similarly, it is undisputed that Respondent was not tracking at 200 feet and that, at best, the tracking system only began to monitor 350 feet from the face. (Tr. 221). In the event of an emergency, this would mean that rescuers would have a less precise idea about the location of the miners. This would contribute, to some degree, to the hazard of miners being lost during an emergency rescue situation.

Respondent presented evidence (and argued in its brief) that this was merely a paperwork violation (*Respondent's Post-Hearing Brief* at 20). It noted that the tracking system was not a "real time" tracker and therefore the only issue was whether the tracker could not tell where the miner was in a 200 foot area or a 350 foot area. (*Id.*). As a result, Respondent argued that the condition did not actually contribute to a hazard. (*Id.*) Relatedly, it argued that if miners left either the primary or secondary escapeway entry while at the face the miner would not be tracked regardless of whether it was a 200-foot or 350-foot area. (*Id.*). According to the Respondent, this lack of tracking outside the escapeways would not violate the plan. (*Id.*).

As noted *supra*, this condition made a lesser contribution to a safety hazard than the other tracking and communication violations. However, ERPs are subject to the same formulation process as other mine plans. *Twentymile, supra*. As such, Respondent submitted the ERP and that plan was approved by MSHA. Presumably there must have been a reason that Respondent was required to track within 200 feet of the face. If Respondent and MSHA believed there was no hazard in having the last tracker 350 (or more) feet from the face then that greater distance would have made it into the plan. The hazard of miners being lost in an emergency situation was higher when the untracked area was 350 (or more) feet rather than 200 feet. While the greater distance may have only marginally increased the hazard present, it was a sufficient amount to find a “contribution” as required by the second element of *Mathies*.

Inspector Broughton testified that, on its own, the installation of the 30-man rescue chamber was not S&S. (Tr. 207). Given that this was merely a paperwork error and the miners were trained on the new, larger chamber, this particular condition would not contribute to any hazard. (Tr. 191, 206-207, 222). Regardless, the remaining conditions were more than sufficient to meet the second prong of *Mathies*.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. The Commission clarified the third element of the *Mathies* test in *Musser Engineering, Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (“PBS”). The Commission held that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury.” *Id.* at 1281. Importantly, it stated that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* The Commission also emphasized the well-established precedent that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996). The likelihood of the hazard being realized must be considered assuming normal continued mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (Jun. 1986).

It is reasonably likely that, in the event of an emergency, miners getting lost would result in injury. Inspector Broughton credibly testified that tracking and communications were an important part of locating and aiding miners. (Tr. 198-199). Knowing the location of miners allowed rescuers to direct efforts and move quickly. (Tr. 199). Shannon credibly testified about the importance of time in a rescue situation. (Tr. 225-226). If an accident occurred and rescue became necessary, lack of tracking and communication could add critical time during which miners would be exposed to a myriad of hazards. It is reasonably likely that the hazard of being lost in an emergency situation would cause injury and the third prong of *Mathies* is met.

Under *Mathies*, the fourth and final element that the Secretary must establish is that there was a “reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC 1573, 1574 (July 1984). Any number of injuries could occur when miners were lost during an emergency. Inspector Broughton credibly testified that all of the miners on the section could suffer fatal injuries. Shannon raised the historical example of Sago, which showed the fatal result of being unable to

track miners after a disaster. Clearly, fatal injuries would be reasonably serious. Therefore, the fourth prong of *Mathies* is met.

Further, I note that an inspector's opinion that a violation is S&S is accorded substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d at 135-36. In this matter, Inspector Broughton credibly testified that the condition was S&S. (Tr. 198-199). As a result of the inspector's opinion and, more importantly, the factors discussed above, I find that the Secretary proved the violation was S&S by a preponderance of the evidence.

Therefore, the preponderance of the evidence supports the Secretary's determination with respect to the likelihood of injury, the severity of that injury, and the S&S designation.

With respect to the number of persons affected, the Secretary presented credible evidence that eight miners were on the section and that all of those miners would be affected by the cited condition. (Tr. 199-200, 216).

In short, the preponderance of the evidence shows that Citation No. 8410032 was reasonably likely to result in fatal injuries to eight persons and was S&S.

c. Respondent's Conduct Displayed "Moderate" Negligence.

In the citation at issue, Inspector Broughton found that the operator's conduct was moderately negligent in character. (GX-23). The substantial evidence supports this determination.

With respect to knowledge, many of the cited conditions were extremely obvious. It would be clear to any person in the mine that communications were down in the primary escapeway and that it was only possible in the secondary escapeway when the radio was actually touching the feeder used as an antenna. (Tr. 193, 207-208). It would also be obvious that the tracking system was disconnected and that trackers were not in the correct place. (Tr. 187-190, 201, 215). Further, management had a responsibility to advance the tracking system as mining occurred. (Tr. 213). As a result, it would know or should have known that in this case, tracking did not occur within 200 feet of the face. (Tr. 172-173, 220-221). Similarly, Respondent would be aware that it had installed a 30-man rescue chamber rather than the planned 8-man chamber. (Tr. 191, 206, 222). In short, there is no question that Respondent knew or should have known about the cited conditions.

Having found the requisite knowledge, the next issue was whether there were any mitigating circumstances. I credit the testimony of Broughton that a "moderate" negligence designation was appropriate because Respondent was not intentionally violating the standard. (Tr. 200). Given Respondent's attempt to comply with the standard meant that a "high" designation would not be warranted. (Tr. 200). Also, the fact that one of the conditions, the 30-man rescue chamber, was arguably more protective of miners and was, even according to Broughton, merely a "paperwork" violation, further mitigates the condition. (Tr. 191, 206-207,

222). In light of these mitigating circumstances, I find that Respondent was moderately negligent.

d. Penalty

In this matter, the Secretary proposed a penalty of \$2,976.00 for Citation No. 8410032. Having affirmed the Secretary's determinations in all respects, no deviation from the proposed penalty is necessary. In fact, the proposed penalty is appropriate under the Act. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$2,976.00.

ORDER

It is hereby **ORDERED** that Citation Nos. 8410021 and 8410032 are **AFFIRMED** as amended.

Respondent is **ORDERED** to pay civil penalties in the total amount of \$3,076.00 within 30 days of the date of this decision.¹⁸

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

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/tjb

¹⁸ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 24, 2015

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of J. DON ARNOLD,

Complainant.

v.

BHP NAVAJO COAL COMPANY,
AND ITS SUCCESSORS,

Respondent.

DISCRIMINATION PROCEEDING

Docket No. CENT 2013-541-D
MSHA Case No.: DENV CD 2013-11

Mine: Navajo Mine
Mine ID: 29-00097

DECISION

Appearances: Karla Jackson Edwards, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, TX, Representing the Secretary

Charles W. Newcom, Esq., Sherman & Howard, LLC, Denver, CO
Representing Respondent.

Before: Judge Lewis

This case is before me upon a complaint of discrimination brought by J. Don Arnold (“Arnold” or “Complainant”), a miner, against BHP Coal, LLC, (“Respondent”), pursuant to § 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(3).

Arnold filed a discrimination complaint in this matter with MSHA on February 28, 2013. On June 11, 2013, the Secretary of Labor filed the complaint with the Commission. Arnold requested revocation of a written warning and a re-evaluation on a performance review. Respondent answered on July 9, 2013, denying the substantive allegations and requesting a hearing. This docket was assigned on August 1, 2013. On November 7, 2013, Respondent filed a Motion for Summary Decision. The Secretary filed a timely Response to the Motion for Summary Decision on December 16, 2013; Respondent replied on December 20, 2013. On March 6, 2014, an Order Denying Respondent’s Motion for Summary Decision was issued.

On April 19, 2014, a hearing was set in this matter for September 17-19, 2014. On May 15, 2014, the date was changed to October 21-23, 2014. The hearing was held on October 22 and 23, 2014, at the Dale Claxton Federal Building in Durango, Colorado. On January 23, 2015, both parties submitted Post-Hearing Briefs; on February 9, 2015, both parties filed Reply Briefs. All Briefs have been fully considered.

STIPULATIONS

The parties have entered into several stipulations, admitted as Parties' Joint Exhibit 1.¹ (Transcript at 228).² Those stipulations include the following:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this action pursuant to Section 113 of the Mine Act, 30 U.S.C. §823.
2. This action is brought by the Secretary and J. Don Arnold pursuant to the authority granted by Section 105(c) of the Mine Act, 30 U.S.C. §815(c).
3. At all relevant times, Respondent, BHP Navajo Coal Company was an "operator" as that term is defined by Section 3(d) of the Mine Act, 30 U.S.C. §802(d).
4. At all relevant times, Respondent was also a "person" within the meaning of Section 3(f) and 105(c) of the Mine Act, 30 U.S.C. §§802(f) and 815(c).
5. Respondent produces products that enter commerce or has operations or products that affect commerce, all within the meaning of Sections 3(b), 3(h), and 4 of the Mine Act, 30 U.S.C. §§802(b), 802(h), and 803.
6. Respondent has employed Complainant J.D. Arnold since February 25, 1986, at Navajo mine.
7. At all relevant times, Respondent employed Complainant J.D. Arnold as a Maintenance-A Electrician.
8. At all relevant times, Complainant was a "miner" within the meaning of Section 3(g) of the Mine Act, 30 U.S.C. §802(g).

¹ Hereinafter the Joint Exhibits will be referred to as "JX" followed by the number. Similarly, the Secretary's Exhibits will be referred as "GX" and Respondent's Exhibits will be referred to as "RX."

² The hearing in this matter occurred on the second and third day of three days of hearings involving BHP Navajo. The first day of hearing concerned an unrelated matter which was later settled. However, the court reporter numbered the transcript pages continuously beginning on that first day. As a result, the transcript in this matter begins at page 223. Hereinafter the transcript will be cited as "Tr." followed by the page number.

9. Complainant engaged in protected activity within the meaning of Section 105(c)(1) of the Mine Act, 30 U.S.C. §815(c)(1) when he filed a complaint with MSHA on February 28, 2013.
10. MSHA issued Respondent a 104(a) citation, number 8480130, regarding a ventilation fan motor in the coal laboratory on February 20, 2013. On the afternoon of March 1, 2014, BHP was advised in a meeting with MSHA at the Navajo Mine that the citation was being modified to a 104(d)(1) order. At the hearing on the merits of this order on July 30, 2014, the citation was further modified to a 104(d)(1) citation because the underlying unwarrantable failure citation leading to an order had been modified to a section 104(a) citation.
11. On February 22, 2013, Complainant was “held out of service pending further Investigation” by Respondent.
12. On March 1, 2013, Respondent reinstated Complainant, allowed him to return to work and paid him for his time off.
13. On March 1, 2013, Respondent issued Complainant a written warning.
14. Respondent drafted a 2013 Performance Review of Complainant’s performance.
15. MSHA proposes a civil penalty of \$20,000.00 against Respondent on June 10, 2013 because of the allegations of discrimination against Complainant.
16. The payment of \$20,000.00 will not affect BHP Navajo Coal Co.’s ability to remain in business.

(JX-1)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Complainant, J. Don Arnold, was present at the hearing and testified. (Tr. 241). Arnold had worked at the mine since 1986. (Tr. 241). As a Maintenance-A electrician, Arnold conducted monthly electrical inspections and repaired/maintained equipment based on work orders. (Tr. 241-243). Arnold was a member of the Operating Engineers Local 953 and served as union steward, miners’ representative, and union board member for at least 15 years. (Tr. 242).

On January 19, 2013, Arnold received a work order to repair equipment in the mine’s coal lab. (Tr. 243-244, 389). At the lab, Arnold noticed that there was an exhaust fan but did not know its purpose. (Tr. 243). Arnold followed the exhaust system to the roof (despite the fact that he was not tasked with doing so) and became concerned about an open-faced motor he found there. (Tr. 243-244). He was concerned because the lab monitored for explosive gases. (Tr. 243-

244, 390). After he observed the motor, Arnold waited for his supervisor, the electric shop foreman, Kerry Steagall, to return to work.³ (Tr. 244-245, 389).

On January 22, 2013, Arnold spoke with Steagall about the possibility of a problem with gas in the lab and they went to view the motor. (Tr. 244, 389-390). Steagall and Arnold had a relationship of mutual respect. Steagall did not question Arnold's credibility or believe he would make irrelevant safety complaints. (Tr. 392). This was the first time Steagall saw the fan and he did not know when it was installed. (Tr. 391-392). They discussed the issue and were concerned that if the gas was not shut off or if there was a leak that the fan was an improper installation and would allow gas to get inside. (Tr. 392, 403). They did not know how the fan was installed, what worked, what did not work, and if there were any safety issues with the set up. (Tr. 434).

Arnold asked if they should tag out the motor but Steagall did not see a hazard and asked him to wait until they learned more.⁴ (Tr. 244, 282, 395). Steagall was unsure whether the motor needed to be changed and said he would ask Jim Berget, the chief electrical engineer.⁵ (Tr. 244-245, 392-393, 477). Arnold knew Steagall's electrical experience and if he was uncertain about the existence of a hazard, Arnold was uncertain. (Tr. 245-246). Berget told Steagall that anything installed was up to code but that he would investigate and get back to them. (Tr. 245, 393). Steagall believed any changes should wait on Berget's reply. (Tr. 394). Berget testified that he never planned to follow up, but instead told them to contact those involved in the installation. (Tr. 477-478).

On the same day Arnold filed (and Steagall signed) a near miss report regarding other equipment on the roof that he claimed was improperly installed. (Tr. 379-380, 393-394, 775). Near miss forms were created to allow hourly personnel without computers to place reports in a searchable database for supervisors to review. (Tr. 775-776). This one stated, "[i]mmediate

³ Kerry Steagall was subpoenaed and testified at hearing. (Tr. 381). He worked at the mine for 36 years and retired in June 2013, last working as an electrical supervisor. (Tr. 381-383, 458-459). In that capacity he made schedules, kept records, and conducted inspections. (Tr. 383). He supervised Arnold and Alfred Bennally and was supervised by Tim Ramirez. (Tr. 383). Steagall was a qualified electrician for 40 years. (Tr. 383-384). No loyalty to Arnold or Respondent affected his ability to testify. (Tr. 382). He was trained on the Mine Act as it relates to locking/tagging out equipment and making complaints without retaliation. (Tr. 419-420).

⁴ At safety meetings, miners were told that if they saw hazardous machinery they should tag it out and remove it from service. (Tr. 270). Arnold testified that, in reality, this rarely happened as certain equipment was never shut down and was kept running until it could be fixed. (Tr. 270-271). Here, if Arnold tagged out the motor, it would have affected the x-ray portion of the lab and the lab tech may not have been able to analyze coal. (Tr. 395-396).

⁵ Jim Berget was present at the hearing and testified. (Tr. 474). Berget retired from BHP after 22 years on May 2, 2014. (Tr. 474). During 2012 and 2013, Berget worked as the only electrical engineer at Navajo Mine. (Tr. 475). He was a qualified electrician for 30 years. (Tr. 476-477). No loyalty to Arnold or Respondent affected his ability to testify. (Tr. 475).

action taken.” (Tr. 380, 394). Anything uploaded to the database was monitored to prevent it from being overlooked. (Tr. 776-777).

On February 14, 2013, Arnold was assigned to conduct a monthly electrical inspection at the coal lab and noticed that nothing had been done with the motor.⁶ (Tr. 246, 402). He turned in his examination form and spoke to Steagall, who also had not heard anything. (Tr. 246, 329, 396). They called Berget, who said that he had not found anything, that he was not getting involved because it was not his area of expertise, and that he thought the fan was installed correctly (based on the specific gravity of propane and the location of the fan on the ceiling). (Tr. 246-247, 396-398, 482-483). According to Berget, he had made no effort to research the issue and he again told them to contact those who installed the lab to discuss classification under the National Electric Code (“NEC”). (Tr. 478, 483-485). Berget left the issue up to Steagall and Arnold. (Tr. 398).

Arnold then called the Area 3 safety department between 2:00 and 3:00 p.m. and spoke with the safety specialist, Tyler Martin.⁷ (Tr. 247, 399, 684, 718). Arnold called Martin because he was a former MSHA inspector and an underground miner and in his opinion they often had electrical skill. (Tr. 247-248). Arnold and Steagall asked Martin if the motor needed to be reclassified because of the explosive mixture of gas or propane in the exhaust system. (Tr. 408, 685-686). They wanted to know if the system was properly installed under the Mine Act. (Tr. 719, 722). Martin testified that Arnold threatened to call in a 103(g) complaint if the issue was not addressed. (Tr. 719). Arnold and Martin went to the lab and Martin took pictures with his company phone and said he would check with the company that installed the motor. (Tr. 247-248, 250, 399, 403, 404-405, 687, 693-694, 688). Arnold and Steagall believed Martin would get back to them about the issue in a few days. (Tr. 250, 405). Steagall did not mind the delay because he believed there was no hazard. (Tr. 405, 437-438).

Martin testified that during the conversation both Arnold and Steagall said there was an imminent danger in their opinion as electrical specialists. (Tr. 719). Martin did not believe there was a potential explosion hazard because the explosive level of CO was so high that anyone in the room would die before it was reached. (Tr. 686, 688-689). However, he was not a qualified electrician and did not have the same level of expertise as the electricians regarding the motor or the NEC. (Tr. 689-690). Steagall did not recall anyone saying “imminent danger” during the

⁶ Monthly inspection forms and related work orders were numbered, tracked, and filed (both on computer and in hard copies) to ensure that repairs were done on time. (Tr. 306-307, 311-313, 467-468). These forms were available for anyone to review. (Tr. 308). Steagall did not always receive the forms but they always went to Tim Ramirez. (Tr. 307, 468-469). Ramirez only reviewed the forms when there was an incident that required documentation or root-cause analysis to prevent future issues. (Tr. 611-612).

⁷ Tyler James Martin was present at the hearing and testified. (Tr. 683). In 2013 Martin was Respondent’s safety specialist. (Tr. 683). Before that, he was an MSHA inspector and had received all MSHA inspection and NEC training. (Tr. 683-684, 717). He had no electrical training beyond MSHA inspection training. (Tr. 684). He had spent 21 years in the mining industry, including two with Respondent, at a variety of jobs. (Tr. 716-718).

conversation but that was the reason they spoke with Martin, to determine whether this was an imminent danger. (Tr. 409-410).

Arnold testified he asked again if he should tag out the motor but that Martin said they did not know if there was an issue so it was not done. (Tr. 247, 282-283). Arnold told Martin and Steagall he was going to note that management told him not to tag out the motor in his monthly inspection notes (GX-1). (Tr. 248-249, 251). He wrote, “[c]oal lab, Room 508 exhaust fan needs to be Class 1, Div. 1 motor. This has been reported at least two months to management. Kerry Steagall and Tyler Martin are aware of the issue, did not remove from service as per their direction.” (Tr. 249).

Steagall did not recall this discussion but he did recall he and Arnold agreed not to take action until they heard from Martin because it was not their area of expertise. (Tr. 403-404). Steagall never told Arnold not to tag out the fan. (Tr. 471). He recalled telling Arnold at other times that he could tag out equipment if they disagreed on the existence of a hazard. (Tr. 471-472). Martin also denied telling Arnold not to tag out the fan. (Tr. 730). He told Arnold and Steagall to research the NEC and that if they believed it necessary, they should tag out or repair the motor immediately under 30 C.F.R. §77.502 and the company policy. (Tr. 689, 719-721). He testified they persisted in calling the condition an imminent danger but did not tag it out. (Tr. 721).

On February 19, Steagall typed a short report about the motor based on his (and to an extent Arnold’s) notes and gave a copy to Arnold and Tim Ramirez (GX-5).⁸ (Tr. 412-413, 469-470, 505, 510). Arnold reviewed the report and may have corrected errors. (Tr. 469-470). Steagall was not asked to make the report; he wanted to make a record and update Ramirez. (Tr. 412-413). The report included notes on Berget, Martin, and the pictures. (Tr. 413-414, 505-506). The notes indicated that Martin had promised to get back to them as soon as possible but had not done so. (Tr. 414, 508). The document does not contain the phrase “imminent danger.” (Tr. 414). Ramirez’s copy was left on Ramirez’s desk. (Tr. 470).

Later that day, Arnold and Steagall asked Martin what he had learned about the motor. (Tr. 249, 405, 508, 690-691, 794). Other electricians were present, including Ben Yazei and Lawrence Beyale.⁹ (Tr. 252 406-407, 411, 794). Martin said he had contacted the manufacturer and then talked about gas, air mixtures, lower explosive limits, and the independent nature of the monitoring system. (Tr. 250-251, 691, 726). He also noted that, based on a letter written about

⁸ At hearing, Tim Ramirez was present and testified. (Tr. 486). At the time of the hearing, Ramirez worked in the mining industry for seven years, all with BHP. (Tr. 486, 589). In 2013, Ramirez was the superintendent of maintenance execution, coal plant. (Tr. 487, 588-589). He supervised four salaried employees, one admin, and 27 or 28 mechanics and electricians including Steagall. (Tr. 317, 487, 589). He was supervised by Halgryn and Goeckner. (Tr. 316-317, 850). He had a degree in mechanical engineering from New Mexico Tech. (Tr. 591).

⁹ Lawrence Beyale was present at the hearing and testified. (Tr. 788). At that time, he was maintenance-A supervisor and had worked for Respondent for about 30 years. (Tr. 788-789). In February 2013, Beyale was the miners’ rep and his supervisor was Steagall. (Tr. 789).

the room by an outside electrical expert, the room did not fit any of the NEC classifications. (Tr. 691, 725).

According to Martin, Arnold and Steagall still thought an explosive mixture could make its way through the exhaust system. (Tr. 726). Arnold felt that Martin raised irrelevant issues unrelated to the installation questions he asked regarding the NEC. (Tr. 250-251, 371-373). At hearing, he conceded the NEC dealt with the topics Martin raised. (Tr. 375-376, 378). Steagall recalled that Martin did not have any answers to their questions despite having sufficient research time, though he did not recall specifics of the conversation. (Tr. 405-406).

Arnold and Martin looked at the fan again and saw that it was full of dust. (Tr. 400). Steagall told Arnold to vacuum out the motor and to take “before and after” photographs with his cell phone. (Tr. 252, 400, 410). Arnold was allowed to use his phone because the batteries in Steagall’s camera were dead. (Tr. 401, 461). Arnold took pictures, cleaned, and then sent the photos to Steagall’s company computer. (Tr. 253, 373). Steagall did not know if the fan was locked out while Arnold cleaned it. (Tr. 404). That would have been standard procedure, but failure to do so would not have been a big issue because there were no moving parts. (Tr. 404).

During the interaction with Martin, Arnold said that if the motor was not removed from service or fixed he was going to call in a 103(g) complaint. (Tr. 250-251, 692). According to Arnold, Martin told him to “do what he had to do.” (Tr. 250-252). Martin testified he told Arnold he had every right to make a call if he felt there was a hazard, but asked if he had done everything in his power to address the situation. (Tr. 692, 726). In Martin’s opinion, Respondent made safety a priority and miners should make a job safe before proceeding. (Tr. 692). Steagall did not recall this exchange. (Tr. 407-408). He also did not recall anyone saying “imminent danger” but it may have been part of the conversation. (Tr. 407). Beyale also did not hear anyone say “imminent danger” though he was only listening intermittently. (Tr. 794-795).

Later, Arnold called Barry Dixon and suggested filing a 103(g) complaint.¹⁰ (Tr. 253, 803). An employee could make a 103(g) complaint, but Arnold usually went through Dixon. (Tr. 336-337). If Arnold and Dixon disagreed, Arnold would file anyway. (Tr. 337, 806). Arnold contacted Dixon because miners were encouraged to follow the chain of command and give the company a chance to fix things before contacting MSHA. (Tr. 253, 270, 273, 338, 418, 548-549, 551, 755, 807). If an issue brought to a supervisor was not addressed in a day or two the miner would continue up the chain before calling MSHA. (Tr. 270, 418, 755, 807). However, imminent dangers could be tagged out immediately. (Tr. 273, 418-419, 471). Managers discussed this policy during safety meetings, Part 48 training, and had it posted on the union bulletin board. (Tr. 253-254, 272-273, 548, 652-653, 676, 807). Ruth Williams testified she had, at Respondent’s

¹⁰ Barry Dixon was present at the hearing and testified. (Tr. 802). He was the union president and business manager for the local at BHP Navajo as well as an electrician for 27 years. (Tr. 802-803, 810). He retired in 2006 after an entire career with BHP. (Tr. 336, 803, 810).

request, told miners to contact supervisors before making 103(g) complaints.¹¹ (Tr. 826-827). In light of this policy, Arnold was afraid of retaliation if he called MSHA. (Tr. 806). In fact, Dixon testified that Shawn Goeckner¹² and Mark Hoffman¹³ told him in 2007 or 2010 that they believed Arnold was making 103(g) complaints. (Tr. 675-676, 807-809). Dixon believed the company was not supposed to seek the source of anonymous complaints. (Tr. 809).

Here, Arnold explained the issue and Dixon agreed, as an electrician, that there was an explosion hazard and that the configuration did not meet NEC standards. (Tr. 803-804). During the discussion Arnold did not use the term “imminent danger” and did not believe there was one. (Tr. 253, 804-805). Dixon believed there was an imminent danger because management had known of the condition for two months and failed to act. (Tr. 804-805). Dixon did not recall Arnold mentioning whether Martin told him twice he should tag out the motor if he thought there was a hazard. (Tr. 812-813). After the conversation, Dixon agreed to call in a 103(g) complaint because he believed there was an imminent danger. (Tr. 253, 336, 496, 804-805).

At 4:00 p.m. Martin was traveling with MSHA Inspector Williams when Hager called to tell her about the 103(g) complaint. (Tr. 693, 815). Williams told Martin about the complaint and noted that Martin seemed familiar with the issue. (Tr. 694, 816). Martin assumed Arnold had made the call and told Williams that he knew Arnold had made the complaint while describing their earlier exchange. (Tr. 694-696, 816-817). The complaint was anonymous but he believed his assumption was logical. (Tr. 695-696). Williams testified she ignored Martin’s comment but that he repeated it several times. (Tr. 817). Martin could not recall if he told Williams that Arnold only gave him half a day to address the issue. (Tr. 696).

Williams, Martin, and Beyale (the miner’s rep) then went and looked at the motor. (Tr. 696, 789-790, 815-816). At the lab, Williams spoke to the lab tech, Collins, who said he was the only person who worked on the fan. (Tr. 817-818). This was the first time Beyale saw the motor and he did not know who installed it. (Tr. 698-699, 790, 816, 818-819). Beyale admitted to Williams that the electricians had not inspected the roof each month, but that they should have. (Tr. 698-699). Williams inspected the motor and saw that the wires were visible from looking at holes in the structures and that there was coal dust on the motor and wires. (Tr. 818). Beyale felt

¹¹ Ruth Williams was present at the hearing and testified. (Tr. 813-814). She was an MSHA inspector for 17 years and her supervisor was James Hager. (Tr. 814). She conducted EO-1, 103(g), and imminent danger inspections. (Tr. 814-815). She completed two EO-1 inspections at Navajo Mine each year. (Tr. 815).

¹² Goeckner was present at the hearing and testified. (Tr. 837). At the time of the hearing, Goeckner was the general manger at Navajo Mine, a position he had held for two years. (Tr. 837-838). He had worked for Respondent for 23 years, including 16 at Navajo. (Tr. 838). He received a mining engineer degree in 1990 from the University of Idaho. (Tr. 838-389). He had worked in various capacities in U.S. and Australian mines. (Tr. 838-839).

¹³ Mark Hoffman was present at the hearing and testified. (Tr. 627). Hoffman started with Respondent in 2011 and it was his first job in the mining industry. (Tr. 628-629). He had around 30 years of experience in human resources. (Tr. 627, 658-659).

the dust could catch fire if the wires got hot. (Tr. 819). The group then discussed whether the motor was suited for the area and Martin provided detailed information about the motor. (Tr. 699-701, 731, 790, 819). Martin never opted out of the conversations because he was not a qualified electrician or unfamiliar with the coal lab. (Tr. 699-700). Martin pushed dust out of the way to take pictures of the rotating motor with his company phone. (Tr. 699-701, 731-732, 819).

Martin told Williams he believed that the motor was in compliance and without issue. (Tr. 791). However, he later said that Arnold had asked him to look into the motor but had only given him half a day. (Tr. 791, 820). Martin was upset about the situation and not having enough time and said that if he went down he would bring Arnold, Steagall, and everyone else involved down with him. (Tr. 791-792). Beyale made note of Martin's comment (GX-3). (Tr. 793). Williams was only concerned with the 103(g) and told Martin to stop worrying about Arnold. (Tr. 256, 792-793).

Martin, Williams and Beyale then returned to the electrical shop to discuss and research the NEC with respect to open-type motors. (Tr. 701, 729, 819-820). Williams determined that there was no imminent danger but that a citation may have been appropriate. (Tr. 702, 820-821). She wanted to review the NEC and the monthly electrical inspection before making a decision. (Tr. 702). They discussed whether the examiners had conducted inadequate examinations because they may have known about the condition for months without taking corrective action. (Tr. 702, 729). Martin believed he gave Williams the monthly inspection reports from November 2012 to February 2013. (Tr. 702, 819-820). Williams also spoke with other MSHA personnel to get their opinions. (Tr. 702, 729, 820-821). During the discussion Martin asserted his research showed the lab was not classified under the NEC. (Tr. 702, 820).

Sometime that evening, Martin called Val Lynch to tell him that a 103(g) complaint was filed.¹⁴ (Tr. 735). Lynch and Martin had already spoken earlier in the day about the issue (the first Lynch had heard about it) and Lynch had believed that Martin had the condition under control. (Tr. 734-735, 741, 758-759). During the call, Martin told Lynch that Arnold had threatened to call in a 103(g) complaint if nothing was done and updated him on all of the other details with the motor. (Tr. 735-736, 742, 769-770).

Around 8:30 - 9:30 p.m., Martin called Lynch again and told him about the 103(g) inspection. (Tr. 702-703, 736, 769). Martin described the pending citation and that Williams planned to return the next day. (Tr. 736). He described his discussion with Williams about the NEC, which he believed had settled the issue unless her supervisors disagreed. (Tr. 736-737, 770). At one point Lynch testified that they did not discuss Arnold on this call but later he recalled Martin saying he told Arnold and Steagall to tag out if they believed there was a

¹⁴ At hearing, Val Lynch was present and testified. (Tr. 734). He served as Mine Representative and heard the testimony of Arnold, Steagall, Ramirez, Hoffman, Martin, and Berget. (Tr. 734). In 2013, Lynch was the safety manager and he held that position since March 2007. (Tr. 734, 766). Martin reported to Lynch. (Tr. 734). Lynch was in charge of regulatory issues, safety, security, training, and compliance. (Tr. 766-767). Lynch had worked in safety at three different mines starting in 1995 and had been in the mines since 1980. (Tr. 767-768).

hazard.¹⁵ (Tr. 703-704, 737, 770). In neither call did Martin say he thought there was a hazard. (Tr. 782). Lynch did not hear about the complaint again that night. (Tr. 737).

At 9:44 p.m., after speaking to Lynch, Martin e-mailed management about the 103(g) inspection (GX-4). (Tr. 703, 487-490, 592). Lynch did not tell him to send the e-mail. (Tr. 704). The e-mail contained several references to Arnold. (Tr. 704). Specifically, it contained information about the motor and that Martin had learned about it from Arnold (meaning Martin was aware of the hazard and Arnold's threat to call in the complaint). (Tr. 489, 529-530, 618-619, 704, 739). Martin wrote that he had told Arnold that he believed the fan complied with the NEC and that if they believed there was an imminent danger they should tag out and make repairs. (Tr. 594-595, 722). The e-mail indicated that a citation was possible for the motor or for an inadequate exam. (Tr. 613-615, 705). Martin did not think it was inappropriate to write about the motor even though he was not a qualified electrician. (Tr. 704-705).

Ramirez received this e-mail because he was responsible for the area at issue. (Tr. 487-490, 592). This was the first he heard of the complaint. (Tr. 488-490). Despite the e-mail placing Arnold's name in the same sentence as the phrase "103(g) complaint," Ramirez did not believe that Arnold called in the complaint. (Tr. 489-490). Ramirez concluded that the problem may have been resolved. (Tr. 595). Ramirez did not question Martin's motives in sending an e-mail despite never receiving such an e-mail before. (Tr. 522). Lynch received Martin's e-mail the next day. (Tr. 737, 742, 769). He learned from that e-mail that Arnold had gotten Dixon to call in the 103(g) complaint and believed Arnold had told Martin about it. (Tr. 737-739, 742). He believed that Arnold called in the 103(g) but he did not care who did it, he only cared about dealing with the issue. (Tr. 739, 742-743). Berget learned about the complaint from someone in electrical. (Tr. 481-482). Hoffman learned about it from Ramirez shortly after it was received and never saw Martin's e-mail or the complaint. (Tr. 627-629). Hoffman and Ramirez later spoke about the issue, but not specifically about the 103(g). (Tr. 629-632). Rudy Halgryn also learned about the motor from Ramirez.¹⁶ (Tr. 831-832). There were rumors that Arnold made the complaint, but Halgryn saw documentation showing Dixon had made the call. (Tr. 835). Halgryn did not recall if Martin's e-mail said Arnold made the call. (Tr. 835-836). Like Lynch, Halgryn testified he was not concerned with who called. (Tr. 836).

On February 20, Arnold learned Respondent knew about the 103(g) complaint because the miners knew and Williams and James Hager were at the mine. (Tr. 254-255, 822-823). Beyale was the first person to speak with Arnold and he told Arnold that Martin was upset, said

¹⁵ In Martin's testimony, he referred to only a single call, the second, in which Arnold was not discussed. (Tr. 703-704). He either did not recall or simply failed to mention the earlier call where Arnold and the 103(g) were discussed.

¹⁶ Rudy Halgryn was present at the hearing and testified. (Tr. 829). He was the maintenance manager at the mine. (Tr. 829-831). During 27 years in the mining industry he had worked many jobs in different types of mines. (Tr. 829-831). He held a degree in electrical engineering. (Tr. 830). Halgryn was from South Africa and was certified as an electrician there; he did not have an MSHA electrician's card and was not a certified U.S. professional engineer. (Tr. 834-835).

that he had not been given enough time, and that he would take Arnold down with him. (Tr. 255). When Arnold saw Williams at the electrical shop, she confirmed Martin's comments. (Tr. 257). Steagall did not recall anyone being upset by MSHA's presence. (Tr. 415-417).

Williams and the miners then discussed the motor, the citation, the complaint, and the NEC. (Tr. 257, 824). Steagall, Gary Long, Ramirez, and Ned Begay were also in the shop. (Tr. 257-258). Arnold mentioned that he took photographs of the motor. (Tr. 257). Williams requested copies, Steagall printed them out, and then Arnold gave them to her. (Tr. 257, 414, 491, 823). Begay asked where Williams got the photographs and she referred to Arnold and Steagall. (Tr. 823). Ramirez learned about the photographs later. (Tr. 491). While they were talking, Val Lynch arrived. (Tr. 258, 415). There was a confrontation between Lynch and Hager about the law and the monitoring system. (Tr. 258).

Because the confrontation was getting out of hand, Hager said they would go look at the motor to see how it worked. (Tr. 258, 823-824). The group, including Arnold, Lynch, and Martin (but not Ramirez or Steagall) drove to the coal lab. (Tr. 260, 496-497, 705, 745). After they arrived at the lab, they went to the roof and looked at the open-faced motor. (Tr. 260). While there, Martin provided information about the lab, the fan, and the NEC. (Tr. 745-746). Martin was knowledgeable and experienced with electrical issues even though he was not a qualified electrician and Lynch did not question his ability to discuss these issues. (Tr. 746). Lynch did not seek Arnold's input as an electrician. (Tr. 746).

After looking at the motor, a heated discussion occurred over whether Arnold should have locked or tagged out the motor. (Tr. 260, 497-498). Lynch and Hager discussed whether lock out was appropriate if someone was complaining about an imminent danger. (Tr. 824-825). Williams testified Lynch looked at Arnold when he spoke. (Tr. 825). Arnold testified that Lynch said Arnold had failed to do his job and questioned his qualifications and abilities. (Tr. 260-261). Williams quoted him as saying "I believe I have unqualified people here. If they walk away, then you are not a qualified electrician." (Tr. 825). Lynch testified that he said whoever did the examination was bound by the Mine Act to lock it out or tag it out. (Tr. 706, 750-751). Lynch asserted that he did not say the electricians were unqualified, but instead that if electricians were not seeing imminent dangers, they needed to look at their qualifications. (Tr. 705-706, 748). At hearing, Williams agreed that she would be concerned if an electrician did not tag out or correct potentially dangerous conditions. (Tr. 827). Lynch also said that reporting an issue to a supervisor was not a mitigation of a hazard. (Tr. 747-748). Lynch testified that he was not angry, but that he was frustrated and may have raised his voice. (Tr. 748-749).

In response, Arnold asked Williams and Hager if Lynch's statements amounted to threatening, harassing, and intimidating a miners' rep. (Tr. 261, 706-707, 749, 825). Arnold never specifically said there was harassment or threats. (Tr. 750). Lynch said he was asking questions, not threatening. (Tr. 749). Hager and Williams tried to intervene, but Williams could not recall if she told the managers not to retaliate. (Tr. 825). The meeting devolved into free-for-all argument. (Tr. 261). At one point, Arnold stated that Hager stepped between Lynch and Arnold because Lynch was so upset. (Tr. 261). Lynch stated that he simply stepped back to lessen the tension. (Tr. 750-751). Ramirez heard about this confrontation and later heard during

the grievance process that Arnold felt threatened. (Tr. 498-499). Ramirez also talked to Martin about the confrontation, but overlooked the issue and never spoke with Lynch. (Tr. 499-500).

Martin and Arnold also argued over whether Arnold had called the condition an “imminent danger” on February 19. (Tr. 261-262, 707). At one point, Martin called Arnold a liar. (Tr. 262). When they left the area to return to the electrical shop, Martin and Arnold were still arguing. (Tr. 262). Eventually, Arnold said that he might have said “imminent danger” in the heat of the moment on the 19th but that if he did he was sorry and Martin and Arnold shook hands. (Tr. 262-263, 330-331, 707). Arnold did not believe he actually said “imminent danger,” he was trying to calm the situation but he conceded that management may have relied on his statement. (Tr. 263, 331). Inspector Williams’ notes for that day included two references to “imminent danger,” which indicates to Arnold that she heard that phrase before reaching the lab (Tr. 332-333, GX-2). He also conceded that he may have said the words “imminent danger” when Martin was talking about irrelevant issues. (Tr. 372).

Martin did not believe Arnold was trying to calm tension, he believed he was trying to cover up a lie but finally accepted the truth. (Tr. 707-708). Martin believed that no one discovered this lie until a later MSHA investigation found Arnold had written about an imminent danger in his monthly inspection report and failed to report it.¹⁷ (Tr. 714). Martin was frustrated that qualified personnel were not making a good faith effort to follow Respondent’s policy and the Mine Act to correct or tag out hazards. (Tr. 707-708, 726-727, 729-730). However, there was no tension between Martin and Arnold on a personal level. (Tr. 708). Ramirez did not know about Arnold and Martin’s confrontation until the investigation. (Tr. 523).

When the group returned to the electrical shop, Williams said Respondent would get a citation for the motor (GX-3). (Tr. 263-264, 491, 705, 708, 753-754). No imminent danger order was issued, indicating that the hazard was not apparent to the inspector. (Tr. 333-334). Lynch received the citation, which included photos he later learned Arnold took. (Tr. 744-745). Lynch tried to argue that the citation was written under a mistaken belief about the correct version of the NEC and a misapprehension as to whether the room was classified. (Tr. 771-772). Martin also reviewed the citation that day. (Tr. 708-709). Steagall went home before the citation was issued and was not aware of it until he returned to work on March 1, 2013. (Tr. 385-386, 417). Steagall testified that employees were general upset when a citation was issued and in this case they were upset both because they thought it was not citable and because they wanted to maintain a safe working environment. (Tr. 417). However, Steagall never heard about anyone being angry. (Tr. 418).

When he learned of the citation, Ramirez’s first thought was that he needed to get the issue resolved by modifying or replacing the motor. (Tr. 593). At some point before or after the citation, Ramirez ordered Steagall to tag out the motor while they talked to MSHA. (Tr. 427-429). While he was addressing the issue, Ramirez learned that Steagall and Martin had known about and had discussed the issue for a while but that nothing was done to correct or isolate the

¹⁷ As will be discussed *infra*, Martin was not a part of the consensus triangle that disciplined Arnold and did not know it had copies of the electrical report in March 2013. (Tr. 714-715).

problem. (Tr. 593). Ramirez was concerned that a potentially hazardous condition was not isolated to prevent injury. (Tr. 593-596). This concern led Ramirez to review Arnold's previous monthly inspections, where he found that Arnold had written in the section reserved for imminent dangers but that his supervisor told him not to lock out. (Tr. 596). At some point, Ramirez contacted Halgryn and Hoffman to discuss whether those involved, including Arnold, failed to act properly. (Tr. 833).

On February 22, Ramirez summoned Arnold to a meeting with a union rep and gave him a form (GX-9) stating that he would be held out of service pending an investigation and that they would contact him when they were ready for his return. (Tr. 264-266, 514-517, 633-634). The investigation would cover whether there was an improper examination. (Tr. 515-517). Mark Hoffman had drafted the notice with help from Lynch, Martin, and Leonard Palmer without consulting with Ramirez or Halgryn. (Tr. 518-519, 632-633, 709-711, 835). In drafting the notice, the group discussed the lock/out tag out policy, Arnold's identification of the motor as an imminent danger as a certified electrician, the life-saving rules, the regulations, miner's rights information, refresher training, and the Mine Act. (Tr. 660-662, 709-710, 727-728).

The notice stated that Arnold told Martin that the condition was an imminent danger, that he did not attempt to isolate it once identified, and that he violated the Mine Act. (Tr. 274-276, 515-516). With respect to lock out/tag out, Respondent had policies requiring the isolation or repair of electrical issues if an electrician had a good faith belief that there was an imminent danger and prohibiting leaving defective equipment in place. (Tr. 349-350, 354-355, 602-603, 810, RX-8, p.2). Goeckner testified that even potential hazards that could cause injury, not just imminent dangers, should be tagged out. (Tr. 841-842). At hearing Arnold reviewed the lock out/tag out policy (RX-1) and related isolation policy (RX-6). (Tr. 345-346, 348, 353-354). Arnold was familiar with the requirement that he tag or lock out hazards and saw it on the policy on the bulletin board (RX-4), though he was not familiar with the policy in written form. (Tr. 346-352). The collective bargaining agreement (RX-5) prohibited miners from violating the law or company rules, including the lock out/tag out policy. (Tr. 352-353). The law, in particular 30 C.F.R. §77.502, was consistent with the lock out/tag out policy. (Tr. 357-359, 370, 462, 811).

At hearing, Arnold noted that the specific company policy regarding lock out/tag out and the Mine Act were not included in the suspension notice. (Tr. 276-278, 355-356). Arnold disputed these claims because he never believed the condition was an imminent danger. He had only failed to lock out the condition because he had been ordered not to, and, he had never been written up for violating the Mine Act. (Tr. 274-276, 300, 350-351, 355, 358). Arnold believed that he was competent in energy risk recognition and isolation procedures. (Tr. 348). In fact he had followed company policy in the past and tagged out a fan on an earlier occasion. (Tr. 368-369). He was not disciplined though he believed he was supposed to report, rather than tag out, equipment because of production needs. (Tr. 368-370).

The notice also alleged Arnold violated Respondent's cell-phone policy (RX-2) because he took pictures with his camera phone without permission. (Tr. 276-277, 355, 517, 520). The cell phone policy prohibited the use of non-company cell phones at the mine. (Tr. 356). The policy had been in place but had not been enforced against the electricians until June or July 2013. (Tr. 759-761). A meeting was held at that time to explain that the policy would be

enforced. (Tr. 760-761). Arnold agreed that he violated the policy, but maintained that Steagall had given him permission. (Tr. 277, 357).

A related policy (RX-3) prohibits taking and distributing photographs outside the company without written permission from management. (Tr. 356, 526-527). No permission was needed to take a photo (if it was taken without a phone) unless it was being distributed outside the company. (Tr. 530-531). Arnold had told Ramirez that he gave photographs to MSHA. (Tr. 528). While Arnold had oral permission from Steagall, he did not have written permission from upper management. (Tr. 356-357). Steagall agreed that Arnold had permission and believed that if there was any problem that he, Steagall, should have been held responsible. (Tr. 460-461).

Arnold testified that he believed Lynch held him out of service because of the 103(g) complaint and that he told Ramirez that this was the case, but that Ramirez did not respond. (Tr. 265, 274). Ramirez did not recall this comment; he did recall Arnold signed the documents and left without speaking. (Tr. 514-515). Beyale agreed the suspension was retaliation for the 103(g). (Tr. 795-796). Ramirez was upset that Arnold did not follow the chain of command and that Arnold did not bring the issue to him. (Tr. 265-266, 270, 338-339, 509-510, 545). Arnold explained that Ramirez was a mechanical engineer and that he did not see the benefit of going to him with an electrical issue. (Tr. 266, 339). However, Arnold knew Ramirez could have contacted Steagall, Berget, or anyone else to address the issue but still did not call him. (Tr. 339). Ramirez testified that even if Arnold had come to him, Arnold was the qualified electrician and expert on the issue. (Tr. 510).

Ramirez did not say anything to Arnold indicating how long the investigation would take, only that he would be notified when he could return to work. (Tr. 266, 340, 517). The suspension started that day and was indefinite. (Tr. 266-267, 517, 676). Ramirez testified he said he would conduct the investigation as quickly as possible, but Arnold did not recall this comment. (Tr. 340, 516-517). According to Hoffman, when an investigation begins, no one knows if it will be with or without pay. (Tr. 649). If, upon investigation, a suspension is justified then it is unpaid but if it is a punishment less serious than suspension, the worker is paid. (Tr. 649, 657). It was easier for payroll to hold out of service without pay and then pay afterwards. (Tr. 657-658, 676). However, if Respondent wanted to, it could have held Arnold out with pay. (Tr. 649). Hoffman explained that Respondent understood that it was difficult to be held out of service without pay, so it was important that investigations would be conducted quickly. (Tr. 677-678). He believed seven days would be a long time to be held out of service; the longest he could recall was four days. (Tr. 677).

On the same day Ramirez also told Steagall he was being held out of service for an investigation into whether he failed to take the motor out of service, despite telling Martin there was an imminent danger, and for ordering Arnold not to take it out of service (RX-8). (Tr. 434, 440-442, 596-597). He was told he would be paid. (Tr. 434, 682). Ramirez would not say if anyone else was being held out of service -- even though Steagall specifically asked about Berget and Martin. (Tr. 435). He asked about Berget because, as an engineer, he needed to be involved when Steagall had questions about a possible imminent danger. (Tr. 438). He asked about Martin because he once worked for MSHA. (Tr. 439). Steagall was surprised he was held out of service because only he and Arnold had all of the facts and documentation he had sent to Ramirez (GX-

5). (Tr. 435-437). Steagall offered to answer questions at that time, but Ramirez told him to go home and not to talk to anyone. (Tr. 436-437). Steagall did not agree with his discipline because they had never determined a hazard was present and never told Martin there was an imminent danger. (Tr. 439-442). He was familiar with the policies at issue, but did not believe the scenario described in the write-up occurred. (Tr. 442). This document did not mention the cell phone policy or Section 77.502. (Tr. 461-463). He noted on the document that he did not agree with it, signed it, and gave it back to Ramirez. (Tr. 442).

Steagall believed the management generally held supervisors to a higher standard than hourly employees. (Tr. 433-434). However, he believed that in the electrical department everyone was treated equally because they were all certified. (Tr. 433-434). That was why they worked jointly on this issue and contacted Martin and Berget together. (Tr. 434). Lynch, Ramirez, and Hoffman did not believe that supervisors were held to a higher standard than hourly employees or that long-term employees were held to a higher standard than new hires. (Tr. 548, 653-654, 761). Ramirez never worked at a place where rules were enforced differently than written policy or were enforced inconsistently. (Tr. 576-577).

During the week he was off, Arnold argued with his wife who was nervous because she had just started a new business and they were uncertain about his job. (Tr. 267). Arnold had six children. (Tr. 267). During his suspension, Arnold considered that he should stop complaining about safety issues and argued with his wife about his propensity to make complaints. (Tr. 267-268).

While Arnold and Steagall were suspended, Ramirez conducted an investigation. (Tr. 639, 833, 840). During that investigation, Ramirez tried to determine issues with the lab, efforts made to address these issues, and whether the motor had been isolated. (Tr. 524, 597). He gathered information from Arnold, Steagall, Berget, Lynch, Martin, and people at the lab. (Tr. 524, 526, 598). He also looked through the lab inspection records. (Tr. 526, 597). The investigation found that Arnold and Steagall were confronted with some level of electrical hazard and that they did not lock it out or correct it. (Tr. 842). He also learned that Martin was aware of the condition. (Tr. 491-492).

During the investigation, Ramirez and Lynch met to discuss the situation and Ramirez sought Lynch's input on potential discipline for Arnold. (Tr. 757). They discussed the severity of the condition, the response Arnold sought from Steagall, and the chain of command issue. (Tr. 494-495). Lynch wondered whether the fan issue had suddenly arisen, whether changes were made, and why Steagall had not acted. (Tr. 496, 501, 740). It did not bother Lynch that he had a confrontation with Arnold before working on his discipline. (Tr. 759). He considered it part of his job and there were often people upset with him. (Tr. 759). Also, Lynch's input focused on the technical support and the regulations. (Tr. 759).

Part of Ramirez and Lynch's discussion dealt with the monthly inspection form. (Tr. 493-494). Around the time of the citation, Lynch had requested that Ramirez bring him the monthly electrical reports from November 2012 to February 2013. (Tr. 492-493, 587-588, 612, 740, 743). He had received all of the reports that day, except for the February report, which he received on March 1 from MSHA. (Tr. 743, 756-757, 765). Lynch wanted the reports to learn what had

occurred, how it was handled during examinations, and how they found an imminent danger regarding the fan. (Tr. 740). When he and Ramirez met, Lynch noted that the reports required electricians to note hazards or imminent dangers and to correct or repair them immediately. (Tr. 757). Anyone who did not complete the form also broke not only the lock out tag out policy and the life-saving rules, but also the nearly identical standard in 77.502. (Tr. 757-758, 778-779). Ramirez had already spoken with Arnold about the Act, but Lynch wanted to emphasize the life-saving rules, which were visibly posted in the mine. (Tr. 758, 779-780).

Ramirez and Lynch also agreed that they believed Arnold had done an inadequate exam of the coal lab. (Tr. 501-502). The inadequate exam was self-evident because the condition was discovered a year after it was installed. (Tr. 502). The investigation determined that Arnold had only listed the condition in the electrical inspection reports for two months. (Tr. 502-503). However, Ramirez did not know when the electricians learned about the motor on the roof of the lab and they had complained to him about items being installed in the lab without their knowledge. (Tr. 504-505). Steagall's e-mail included these complaints, though Ramirez did not remember when he got it or if it was available when he was doing the investigation. (It was not date stamped). (Tr. 506-509). He did not recall using it during the investigation and probably would have used such if he had it. (Tr. 509).

During the investigation, Ramirez had access to an e-mail Berget sent on February 20. (Tr. 478-481, 510). He received this e-mail before holding Arnold out of service. (Tr. 524-525). Berget's email described the issues at the lab, including the motor that Berget did not want to handle (GX-7). (Tr. 478-481, 510). Berget requested that Ramirez instruct the electricians whom he supervised to stop asking him about those issues. (Tr. 478-481, 510). The electricians wanted to know if the motor was safe, but Berget had no expertise in the area and did not want to do research. (Tr. 484-483, 512). Berget was the chief electrical engineer, a qualified electrician but not an expert in coal labs. (Tr. 512-513). This letter showed Berget was aware of the motor and that Ramirez knew it before disciplining Arnold. (Tr. 510, 513). Ramirez was not concerned about this letter because Berget was not an expert. He might not have inspected the area; and he told Arnold and Steagall to follow up with those who installed the motor. (Tr. 511-513). Ramirez believed he followed up with Berget about what he had told Arnold and Steagall. (Tr. 511-512).

Ramirez also investigated the cell phone policy and whether someone had taken and distributed photographs outside the company. (Tr. 597-598). Ramirez learned during the investigation that Martin had also taken photos but did not know if Martin gave them to MSHA (GX-30). (Tr. 527-528, 530). Ramirez did not ask whether Martin had received permission for the photos, because he was a salaried employee. (Tr. 531). Ramirez did learn whether Martin used his phone to take photos; he was not concerned about it. (Tr. 531-532).

During the investigation, Ramirez also learned that Steagall told Arnold he could hold off on the motor until he received more information. (Tr. 545). However, Ramirez felt that if Arnold felt there was an issue he should have acted. (Tr. 545-546). Management believed contacting supervisors to get more information or going through the chain of command was insufficient and did not relieve the miner of the obligation to follow the lock out/tag out policy or the life-saving rules. (Tr. 545-546, 656).

Ramirez was not concerned that Berget and Martin knew about the condition and never considered disciplining either. (Tr. 496, 513-514, 520-521). He never considered disciplining Martin because he was not a qualified electrician. (Tr. 520-521). Lynch testified that while Martin was not an electrician, he, and everyone at the company, was bound by the law and company policy to lock out or correct hazards. (Tr. 546-547, 657, 746-747). Ramirez never spoke to Martin about his previous knowledge of the potential hazard. (Tr. 496, 513-514). If Martin was disciplined, Ramirez would not know because Martin did not report to him. (Tr. 521). Lynch also never considered disciplining Martin because he had the knowledge and expertise to determine whether the fan was a hazard and was doing his due diligence to investigate the issue. (Tr. 758, 782-783). Hoffman also never considered disciplining Martin, even though he knew about the condition on February 14. (Tr. 642-643, 650-651, GX-9). Ramirez did not consider disciplining Berget, who was a qualified electrician, because he did not report to Ramirez (though he could have gone to Berget's supervisor). (Tr. 521-522).

On February 27 Ramirez interviewed Arnold. (Tr. 281, 366, 525, 598). Benally and Dixon were also present. (Tr. 281). This was the day Arnold would have returned to work if he had not been held out of service. (Tr. 340-341). Ramirez did not recall why it took five days to talk to Steagall and Arnold. (Tr. 525). It was likely day-to-day business got in the way; it was not an additional punishment. (Tr. 525). He could have interviewed them on February 22, but he could not recall his schedule. (Tr. 525-526). He did not talk to anyone else about the specifics of this incident during those five days. (Tr. 525). In the meeting Arnold told Ramirez that, as an electrician, he did not know if the motor was a hazard and that he was seeking more information. (Tr. 281-282). Ramirez asked Arnold whether he had given pictures to MSHA, even though Arnold and others had told him about such earlier. (Tr. 526, 528-529). Arnold also told Ramirez that he had documented the cited issue in the monthly inspection report. (Tr. 532). Ramirez had already received and reviewed that report, but had not spoken to Lynch about it. (Tr. 533).

On February 28 Ramirez held a "consensus triangle" meeting with Hoffman, Halgryn, and Goeckner to discuss Arnold's discipline. (Tr. 534-535, 539, 598, 632, 833, 840). Ramirez, as the person with the most information on the situation, presented his findings including Martin's e-mail, Berget's e-mail, Steagall's documents, the monthly inspection report, the interviews, and perhaps the citation, policies, standards, and collective bargaining agreement. (Tr. 535, 539-540, 543-544, 619, 639-645). The group determined that Arnold violated Respondent's "life-saving rules" by placing people in the "red zone" where they could be killed and by knowingly violating a policy that could result in a fatality by not isolating or locking out the hazard. (Tr. 600-602, 661). The group was worried that miners with less expertise would be exposed to an explosion, because someone with more expertise did not alert them. (Tr. 601). The group was also concerned Arnold was not addressing other issues. (Tr. 537).

After discussing Arnold's actions, the consensus triangle determined discipline. (Tr. 535, 645). The options included verbal warning, written warning, and suspension. (Tr. 841). While he could not recall who made the various suggestions, Hoffman (who had final say) likely suggested a written warning to ensure fairness and consistency with past discipline. (Tr. 535-536, 645-646). Ramirez approved of a written or verbal warning (though he made no recommendation). (Tr. 536). A verbal warning may have been proper because Arnold had a clean record. (Tr. 537). The life-saving rule issues were serious enough to warrant termination

but given Arnold's record nothing more serious than a written warning was discussed. (Tr. 538, 602). The group came to a consensus on a written warning because Arnold saw an imminent danger and a potential for explosion but had taken no action. (Tr. 536-537, 645-646, 599-600, 833-834, 841). The 103(g) complaint was not discussed other than to say that Arnold should have taken action right away. (Tr. 538-539). Hoffman drafted the warning by himself, including language about the Mine Act, and Ramirez wrote it. (Tr. 540-541, 543-544, 647, 835).

Arnold requested reinstatement by MSHA on February 28, 2013, while he was still off work (GX-11). (Tr. 268-269). He listed the discriminatory actions as his argument with Martin on February 19 and his arguments with Lynch and Martin on February 20 after the 103(g) complaint. (Tr. 268). While Arnold had issues with Respondent in the past, this was the first time he was disciplined for a 103(g) complaint. (Tr. 269). Under the collective bargaining agreement, Arnold was not required to file a grievance, an EEOC complaint, or a Wage and Hour complaint before filing a 105(c) complaint. There is no requirement to exhaust remedies. (Tr. 296-297). Lynch learned about the complaint from Goeckner on March 1. (Tr. 765-766).

Concurrent with Ramirez's investigation, Hoffman conducted an investigation into Arnold's harassment claim. (Tr. 638). At some point, perhaps during the consensus triangle, Hoffman learned that Lynch and Arnold had an argument and that Arnold was concerned that Lynch was harassing him. (Tr. 634-635). HR became involved with a formal grievance procedure under the collective bargaining agreement. (Tr. 635-636). Hoffman conducted the investigation but never spoke with Arnold or Lynch and did not investigate their conversation. (Tr. 636-637, 659). Hoffman eventually determined that Dixon, not Arnold, filed the 103(g) complaint, so he found there was no retaliation. (Tr. 636). Hoffman did not talk to Dixon about Arnold, because Respondent did not know who filed the complaint. (Tr. 675).

On March 1, 2013, Respondent reinstated Arnold and told him that he would be made whole for his time off. (Tr. 267, 273-274, 278, 280-281, 335, 523, 658). While he was held out seven days, he only missed four days of work. (Tr. 334-335). When he returned to the mine site, Ramirez gave him his first ever written warning (GX-10). (Tr. 278, 283). The reasons for Arnold's written warning were different from those given for his suspension; it did not include references to imminent danger, Martin's statements, or company policy, including the cellphone policy. (Tr. 278-280, 282, 541-542). The cell phone policy was not included because Steagall confirmed he had given permission. (Tr. 282, 355, 544-545, 598-599, 648). Instead, the written warning included what Arnold's electrical inspection report had indicated, including his notation that there was potential hazard. (Tr. 279-280, 542, 544, 620, 647-648). The warning stated Arnold had seen a hazard but, as a qualified electrician, did not correct or lock it out and referred to 77.502. (Tr. 542, 549, 623-624). Arnold was also disciplined for giving photos to MSHA and Dixon. (Tr. 534). The written warning also stated Arnold violated the Mine Act. (Tr. 280). The warning did not mention the "lifesaving rules" and Ramirez did not recall mentioning them to Arnold. (Tr. 620, 657). Ramirez told Arnold to bring issues to him in the future. (Tr. 545).

Steagall also returned that day and received a written warning. (Tr. 442). He disagreed with the warning because he never determined there was a hazard with the motor-- just a possible condition. (Tr. 442-443). He believed, but did not know or particularly care, that he got a warning because Respondent received a citation. (Tr. 444-445).

A written warning is the first step in the progressive disciplinary process.¹⁸ (Tr. 325, 570, 761). Notices of discipline were in the maintenance department and the off-site HR office. (Tr. 569-570, 573-574, 587). However, the collective bargaining agreement did not cover progressive discipline, it was an unwritten rule. (Tr. 670). For purposes of progressive discipline, Respondent considered disciplinary action, including written warnings, to be active for 12-18 months. (Tr. 671). Records were kept for different times depending on the miner's behavioral record and the seriousness of the transgression. (Tr. 671-672, 762). Records were kept so that discipline could be graduated if changes to a miner's behavior were not made. (Tr. 762). After the 12-18 month period, the records were not used but were retained in the employee's permanent file-- though Hoffman could not say why. (Tr. 672-673). Hoffman never considered these older discipline reports for miners with clean records, though he did see them in the files. (Tr. 673-675).

The mine operator conducted performance reviews for electricians every six months. (Tr. 286, 452, 847). Arnold received a performance review in June 2013 from Steagall, the person most familiar with his work (GX-12). (Tr. 287-288, 452, 454, 847). The review was solely Steagall's responsibility and no one could tell him what to include. (Tr. 454). In that review, Arnold received a "meets requirements" grade for safety. (Tr. 288, 452-453, 560, 604). The comments section stated, "[n]eeds to follow up on safety hazards by doing the SLARS to inform others as to hazards found on the mine site." (Tr. 289, 453-454, 844). SLARS was a safety program created by the company and electricians were encouraged, but not required, to enter at least two hazards into SLARS each month.¹⁹ (Tr. 283-286, 453, 572). Arnold did not report two hazards each month, but he did report some hazards. (Tr. 285). Steagall felt Arnold was not getting his documents in, but he was not missing hazards or doing anything wrong. (Tr. 453-454).

Arnold asked Steagall why SLARS was used in the evaluation because Goeckner had told him that non-participation would not result in discipline. (Tr. 289, 453, 604, 680, 842-843). Steagall told him that the order to include SLARS had come from "upstairs," and Arnold understood this as retaliation from Lynch, who was still mad about the 103(g) complaint. (Tr. 289-290). Arnold then raised the issue with Goeckner. (Tr. 291, 297, 360-361, 842). Goeckner agreed that SLARS should not have been used and promised to speak with Ramirez. (Tr. 291, 297, 843-845). Arnold expected his review to be changed to "very good" and for the references to SLARS to be removed. (Tr. 291). Arnold was told that the performance review was going to be redone by Ramirez. (Tr. 291-292, 360-361). Ramirez had already signed the document as the superintendent (RX-16). (Tr. 624-625).

¹⁸ Lynch believed the steps of the progressive discipline plan were verbal warning, written warning, suspension, and termination. (Tr. 761-763).

¹⁹ SLARS stands for Safety Leadership Achievement Recognition. (Tr. 607). Under the system miners were encouraged to look for hazards, correct them, document issues, and isolate problems. (Tr. 607). The goal of SLARS was to improve health and safety and to reduce citations. (Tr. 607-608). Miners were evaluated under SLARS but for electricians it was optional. (Tr. 608).

Shortly thereafter, Goeckner told Ramirez about Arnold's concern with his rating. (Tr. 561, 604, 843). Goeckner also spoke with Steagall about it even though he was retired. (Tr. 843, 845). Ramirez and Stegall said that Arnold was not participating in SLARS, but Goeckner explained it was not mandatory. (Tr. 843). Goeckner told Ramirez to re-do the crews' safety ratings without SLARS, but did not tell him to increase Arnold's rating.²⁰ (Tr. 561, 604-605, 843-846, 849). Goeckner had no further involvement. (Tr. 843-844). Ramirez followed Goeckner's instructions and reevaluated Arnold's entire safety rating (not just the SLARS information). (Tr. 562-563). Goeckner did not recall telling Ramirez to review the entire rating and he expected Ramirez to simply remove references to SLARS. (Tr. 845, 848, 850). Ramirez decided that Arnold had not met expectations because he walked away from a hazard without taking action. (Tr. 562). Ramirez changed the rating to show that Arnold needed to take action and follow the chain of command. (Tr. 562, 610). Ramirez referred to the motor issue and the fact that Arnold did not bring the issue to him. (Tr. 563, 610). Ramirez did not believe Arnold was being held accountable and wanted to convey that information. (Tr. 622). Ramirez did not change the "accountability" section that was marked "very good," because he had only been asked to look at safety. (Tr. 566, 605, 622).

Arnold found his changed performance review on the desk of his new foreman, Gene Lee, where anyone could see it (GX-13). (Tr. 292-293, 567-568). Steagall's writing was whited out to make room for new notes. (Tr. 455, 457). No one discussed the changes with Arnold or gave him the document (though he never asked for it); he had just found it. (Tr. 294, 365-366, 567-568). Ramirez testified that Arnold was not contacted because the overall grade of "good" was unaffected and it had been given to Lee. (Tr. 365, 568-569). The last two paragraphs of the comments section had been changed to say Arnold needed to take accountability when he saw issues, that he was vocal about bringing up safety issues, that he needed to greatly improve on bringing issues up the chain of command (and that this would be his focus in the future), and that he actively looked to improve the mine site. (Tr. 294-296, 362-363, 566-567, 603-604, 610, 621-622, 846). The safety section had also been whited out and lowered from "meets expectations" to "needs improvement." (Tr. 292-293, 295, 363, 845-846). No one contacted Steagall about the changes and he disagreed with them. (Tr. 455-457). The changes were unsigned, but the comments were in Ramirez's handwriting. (Tr. 361-362). Arnold believed the notes referred to the motor, the 103(g) complaint, and failing to bring issues to Ramirez. (Tr. 294-296, 363-364). Ramirez stated the notes were related to the motor but not the 103(g). (Tr. 563, 566).

Ramirez and Goeckner did not discuss the changes and Goeckner was not aware of them. (Tr. 846, 849-850). Goeckner was not surprised by the changes. (Tr. 847-848, 850). Goeckner believed the changes were appropriate given the written warning and the conduct leading to it. (Tr. 849-851).

Arnold expressed concern to Lee over the changes. (Tr. 292). Lee told him Ramirez made the changes, so Arnold made a note about the changes and went to Ramirez to initial it. (Tr. 292-

²⁰ There were nine total evaluations and almost all noted the need to participate in SLARS. (Tr. 604-605). Ramirez believed he raised one electrician's safety rating, Will Charley, because he produced documentation and addressed issues quickly. (Tr. 605-606, 620-621). Arnold was not aware of Charley causing or filing a 103(g) complaint. (Tr. 620).

293, 361-362, 567-568). Arnold and Ramirez did not discuss the changes. (Tr. 293-295). Arnold knew that Ramirez would request, review, and sign some (but perhaps not all) evaluations, but he did not know Ramirez would make changes. (Tr. 337-338, 361). Ramirez assumed that Arnold would be upset about the rating and take it as a gut punch. (Tr. 569). Hoffman later investigated the evaluation and found that Respondent was fair and consistent in discipline involving life-saving rules. (Tr. 637).

Unlike written warnings, evaluations were not supposed to be a part of the progressive discipline process and, under an agreement with the union, they were not supposed to be kept. (Tr. 325). However, Arnold believed the records were kept and that when a miner was disciplined, the earlier evaluations were brought up to show a trend or history. (Tr. 325). Ramirez and Hoffman disagreed that the files were used for discipline and argued they were only used by front-line supervisors to improve performance. (Tr. 570-571, 668-669). However, Ramirez conceded that performance evaluations were sent to HR and sometimes mistakenly left in the files. (Tr. 571, 587). The amount of time they stayed in the file would vary depending on the particular manager; Ramirez had never cleaned out his files. (Tr. 587, 618). The CBA was specific on how employees were paid and the evaluations had no bearing on miners' pay (it could affect salaried employees). (Tr. 669-670). Dixon believed that an evaluation could affect a miner's pay because discipline on the record (including discipline for violating an MSHA regulation) could be used to disqualify an employee for different positions. (Tr. 811-812).

At hearing, Arnold reviewed several previous monthly examination reports for which no one was disciplined. (Tr. 297-313). One such record was for an exam in October 2012 (GX-13). (Tr. 297-298, 301). In the imminent danger and potential hazard section, Arnold wrote "Pole No. 6" but did not tag out the equipment. (Tr. 298). Steagall agreed that the pole was broken and that something needed to be done but the decision to tag out a damaged pole would depend on severity. (Tr. 299, 450-451). Here, in order to tag out this equipment, Arnold would need to kill the power on the catenary line, which would have shut the train down (though it was possible to shut down only one side of the rail). (Tr. 299-303, 451). It took a few days to get a new pole for repairs and during the wait the pole remained energized to ensure coal haulage. (Tr. 298-299). Arnold was not disciplined for this action. (Tr. 298). Arnold reviewed another monthly exam where Beyale filled in the imminent danger section but was not disciplined. (GX-16). (Tr. 306-307). As union steward, Arnold would have heard if Beyale was disciplined. (Tr. 308). Another monthly examination with writing in the imminent danger section for which no one was disciplined (GX-17). (Tr. 309). In fact, the work order for that condition was put in place on June 29, 2013, but the repairs did not begin until May 14, 2013. (Tr. 309-313).

Arnold and Steagall also recalled incidents involving other miners that did not result in discipline. (Tr. 314-322, 430). In 2012 or 2013, Halgryn and Ramirez contacted a moving belt with a shovel while using a metal detector. (Tr. 314, 316, 420, 554-555, 799-800). Steagall and other electricians were present. (Tr. 316, 421). Ramirez recalled they were conducting an inspection. (Tr. 555). Steagall stopped Halgryn and told him that he needed to lock the belt. (Tr. 316, 420-421). Ramirez also should have locked it. (Tr. 422). The belt was already locked; Steagall believed Halgryn and Ramirez needed to add their locks. (Tr. 329, 555-556). Ramirez believed the group lock was sufficient. (Tr. 555-557). Halgryn was upset but put the locks on, to err on the side of caution. (Tr. 316-317, 557). Later, Halgryn, Steagall and Arnold went back and

Halgryn demonstrated that he had not contacted the belt and that a lock was unnecessary. (Tr. 317-318). Halgryn also argued Steagall could not see anything from where he was standing. (Tr. 318). Ramirez was present for this explanation and agreed with it at hearing. (Tr. 423-424, 555-556). Steagall did not. (Tr. 423). Ramirez and Steagall later learned that company policy did not require salaried employees to lock out during an inspection. (Tr. 557-559). That policy was later changed. (Tr. 559). Steagall did not think they followed the policy. (Tr. 558).

Afterwards, Ramirez told Steagall that he should conduct an investigation and make the incident go away. (Tr. 424, 558). Steagall believed this meant he was to investigate and make a report. (Tr. 424). He was not sure if Ramirez was asking him not to include everything, but he was a bit intimidated. (Tr. 425). Stegall would never lie, but he felt that management wanted the incident investigated and put away. (Tr. 425-426). Steagall created a report and it included what he saw. (Tr. 420-421, 424-425). Ramirez did not recall seeing the report. (Tr. 559).

Steagall and Arnold were not aware of Halgryn or Ramirez receiving discipline for this incident. (Tr. 317, 421-422). Steagall testified that HR would handle discipline and it would not reach him directly, but that miners would hear rumors of discipline. (Tr. 421-422, 466). Ramirez testified that Halgryn coached him after the incident. (Tr. 559). Coaching is not discipline. (Tr. 577). There was probably no record of the coaching and Ramirez was not suspended. (Tr. 559-560). He did not know if Halgryn was disciplined. (Tr. 559-560). Halgryn testified he never coached Ramirez about the lock out/tag out policy. (Tr. 836).

In another incident, Beyale and Roger Benny saw Robert Arthur standing on a boom belt. (Tr. 321, 552, 554, 801). Beyale brought it to Benny's attention. (Tr. 321, 801). As soon as the condition was discovered Beyale locked down and shut down. (Tr. 321, 328, 801). Arnold spoke with Ramirez about the incident as the shop steward, but as far as he knew Ramirez did not do anything because Beyale did not raise the issue. (Tr. 321-322). Ramirez recalled an electrician was concerned (he did not believe it was Arnold) but he did not know anything about the incident. (Tr. 554). Arnold believed that neither Arthur nor Benny was disciplined. (Tr. 322). Beyale did not know if Benny was disciplined. (Tr. 801). Ramirez testified that Benny disciplined Arthur for the incident with re-training. (Tr. 552-553). He did not know if there was a record but if there was he would have seen it as Benny's supervisor. (Tr. 553). Benny had been disciplined in the past, but Ramirez did not recall if it was related to lock out/tag out. (Tr. 553-554). Beyale was not disciplined for telling Benny to get Arthur off of the belt. (Tr. 802).

In another incident, a locomotive derailed and was not tagged out before the person left the train. (Tr. 430-431, 473). The person who failed to tag it out was a plant supervisor. (Tr. 431). The supervisor may have been Roland Lee, who was terminated at some point. (Tr. 465-466). Lee may have been terminated before this incident. (Tr. 473). There were several foremen in the area that could have locked or tagged out the locomotive. (Tr. 472).

Another incident involved a crusher that was not locked out during an inspection. (Tr. 431). No one was in the crusher but the cover was open. (Tr. 431-432).

In another incident, Lynch asked Arnold to tag out broken reclaimers. (Tr. 271). Arnold replied, "see what happens because that power plant doesn't get coal" and then contacted his

supervisor, Steve Flamang. (Tr. 271). The reclaimers continued to run for two or three days until they could be repaired and no one, including Arnold, was disciplined. (Tr. 272).

Steagall recalled another incident where there was a line on the ground. (Tr. 446). Engineers, truck drivers, and pit foreman were present (the engineers closest) but the line was not locked out. (Tr. 446, 448-449). If the line snapped, regardless of electricity, someone could have been killed. (Tr. 446). Steagall ordered the line locked out. (Tr. 447-449). A crew disassembled the equipment to get weight off the line and the area was isolated for repair. (Tr. 447-448). Steagall made a report for upper management. (Tr. 445-446, 466). Steagall did not know who was in charge or to whom the engineers would report. (Tr. 449). Steagall was not aware of anyone being disciplined for this event, but he would never see the discipline if they were. (Tr. 447).

By contrast, Lynch recalled an incident where a supervisor, Lee, breached the lock out/tag out policy by giving an employee a key and allowing him to unlock equipment. (Tr. 780). Lynch heard about the issue, researched it, and terminated Lee. (Tr. 780-781).

Lynch also recalled an incident in which two electricians removed the safety devices on a draft line cable at a substation so they could try to find the bad spots. (Tr. 781, 785). This method was not a proper troubleshooting technique and exposed four people to electrocution. (Tr. 781). It was not a company shortcut, but it was a practice of the electrical department. (Tr. 783-784). This was not a violation of the lock out/tag out policy, it was a violation of other policies. (Tr. 785-786). Lynch first learned about this practice during this incident and did not know if other members of management were aware. (Tr. 784-785). Both electricians were terminated and several members of management were disciplined. (Tr. 781-782, 786-787). Lynch did not know the nature of that discipline or if it was documented. (Tr. 786-787).

Arnold widely held a reputation as a safety advocate and perhaps a troublemaker with respect to safety.²¹ (Tr. 429-430, 456, 547, 653, 712, 754). Since this event, other miners' reps (including Charley, Beyale, and Yazei) were more hesitant to raise issues. (Tr. 322-323). They were concerned because Arnold had the most training and experience and the company disciplined him. (Tr. 323). They only brought up small issues and gave Arnold large issues. (Tr. 323-324). Beyale was no longer sure if electricians would be reprimanded for tagging things out. (Tr. 796). However, he still followed the policy. (Tr. 798-799). The mine has a non-retaliation policy for miners who bring up a safety issue to management, the union, or MSHA. (Tr. 432-433, 551, 654, 755). Bringing a complaint to a supervisor or union steward would be covered by that policy. (Tr. 551-552, 654, 755-756).

Until this incident, Arnold had a 30-year clean record. (Tr. 325). He believed the evaluation was retaliation. (Tr. 325-326). People at the mine knew he had a target on his back.

²¹ Martin disagreed that Arnold was a reputed safety advocate and believed that he had a reputation for being confrontational and vindictive. (Tr. 712). He knew Arnold's reputation while at Respondent and at MSHA. (Tr. 712). Martin heard rumors Arnold would purposefully leave work incomplete and then call in 103(g) complaints resulting in citations. (Tr. 712-713).

(Tr. 326). The union only filed a grievance for the written warning, not the suspension or the changed evaluation, despite the fact that those were issues that could be grieved (RX-11).²² (Tr. 359-360, 571, 667). Hoffman testified that the evaluation had been discussed during the grievance process. (Tr. 666-667). Arnold wanted the negative performance reviews and discipline removed from his personnel files and an apology. (Tr. 324-325).

CONTENTIONS OF THE PARTIES

Following the hearing, the Complainant and Respondent submitted briefs and subsequent reply briefs in support of their respective positions. Complainant argued that Respondent had retaliated against Arnold for engaging in activity protected by the Mine Act. (*Complainant's Post-Hearing Brief* at 22-41). Specifically, Complainant alleged that Arnold's actions in raising the issue of the coal lab fan motor and, eventually, complaining about that motor constituted protected activity under the Act. (*Id.* at 23). Complainant also asserted that Respondent's actions in suspending Arnold, issuing him a warning, and changing his safety evaluation, constituted adverse employment actions. (*Id.* at 25-33). Complainant further argued that the adverse employment actions were motivated, in part, by Arnold's protected activity. (*Id.* at 24-28, 35-41). Finally, Complainant argued that Respondent failed to rebut the *prima facie* case showing retaliation. (*Id.* at 28-41). As a result of these arguments, Complainant requested a civil penalty of \$20,000.00, revocation of the written warning, and a re-evaluation of the June 2013 performance evaluation without animus or reference to SLARS. (*Id.* at 41).

Respondent argued that Arnold's discipline was the result of his failure to follow MSHA regulations and company policy. (*Respondent's Post-Hearing Brief* at 8-9). It further alleged that, even in the absence of protected activity, Arnold would have received the same discipline. (*Id.* at 10). According to Respondent, all of Arnold's disciplines were related to his inaction with respect to the coal lab fan motor and not related to any of his protected activity. (*Id.* at 10, FN 6). In fact, Respondent alleged that Arnold had no good-faith belief that a safety condition actually existed and, therefore, his actions were not really protected activity. (*Id.* at 17-19). Finally, it argued that the discipline issued to Arnold was minor and was in no way a material adverse action. (*Id.* at 10, note 6). As a result of these arguments, Respondent requested that the civil penalty be eliminated or greatly reduced and for a finding that Respondent did not retaliate against Arnold. (*Respondent's Reply Brief* at 9).

HOLDING

For the reasons set forth below, I find that the Complainant satisfied his requirement to prove a *prima facie* case of discrimination in this matter. Further, Respondent failed to rebut that *prima facie* case or to establish an affirmative defense. As a result, I find Respondent discriminated against Arnold under the Mine Act.

²² At the time of the hearing, the grievance had already been through Respondent's three-step grievance procedure and was awaiting arbitration. (Tr. 663-666).

ANALYSIS

This case is before me on allegations that Respondent retaliated against Arnold for engaging in protected activity in violation of §105(c). That provision states:

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

30 U.S.C. §815(c)(1).

The purpose of this section is to encourage miners “to play an active part in the enforcement of the [Mine Act]” recognizing that “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 35 (1978). The section was intended “to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation ...” *Id.* at 36.

I. Claimant Established a *Prima Facie* Case of Discrimination

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. *See Robinette*, 3 FMSHRC

at 818 n.20. The complainant bears the burden of persuasion. *Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1535-1536 (Sep. 1997).

a. Claimant Engaged in Activity Protected by the Mine Act

The first inquiry is whether, in this particular matter, Arnold engaged in protected activity. Section 105(c) defines “protected activity” broadly to include the “fil[ing] or ma[king] [of] a complaint under or related to [the] Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation” *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) rev’d on other grounds, 709 F.2d 86 (D.C. Cir. 1983); *see also U.S. Steel Mining Co.*, 23 FMSHRC 981, 986 (Sep. 2001). Section 105(c) also explicitly protects notifying the “representative of the miners” of complaints. 30 U.S.C. 815(c)(1). Finally, protected activity includes instituting or causing to be instituted a proceeding under or related to the Act. *Id.*

The record clearly establishes that Arnold engaged in several forms of protected activity. Specifically, Arnold raised a possible safety issue with the coal lab fan motor to his supervisors on January 22, February 14, and February 19. (Tr. 244-246, 249, 389-390, 396, 405, 508, 690-691, 794). He raised this issue with three members of management: his immediate supervisor (Steagall), Respondent’s only electrical engineer (Berget), and a former MSHA inspector and safety expert (Martin). (Tr. 244-247, 389-393, 399, 477, 684, 718). Arnold then contacted a representative of miners, specifically the local union president, and convinced him to call in a complaint under Section 103(g) of the Act. (Tr. 253, 803). This action caused an inspection at the mine and led to a citation. During the Section 103(g) inspection, Arnold acted as the miner’s representative and also provided Inspector Williams with photographs. (Tr. 257, 260, 414, 491, 823). Finally, after he was suspended, Arnold filed a 105(c) action with MSHA. (Tr. 268-269). Arnold’s actions, individually and cumulatively, are protected under the Mine Act.

In its post-hearing submissions, Respondent attempted to rebut this evidence by arguing these actions were not protected. Respondent’s witnesses conceded complaining to a supervisor or the union president would be protected by the company’s anti-retaliation policy and by the Mine Act. (Tr. 432-433, 551-552, 654, 755-756). However, Respondent argued that a miner that seeks to avail himself of these protections must have a “good-faith basis” for believing a safety hazard exists and for making those complaints. (*Respondent’s Post-Hearing Brief* at 18). In short, Respondent argues that the Act only protects *bona fide* safety complaints-- not bad-faith attempts to cause trouble. Respondent asserts that Arnold’s actions were the latter rather than the former. (*Id.*).

To support this assertion, Respondent noted that Arnold, as a certified electrician, called MSHA to make a complaint but had failed to address the motor issue as mandated by MSHA regulations and the company’s written policy. (*Respondent’s Post-Hearing Brief* at 18). Further, it drew attention to Arnold’s testimony that the NEC was “irrelevant” and his later concession that the code actually addressed pertinent issues. (*Id.*). It also noted that Arnold testified that that he was not supposed to lock out/tag out equipment because of production issues, but, on the other hand, had also stated that he had locked or tagged out equipment in this same area in the past. (*Id.* at 18-19). Finally, Respondent raised the fact that, despite Arnold’s claims that

Respondent's actions had dissuaded him from making safety complaints, he continued to raise safety issues at the mine. (*Id.* at 19). Respondent alleges that these facts show Arnold's complaints were made in bad faith and therefore, did not constitute protected activity. (*Id.*).

Having heard the testimony at hearing, evaluated the credibility of the witnesses, and having carefully evaluated the evidence, I find that Arnold's expressed safety concerns had been made in good-faith. Regardless of whether there were actual hazards associated with the fan motor, Arnold's expressed concerns about the possible existence of such hazards, given the totality of the circumstances discussed herein, were reasonable and made in good faith. Arnold credibly testified that he happened upon a fan motor that he did not know existed and had never been told about. (Tr. 243-244, 390). He had questions about the installation. He was not certain it was hazardous. He contacted his supervisor, the electrical engineer, and a safety expert searching for answers. (Tr. 244, 389-390, 434). There is no reason to doubt Arnold was reasonably uncertain about whether there was a hazard-- especially in light of the fact that MSHA eventually issued a citation for a hazard at the fan-- albeit possibly a different hazard than the one Arnold feared.

I also credit Arnold's testimony that he had been told not to lock or tag out the condition pending research regarding his concerns. (Tr. 244, 247, 274-283, 300, 350-358). Rather than supporting Respondent's argument, the fact that Arnold had locked or tagged out equipment in the area before corroborates his testimony that he was told not to act here. Arnold was not shy about tagging out conditions he believed to be hazardous, but here no one was positive if there was a hazard and Arnold was told to hold off. Steagall further corroborated this testimony, explaining that he had told Arnold to hold off on acting until they had answers.²³ (Tr. 244, 282, 385, 403-404). There is no reason to believe Arnold acted in bad-faith in failing to lock out or tag out the equipment.

Similarly, I credit the testimony of Arnold and Steagall that they believed the issues Martin raised with respect to the NEC were not relevant *in the context of their discussion*. (Tr. 250-251, 371-372, 405-406). Whether the NEC actually brought anything to bear on this situation is beyond the scope of this matter, suffice it to say that Arnold had acted in good-faith.

Finally, whether or not Arnold was dissuaded from making safety complaints in the future is not relevant to his good-faith in making the initial complaints. To argue that Arnold's completely unforeseeable future discipline and his reaction thereto could somehow shed light on his good-faith at the time this issue arose is extremely questionable.

In a related argument, Respondent asserted that while it stipulated that Arnold's 105(c) complaint was a protected activity, it was not aware of the complaint until after Arnold's written warning was already drafted. (*Id.* at 21). While it is true that Respondent was not aware that Arnold filed the claim at that time, it was certainly aware at the time Arnold's evaluation was completed several months later. Further, the filing of the 105(c) complaint was just one of many

²³ Steagall was retired at the time of the hearing. Further, he was forthright about issues that he could not recall or things for which he lacked knowledge. As a result, I found him to be disinterested in the outcome of the hearing and extremely reliable as a witness.

instances of protected activity, as listed *supra*. There is no question Respondent was aware of the other protected activity.

b. Claimant Suffered An Adverse Employment Action Motivated In Part By That Protected Activity

Having determined that Arnold engaged in protected activity, the next inquiry is whether the adverse action complained of was motivated in any part by that activity. In practice, this second half of the *Pasula* and *Robinette* framework really consists of two inquiries: (1) whether there was an adverse employment action and (2) whether there was a nexus between the miner's protected activity and that adverse employment action. See *Kenneth L. Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 329 (Apr. 1998); *United Mine Workers of America (UMWA), on behalf of Mark A Franks and Ronald M. Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2096 (Aug. 2014) (Cohen and Young) (Decisions where Commission first held that miner engaged in protected activity, then determined that the complained of action, a termination, was an adverse employment action, before addressing the nexus). Therefore, the Complainant must first establish that an adverse employment action occurred before the issue of a nexus is reached.

i. Claimant Suffered An Adverse Employment Action²⁴

The legislative history of the Mine Act showed that the forms of discrimination should be considered broadly, stating:

It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal.

Legislative History at 36. In keeping with the Congressional intent, the term "adverse action" has been broadly defined as "an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Pendley v. Fed. Mine Safety & Health Rev. Commn.*, 601 F.3d 417, 428 (6th Cir. 2010). The Commission has recognized that adverse action may be "subtle or indirect" but nonetheless must be more than an action "which an employee does not like." *Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1848 FN 2 (Aug. 1984) (*quoting Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981). To differentiate between legitimate adverse actions and an actions which an employee simply does not like, the Commission adheres to Supreme Court's test in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). *Pendley v. Highland Mining Company*, 34 FMSHRC

²⁴ In my March 6, 2014 Order Denying Respondent's Motion for Summary Decision, I addressed the issue of whether any of Respondent's post safety complaint actions toward complainant – singly or in combination – constituted a "material adverse action," so as to raise a cognizable claim under §105(c). I hereby incorporate the rationale contained therein without full recitation thereof.

1919 (Aug. 2012). Under that standard, adverse actions are those that are “materially adverse to a reasonable employee,” meaning “that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Id.*

In this matter, the record clearly establishes that Arnold suffered three discrete adverse employment actions. Arnold was suspended indefinitely without pay (though that suspension ultimately lasted for a week after which time he was reimbursed). (Tr. 264-267, 514-517, 633-634, 649, 675-676). He received a written warning which was placed in his personnel file-- the first such warning in his nearly 30 years with Respondent. (Tr. 278, 283, 325). Finally, Arnold had an evaluation downgraded to “needs improvement” with respect to safety, despite a previously spotless record. (Tr. 292-295, 363, 845-846). Each of these actions, individually, constitutes an adverse employment action. Moreover, an employer’s actions are to be evaluated cumulatively. See *Burlington Northern* at 68 and 73; see also *Moore v. Cricket Communications*, 764 F. Supp 2d 853, 862 (S.D. Tex. 2011). When considered together, there is no question these actions form an adverse employment action. A reasonable miner, considering the way in which Arnold was held out of work, disciplined, and then unfavorably reevaluated, could easily be dissuaded from making a complaint.

In its post-hearing submissions, Respondent argued that the actions taken with respect to Arnold were not “materially adverse.” (*Respondent’s Post-Hearing Brief* at 23). For the suspension, Respondent argues that Arnold was only held out for four days, ultimately received his full pay, and was not harmed in his employment. (*Id.*). It asserted that the holding out of service during an investigation was not an adverse employment action, but instead a necessary action to ensure that other miners understood that safety regulations and company policy were important. (*Id. citing Gerald v. Locksley*, 785 F. Supp. 2d 1074, 1117 (D. N.M. 2011)). It further asserted that his suspension lasted only long enough to determine the appropriate course going forward. (*Id.*). Finally, it argued that a short suspension was appropriate given Arnold’s action in failing to lock out/tag out the motor and that other miners had been terminated for similar actions. (*Id.*). Respondent asserted that, given Arnold’s improper actions, the actual punishment that it meted out would not dissuade others from making safety complaints. (*Id.* at 23-24 *citing Dehart v. Baker Hughes Oilfield Operations*, 214 Fed. Appx. 437 (5th Cir. 2007).

The record does not support Respondent’s characterization of the suspension. Arnold was held out of service for seven days-- between February 22 and March 1. (Tr. 334-335). While Arnold was only scheduled to work four days in that time period, that did not shorten his time of actual suspension by three days. (Tr. 334-335). Respondent’s human resources specialist, Hoffman, agreed that he had never heard of a suspension longer than four days and that a week would be a long time to be held out of service. (Tr. 677). It hardly sounds like the time taken by Respondent was just long enough to conduct the investigation --especially given that Arnold and Steagall were both available February 22 for interview on that day and Ramirez had already assessed all of the documents he would later rely on at the consensus triangle. Further, while the suspension eventually lasted seven days, Arnold had no way of knowing until he was actually called in to return to service how long the suspension would last. He had been told it was

indefinite. Similarly, Arnold had no way of knowing if he would be paid for the week.²⁵ Arnold credibly testified as to the financial, familial, and psychological pressures that he felt during his suspension. (Tr. 267-268). A reasonable miner, knowing about the nature of Arnold's suspension, may have been dissuaded from making a safety complaint.²⁶

Respondent's argument that a suspension to conduct an investigation was not an adverse employment action reaches outside of Mine Act jurisprudence and draws unsupportable analogies. The case Respondent cited, *Gerald v. Locksley*, deals *inter alia* with an assistant football coach's claim of racial discrimination under Title VII of the Civil Rights Act. 785 F.Supp.2d at 1085. In that case, the Court noted "[o]nly acts that constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits will rise to the level of an adverse employment action." *Id.* at 1117 *citing Robinson v. Cavalry Portfolio Serv., LLC*, 365 Fed.Appx. 104, 114 (10th Cir. 2010)(internal quotations omitted). These are clearly the "common forms of discrimination" to which Congress chose not to limit the Mine Act. *Legislative History* at 36. Put simply, an action that would not be an adverse employment action under Title VII (as articulated by the Federal District Court of New Mexico) may be an adverse employment action under the Mine Act. The Mine Act is broader and more protective of miners. Simply because the discipline here was more subtle than a discharge or change in long-term benefits does not mean that it was not an adverse employment action under the Mine Act. The question, under the Mine Act, is whether in light of the disciplines given to Arnold a reasonable miner would be dissuaded from making a safety complaint. As noted *supra*, this court finds such to be the case instantly

Respondent's assertion that the miner's suspension was justified punishment for his failure to lock out/tag out is not pertinent to the issue of whether said suspension was an adverse employment action. The appropriateness of Arnold's punishment will be addressed, *infra*, in the discussion regarding the affirmative defenses.

Respondent also asserted that Arnold did not experience an adverse employment action with respect to the written warning. (*Respondent's Post-Hearing Brief* at 24). It argued that warning an employee of safety obligations is not enough, without more, to dissuade someone from making complaints. (*Id. citing Foreman v. Western Freightways, LLC*, 958 F. Supp. 2d 1270, 1284-1285 (D. Colo. 2013); *see also Respondent's Post-Hearing Brief* at 25, note 8). It

²⁵ That Arnold's suspension was, in fact, a punishment is further bolstered by the fact that Hoffman testified that miners were held out of service without pay generally in case a suspension was later deemed necessary. (Tr. 649). However, in this case Ramirez testified that at the consensus triangle, nothing more serious than a written warning was discussed because of Arnold's work record. (Tr. 538, 602). If Respondent had no intention of suspending Arnold, the only explanation for this holding out of service without pay was that it was a separate punishment outside the company's normal procedures.

²⁶ Respondent's admission that it could have held Arnold out with pay pending the investigation but instead opted to hold him without pay further supports the conclusions of material adverse action and discriminatory bias.

argued that it could have terminated Arnold for his failure to lock out/tag out the motor and that adverse employment action cannot occur when the punishment could have been more severe. (*Id. citing National Cement Co. v. FMSHRC*, 27 F.3d 526, 534 (11th Cir. 1994)). The mine operator again contended that the punishment was justified and that a warning for being insubordinate and/or for being argumentative could not dissuade a reasonable worker from making safety complaints, especially when justified. (*Id. citing Dehart*).

The warning provided to Arnold here was more than simply a reminder to Arnold of his safety obligations. In the case Respondent cited, *Foreman v. Western Freightways, LLC*, a worker making a discrimination claim under Title VII of the Civil Rights Act failed to establish an adverse action because he had already received similar warnings before his protected activity occurred and his warnings brought him no closer to terminations. 958 F. Supp. 2d at 1284-1285. That scenario was clearly inapposite to the situation here. Arnold had an immaculate record at Respondent and had never received a written or verbal warning with respect to safety before. (Tr. 278, 283, 325, 537). Further, because a written warning was part of Respondent's unwritten progressive discipline system, receipt of the warning placed him closer to termination. Beyond these substantial differences, it is unnecessary to reach into Title VII litigation when several Commission ALJs have determined that in the context of the Mine Act a written warning can constitute an adverse employment action. *See Howard v. Cumberland River Coal Company*, 2010 WL 3616453, *5-6 (August 13, 2010)(ALJ Hodgdon)("The letter could have had a potential chilling effect on further documentation of hazardous conditions by...other miners aware of the disciplinary action"); *see also Palmer v. Asarco Inc.*, 28 FMSHRC 669, 678-679 (Aug. 2006)(ALJ Manning) and *United Steelworkers of America on Behalf of Bird v. General Chemical Company*, 15 FMSHRC 2475, 2489-2490 (Dec. 1993)(ALJ Lasher). A reasonable employee, seeing a miner with Arnold's spotless record receive progressive discipline, could be dissuaded from raising safety issues.

Similarly, Respondent's argument that the warning could not be an adverse action because a more severe punishment was possible does not comport with the law or logic. This is clear from a closer reading of the case cited by Respondent, *National Cement Co. v. FMSHRC*. In that case, the complainant's claimed adverse action was an offered reassignment to a different position. 27 F.3d at 534. That new position was actually at a higher pay grade (though the miner would make less money without overtime). *Id.* The court determined that a change of position to a higher pay grade could not be an adverse action. *Id.* That is not the situation here. Arnold does not claim that a change in position to a higher pay grade occurred. He claims that he was disciplined with a written warning. In no way could a written warning be seen as a lateral move or an improvement in Arnold's position. Further, if Respondent's argument were to prevail, then management could simply provide "termination" as the penalty for breaking any rule and claim that any action that fell short of termination could not be an adverse action. The question presented here is whether a written warning would dissuade a miner from making safety complaints – not whether a promotion to a higher pay grade would have such a chilling effect.

Finally, Respondent claims that Arnold did not experience an adverse employment action with respect to the employee evaluation. (*Respondent's Post-Hearing Brief* at 25). Specifically, Respondent claimed that all the changes were minor because his overall grade was unchanged

and it did not affect the terms and conditions of employment. (*Id.* at 25-26 citing *Daniels v. United Parcel Services*, 701 F.3d 620, 638 (10th Cir. 2012)).

I see no reason to consider the negative aspects of Arnold's evaluation to be "minor" simply because the overall grade was unchanged. Respondent's witnesses took great pains to explain that safety was of the utmost importance to the operator. As such, a "needs improvement" rating on the "safety" category of the evaluation must be extremely important.

Further, the evidence suggests that the change in evaluation was more significant than Respondent and its witnesses implied. Arnold credibly testified that, while evaluations were not supposed to be kept, they were used to show a trend or history during discipline. (Tr. 325). Further, Dixon credibly testified that evaluations could be used to disqualify employees for different positions. (Tr. 811-812). As the local union president, Dixon would be in the position to know how Respondent used miners' evaluations. Further, despite Ramirez's testimony that evaluations were not used, Ramirez conceded that he left the evaluations in the HR files. (Tr. 570-571, 587). It stretches credibility to claim that the evaluations were ephemeral and inconsequential and, for practical purposes ignored, but then concede that these evaluations were also kept in two separate locations and sometimes saved indefinitely. While I credit Hoffman's testimony that the CBA dictated pay for Arnold and that the evaluations did not directly affect the CBA, I also find that evaluations were indirectly used in decisions related to promotion and other job conditions. (Tr. 669-670). Even if the company truly did not use the evaluations to dictate terms and conditions, I find that it would be reasonable for a miner to believe a grading of their job performance by supervisors would be important and could be dissuaded from raising conditions as a result.

Therefore, notwithstanding Respondent's assertion that it only reviewed performance appraisals 12-18 months retroactively and that the appraisals in any case fell outside the CBA, I find that the negative appraisal modifications were material and adverse in nature. Also, the disclosure that the performance appraisals were kept "permanently" only further persuaded this court of the untoward consequences for miners facing additional disciplinary action. Indeed, if there is one thing that many years of legal and judicial experience has taught this court, it is this: the collection and retention of negative data regarding individuals never has benign consequences.

Finally, Respondent argued that the various claimed adverse actions taken as a whole could not have dissuaded a reasonable miner from making safety complaints. (*Respondent's Post-Hearing Brief* at 26-27). To that end, Respondent noted that despite Arnold's claim that he would be dissuaded from making further safety complaints, he had continued to do so even up to the time of the hearing. (*Id.* at 26 citing *Somoza v. University of Denver*, 513 F.3d 1206, 1214 (10th Cir. 2008). It also noted that no other miners had ceased to act as miner's representatives. (*Id.*). It claimed that Arnold's testimony was self-serving, contrary to other evidence, and should be disregarded. (*Id.* citing *Cox v. Pammlid Coal Company*, 9 FMSHRC 435. 522 (ALJ Koutras).

The fact that Arnold was a particularly persistent (albeit abrasive) safety advocate and refused to be cowed is beside the point. As the Supreme Court noted in *Burlington Northern*, "We refer to reactions of a *reasonable* employee because we believe that the provision's standard

for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings.” 548 U.S. 53 at 68-69. The issue is not whether Arnold was dissuaded but if a reasonable miner would be dissuaded. (Unfortunately, American Mining History is replete with examples of mining disasters involving “reasonable” miners who had failed to speak out about blatant safety hazards because fear of operator retribution.) I credit the testimony of Arnold and Beyale that, though no BHP miners had quit as representatives, they were nonetheless concerned about how they would be treated for raising safety issues. (Tr. 323-324, 796). This court is convinced that each of the above adverse actions, considered singly, would be sufficient on its own to dissuade a reasonable miner from making safety complaints. The cumulative effect of the serial adverse actions was undoubtedly more than adequate to do so.

In short, the suspension, the written warning, and safety evaluation were individually and cumulatively adverse employment actions that would reasonably deter a miner from engaging in protected activities.

ii. A Nexus Existed Between The Protected Activity And The Adverse Action

Having determined that there was protected activity and an adverse employment action, the next inquiry is whether there was a nexus between the two. To establish that nexus, the Commission has identified these indicia of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec’y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a “motivational nexus between protected activity and the adverse action that is the subject of the complaint.” *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *See Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). I will consider each indicia in turn.

1. *Respondent Had Knowledge of the Protected Activity*

There is no question that Respondent had knowledge of the protected activity. As Judge Bulluck recently observed, knowledge of protected activity “is probably the single most important aspect of a circumstantial case.” *Lopez v. Sherwin Alumina, LLC*, 36 FMSHRC 730, 736 (March 2014). Well-settled Commission case law establishes that when an agent of an operator has knowledge or should have knowledge of a safety hazard, such knowledge should be imputed to the operator. *See Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000); *Pocahontas Fuel Co.*, 8 IBMA 136, 147 (Sept. 1977) *aff’d* 590 F.2d 95 (4th Cir. 1979) (Coal Act case) (adopting the common law principle that acts or knowledge of an agent are attributable to a principal). An agent is defined as someone with responsibilities normally delegated to management personnel, has responsibilities that are crucial to the mine’s operations, and exercises managerial responsibilities at the time of the negligent conduct. *Martin Marietta*

Aggregates, 22 FMSHRC 633, 637-638 (May 2000) *see also* 30 U.S.C. §802(e) (an agent is “any person charged with responsibility for the operation of all or part of a...mine or the supervision of the miners in a...mine.”). In this case, the evidence of knowledge is overwhelming. Steagall, a member of management, was aware of Arnold’s safety complaints as early as January 22, 2013.²⁷ (Tr. 244, 389-390). As a result, Respondent had knowledge of Arnold’s protected activity on that date.

However, that was not the extent of Respondent’s knowledge. Berget, also a member of management, learned about Arnold’s safety complaints on January 22, 2014, the same day as Steagall. (Tr. 244, 245, 392-393, 477). Martin, again a member of management, learned about those complaints on February 14, 2014. (Tr. 247, 399, 684, 718). On February 19, Martin learned that Arnold was going to file a 103(g) complaint if nothing was done regarding the motor. (Tr. 250-251, 692). Later that day, after Dixon had filed the 103(g) complaint, Martin told Williams that he knew Arnold had been the person to call. (Tr. 694-696, 816-817). In response, Martin wrote an e-mail that evening which explained Arnold’s complaints and the 103(g) inspection. (Tr. 487-490, 592, 703). Lynch and Ramirez, both members of management, received this e-mail. (487-490, 592, 737, 742, 769). Lynch testified he believed from this e-mail that Arnold had caused the 103(g) complaint to be filed. (Tr. 739, 742-743). Halgryn and Hoffman, both members of management, learned about Arnold’s safety complaints and the 103(g) inspection from Ramirez. (Tr. 627-629, 832-832). Berget heard about the 103(g) complaint from someone in the electrical department. (Tr. 481-482). Finally, everyone at the company became aware of the 105(c) complaint (after the suspension and written warning but before his lowered evaluation). Around half a dozen members of management were aware of Arnold’s various forms of protected activity at the time Arnold suffered adverse employment actions.

2. Respondent Displayed Hostility Towards Claimant’s Protected Activity

The record contains several instances in which members of mine management displayed hostility towards Arnold’s protected activity. When Martin accompanied Williams on the 103(g) complaint inspection, he repeatedly stated that he knew Arnold had called in the complaint and expressed anger. (Tr. 694-696, 816-817). In fact, Williams had to tell Martin to stop discussing the issue. (Tr. 256, 817). During the inspection the next day, Lynch provoked a confrontation with Arnold and angrily questioned his credentials while discussing the motor at issue. (Tr. 260-261, 497-498, 706-707, 749-751, 824-825). Arnold and Williams testified that the MSHA inspectors had to step between Lynch and Arnold to prevent the confrontation from spiraling out

²⁷ Occasionally in its briefs and often at hearing, Respondent argued that “upper management” did not have actual knowledge of the protected activity. (*See e.g. Respondent’s Post-Hearing Brief* at 12). Neither the term “upper management” nor anything similar is defined in the Mine Act and no distinctions between “types” of management exist in Mine Act jurisprudence. It is uncontested that Steagall was management and therefore his knowledge is imputed to the corporate person of the Respondent. It is not Claimant’s responsibility to show that each member of management was personally aware of his protected activity. If “lower management” was delinquent in passing messages to “upper management” it would constitute a management concern.

of control. (Tr. 261). Even Lynch conceded that he had to take two steps back to cool down. (Tr. 750-751). During the suspension and when Arnold received his written warning and performance evaluation, Ramirez told Arnold to “follow the chain of command” before calling MSHA. (Tr. 265-266, 294-296, 338-339, 362-363, 509-510, 545, 621-622). Similarly, Hoffman had complained to Dixon about Arnold calling in 103(g) complaints. (Tr. 675-676, 807-809). Martin expressed deep, almost personal hostility toward Arnold and characterized his actions as vindictive and confrontational. (Tr. 712). He even claimed that Arnold would stage unsafe conditions to provide a pretext to call in 103(g) complaints. (Tr. 712-713). Whatever motive he believed existed for Arnold’s alleged actions was left unstated. Such negative characterization of a miner can be indicative of hostility toward protected activity. *Turner v. National Cement*, 33 FMSHRC 1059, 1069-1070 (May 2011). In sum, several different members of management expressed opinions or behaved in a manner which indicated hostility toward Arnold’s protective activity in this matter.

Respondent argued that it displayed no hostility toward protected activity. (*Respondent’s Post-Hearing Brief* at 19-22). It noted that all of its witnesses testified that the punishment was based on Arnold’s failure to lock out or tag out the equipment in violation of company policy and MSHA regulations. (*Id.* at 19-20). It argued that if there had been hostility, Arnold would have received punishment for the telephone or photograph violation, but that there was no piling on here. (*Id.*). Similarly, it argued that if it were hostile, Arnold would have been discharged. (*Id.* at 19-21). It also noted that it could not have hostility towards Arnold for the 105(c) because it was not aware of it until Arnold had returned to work. (*Id.* at 21 *citing Cyprus Bagdad Copper Co.*, 12 FMSHRC 1239, 1259 (Jun. 1990)(ALJ Cetti). Finally, Respondent argued that Arnold’s evaluation was only changed after he requested the review and it was changed, along with all the other electrician evaluations, to ensure conformity. (*Id.* at 21). During the review, it was determined that Arnold’s review did not accurately reflect the conditions for which he was punished so it was changed and an explanation added. (*Id.* at 21-22). Respondent argued that if hostility actually motivated the change, Arnold’s entire rating rather than only his safety rating would have been changed. (*Id.* at 22).

None of Respondent’s arguments are compelling and some show a lack of understanding as to the nature of discrimination under the Mine Act. The legitimacy of Respondent’s claim that Arnold’s punishment was for failure to lock out or tag out the motor will be discussed more fully with respect to Respondent’s affirmative defenses, *infra*. Regardless, as Arnold experienced each of his punishments in this matter (the suspension, the written warning, and the changed evaluation) Arnold was told that his failure to follow “the chain of command” contributed to the discipline. (Tr. 265-266, 294-296, 338-339, 362-363, 509-510, 545, 621-622). This point is essentially undisputed and several of Respondent’s witnesses openly testified that they were upset or concerned that Arnold went outside of the chain of command to contact MSHA. (Tr. 494-495, 509-510, 545, 610, 651-652). In fact, concern over Arnold’s failure to follow the chain of command was written into Arnold’s evaluation. (Tr. 294-296, 362-363, 621-622). Williams testified that the Respondent asked MSHA to explain that miners should follow the chain of command. (Tr. 826-827). Similarly, it is undisputed that Respondent was upset that Arnold gave photographs to MSHA personnel and, in fact, this was cited as being one of the reasons for his suspension, though not for the written warning or evaluation. (Tr. 356, 526-528).

Respondent and its witnesses seem oblivious to the fact that their open admission to antipathy toward going outside of the “chain of command” to MSHA was an explicit, open admission to hostility toward protected activity. If anything constitutes protected activity under the Mine Act, then filing (or causing the filing) of a safety complaint with MSHA must be such. In fact, filing a complaint is one of the few forms of protected activity unambiguously referred to in the relevant provision of the Mine Act. 30 U.S.C. §815(c)(1)(prohibiting discrimination against a miner “because such miner...has filed or made a complaint under or related to this Act.”). I find that Respondent’s witnesses essentially conceded that they were hostile to this most fundamental form of protected activity. While Respondent is certainly free to ask miners to bring their safety concerns to the company, it cannot punish miners for speaking to MSHA at any time. Euphemistic language about “chain of command” does not change the fact that in this matter, Arnold was disciplined, in part, because he complained to MSHA.

Further, even if there was some basis for requiring Arnold to “follow the chain of command” before contacting MSHA, he did so. As noted *supra*, Arnold told Steagall and Berget about the condition on January 22 and later told Martin about the condition on February 14. While he may not have gone to “higher levels of management” as Respondent urges in its brief, he still made Respondent aware of the condition. And, as noted *supra*, the Mine Act does not recognize “upper management.” Apparently, under Respondent’s policy, Arnold was required to bring safety issues to every single member of management until one of them took action. If none of those members of management took any action, then Arnold was still responsible for any safety hazards he observed. This is, of course, absurd and shows that Respondent’s insistence on “chain of command” is, in reality, a post-hoc justification for hostility to miners contacting MSHA.

Respondent’s arguments that imply that there was no hostility because they could have behaved more egregiously are likewise disregarded. Specifically, Respondent argues that it showed no hostility because it did not “pile on” with additional written warnings for taking photographs or using the camera. Similarly, BHP argues if it was hostile it would have discharged Arnold. Finally, it claims that Arnold’s performance evaluation was only changed with respect to safety issues, and did not impact on the overall score. Simply because a Respondent could have been more hostile to protected activity does not mean that it was not hostile at all. To claim that only the most egregious levels of hostility can meet the requirements of the *CAM Mining, LLC*, framework has no basis in law and is absurd on its face.

Respondent also argued that the change in Arnold’s performance appraisal should not be considered evidence of hostility in that Steagall’s initial evaluation was not discriminatory and that Arnold himself initiated the process of reevaluation. These arguments are beside the point. The critical issue is whether the ultimate changes in Arnold’s performance evaluation were grounded in Respondent’s hostility toward the miner for having made safety complaints. As noted *infra*, failure to follow the chain of command would be a critique from which a hostile, discriminatory animus could be inferred.

Respondent’s argument that it could not have had animus toward the 105(c) complaint because it was not aware that the complaint had been made has some support in the record. However, this argument only has merit with respect to the suspension and the written warning.

By the time Arnold's performance evaluation occurred, the Respondent was clearly aware of the 105(c) complaint.

In short, I find various members of Respondent's management team showed hostility toward Arnold's protected activity and none of Respondent's arguments to the contrary are compelling.

3. There Was A Coincidence In Time Between The Protected Activity And The Adverse Action

The third circumstantial indicia of animus, coincidence in time between the protected activity and the adverse action, is also clearly present. The Commission has found delays lasting several weeks to several months to be sufficient to show animus. *See, e.g., CAM Mining, LLC*, 31 FMSHRC at 1090 (three weeks); *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 *1932 FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a lay-off; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure). The Commission has explained that it applies "no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time." *All American Asphalt*, 21 FMSHRC at 47 (*quoting Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)).

In this matter, Arnold was suspended a mere three days after Dixon filed the 103(g) complaint and two after Respondent received a citation. As chronicled *supra*, Arnold made a whole series of complaints leading up to this event. The written warning occurred a week later. Finally, Arnold's evaluation occurred a few months after his suspension and covered the time period during which the suspension and written warning occurred. The time delay is clearly within the limitations set by the Commission.

4. Claimant Experienced Disparate Treatment

While the traditional animus framework outlined in *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining*, contains only three kinds of discriminatory indicia (those discussed above) the Commission has often also considered disparate treatment. *Chacon v. Phelps Dodge Corp.*, *supra*. "Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Id.* at 2512. However, the existence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present. *Id.* at 2510-2513. I conclude that, because there was clearly knowledge, hostility, and coincidence in time in this matter that Claimant need not prove disparate treatment here. However, I will still address the issue.

In this matter, Arnold's treatment was clearly far different, and harsher, than the way in which Berget, Martin, and even Steagall were treated.²⁸ Arnold was ostensibly punished for failing to follow the lock out/tag out procedure. (*Respondent's Post-Hearing Brief* at 11-16). He was also told at all relevant times during his punishment that he should have followed the chain of command to bring issues to other members of management. (Tr. 265-266, 294-296, 338-339, 362-363, 509-510, 545, 621-622). Berget, Martin, and Steagall all learned from Arnold that there was a possible problem with the coal lab fan motor. (Tr. 244-247, 389-393, 399, 477, 684, 718). Steagall and Arnold attempted to move this concern up the chain of command to Berget and Martin. (Tr. 244-247, 392-393, 399, 477, 684, 718). Berget and Martin never raised this issue with anyone higher until after the 103(g) complaint was already filed. Berget, Steagall, and Martin also failed to lock out or tag out the coal lab motor fan. Arnold was indefinitely suspended (initially without pay), received a written warning, and a lowered performance evaluation. (Tr. 264-266, 514-517, 633-634, 649, 676). Steagall was suspended with pay. (Tr. 434, 440-442, 596-597, 682). Neither Berget nor Martin suffered any adverse employment action for doing exactly what Arnold had done. This is a textbook example of disparate treatment. Arnold was treated more harshly for engaging in the exact same behavior as his superiors.

Respondent argues that Berget and Martin were in fundamentally different positions than Arnold and, as a result, cannot be used to show disparate treatment. (*Respondent's Reply Brief* at 4-5). With respect to Berget, Respondent claims that he was unfamiliar with the coal lab and told Arnold and Steagall to contact the installer. (*Id.* at 4). Berget was not involved with the upgrading or modification of the coal lab, so he had no knowledge of the specifics of the installation. (*Id.*). His lack of knowledge was so great that he asked Ramirez to tell the miners not to ask him about it. (*Id.*). Berget simply relied on his certified electricians. (*Id.*). Finally, Berget never concluded that there was a hazard or left a perceived hazard of others. (*Id.* at 4).

The evidence suggests that no one was particularly knowledgeable about the coal lab. The room was installed by an outside contractor, and the electricians were not even sure about what equipment was in place. (Tr. 243, 391-392, 478-483). Arnold did not have any additional information that Berget did not have and, in fact, Arnold went to Berget hoping he would have some expertise. (Tr. 247). Berget was a certified electrician as well, in addition to being Respondent's only electrical engineer. (Tr. 244-245, 475-477, 698-699, 790, 816-819). In short, Berget, as a member of management, was arguably more qualified than Arnold and was in the same (or perhaps a better) position to learn information about the fan motor as Arnold. His far more lenient treatment has no rational basis in the record.

Respondent's claim that Arnold and Berget are not comparable because Berget never concluded that a hazard existed is likewise unpersuasive. In its briefs, Respondent argued that

²⁸ While Arnold was a rank-and-file worker and Berget, Martin and Steagall were members of management, in all ways relevant to this discussion, they were similarly situated here. All four had the power to lock out or tag out equipment. Various witnesses credibly testified that management and workers were held to the same standard. (Tr. 548, 653-654, 761). And Steagall credibly testified that in the electrical department, the distinction between management and worker was insignificant because everyone was a certified electrician. (Tr. 433-434).

Arnold was punished for failing to lock out or tag out the motor. (*Respondent's Post-Hearing Brief* at 11-16). It believed this failure was particularly serious because that possible condition exposed miners to a grave hazard. (*Id.*).

Respondent's argument does not align with the facts in this case. Perhaps most importantly, Arnold and Steagall credibly testified at all times that they were by no means certain that there was a hazard. (Tr. 244-246, 282, 389-395, 403-404, 477, 408, 685-686). The two electricians talked to two other members of management, including Respondent's only electrical engineer, to seek answers. Berget essentially said the same thing; he did not know if there was a hazard. Each told Arnold and Steagall to follow up with the manufacturer or promised to follow up himself. (Tr. 245-247, 393, 396-398, 477-478, 482-483). There is simply no reason to make a distinction between Arnold and Berget.

However, Respondent's argument on this point raises more fundamental problems in its case. Respondent took great pains to note in its briefs that Arnold "perceived" or "believed" there was a hazard, rather than claiming such a hazard existed. (*see e.g. Respondent's Reply Brief* at 1). It points to the fact that Arnold filled out the "imminent danger" section on his monthly inspection report and that Martin testified he heard Arnold call the condition an "imminent danger." (Tr. 249, 719-721). This is because Respondent maintains that the fan motor at issue was properly installed and never was a hazard. (*Respondent's Reply Brief* at 5). And this was Respondent's basis for contending Arnold and Berget are differently situated: Arnold believed that a hazard existed and wrongfully failed to act, while Berget believed there was no hazard and appropriately declined to act. But even if Arnold subjectively believed there was a hazard and Berget subjectively did not-- that does not change the facts that Arnold and Berget were both similarly situated and received disparate treatment.

With respect to the fan motor, a hazard either existed or did not. Arnold or Berget's subjective belief about whether a hazard existed would not change that status. A whole subchapter of the Mine Act regulations (Subchapter H) deals with training of miners. 30 C.F.R. §§46-49. That training is designed, in part, to ensure that miners are able to recognize the existence of hazards. Whether a miner sees and ignores an unsafe condition or sees an unsafe condition and fails to recognize it as such, miners will in any case still be exposed to a hazardous condition and the requirements of the Act will not be met. It is beyond of the scope of the instant matter to determine whether the fan motor was hazardous. However, if there was a hazard then both Arnold and Berget saw it and should have recognized it. If that were the case, then both should have been punished for failing to lock out or tag out the hazardous motor. If it was not hazardous then neither Arnold nor Berget should have been punished for not locking or tagging it out. Their subjective beliefs or reasons for not locking or tagging out the motor are irrelevant.²⁹

²⁹ Respondent's position, when taken to its logical conclusion, would be extremely dangerous. Here, Arnold was punished for recognizing a hazard but failing to lock out and tag out (despite the fact that he went to three of his supervisors). Berget did not recognize a hazard and therefore was not punished. However, they were both looking at the same condition. The message is clear: If a hazard exists, it is better to be entirely ignorant about it than to recognize it and bring it to your superiors. You can violate the lock out/tag out regulations and policies so
(continued...)

With respect to Martin, Respondent claims the he was not a certified electrician and unfamiliar with the installation. (*Respondent's Reply Brief* at 5). It argues that Martin told Arnold and Steagall that they should lock out or tag out the equipment if they believed it appropriate. (*Id.*). Finally, as with Berget, it argues Martin never concluded that there was a hazard or left a perceived hazard of others. (*Id.*).

As with Berget, I find that Arnold did not have any particular knowledge about the installation and was unfamiliar with it as well. While it is true that Martin was not a certified electrician, he was nonetheless apparently relied on for electrical issues and could have locked or tagged out the equipment if he was so inclined. In fact, he was a former MSHA inspector and received MSHA's standard electrical training. (Tr. 683-684, 717). The argument regarding Martin's subjective belief is rejected for the same reasons discussed with respect to Berget, *supra*. I see no reason to believe that Berget or Martin were differently situated than Arnold in any substantive way and find that their lenient treatment, when contrasted with the harsher punishment dealt Arnold, clearly showed disparate treatment.

Beyond the issues with Berget and Martin, I find that Arnold experienced disparate treatment with respect to the length of time he was held out. Arnold was held out of seven days, while Hoffman testified that the longest amount of time he could recall for an investigation was four days. (Tr. 677-678).

Arnold also credibly testified, and provided documentary evidence, to show that other miners had entered information into the "imminent danger" section of their monthly reports without discipline over the lock out tag out issue. (Tr. 297-313). This also clearly shows disparate treatment.

Further, Arnold and Steagall recounted several incidents in which miners who failed to lock or tag out equipment were not given a written warning. Arnold and Steagall both recalled an incident in which Halgryn and Ramirez contacted a belt with a shovel while using a metal detector. (Tr. 313-322, 420, 430, 554-555, 799-800). Steagall and Arnold were not aware of Halgryn or Ramirez having received any discipline for this incident. (Tr. 317, 421-422). Ramirez testified that he was coached, but did not receive a written warning for this condition. (Halgryn testified that even this had not occurred). (Tr. 559-560, 836).

With respect to this incident, Respondent argued that the equipment was locked out but that Ramirez and Halgryn simply did not add a group lock. (*Respondent's Reply Brief* at 3-4). The testimony supports this assertion. (Tr. 329, 555-556). Respondent argues that this was only a technical violation which placed no one in danger, unlike Arnold's failure to lock out or tag out the motor here. (*Respondent's Reply Brief* at 4).

²⁹ (...continued)

long as you say you do not believe the hazard exists. Conversely, if there is no hazard, asking questions and raising issues without locking and tagging out (which given the lack of a hazard would be inappropriate) can lead to punishment just as though you ignored an actual hazard. In short, the safe bet with respect to safety hazards (real or potential) is keep your eyes closed and your mouth shut.

The testimony on the purpose of a “group lock” and an “individual lock” was meager. It would not be appropriate at this time to parse the technical aspects of Respondent’s various rules. It is sufficient to note that Arnold was punished for failing to lock out or tag out equipment while Halgryn and Ramirez were not punished (or punished more lightly) for the same issue. Furthermore, even if the group lock did render the condition totally safe, Respondent also asserts that the motor at issue here posed no danger and that only Arnold and Steagall believed there was a danger. In light of such, from Respondent’s perspective, the situations were identical with respect to safety, making the disparate treatment all the more stark.

Arnold and Steagall recounted several other incidents involving miners who failed to lock or tag out equipment. Those incidents included an event where Beyale and Benny saw Arthur standing on a belt boom, one where a locomotive derailed and was not tagged out before the person left the train, another involving a crusher not locked out during an inspection, another involving Arnold not locking or tagging out reclaimers, and a final one where electrical wires were not locked out. (Tr. 271, 321, 430-431, 446, 473, 552, 554, 801). Arnold did not believe anyone was punished with respect to these incidents and Steagall was uncertain. (Tr. 272, 322, 447, 472-473). Respondent argued that, with respect to the incident involving Benny and Beyale, the equipment was locked out and tagged out immediately and the miner was disciplined. (*Respondent’s Reply Brief* at 5). Further, Lynch testified to several other lock out/tag out incidents where miners were punished. (Tr. 780-787). I find that the testimonial evidence with respect to these events was too vague and uncertain to support Arnold’s claim of disparate treatment.

Regardless of these incidents, the treatment of Berget and Martin, the length of the suspension, the other miners who entered information in the imminent danger section of their reports, and the incident involving Halgryn and Ramirez are ample support for a finding of disparate treatment.

In light of the foregoing findings regarding Arnold’s protected activity, the adverse employment actions he suffered, and the discriminatory nexus between those two (as shown by the circumstantial evidence of knowledge, hostility, coincidence in time, and disparate treatment), I find that Claimant established a *prima facie* case of discrimination under the Mine Act. Further, for the reasons discussed *supra*, I find that Respondent was unable to rebut this *prima facie* case.

II. Respondent Proffered Affirmative Defense Was Pretextual

If a Claimant establishes a *prima case* of discrimination, the operator may make an affirmative defense by proving by a preponderance of all the evidence that the adverse action would still have occurred absent the protected activity. *See Pasula*, 2 FMSHRC at 2799-2801; *Robinette*, 3 FMSHRC at 819-820; and *U.S. Steel Mining Company*, 23 FMSHRC 981, 988-989 (Sept. 2001). An affirmative defense is usually made by showing “past discipline consistent with that meted out to the alleged discriminatee, the miner’s unsatisfactory work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question.” *Bradley v. Belva Coal Company*, 4 FMSHRC 982, 993 (Jun. 1982). The Commission

summarized the judge's task in evaluating affirmative defenses in, *Turner v. National Cement Company of California*, stating:

[A] defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. The Commission has held that "pretext may be found ... where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro*, 4 FMSHRC at 1937-38).

33 FMSHRC 1059, 1072 (May 2011). In the interest of ensuring that judges adequately scrutinize the operator's affirmative defense, the Commission has explained "[i]t is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it." *Pasula* at 2800. The operator must show that it considered the employee deserving of discipline for the unprotected activity alone and would have disciplined him solely for that. *Id.*

In its brief, Respondent challenges the Commission's allocation of the burden of proof with respect to affirmative defenses. (*Respondent's Post-Hearing Brief* at 11, FN 7). In addressing Respondent's argument, it might be helpful to first understand the various burdens at play in a discrimination proceeding under the Mine Act. In *Robinette*, the Commission clearly explained those burdens:

The "ultimate burden of persuasion" on the question of discrimination rests with the complainant and never "shifts." As we indicated in *Pasula*, above, there are intermediate burdens which do shift. The complainant bears the burden of producing evidence and the burden of persuasion in establishing a *prima facie* case. The operator may attempt to rebut a *prima facie* case by showing either that the complainant did not engage in protected activity or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut, he may still affirmatively defend... The twin burdens of producing evidence and of persuasion then shift to him with regard to those elements of affirmative defense. If the operator cannot rebut or affirmatively defend against a *prima facie* case, the complainant prevails. Of course, the complainant may attempt to refute an affirmative defense by showing that he did not engage in the unprotected activities complained of, that the unprotected activities played no part in the operator's motivation, or that the adverse action would not have been taken in any event for such unprotected activities alone. If a complainant who has established a *prima facie* case cannot refute an operator's meritorious affirmative defense, the operator prevails. This latter consequence stems from the fact that the "ultimate" burden of persuasion never shifts from the complainant. Cf. *Wright Line*, 251

NLRB No. 150, 105 LRRM 1169, 1173-1175 (1980) (adopting a discrimination test substantially the same as the one announced in *Pasula*).

Robinette at 818 FN 20.

Respondent objects to this framework, claiming it was rejected in several Supreme Court decisions. It notes, “In light of recent decisions of the Supreme Court under similar statutes, to establish Arnold’s claim, he and MSHA now must carry the burden of proof and show that ‘but for’ Arnold’s protected activity he would have received no discipline or change in his evaluation.” (*Respondent’s Post Hearing Brief* at 11, FN 7 citing *Gross v. FBL Financial Services, Inc.*, 557 U.S. 17, 176 (2009); *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ___, 133 S. Ct. 2517, 2525 (2013); and *Burrage v. U.S.*, 571 U.S. ___, 134 S. Ct. 881, 888 (2014)). Respondent explains that under the Supreme Court’s holdings in those cases, the protected activity must be “the straw that broke the camel’s back” leading to the discipline/evaluation modification. (*Id.*).

However, after analysis of the cases cited by Respondent, it is evident that the definition of “because” applied in *Gross* and its progeny does not apply here. In *Gross*, the Court held that the phrase “because of” under the ADEA meant that a plaintiff must prove that age was a “but-for” cause of the employer’s adverse decision, a conclusion it repeated in *Burrage*. *Gross* at 174 and *Burrage* at 888-889. However, it also warned courts to “be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.” *Gross* at 175 quoting *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008). This indicates that rather than making a broadly applicable definition of “because” in all statutes, the Court was indicating that the phrase “because of” can mean “but-for” in certain circumstances. In analyzing statutory language with respect to this burden-shifting issue, the Court has emphasized both that determining the meaning of a term like “because” requires analysis of both the text of the provision at issue and an understanding of the overall structure of the statute. *See Nassar* at 2527-2528.

A close reading of the text of section 105(c) of the Mine Act and an understanding of the context of that language shows that the Commission’s intermediate burden shifting described in *Robinette* is appropriate. With respect to text, the ADEA (which was at issue in *Gross*) states it is unlawful to “discriminate against an individual... *because of* such individual’s age.” 29 U.S.C. §623(a)(1)(emphasis added). The text refers to a status or criteria that an employer cannot consider when making employment decisions. By contrast, the Mine Act states, “[n]o person shall discharge or in any manner discriminate against...any miner...because such miner...has filed or made a complaint under or related to this chapter, including a complaint notifying the operator... of an alleged danger or safety or health violation.” 30 U.S.C. §815(c)(1). Unlike the ADEA in *Gross* (or Title VII in *Nassar*), the focus in the Mine Act is not the unlawful actions of the employer, but instead based on the protected activity in which the miner engaged.

This is a significant textual difference. It shows that despite the use of the term “discrimination” in the Act, Section 105(c) is more akin to federal whistleblower protection than the discrimination protections of the ADA. *See e.g.* 18 U.S.C. §1514A(a)(1); 42 U.S.C. §5851; and 49 U.S.C. § 42121(b)(1) (statutes providing protection to people who report specific

wrongdoing). The goal of whistleblower statutes is not to protect a certain passive class of people. Instead, the goal is to encourage people to act in a manner desired by law and to protect them when they do so. *See Day v. Staples Inc.*, 555 F.3d 42, 53 (1st Cir. 2009)(whistleblower protections encourage and protect employees who report fraud); *Haley v. Retsinas*, 138 F.3d 1245, 1250 (8th Cir. 1998) (“Laws protecting whistleblowers are meant to encourage employees to report illegal practices without fear of reprisal by their employers.”); and *Watson v. Department of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995)(“[t]he [Whistleblower Protection Act] was clearly intended to encourage such disclosures and to prevent reprisals against the whistleblowing employee.”). The government has no interest (or ability) to encourage people into a passive class, but it can encourage miners to raise safety issues.

The legislative history of the Mine Act similarly shows the Congress’ intent to encourage miners to actively participate in ensuring their own health and safety and to protect them when doing so. As noted *supra*, Section 105(c) was intended to encourage miners “to play an active part in the enforcement of the [Mine Act]” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.” *Legislative History* at 35. Clearly Congress did not think of miners as a passive class, but instead sought to make miners into active protectors of their own health and safety and to ensure that miners felt safe in blowing the whistle on unsafe conditions.

After careful and critical examination of textual and structural differences between the Mine Act and the statutes discussed in *Gross*, *Nassar*, and *Burrage I* I find no reason to divert from the Commission’s traditional analysis of affirmative defenses. Given the Mine Act’s purpose in encouraging and protecting miners to report health and safety conditions, the requirement that Respondent show by a preponderance of the evidence that it would have taken the same action regardless of the protected activity is entirely appropriate. This ensures miners will suffer absolutely no punishment for fulfilling the purposes of the Act and acting as stewards of their own health and safety. Respondent must justify *all* discipline as being related to unprotected activity.

With those burdens in mind, the question is whether Respondent can prove that it would have taken the same action regardless of Arnold’s protected activity. In its brief, Respondent argued that it would have punished Arnold because of his failure to lock out/tag out the motor, regardless of his protected activity. (*Respondent’s Post-Hearing Brief* at 11-17). Respondent stated that even if it was motivated in part by Arnold’s protected activity, Arnold violated the clear language of the lock out/tag out policy and §77.502. (*Id.* at 12 and 14). It noted that Arnold, Beyale, and Dixon all acknowledged the requirement to lock out serious safety issues under the company policy. (*Id.* at 14). Respondent noted similar requirements under the life-saving rules and the isolation management policy which Arnold also violated. (*Id.*). It also stated that all of the adverse employment actions suffered by Arnold were justified by this unlawful failure. (*Id.* 12-17).

Additionally, Respondent asserted that Arnold was only held out of service when it learned a potential hazard was not locked or tagged out-- not because Arnold reported that condition to management, Dixon, or MSHA. (*Respondent’s Post-Hearing Brief* at 13). It further

asserted that the suspension only occurred when it learned Arnold may have failed in his obligations and lasted only as long as necessary for Respondent to conduct an investigation. (*Id. citing Colowyo Coal Company*, 26 FMSHRC 105, 115 (Feb. 2004) (ALJ Manning) and *Myers v. Freeport-McMoran Morenci, Inc.*, 34 FMSHRC 1593, 1610-1611 (Jul. 2012) (ALJ Manning)). That investigation showed Arnold had failed to follow the lock out/tag out policy. (*Id.* at 14). Once the investigation was completed, Arnold was returned to work with full pay. (*Id.* at 13).

Respondent also argued that not giving Arnold a written warning would have turned the purpose of the Act on its head by encouraging a miner not to be actively engaged on safety matters. (*Respondent's Post-Hearing Brief* at 15 citing *Ross v. Shamrock Coal Company, Inc.*, 13 FMSHRC 1475, 1485 (Sept. 1991) (ALJ Fauver). It also asserted that Arnold's evaluation was only changed because he requested it. (*Id.* at 17). It avowed that, in light of the locking and tagging out issues, it was appropriate and reasonable for Ramirez to modify the evaluation and add comments. (*Id.*). It further noted that Arnold's overall score was unaffected and his next evaluation was given top marks. (*Id.*).

On the whole, Respondent argued that the punishment Arnold received was reasonable because he did not act and knew he was placing miners in danger. (*Respondent's Post-Hearing Brief* at 16). It noted that employers are allowed to punish employees whose unlawful conduct threatens the physical welfare of other miners. (*Id. citing Collins v. FMSHRC*, 42 F.3d 1388 (6th Cir. 1994). Respondent asked what actions it could have taken if it believed an electrical hazard existed and that an electrician did not lock it or tag it out or bring it to "higher management" to resolve the issue. (*Id.* at 12). It asserted that Arnold's complaint did not insulate him from the repercussions of his actions. (*Id.*).

Respondent argued that, even if Arnold was engaged in protected activity, his misconduct – in the way he went about that activity – provided sufficient ground for discharge. (*Respondent's Post-Hearing Brief* at 12 citing *Benes v. A.B. Data, Ltd.*, 724 F.3d 752, 754 (7th Cir. 2013). Consistency with Respondent's history required at least a written warning. (*Id.* at 16-17). Respondent argues that, in light of these circumstances, the written warning, holding out with pay, and encouragement to be proactive was "minor" and "understated." (*Id.* at 14-16).

With respect to history, Respondent argued that at least three other employees were terminated for lock out/tag out violations. (*Respondent's Post-Hearing Brief* at 16). Respondent argued that Ramirez and other "upper management" people had never received the monthly inspection reports Arnold cited as evidence of disparate treatment and that, as a result, they were not part of the decision-making process. (*Id.* at 15-16). BHP further argued Martin was not punished because he did not believe there was a hazard and said that Arnold could lock out or tag out the equipment if necessary (*Id.* at 15). Further, Martin was not an electrician with lock out/tag out responsibilities. (*Id.* at 15).

After careful review of the evidence, I have determined that Respondent failed to establish that it would have taken the same actions here in the absence of Arnold's protected activity. Complainant has conclusively established that Respondent's explanations were mere pretext. Respondent suspended Arnold, gave him a written warning, and gave him a lower

performance evaluation not because he failed to lock out or tag out equipment-- but because he caused a 103(g) inspection and that inspection resulted in a citation.

The evidence establishes that the failure to lock out or tag out the equipment at issue was not Arnold's responsibility. Arnold credibly testified that management told him on numerous occasions not to lock out or tag out the equipment. (Tr. 244, 247, 282-283). The evidence establishes that no one was certain on January 22 or February 14 about whether a hazard actually existed. In light of that fact, Arnold was told to refrain from taking action until they received a more definitive answer. (Tr. 244, 282, 395). Steagall broadly confirms that he instructed Arnold to wait until they had answers. (Tr. 403-404). As noted *supra*, on February 19, Martin gave Arnold and Steagall information about the fan motor, but the electricians still did not believe their questions were answered about whether there was a hazard. (Tr. 250-251, 371-373, 405-406). In an attempt to get information he deemed relevant to making an informed decision, Arnold threatened to call in 103(g) at that time. (Tr. 250-251, 692).

If Martin had given Arnold permission at any time to lock out or tag out the motor, Arnold would have done so. Despite the presence of many electricians (including Steagall) for parts of the various conversations between Arnold and Martin, no one besides Martin could recall this permission. The record establishes that Arnold was constantly on the lookout for safety issues and had consistently locked out and tagged out equipment regularly in the past. (Tr. 379-380, 393-394, 429-430, 456, 547, 653, 712, 754, 775). Arnold had an immaculate performance record for over his nearly 30 years at Respondent's mine and there was no indication he had a history of failing to lock out or tag out equipment in the past. (Tr. 278, 283, 325). In light of this history, there is simply no reason to believe that Arnold vindictively and willfully sought to saddle Respondent with a fraudulent citation. It is likely that Martin's evident disdain for Arnold as a professional and the passions that arose as a result of the 103(g) inspection caused Martin to misremember what he had told Arnold. (Tr. 712-713).

Given the fact that Arnold was told by management to hold off on acting, Respondent's argument that he should have told "upper management" for resolution is also inappropriate grounds for discipline. As noted earlier with respect to the *prima facie* case, an operator has knowledge of a condition when an agent of the operator knows or should know about it. *Martin Marietta Aggregates* at 637. As soon as Steagall knew about the condition on January 22, under the Mine Act's case and statutory law, Respondent had actual, constructive, and/or imputed knowledge of such. The Mine Act does not define "upper management" and does not require miners to inform all members of this vague class of managers about safety conditions. Similarly, Respondent could point to no company policy which required miners to report to "upper management". Respondent instead noted there was a policy in place requiring miners to "give the company a chance." (Tr. 253, 270, 273, 338, 418, 548-551, 755, 807). Arnold had in fact given the company a chance in his expressed concerns about the coal lab fan and thus fulfilled the company policy. In fact, he gave it three chances on January 22, February 14, and February 19. Further, Arnold and Steagall were punished for not raising issues to "upper management" but Martin and Berget were not, showing disparate treatment. Therefore, this explanation for Arnold's punishment is implausible and exceptionally weak. Instead, this evidences that the upper management requirement was a pretext used to justify punishing Arnold for the 103(g) inspection and citation.

Ultimately, whether Arnold was told he could lock out or tag out the motor is immaterial. Even if Martin told Arnold he could act with respect to the equipment, the evidence establishes that Respondent would not have taken the same action absent Arnold's protected activity. The time-line of events at issue show clearly that this was the case. On January 22 Arnold informed management about the fan motor. At that time he did not lock out or tag out the equipment. Steagall and Berget were unquestionably aware of that failure. Arnold was not punished that day. Steagall and Berget were also not punished for failure to lock out or tag out. On February 14, Arnold again raised the issue, this time with Steagall, Berget, and Martin. Once again he did not lock or tag out the equipment, all three members of management were aware, and no one was punished. Finally, on February 19, Arnold raised the issue with Martin. Once again, he did not lock or tag out the equipment; Martin was aware of that fact, and no one was punished.

However, later that day Arnold implored his local union president to call in 103(g) and that action eventually resulted in a citation for Respondent. (Tr. 253, 263-264, 491, 705, 708, 753-754, 803). Only then was Arnold punished. Respondent's claim that he was now punished for failure to lock out and tag out defies logic. Arnold had been failing to lock out and tag out, with management knowledge, for nearly a month without repercussions. He was only punished for such when he had engaged in protected activity and contacted MSHA. As noted *supra*, "[i]t is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it." *Pasula* at 2800. Furthermore, two other people at the mine, Martin and Berget, who had also failed to lock out and tag out the fan, were not punished.³⁰ In fact, Martin had input into Arnold's discipline. Clearly, the punishment was not about locking out or tagging out, it was about getting the company in trouble with MSHA. The message from management was clear: Respondent will indefinitely tolerate a failure to follow safety policies, but if you complain to MSHA, punishment will be swift.

The justification for Arnold's punishments therefore are pretext. If Arnold had not caused a 103(g) inspection and citation, matters would have continued as they had for the previous month: the motor would not have been locked out; management would have known it was not locked out; and no one would have cared. Arnold would not have been suspended; he would not have received a written warning; and he would not have received a more pejorative evaluation. The timing and nature of the punishments in this matter confirm the pretextual nature of the justification. If Arnold's indefinite suspension without pay were for failure to lock out and tag out, then it would have arguably occurred in January. Further, Steagall would not have been paid during his suspension and Berget and Martin would have been suspended as well. If that was the cause of the written warnings, then Berget and Martin also would have been warned.

³⁰ Respondent's claim that Martin and Berget are differently situated from Arnold is rejected for the same reasons discussed in the *prima facie* case, *supra*. In a related argument Respondent asserted that Martin was differently situated from Arnold because he sent an e-mail to Lynch, "well before the dispute here arose." (*Respondent's Reply Brief* at 2). Presumably this was intended to show Martin was behaving "proactively" with respect to dangers. However that email (C-4) was mailed on February 19, after Martin had already learned about the 103(g) inspection and possible citation.

Respondent's evidence showing other employees had been terminated for lock out/tag out violations was vague and confusing, whereas the treatment of Steagall, Berget, and Martin was quite apparent. The best documented evidence shows that other miners had written in the imminent danger section of their monthly reports without suffering any adverse action.

In light of the evidence presented, I find that Respondent's claim that Arnold was disciplined for failing to lock out or tag out equipment was weak and implausible. In short, I have determined that that Respondent's asserted justification is merely pretext to excuse unlawful discriminatory. Therefore, Respondent's affirmative defense must be rejected.

PENALTY

The Secretary proposed a civil penalty amount of \$20,000.00 against Respondent for the violation of 105(c). When assessing a civil penalty, the ALJ is independently responsible for determining the amount of the penalty in accordance with the six criteria set forth in section 110(i) of the Act; 30 U.S.C. § 820(i). *See Performance Coal Co.*, 2013 WL 4140438 (Aug. 2013) (citing *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000)). The six criteria include: the appropriateness of the penalty to the size of the business of the operator charged, the operator's history of previous violations, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violations, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. *Id.* The Commission has used these factors in the past while assessing civil penalties in discrimination proceedings. *See Sec'y of Labor on Behalf of Poddy v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1313-1322 (Aug. 1996).

At the time the instant violation occurred, Respondent's operation was very large, employing over 500 people. (*Secretary's Post-Hearing Brief* at 41).

The Secretary provided no evidence of previous 105(c) violations committed by Respondent.

The Secretary asserted Respondent's action constituted "High" negligence. (*Secretary's Post-Hearing Brief* at 41). With respect to negligence, Commission case law has provided that the ALJ must consider whether "the operator intended to commit the violation of section 105(c) rather than whether it intended to chill future protected activities." *Poddy* 18 FMSHRC at 1319. However, a finding of intentional conduct does not necessarily lead to a finding of high negligence. *Id.* To find high negligence, the ALJ must make a determination that there was "an aggravated lack of care that is more than ordinary negligence." *Id.* at 1320.

I have already determined that the Respondent failed to successfully mount an affirmative defense and was unable to prove it would have punished Arnold based on unprotected activity alone. This determination necessitates a finding that Respondent's actions in violation of 110(c) were intentional. Respondent lacked a good-faith basis for punishing Arnold and knew that it was attempting to retaliate against one of the mine's strongest safety advocates. Nothing presented mitigates this negligence in any way. As a result, Respondent's actions constituted aggravated lack of care and a finding of "High" negligence is appropriate.

When analyzing the gravity criterion, the ALJ must look to both the seriousness of the violation and the importance of the standard violated. In implementing section 105(c), Congress intended to “protect miners against the chilling effect of employment loss they might suffer as a result of illegal discharge.” *Poddy*, 18 FMSHRC at 1321. A chilling effect is not, however, presumed for every violation. *Id.* To determine whether a chilling effect has occurred, the Commission must look at both a subjective (testimony as to whether there was a chilling effect) and an objective (whether the adverse action would reasonably tend to discourage miners from engaging in protected activity) standard. *Id.*

For the reasons discussed in the discussion on adverse employment actions *supra*, Respondent’s actions would reasonably tend to discourage miners from engaging in protected activities. Further, both Arnold and Beyale testified to actual, subjective chilling effect at the mine. (Tr. 322-323, 796). Therefore, Respondent’s actions were sufficiently grave to support a civil penalty.

Respondent did not argue at hearing or in its brief that if the operator was assessed a civil penalty in the amount of \$20,000.00 it would not be able to continue in business. *See also* Stipulation 16 at JX-1.

Respondent has taken no action that would constitute “abatement” of the suspension, the written warning, or the negative performance review.

After applying the 110(i) criteria and reaching the aforementioned conclusions regarding the Secretary’s request for a civil penalty assessment, this Court finds that a penalty in the amount of \$20,000 is appropriate.

CONCLUSION & ORDER

Based on the above, I find that Respondent violated §105(c) of the Act by discriminating against Arnold for engaging in protected activity. Therefore, it is hereby **ORDERED** that Respondent remove any and all negative references to this matter in Arnold’s personnel records. It is further **ORDERED** that Respondent ensure someone without animus complete Arnold’s June 2013 performance review without negative reference to this matter or the SLARS program. Finally, Respondent is hereby **ORDERED** to pay a civil penalty of \$20,000.00.

/s/ John Kent Lewis

John Kent Lewis
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 24, 2015

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

v.

REGENT ALLIED CARBON ENERGY,
INCORPORATED,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. VA 2013-0404
A.C. No. 44-07081-323471

Mine: No. 2

DECISION AND ORDER

Appearances: Billy Shelton, Esq., Jones, Walter, Turner, & Shelton, Lexington,
Kentucky for Petitioner

Paige Bernick, Esq., U.S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Petitioner, Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondent, Regent Allied Carbon Energy, Inc. (Regent) with an unwarrantable failure to comply with 30 C.F.R. §75.511, which sets forth requirements to be met when miners perform electrical work on low-, medium-, or high-voltage distribution circuits and equipment in an underground coal mine.¹

¹ 30 C.F.R. § 75.11 (2013) states:

No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such person. Locks or tags shall be removed only by the persons who installed them, or, if such persons are unavailable, by persons authorized by the operator or his agent.

A hearing was held in Blountville, Tennessee. The parties presented testimony and documentary evidence. Witnesses were sequestered. Thereafter, the parties submitted post-hearing briefs.

The single 104(d)(1) citation at issue was given to Regent on January 28, 2013 at its No. 2 mine during a regular inspection by MSHA Inspector Marty Robinson.² Citation No. 8201921 alleges a violation of 30 C.F.R. §75.511 for performance of electrical maintenance on a shuttle car trailing cable that had not been properly locked and tagged out. The citation also alleges that the maintenance was performed without proper supervision by a qualified person. The violation was designated significant and substantial. Initially, Citation No. 8201921 was issued under Section 104(a), but was modified to a 104(d)(1) unwarrantable failure citation after Robinson conducted additional investigation on January 29. The modified citation also reduced the injury or illness that could reasonably be expected to occur as a result of the violation from “fatal” to “lost workdays or restricted duty” and increased the level of negligence from “moderate” to “reckless disregard.”

MSHA specially assessed the proposed penalty at \$20,900, but testimony elicited from the inspector by the Secretary was limited to the fact that the penalty was recommended for special assessment. Tr. 130-32. The Narrative Findings for Special Assessment contained in the Commission case file were not offered into evidence.

The threshold issue presented is whether the work that inspector Marty Robinson observed Regent miners Jonathon Browning and Bradley Martin performing on January 28 was “electrical work” under Section 75.511. Other issues concern the appropriateness of the gravity, negligence, significant and substantial (S&S) and unwarrantable failure designations and the appropriateness of the proposed, specially-assessed civil penalty of \$20,900.

Section 75.511 imposes three duties on the operator. First, electrical work may only be performed by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Second, the disconnecting device of an electrical component being repaired must be locked out and tagged by the person performing such work. Third, the locks or tags may only to be removed by the person who installed them, or by an authorized individual if this person is not available. *See* 30 C.F.R. Sec. 75.511.

Since section 75.511 only applies to electrical work, the dispositive issue is whether the work done by Browning and Martin in handling and taping the shuttle car trailing cable constitutes electrical work. Neither party contends that Browning and Martin were qualified to conduct electrical work or that the work they performed was supervised by a qualified person. Both Respondent and the Secretary have recognized that if the work done by Browning and Martin does not constitute electrical work, then no violation of section 75.511 occurred. Tr. 73, 98; R. Br. 14.

² All subsequent dates are in 2013, unless otherwise indicated.

Neither the Mine Act nor MSHA regulations specifically define “electrical work.” The MSHA Program Policy Manual (PPM), however, provides guidance that electrical work is “work required to install or *maintain* electric equipment or conductors.” P. Ex. 3, at 54 (emphasis added). To clarify this definition, the PPM lists 11 examples of electrical work within the scope of the standard.

1. Locating faults in cables;
2. Replacing blown fuses, except blown fuses on trolley poles may be replaced by miners other than persons qualified to do electrical work [in certain circumstances];
3. Making splices, connections, and terminations in electric conductors and cables;
4. Installation of couplers on the end of cables.
5. Repair of electric components of electrically-powered portable, mobile or stationary equipment;
6. Installation of electrical wiring;
7. Electrical maintenance of permissible equipment;
8. Any type of work performed inside rooms, vaults, substations and other similar enclosures where energized parts of conductors are exposed;
9. Any type of work performed inside transformers, power centers, rectifiers, switch boxes, switch houses, panels, and other enclosures of electric equipment or conductors;
10. Electrical troubleshooting and testing; [and]
11. Handling energized high voltage power cables.

P. Ex. 3, at 55–56.

The PPM also includes 12 examples of non-electrical work that does not require the supervision of a qualified person:

1. Operation of electrical equipment;
2. Normal operation of control switches, switch boxes, or circuit breakers, provided no energized parts or conductors are exposed;
3. Operation of cutout switches in trolley circuits;
4. Hanging or removing fuse nips from trolley wires;
5. Changing bits;
6. Lubrication;
7. Handling energized trailing cables;

8. Inserting low- and medium-voltage cable couplers into receptacles or withdrawing low- and medium-voltage cable couplers from receptacles;
9. Transportation of electric equipment and cables;
10. Mechanical repairs on electrically-powered equipment, provided no energized parts or conductors are exposed;
11. Installation and repair of equipment and circuits in which shock hazards do not exist (having a nominal rating of 40 volts or less), provided such equipment is not required to be permissible; and
12. Installation, repair, and guarding of trolley wires and trolley feeder wires.

P. Ex. 3, at 56-57.

For the reasons set forth below, I find that the miners were handling and re-taping splices on a shuttle-car trailing cable during a power outage and the cable was not locked and tagged out. I find that this was electrical work and the standard was violated. I affirm the citation, as written, but assess a penalty of \$11,500 because the basis for special assessment was not substantiated at trial.

II. Stipulated Facts

At hearing, the parties agreed to the following stipulations:

1. Regent Allied Carbon Energy (Regent) was the operator of Mine #2.
2. Regent Mine #2 is a mine as defined by Section 3(h) of the Act. 30 U.S.C. § 802(h).
3. At all material times involved in this matter, the product of the subject mine entered commerce, or the operations thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act. 30 U.S.C. § 803.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission pursuant to Section 105 and 113 of the Mine Act.
5. MSHA Inspector Marty Robinson, whose signature appears in block number 22 of the Citation, was acting in his official capacity and as an authorized representative of the Secretary of Labor when the Citation was issued.
6. True copies of the Citation were served on Regent as required by the Mine Act.
7. The total proposed penalty assessed for the Citation will not affect Regent's ability to remain in business.
8. The alleged violation was abated in good faith.

Jt. Ex. 1.

III. Apercu of Regent's Underground Power System

The #2 Mine runs three shifts. The first two are production shifts. The third is a maintenance shift. Tr. 200.

Underground power is supplied to Regent's Mine #2 by a 7,200-volt cable, which extends from a surface power substation to an underground power center. Tr. 217.³ On the back of the power center is a visible disconnect device so one can see the blades in the back of the power center. When the blades are closed, the circuit can be energized. Tr. 152-53.

A distribution circuit distributes power to various areas on the mine, like the power center. Tr. 150. An equipment circuit powers a particular piece of machinery. The miners in this case were working on an equipment circuit. Tr. 150.

Once power reaches the power center, a transformer reduces the voltage and supplies it to various receptacles at the power center. Tr. 218. These receptacles provide necessary electrical power in various voltages to the equipment via cables. Tr. 38.⁴

A cable extends from an individual machine or piece of equipment and is connected to a receptacle and disconnected via a plug, or cathead, at the end of the cable. Tr. 38, 151. For example, a shuttle car has a trailing cable that provides 480 volts of electrical power necessary for operation. Tr. 34. A trailing cable is usually two to three inches wide and has an insulated jacket that protects copper cable conductors inside. Tr. 230-31.

Each receptacle within the power center can be disengaged by a circuit breaker. Tr. 38. A receptacle can also be locked and tagged out, preventing a plug from being inserted into a receptacle and power from being supplied to a cable or piece of equipment. Tr. 39. To lock out a receptacle, a lock is placed through a pre-drilled hole or tab on the receptacle, which would house the cathead if it were plugged in. Tr. 62. The tab is used to hold a plug in place. A lock or bar inserted into the tab, prevents the plug from lining up with the tab and making contact with the receptacle. Tr. 62. A lock also prevents a circuit breaker on the receptacle from being plugged in or reset. Tr. 38. A tag or warning sign is placed on the device to alert others to refrain from energizing the circuit. Tr. 38.

³ The power center in the No. 2 mine is located on the floor in the number 3 entry. Tr. 22, 143. The power center is about five feet wide, twenty to thirty feet long, and three feet high. Tr. 261, 327. A curtain is located behind the power center, extending from one rib to another. Tr. 262.

⁴ The side power center at Regent's No. 2 mine has a dozen receptacles, located in a row. Tr. 104, 264.

IV. Summary of Testimony

A. Inspector Robinson's Testimony

On January 28, MSHA inspector Marty Robinson conducted a regular inspection at Regent's No. 2 Mine. Tr. 31. When Robinson arrived on the property that morning, he was met by mine superintendent Robert McClanahan. Tr. 32. McClanahan called John Senter, the belt foreman, to accompany inspector Robinson into the mine. Tr. 32. There was no power extending underground at the time Robinson arrived at the mine. Tr. 33. Robinson first inspected Senter's personnel carrier, and then Robinson and Senter went underground through the primary escapeway. Tr. 33.

Inspector Robinson performed an imminent danger inspection immediately after arriving at the MMU. Robinson and Senter then went down the number two entry to check the power center. Tr. 33. As they did so, Robinson observed two miners, Jonathan Browning and Bradley Martin, near a shuttle car pulling the 480-volt cable through their hands and "feeling every inch of the cable" as if they were doing an exam. Tr. 33-34. According to Robinson, the miners were holding the cable, sliding it through their hands, pulling it off a reel, and taping spots and splices on the cable. Tr. 34-35, 116, 136.⁵ Robinson credibly testified that the miners were looking for damage to the inner conductors, which required require bending the cable to check for ruptures on the outer jacket. Tr. 35, 134. Bending the cable can open the jacket to show if there is damage and the insulating material is compromised. Tr. 135. Robinson further credibly testified that the miners may have been refreshing electrical tape that had been previously applied to cover splices in the cable, but they were definitely looking for damage based on the way they were handling and pulling the cable from hand to hand. Tr. 35.

Robinson considered this task to be maintenance on an electrical component of the shuttle car, which was electrical work. Tr. 35. Essentially, Robinson determined that the re-taping was repair of electric components of electrically-powered mobile equipment and not mechanical repair on electrically-powered equipment. Robinson explained, "A mechanical repair would not involve electricity. It wouldn't involve the electrical conductors. The trailing cable is the conductor[s] for the machine. Without that trailing cable the machine will not function." Tr. 37. Robinson did not examine the cable himself to see if it was damaged. Tr. 69.

After observing the miners working with the cable, Robinson and Senter went to the power center in the number three entry. Tr. 37. Robinson inspected the power center. Tr. 39. Robinson observed that all the cathead receptacles were plugged in. Tr. 37. Robinson also observed that there were no locks anywhere on the power center, the circuits were tripped, and the blades on the back were in the closed position, which would allow the section transformer to automatically energize upon restoration of power. Tr. 39-40, 63, 153. Robinson credibly testified that with the blades in the closed position, the power center would automatically reenergize

⁵ A splice is a mechanical joining of the inner conductors or copper wires of a cable that have been severed. Tr. 268-69.

when power was restored, allowing the high voltage to feed directly into the power center and energize the branch circuits. Tr. 64.

Robinson also noticed that the circuit breakers were tripped, as expected after a loss of power. Tr. 63. Thus, if the circuits were reset, they would be re-energized. Tr. 63. Robinson testified that without locking and tagging out the circuit, anyone could come by and pull a breaker, energizing the circuit. Tr. 38.

Based on his experience as a certified electrician and MSHA inspector, Robinson concluded that the way the miners were handling the cable suggested that they were examining it to check for damage, and not just generally re-taping previously taped areas of the cable, although the only places that Robinson observed the miners apply additional tape were to previously taped areas on the cable. Tr. 51, 87. Robinson opined that only a qualified electrician would be able to determine whether damage to a cable's outer jacket was superficial or extended into the inner conductors, and to determine the type and extensiveness of repair necessary. Tr. 51, 60. Robinson also testified that the only way a miner can guarantee that the circuit he is working on cannot be energized is to lock and tag the circuit out, thereby making other miners aware that someone is working on the circuit. Tr. 38. Robinson had no direct knowledge about whether Browning and Martin had participated in an MSHA-approved training plan that covered electrical hazard recognition practices. Tr. 91.

Robinson informed Senter that he intended to issue a section 104(a) citation for violation of 30 C.F.R. § 75.511 because the shuttle car was not locked and tagged out to prevent the cable from becoming energized while the miners were working on it. Tr. 37–38. Robinson testified that the miners pulling the cable from hand to hand could encounter a damaged spot with exposed energized conductors. Tr. 38-39. If the cable was energized, an exposed conductor or a fault created from bending the cable would cause electrocution, shock, or burns. Tr. 39, 40, 57. Robinson testified that there was a risk of bending an energized cable with a damaged outer layer because exposed inner conductors in contact could create a fault condition and blow up. Tr. 39. If there was a fault, an energized cable could have an arc flash, causing an explosion, which would burn miners. Tr. 56.

After Robinson told Senter that he was going to issue a citation, Senter yelled out to Browning and Martin to stop working on the cables. Tr. 41. Senter then called Leon Kelly, the section foreman, and asked him to come to the power center. Tr. 41.

Once section foreman Kelly arrived, Kelly and Robinson discussed the citation he would issue. Kelly informed Robinson that the power was locked and tagged at the surface. Tr. 41. Richard Ventro, a certified electrician, had informed Kelly via telephone that he had locked and tagged out the surface substation that provided power to the mine. Tr. 185. Robinson replied that the locking and tagging out on the surface power source was irrelevant because the cables themselves needed to be locked and tagged out. Tr. 41.

Kelly called to the surface to inform superintendent McClanahan of the citation. Robinson, who was about five feet away from the mine phone, heard McClanahan tell Kelly,

“you know better than that, that’s stupid.” Kelly then began to unplug some of the receptacles. Tr. 41.

Shortly thereafter, Kelly received another call, and a few seconds later the power center began humming and was energized. Tr. 41–42. Robinson testified that no one went to the back of the power center to turn it on, confirming, contrary to Clark’s testimony *infra*, that the blades were in closed position. Tr. 106. At this point, Kelly immediately plugged the receptacles back in and energized the circuits. Tr. 42.

Robinson did not observe Kelly inform anyone that the power was coming back on. Tr. 43. Kelly and Robinson were the only people present at the power center when the power came back on, although Don Clark, the certified electrician, arrived at the power center about 20 minutes later. Tr. 42, 50. According to Robinson, Clark had been outby trying to troubleshoot the problem with the high-voltage circuit. Tr. 154.

Robinson testified that if the miners had not been pulled from their work on the trailing cable, they would have been working on live cable. Tr. 42. Further, Robinson testified that from the power center, it impossible to see the location where the two miners had been handling the trailing cable. Tr. 43, 148.

After power was restored, Robinson continued with the E01 inspection. Tr. 43. Robinson was unsuccessful in obtaining any information from the miners about why they had been patching the trailing cable. Tr. 44. Once above ground, Robinson reviewed the Program Policy Manual (PPM), typed up Citation No. 8201921, and served it upon Senter. Tr. 36, 44. The condition or practice section of the January 28, 2013 citation alleges:

TWO MINERS ARE PERFORMING MAINTENANCE ON THE TRAILING CABLE FOR THE COMPANY #2 SHUTTLE CAR AND THE MACHINE IS NOT LOCKED OUT OR TAGGED. THE MINERS ARE PULLING THE CABLE BY HAND AND CHECKING SPLICES AND DAMAGED PLACES IN THE TRAILING CABLE. THE MACHINE CATHEAD IS PLUGGED INTO THE SECTION POWER CENTER. THE CIRCUIT BREAKER IS OPEN AT THE TIME. MINERS REPAIRING THE CABLE WOULD RECEIVE FATAL INJURIES IF THE CABLE WERE TO BECOME ENERGIZED. THIS CABLE PROVIDES 480 VAC TO THE SHUTTLE CAR.

The citation further alleged a Section 104(a) significant and substantial (S&S) violation of 30 CFR § 75.511, which was reasonably likely to result in a fatal injury, with two persons affected, as a result of Respondent’s moderate negligence. P. Ex. 1. Robinson determined that the violation was “reasonably likely” to result in a fatal injury or illness because if power had been restored to the unlocked circuit during continued normal mining operations, the miners would be handling the trailing cable when the circuit became energized. Tr. 55. Robinson testified that an acquaintance had died as a result of working on a continuous miner cable that was not locked and tagged out when an unannounced restoration of power occurred after mine-wide power outage. Tr. 59.

Robinson returned the next day (January 29) to continue the inspection and interview miner informants and management. Tr. 44-46. Robinson was informed by miners that section foreman Kelly had instructed them to check splices and re-tape the trailing cable because Robinson had not yet checked the cable cars and equipment during his quarterly E01 inspection. Tr. 45-46. At hearing or during pre-hearing depositions, Martin and Browning testified that they had been instructed to perform this work by section foreman Kelly. Tr. 232 (Martin testimony; R. Ex. 6, at 4 (Browning deposition)).⁶ Robinson also learned that the two miners working on the live shuttle car cable the previous day were not on the mine's list of qualified electricians. Tr. 47.⁷ In addition, Robinson found out that while Browning and Martin were performing work on the trailing cables the day before, Don Clark, the qualified electrician, had been in a different part of the mine troubleshooting the power failure, and therefore Clark had not supervised the work that was performed by Browning and Martin on the trailing cable. Tr. 48, 53.

During the investigation, superintendent McClanahan informed Robinson that miners were asked to check trailing cables a few times a week when power was out, or a machine was down. Tr. 49. Respondent had received previous citations because trailing cables were not maintained properly, and McClanahan told Robinson that Respondent was trying to stay ahead of the game and prevent reoccurrences. Tr. 49-50.

Based on the information obtained from Robinson's January 29 investigation, MSHA modified S&S Citation No. 8201921 under 104(a) to a S&S 104(d)(1) Citation. Tr. 53. In the condition or practice section, the unwarrantable failure citation alleged:

TWO MINERS ARE PERFORMING ELECTRICAL MAINTENANCE ON THE COMPANY #2 SHUTTLE CAR TRAILING CABLE AND THE MACHINE IS NOT LOCKED AND TAGGED. THE MINERS ARE PULLING THE CABLE BY HAND AND CHECKING SPLICES AND DAMAGED PLACES. THE MACHINE CATHEAD IS PLUGGED INTO THE SECTION POWER CENTER. THE CIRCUIT BREAKER IS OPEN AT THE TIME. THE MINERS PERFORMING THE WORK ARE NOT CERTIFIED ELECTRICIANS NOR UNDER THE SUPERVISION OF A CERTIFIED ELECTRICIAN. THE OPERATOR HAS ENGAGED IN AGGRAVATED CONDUCT CONSTITUTING MORE THAN ORDINARY NEGLIGENCE IN THAT THE MINERS WERE INSTRUCTED TO PERFORM THE WORK WITHOUT BEING UNDER THE DIRECT SUPERVISION OF A CERTIFIED ELECTRICIAN AND WITHOUT THE MACHINE BEING LOCKED AND

⁶ Absent objection from the Secretary, Browning's December 12, 2013 deposition was received into evidence as sworn testimony. Tr. 350; R. Ex. 6.

⁷ Don Clark and Chester Hubbard were listed as the only qualified electricians working underground on day shift at the time of the January 28 inspection. Tr. 47. Clark was working about 30 crosscuts away from where the miners were examining the trailing cable. Tr. 48, 52. Hubbard was working outby. Tr. 53.

TAGGED. MINERS EXPOSED TO THIS CONDITION WOULD RECEIVE SHOCK AND BURN RELATED INJURIES.

The modified citation reduced the gravity of the injury expected from fatal to lost workdays based on the fact that the cable provided 480 VAC to the machine in relatively dry conditions, which would likely cause a burn or shock resulting in lost workdays, rather than a fatal electrocution. P. Ex. 1, Citation No. 8201921-01; Tr. 55. Robinson opined that gloves, if worn by miners, did not decrease the risk of being burned because a miner could still have exposed skin, and that the gloves were likely wet and dirty, decreasing their effectiveness. Tr. 56. The modified citation increased negligence from moderate to reckless disregard involving aggravated conduct because the miners were instructed to perform work on the circuit without being under the supervision of a certified electrician and without the machine being locked and tagged out. P. Ex. 1, Citation No. 8201921-01; Tr. 54, 58.

Robinson testified that “Mr. Kelly knew that the circuit was not locked and tagged because when he came to the power center he told me it’s locked on the surface. So by him knowing that it was locked on the surface, he had to know that it was not locked there. And it was obvious. Anyone could walk by the power center and tell that there’s no locks or tags installed on any of the plugs.” Tr. 65. Further, Robinson opined that Kelly knew or should have known that Clark, but not the roof bolters and shuttle car operators, were certified to perform the work. *Id.*

Robinson defended the unwarrantable failure modification because Kelly had instructed miners to perform work on an energized cable, knowing that the circuit was not locked and tagged. Further, it was obvious that the miners designated to do this task were not on the list of qualified individuals to perform electrical work. Tr. 61-62.

MSHA specially assessed the proposed penalty at \$20,900. Robinson’s testimony was limited to the fact that the penalty was recommended for special assessment. Tr. 130-32. The Narrative Findings for Special Assessment contained in the Commission case file were not offered into evidence.

B. The Testimony from Respondent’s Witnesses

1. Richard Ventro’s Testimony

Richard Ventro, an MSHA-qualified electrician, testified that he was the outside mechanic working at Mine No. 2 on January 28. After Ventro arrived at the mine, he received a call from the mine to inform him that the power was out in the mine. He does not remember who called him. Tr. 181. Ventro and Dean Addington, a mine mechanic, traveled to the above-ground substation and visually confirmed that the underground power was out. Tr. 182. Ventro then locked and tagged out the pump that operates the power at the surface substation so that no one could turn the power back on in the mine. Tr. 183. Ventro testified that there was no way the power could be on within the mine if the power at the substation was locked and tagged out. Tr. 190. Ventro and Addington traveled back to the main shop and called underground to Kelly and

Clark to inform them that Ventro had locked and tagged out the substation power source. Ventro and Addington then returned to the substation and identified the power problem. Tr. 184-85.

Ventro and Addington turned the power back on at the substation, but the power source to the mine remained locked and tagged out. Tr. 185-87. Ventro remained in communication with Kelly and Clark inside the mine while they were troubleshooting the power at the substation. Tr. 187. Ventro informed Clark that they were going to turn the power back on in the mine, but waited until receiving confirmation from Clark that “everybody was in the clear.” Tr. 188. After receiving that confirmation from Clark, Ventro unlocked and untagged the pump and turned the mine power source back on. Tr. 189. By Ventro’s estimate, the power outage lasted between one and one-half hours and two hours. Tr. 194.

2. Dean Addington’s Testimony

Dean Addington was working as a mechanic with certified electrician Ventro at the mine on January 28. Addington became aware of the power problem when he and Ventro received a call from underground. Tr. 199, 206. Addington and Ventro went to the substation and Addington witnessed Ventro lock and tag out the underground power source. Tr. 201. Then they returned to the shop and informed Clark and Kelly that Ventro had locked and tagged out the power. Tr. 201.

Addington knew that Clark had been troubleshooting the problem underground. Tr. 206, 211-14. Addington communicated with Clark, who was on the phone at the life shelter, to try to pinpoint the problem. Tr. 214. Clark informed Addington that he had been unable to diagnose any problem underground. Tr. 206.

Addington and Ventro then returned to the substation, where Addington diagnosed and fixed a problem with the potentiometer in the monitoring package above ground. Tr. 202. They returned to the shop a second time and informed Clark and Kelly that they had fixed the problem and were ready to turn the power back on. Tr. 202. After receiving the all-clear, Ventro and Addington went back to the substation, where Addington witnessed Ventro unlock and untag the power supply before turning it back on. Tr. 202, 216. Addington and Ventro then went back to the main shop and called Clark and Kelly underground to inform them they had turned the power back on from the substation. Tr. 207.

On the third shift (maintenance shift), Addington has had mechanics work under him, who have experience maintaining trailing cables. Tr. 218-19. In Addison’s opinion, taping a cable without exposed wires does not constitute an electrical repair. Tr. 219-20. He testified that when he examines cables to check for pinholes and nicks, *he locks and tags out the cable*, and then bends the cable to identify any nicks or cracks, and to make sure that no red or white electrical leads can be seen. If there are no exposed wires, then he just tapes over the nick. Tr. 220-21.

In Addington’s opinion, working on a cable after the power had gone out would not normally pose any risk of shock because the power outage would have tripped the breakers in the

underground power station and the cable would not re-energize even if the power was turned back on. Tr. 223. Addison also opined, however, that a cable could automatically re-energize and pose an electrocution risk when the power comes back on at an underground power center if someone had already re-engaged the breakers. Tr. 223. Addington further testified that it was possible for someone to energize or put the breaker in after the high-voltage power was restored if there was no lock on the cathead of the cable being maintained. Tr. 225. When asked by the undersigned how that would happen, Addington testified, "Well, the guy putting the high voltage in is not going to holler underground." Tr. 225. Addington further explained that somebody could put the breaker in after the high-voltage power was restored, but volunteered that Kelly was at the power center and would know if somebody was going to put the breaker in. Tr. 226.

3. Bradley Martin's Testimony

Bradley Martin is a shuttle car operator at Respondent's Mine #2. Tr. 228, 231. Martin testified that the power was out when he arrived at the mine on January 28. Tr. 231-32. Martin, two other shuttle car operators, and two roof bolters were instructed by Kelly, the foreman, to "Pull our shuttle car cables off and just tape over our splices." Tr. 232-33; 236, 246. Martin opined that he was not asked to do anything that he felt was unsafe. Tr. 239.

Martin testified that "we never pulled the cable off [shuttle car] two because it had new cable on it the day before. It had no splices in it. It was solid cable." Tr. 234; see also Tr. 238. The number two shuttle car, which Martin drove all the time, was the car cited by inspector Robinson. P. Ex. 1. The cars are not labelled with numbers. Rather, they are identified based on distance from the power center. Martin testified that the closest shuttle car that is plugged into the power center is the number one car "and then the next one is two and the next is three." Tr. 238.

Martin testified that he never worked with Jonathan Browning on the morning of January 28. Tr. 235, 244. Browning was never asked in his deposition whether he was working with Martin. See R. Ex. 6. Martin testified that Browning was at the number one car and that Martin was not with him and could not see him from where he was working. Tr. 244.

Martin further testified that he and shuttle car operator Greg Hall were pulling the cable off the number three shuttle car when they were instructed to stop by someone whom Martin could not remember. Tr. 235. Hall did not testify. Martin further testified, "They just come, you know, towards where we was at and just hollered over there and got our attention and told us that we needed to quit pulling our cable; you know, quit pulling the cables off." Tr. 235; see also Tr. 246. Martin testified that power was still out when they were told to stop working. Tr. 248

Martin wore fairly new, insulated, rubber-palmed gloves when performing the work. Tr. 236, 248. Martin testified that they did not bend the cable and that they had not pulled much cable off and had just started on the car when they were told to quit. Tr. 237, 249. Martin testified that he did not find any gashes or damaged places with exposed wires, but if he had, he would have notified Clark, the electrician. Tr. 237. Martin testified that he did not bend the cable or place tape where there was not already a taped splice. Tr. 237.

Clark was not nearby while Martin was working on the cable. Tr. 246. Martin remembers Clark yelling to the miners that day that he was going to put the breakers back in. Tr. 250.

Martin is not a qualified electrician, but he has received training from Regent on handling cables and electrical hazard recognition. Tr. 229. Martin testified that, based on his training, handling a cable is “no big deal,” but that a cable needs to be locked and tagged out if the work involves cutting into the cable. Tr. 229-30.

I discredit Martin’s testimony that he never worked with Browning on January 28. I credit Robinson’s testimony, as supported by his January 29 investigation, and corroborated by Senter’s testimony discussed *infra*, that Martin was pulling cable with Browning that day. I also discredit Martin’s testimony that he heard Clark holler that he was going to put the breakers back in. I have discredited Clark’s testimony *infra* that he did so. I also discredit Martin that he never pulled cable from the number two shuttle car because new cable was placed on it the day before. No documentation was proffered to support this testimony and it was not corroborated by any other witness. Browning, the other miner doing re-taping on the cable, did not indicate which trailing cable was repaired. When asked, Clark was not sure which shuttle car trailing cable was being worked on, but he thought that it was probably the number two car. Tr. 299. Further, I find it unlikely that inspector Robinson would specifically cite work on the wrong shuttle car. In any event, I further credit Robinson’s testimony about the manner in which Martin and Browning were pulling cable even if Robinson was somehow mistaken about which shuttle car cable was being worked on by them. See Tr. 238-39. Martin testified that he was working on the number three car, which was also plugged into the power center and not locked or tagged out. Tr. 244.

4. John Senter’s Testimony

John Senter works as a belt boss at Respondent’s #2 Mine. Senter accompanied inspector Robinson into the mine on January 28. Tr. 253-54. Senter does not recall seeing Clark underground that day. Tr. 266.

Senter testified that he and Robinson saw two miners, Brad Martin and Jonathan, taping cables shortly after they arrived on the section in the power center entry or number three entry. Tr. 255-58. Senter saw the miners, Browning and Martin, holding the cable and visually checking it for cracks, but did not see them bend or twist the cable. Tr. 260. Senter did not observe the miners using any tools to examine the cables. Tr. 269.

After observing the miners working on the cable, Senter accompanied Robinson to the power center, where Robinson checked the catheads for the cables and saw that they were not locked and tagged out. Tr. 256. Senter testified that he did not check to see whether the blades on the back of the power center were in or out, nor did he see Robinson check the blades. Tr. 260. In fact, on questioning from the undersigned, Senter testified that he knows that Robinson did not check the blades because he was right there looking at the catheads. Tr. 260. According to Senter’s testimony, Senter and Robinson remained at the side of the power center, and at no time did Robinson move to the back of the power center to check the blades. Tr. 264. I find it

noteworthy, however, that Senter never went behind the power center to see if the blades had been locked out. Tr. 275.

I discredit Senter's testimony that Robinson never checked the blades on the back of the power center. Rather I credit Robinson, after specific questioning from the undersigned, that he walked to the back of the power center while the power was still off and observed no lock on the back of the power center and the blades in the closed position. Tr. 63-64. Robinson testified that this occurred shortly after he told Senter he was issuing a citation. Tr. 64. I note that Senter had to leave to holler out to Martin and Browning and to call foreman Kelly. Moreover, Robinson persuasively testified that part of the normal examination of the power center is to make sure there is a means to lock and tag out the power center. Tr. 64

5. Don Clark's Testimony

On January 28, Clark was the qualified underground electrician at Mine #2. Clark testified that after he discovered the underground power outage, he called the surface to inform Ventro. Tr. 285. After Ventro informed Clark that there was no problem with the surface power, Clark reset the underground power center, and asked Addington and Ventro to check the power again. Tr. 286. When the underground power was still out, Ventro locked and tagged out the underground power at the above-ground substation. Tr. 288.

Clark testified that he then locked and tagged out the blades on the back of the power center. Tr. 287, 296. The process involves locking a chain through a hole in the handle of the breaker so that it physically cannot be re-engaged. Tr. 297. Clark testified that he specifically remembers locking and tagging out the breakers because it allowed him to eliminate the section power center as the problem while troubleshooting. Tr. 290-92. Clark had the only lock, so he was the only person who would be able to lock the blades. Tr. 298. At that point in time, Clark remembers that the trailing cable catheads were plugged into the power center. Tr. 297. Clark testified that he did not lock and tag them out because he was not going to be working with them. Tr. 297-98.

I do not credit Clark's testimony that he locked and tagged out the blades at the back of the power center. Rather, I have previously credited Robinson's testimony on specific questioning from the undersigned that he checked the power center and there were no locks anywhere on the power center, and the blades on the back of the power center were in the closed position. Tr. 39, 63-64. Moreover, Clark never told foreman Kelly that he locked the blades in the back of the power center, and Kelly, who assigned the work, did not know whether the blades were locked. Tr. 344-45. Clark did not show or tell Robinson that the blades were locked and tagged and Robinson did not see Clark until 20 minutes after power had been restored. Tr. 311, 154. Robinson also testified that the power center became energized immediately after power was restored, without the blades being flipped. Tr. 105-06.

Clark testified that he then proceeded down twelve or fifteen breaks from the power center to perform a visual check on the underground circuit. Tr. 287. Clark had already checked the first junction box when Ventro and Addington called him from the surface and informed him

that the surface monitor had tripped and caused the underground power outage. Tr. 289-90, 293. Clark testified that he returned to the power center, where Kelly informed him that Robinson was going to issue a citation for the cables. Tr. 294-95.

Clark instructed Ventro and Addington to attempt to turn on the power to the section power center. They did so and were successful. Tr. 295. After checking to be sure that everyone was clear of electrical equipment, Clark testified that he unlocked and untagged the breakers and turned the section power back on. Tr. 295. I discredit this testimony and specifically credit Robinson that only he and Kelly were at the power center when it began humming and was reenergized. Tr. 41-42, 106. Moreover, Clark could not specifically remember, when asked, whether Kelly or Robinson were in the area. Tr. 294.

After Kelly told Clark about the citation, Clark testified that he went and looked at the cable. Tr. 299. Clark testified that it looked like Browning and Martin had put new tape over two or three existing taped places. Tr. 299-300. In Clark's opinion, the miners were not exposed to any kind of danger by placing tape on the cable. Further, Clark had never seen nor heard of an instance in which mine management asked an unqualified miner to perform electrical work. Tr. 301-02.

Clark also recalled occasions where Martin and Browning have asked for his assistance when they have encountered electrical problems. Tr. 301-02. Clark did not consider taping cables to be electrical work because no conductors were exposed. Tr. 303.

6. Leon Kelly's Testimony

Leon Kelly was the section foreman working on January 28. Since the power was out underground, Kelly told miners to re-tape the splices on their shuttle car cables. Tr. 319. He testified that he did not instruct them to bend, cut into, or go into the cables. Tr. 334. Rather, he specifically instructed them to put tape on existing splices. Tr. 322.

Kelly's section had previously received a citation and a \$5,900 penalty assessment for a cut in a cable that was not sufficiently taped over. Kelly wanted to avoid receiving another citation for the same kind of violation. Tr. 320-21. Kelly testified that he knew that only qualified persons could cut into cable. He testified that he did not think that the miners were in any danger because the power was locked and tagged out at the surface. Tr. 322.

Kelly explained that three things had to happen for the cables to become energized: the power would have to be put back in from outside; the blades would have to be put back in on the power center; and the cathead breakers would have to be put back in. Tr. 339. Kelly testified that the cathead breakers at the front of the power center were out. Tr. 345.

Kelly was at the face when someone told him (presumably Senter) that he was needed at the power center because Robinson was looking at the catheads. Tr. 323. When Kelly arrived at the power center, Robinson informed him that he was going to issue a citation because miners were working on a cable that had not been locked and tagged out. Tr. 323. Kelly told Robinson

that the power was locked and tagged out at the surface. Tr. 323. Kelly did not go to the back of the power center to check whether the power center itself had been locked and tagged out, and was unaware of whether or not Clark had done so. Tr. 324-25. Kelly also did not check to make sure that the miners were clear of the cable immediately before the power came back on because he had previously told them to stop working on the cable after Robinson had informed him that he was going to issue a citation. Tr. 343.

Kelly learned that Ventro and Addington were going to try to turn the power back on when they called the power center. Tr. 324. Kelly told everyone to stay clear of the power center, since he was unaware that the center itself was locked out. Tr. 325. Kelly did not see Clark unlock and untag the blades at the back of the power center because he stayed at the telephone 40 feet away from the front of the power center. Tr. 325-326. Kelly's view might also have been blocked because the blades could have been behind the curtain at the back of the power center. Tr. 338. Kelly testified that from where Robinson was standing, he would not have been able to see whether the blades on the back of the power center were locked out, and he did not see Robinson go to the back of the power center to check. Tr. 328.

Kelly trains new hires at Mine #2. Tr. 329. Part of that training includes instructing the miners that if there is problem with their cables, the electrician has to work on it. Tr. 329. Kelly has instructed miners to tape cables before, although not often, and sometimes he instructs the miners to mark nicks in the cable with paint so that the electrician can fix them. Tr. 335. On those previous occasions, Kelly admitted that the cables were locked and tagged out, but he did not lock out and tag the cables on January 28 because the power was out in the mine. Tr. 336.

7. Jonathan Browning's Deposition Testimony

Jonathan Browning is a roof bolter at the No. 2 mine. Browning Dep. 4. Browning has been told to tape cables before, and did as instructed by Kelly on January 28. Browning testified that he does not do any electrical work on cables and only wraps tape over splices. Browning Dep. 5.

Browning tapes cables after the cables have been locked and tagged out, but Browning testified that on January 28, the power was locked and tagged out above ground. Browning Dep. 5-6. Browning testified that he does not tape over nicks or look inside the outer jacket, and that if he encounters a nick, he calls for the electrician to perform the work. Browning Dep. 6.

Browning wore gloves while he was taping the shuttle car cable at issue. Browning testified that he was never in contact with any exposed leads, and he did not believe that there was any potential for such contact. Browning Dep. 6-7.

V. The Position of the Parties

A. Brief Summary of Arguments

The Secretary argues that section 75.511 contains three distinct requirements: 1) electrical work shall only be completed by a qualified electrician or under the supervision of a qualified electrician; 2) the disconnecting device shall be locked and tagged by the person completing or supervising the work; and 3) only the person who installed the lock and tag shall remove the lock and tag, unless that person authorizes another individual to remove the lock and tag. P. Br. 9. The Secretary argues that the work performed by Browning and Martin on the #2 shuttle car cable constitutes a violation of section 75.511 because Browning and Martin were performing electrical work, they were not qualified to do so, nor working under the supervision of a qualified electrician, and the shuttle car trailing cable was not locked and tagged out.

The Secretary admits that section 75.511 does not provide a definition of electrical work, but points out that the MSHA Program Policy Manual's (PPM's) definition of electrical work includes any "work required to install or maintain electric equipment or conductors." P. Br. 10; P. Ex. 3, at 54. The MSHA PPM also lists examples of work that must be performed by certified persons, which include locating faults in cables; repairing electric components of electrically-powered portable, mobile, or stationary equipment; and electrical maintenance of permissible equipment. P. Br. 9-10; P. Ex. 3, at 55. The Secretary argues that the #2 shuttle car trailing cable should be considered an electrical component because it provides power to the shuttle car, and the work the miners were doing should be considered "electrical maintenance." P. Br. 11; Tr. 303.

There is no dispute that Browning and Martin were not persons qualified to conduct electrical work and there is no dispute that the shuttle car trailing cable cathead was not locked and tagged out. P. Br. 12, 14; Tr. 276, 336, 297. Although Clark's and Robinson's testimony conflicts regarding whether the blades on the power center were locked out (compare Tr. 39 with Tr. 287), the Secretary argues that the failure to lock and tag out the cathead itself still poses an electric shock hazard to Browning and Martin. P. Br. 13.

The Secretary argues that under *Chevron*, courts must defer to reasonable agency interpretations when Congress' intent is not clear. *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1983). Further, the Secretary's litigation position, "is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a . . . health and safety standard," and is therefore due the same deference as an any other agency interpretation. *See Sec'y of Labor v. Excel Mining, LLC* 334 F.3rd 1, 6 (D.C. Cir. 2003). Since inspector Robinson reasonably believed that the miners were conducting electrical work on the cable, the Secretary argues that his litigation position is entitled to deference under the *Excel Mining* standard. Sec'y Post-Hr.'g. Br. 9-12.

Respondent argues that the work performed by Browning and Martin in handling and re-taping the shuttle car cable did not constitute electrical work. Based on the examples in the MSHA PPM, *see* P. Ex. 3, at 56, Respondent argues that what distinguishes electrical from non-

electrical work is the potential for exposure to energized parts. Under the Respondent's interpretation of the MSHA PPM, locating faults in cables, making splices, making repairs of electrical components, and electrical maintenance all qualify as electrical work which requires electrical training because the person performing those kinds of tasks could come into contact with energized parts. By contrast, handling energized trailing cables, operating electrical switches, and performing mechanical repairs on electrical components do not constitute electrical work because those tasks lack the potential to expose a person to energized parts. R. Br. 15.

Although inspector Robinson characterized the miners' work on the cable as an examination, Respondent argues that whether or not an examination occurred has no bearing on whether the work was electrical. R. Br. 16. Moreover, Respondent argues that since the cable was not damaged, the miners' work cannot be considered electrical maintenance. Instead, it should be characterized as "upkeep" designed to increase the cable's usefulness as distinguished from actual maintenance. *Sec'y of Labor v. Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan 1997), *aff'd* 156 F.3d 1076 (10th Cir. 1998); R. Br. 16. Specifically, Respondent argues that "the work of re-taping previously taped splices was not maintenance, because it was not designed to maintain the cable in a state of repair or efficiency." R. Br. 16. Respondent relies on *Walker Stone*, 19 FMSHRC 48 (Jan. 1997), *aff'd*, 156 F.3d 1076 (10th Cir. 1998), and *Southern Ohio Coal Co.*, 14 FMSHRC 978 (June 1992), to distinguish the work that Browning and Martin were doing from repairs or maintenance. The Respondent argues that the "miners were simply applying more tape to previously taped areas on cable to prevent future violations for inadequate taping of splices," and this did not constitute maintenance, as anticipated by the standard. R. Br. 16, citing Tr. 49. The Respondent uses the definition of maintenance supplied by the Commission in *Walker Stone* to support its contention that the work performed by the miners on the trailing cable was not "maintenance."

VI. Discussion and Legal Analysis

A. The Violation of 30 C.F.R. § 75.511 -- The Work That Browning and Martin Were Performing on the Shuttle Car Trailing Cable was Electrical Work and the Secretary's Interpretation of Electrical Work is Entitled to Deference

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as written unless the regulator clearly intended the words to have a different meaning or they lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). In the absence of a regulatory definition or technical usage of a word, the Commission looks to the ordinary meaning of the word. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997).

Where a standard is ambiguous, however, courts defer to the Secretary's reasonable interpretation of the regulation. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *La Farge Construction*, 20 FMSHRC 1140, 1143 (1998); *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321

(D.C. Cir. 1990). An agency's interpretation of a regulation may prevail, even if it is not the only or best interpretation, as long as it is not inconsistent with the regulation or plainly erroneous. *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1337 (2013); *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Emery Mining Corp.*, 744 F.2d 1411, 1414 (10th Cir. 1984)(holding that where there is an interpretation of ambiguous regulation that is reasonable and consistent when viewed in light of the statute it implements, that interpretation is preferred); *Island Creek Coal Co.*, 22 FMSHRC 823, 827 (2000)(holding that a safety standard should be interpreted in a way that furthers the objectives of the Mine Act).

I find that the meaning of the phrase "electrical work" under Section 75.511 is ambiguous. As noted, neither the Mine Act nor MSHA regulations specifically define "electrical work." The MSHA Program Policy Manual (PPM), however, provides guidance that electrical work is "work required to install or *maintain* electric equipment or conductors." P. Ex. 3, at 54 (emphasis added). To clarify this definition, the PPM lists 11 examples of electrical work within the scope of the standard and 12 examples of non-electrical work that does not require the supervision of a qualified person:

The Secretary reasonably relied on MSHA's Program Policy Manual to offer guidance as to what is "electrical work" under Section 75.511. In issuing Citation No. 8201921, Robinson specifically relied on the PPM example No. 5 (repair of electric components of electrically-powered mobile equipment) and example No. 7 (electrical maintenance of permissible equipment) to find that the work that Browning and Martin were performing on the shuttle car cable was electrical work. Tr. 36; P. Ex. 3, at 55, paras. 5 and 7. Further, Robinson did not consider the work to fall under PPM exception para. 10 for non-electrical work, (i.e., mechanical repairs on electrically-powered equipment, provided no energized parts or conductors are exposed), because the trailing cable is an electrical component that provides power to the machine, and a mechanical repair would not involve electricity. Tr. 37; see P. Ex. 3, at 56, para. 10.

The Respondent argues that re-taping is not electrical work and that the potential to come into contact with energized components is the deciding factor for whether a task is electrical work. R. Br. 15. Specifically, the Respondent argues that, "the more common sense approach is to determine the potential for coming into contact with energized components and to determine the level of electrical training required to complete the work in defining whether or not work being performed is 'electrical work.'" R. Br. 17. Respondent relies on the PPM to support its contention and notes that while the PPM characterizes "repair of electrical components of electrically powered . . . equipment" and "electrical maintenance of permissible equipment" as electrical work, *see* P. Ex. 3, at 55, paras. 5 and 7, non-qualified persons are allowed to conduct non-electrical work such as "handling energized trailing cables" and "mechanical repairs on electrically powered equipment, provided that no energized parts or conducts are exposed." *Id.* at 56, para. 10.

I reject Respondent's argument that the litmus test for determining whether a task is "electrical work" is whether there is potential to come into contact with "energized components."

The trailing cable is an electrical component that can be energized if the cathead receptacle is not locked and tagged. Moreover, the repair or maintenance was performed on the trailing cable, not the electrically powered shuttle car itself.

Even if I accepted Respondent's proposed approach to defining "electrical work," I would still find that the work performed by Browning and Martin was "electrical work," within the meaning of Section 75.511. The risk of exposure to an inner conductor is not apparent upon first glance, but the risk increases the longer a miner inspects and holds a trailing cable. Concededly, there was no evidence that the trailing cable was damaged. R. Br. 16; Tr. 49, 68, 69, 88, 138, 299. But this fact is more appropriately assessed under the third *Mathies* factor in the S&S analysis, i.e., whether the shock hazard contributed to by the failure to lock and tag out the cable when performing electric maintenance on it was reasonably likely to result in an injury. Indeed, the very fact that splices were on the trailing cable in the first place means that the cable was damaged at some point, although the damage was mitigated by tape over the jacket. Tr. 108.

Concededly, the PPM permits the "handling of energized trailing cables" without requiring lock and tag protocol or particular qualifications. P. Ex. 3, at 56, para. 7. Robinson persuasively testified that such work meant picking up and moving a particular portion of cable, rather than handling an entire cable as Browning and Martin were doing. Tr. 78, 80, 111, 136; P. Ex. 3, at 55, para. 7. Robinson further opined that this exception was to allow a miner to pick up a cable in one spot and move it to another spot in order to allow a machine or person to pass by. Tr. 111-12. By contrast, Robinson testified that if a miner felt and examined the cable by hand, as Browning and Martin were doing, the task became an inspection and fell under the classification of electrical work. Tr. 92.

I credit Robinson's specific and detailed testimony that he saw Browning and Martin, near the shuttle car pulling the 480-volt cable through their hands and "feeling every inch of the cable" as if they were doing an exam. Tr. 33-34. According to Robinson, the miners were holding the cable, sliding it through their hands, pulling it off a reel, and taping spots and splices on the cable. Tr. 34-35, 116, 136. Robinson credibly testified that the miners were looking for damage to the inner conductors, which required bending the cable to check for ruptures on the outer jacket. Tr. 35, 134.⁸ Bending the cable can open the jacket to whether there is damage and

⁸ Respondent argues that Robinson's testimony that he saw the miners bending the cable and sliding it through their hands should not be credited because he admitted on cross examination that he did not record that observation in his notes. R. Br. 6; Tr. 34, 56, 81, 83, 111; P. Ex. 2; R. Ex. 4. I note, however, that Robinson did say that the miners were bending the cable in his affidavit/statement during the related section 110(c) investigation. P. Ex. 5.

Martin testified that he pulled the cable off and placed new tape over splices, but did not bend the cable. Tr. 233, 236. Senter testified that he saw the miners "just sort of looking at it [the cable]; just lay it out in front of them and sort of looking to see if there were any cracks or anything, just any damage on them and things like that. And they had a little tape in their hand. But as far as seeing them going into the cable, bending it, no." Tr. 259-60. Kelly initially testified on cross examination that the miners were not bending the cable, but on further

(continued...)

whether the insulating material is compromised. Tr. 135. Robinson further credibly testified that the miners may have been refreshing electrical tape that had been previously applied to cover splices in the cable, but they were definitely looking for damage based on the way they were handling and pulling the cable from hand to hand. Tr. 35. He convincingly testified:

The manner they were examining the cable, I believe they were looking for damage to the cable, not just, you know, general re-tape of a splice or spot that had already been taped. If you were doing that, you would just pull the cable off until you seen a spot and then you would freshen that spot up.

But to feel the cable by hand, you're examining the cable for further damage. And only a qualified person can recognize if that damage to that outer jacket is truly just to the outer jacket and would require only tape or if the cable needs to be gone further into because there's damage to the inner conductors. And a person who's trained and qualified along those lines in electrical certifications and qualifications, he's trained to make that determination and know what type of repair and how extensive it needs to be.

Tr. 51.

Robinson considered the work to be maintenance on an electrical component of the shuttle car, which was electrical work. Tr. 35. Essentially, Robinson determined that the examination and re-taping was repair of electric components of electrically-powered mobile equipment and not mechanical repair on electrically-powered equipment. Robinson explained, "A mechanical repair would not involve electricity. It wouldn't involve the electrical conductors. The trailing cable is the conductor[s] for the machine. Without that trailing cable the machine will not function." Tr. 37.

Respondent calls Robinson's interpretation of the work as electrical rather than mechanical repair of electrically powered equipment "nonsensical." R. Br. 17. I disagree. Merriam Webster defines electrical as "[o]f or related to electricity, operated by electricity, providing electricity."⁹ On the other hand, "mechanical" is defined as "of or relating to

⁸ (...continued)

questioning from the undersigned, he recanted and said that he did not know whether they were bending the cable because he was not present during the task and had simply instructed them to tape over old existing splices. Tr. 341. Based on demeanor and the specificity and detailed nature of Robinson's testimony, I credit Robinson over Respondent's witnesses and Martin's general denial.

⁹ *Merriam-Webster*, "Electric," <http://www.merriam-webster.com/dictionary/electric> (last visited Jan. 16, 2015).

machinery or tools; or produced or operated by a machine or tool.”¹⁰ There is no doubt that the cable is the electrical component sourcing power to the shuttle car and thus is “electrical” equipment.

In my view, Robinson reasonably characterized the miners’ work as electrical maintenance because the miners were examining and maintaining the taped spots in the cable by applying new tape, and because the taping was done to the cable, i.e., the part of the machine that supplies electric power to the shuttle car. Tr. 133, 37; 75; *see also* P. Ex. 3, at 55, para. 7. Robinson noted that the shuttle car needs the trailing cable and plug in order to operate. Tr. 133. Robinson further testified that even reapplying or refreshing tape would be considered maintenance of a weak spot on the cable, and work necessary to keep the cable in a state of repair. Tr. 138, 142. Although Clark testified that he did not believe that the work was electrical work because the miners were not exposed to the conductors, Clark conceded that the work was electrical maintenance. Tr. 303. Under the circumstances, I find that the Secretary’s interpretation of electrical work was reasonable and entitled to deference.

The Secretary’s interpretation is also consistent with Commission precedent. The Commission has held that “‘repair’ means ‘to restore by replacing a part or putting together what is torn or broken: fix, mend ... to restore to a sound or healthy state: renew, revivify’” *Walker Stone Company, Inc.*, CENT 94-97-M (Jan. 1997) (quoting *Webster's Third New International Dictionary, Unabridged* 1923 (1986)). I find that the trailing cable is an electrical component of the shuttle car and that re-taping was repair of an electric component of electrically-powered mobile equipment.

Alternatively, the work being performed was electrical maintenance of permissible equipment. Generally, electric face equipment, such as shuttle cars, must be maintained in permissible condition under 30 C.F.R. §75.506. Further, several MSHA regulations, including 30 C.F.R. §§ 56.12016, 56.12017, 57.12016, 57.12017, 75.511, and 77.501, require that lock and tag out procedures be followed when work on electrical equipment poses a danger of electric shock. *See Island Creek Coal Co.*, 22 FMSHRC 823, 827 (2000). That same hazard was present here when power was restored and the cable was not locked and tagged out.

The Commission held in *Walker Stone* that “maintenance is defined as ‘the labor of keeping something in a state of repair or efficiency: care, upkeep. . . proper care, repair, and keeping in good order.’” *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997) *aff'd* 156 F.3d 1076 (10th Cir. 1998). I find that re-taping a splice is upkeep meant to keep the trailing cable in a state of repair. The taping or re-taping was clearly intended to “keep [the cable and the tape] in a state of repair or efficiency,” *see Walker Stone*, 19 FMSHRC at 51, especially in light of section foreman Kelly’s testimony that he was concerned about receiving citations for damaged or worn tape over existing repairs. Tr. 320-21.

¹⁰ *Merriam-Webster*, “Mechanical,” <http://www.merriam-webster.com/dictionary/mechanical> (last visited Jan. 16, 2015).

Respondent argues that the re-taping was not “maintenance,” but rather activity designed to “increase usefulness” of equipment. *S. Ohio Coal Co.*, 14 FMSHRC 978, 982-983 (June 1992). In *Southern Ohio Coal*, the Commission held that an extension of a conveyor belt was not designed to keep the belt in good repair, but rather to increase its usefulness. *S. Ohio Coal Co.*, at 983. The Commission explained that the improvement “did not preserve the ability of the existing belt to convey material.” *Id.*

I reject Respondent’s arguments that the taping the cable in this case was similar to the extension of the conveyor belt for the purpose of increasing its usefulness in *Southern Ohio Coal*. I further reject Respondent’s arguments that the taping should not be characterized as maintenance or repair because there was nothing wrong with the cable, the taping was done merely to prevent future citations for inadequate taping of splices, and the re-taping was “performed to increase the functionality of the previously taped cable splice by increasing the level of safety.” R. Br. 16-17; Tr. 49. I find to the contrary. Taping over a splice, or taping over previous tape that was applied to a splice, does not increase the usefulness of a trailing cable, rather it *preserves* the cable’s ability to *convey* power to the shuttle car for operation.

I also reject Respondent’s reliance on the judge’s decision in *U.S. Steel Mining Co.*, 13 FMSHRC 1451 (Sept. 1991) (ALJ) to support its argument that taping cables does not constitute electrical work. *U.S. Steel Mining* involved a section 75.511 citation issued after a section foreman instructed a shuttle car operator to lock and tag out a shuttle car cable before applying tape to a nick on the training cable. The judge found that simply because a miner performs work involving a piece of electrical equipment or component, such as a trailing cable, does not *ipso facto* make such work electrical work required to be performed only by a qualified person.” The judge found the work more akin to mechanical work. 13 FMSHRC at 1463-64. The judge noted that the miner “simply taped over a nick or split in the boot of the permanent splice, and other than a roll of electrical tape, he used no tools or other equipment.” *Id.* at 1462–63.

I am not persuaded by the reasoning in *U.S. Steel Mining* for several reasons. Electrical tape is used as a tool to insulate a splice and prevent electric shock. In any event, the use of tools should not be a controlling factor in categorizing a task as electrical work. In fact, another Commission judge has rejected an argument that the absence of tools used in work which resulted in electrocution, somehow excepted the task from the category of “electrical work.” *Day Mining Inc.*, WEVA 2001-0066, 2002 WL 31236050, at *4 (Sept. 2002) (ALJ) (“Respondent’s argument that no work was contemplated by [miners] because they did not bring tools with them is overly simplistic. That [miner] died without a tool in his hand is very hard evidence of the hazard involved even without tools.”).

Furthermore, the facts in *U.S. Steel Mining* are markedly different from those at issue here. *U.S. Steel Mining* involved one discrete spot on a cable, and although no bare wires were exposed, the trailing car cable had been locked and tagged. Regent’s #2 shuttle car cable was not locked and tagged out when work was being performed on it. When power was restored at the surface and at the power center, the cable would become energized and expose any miners working on it to electric shock and burn hazards. Fortuitously, the miners in this case were no longer working on the cable when power was re-energized because Robinson intervened and

wrote the citation. It is mere speculation to ponder what would have occurred had Robinson not been present. The standard was written to preclude the possibility of injury when electrical work is performed on distribution circuits and equipment that are not locked and tagged out. That standard was applicable here.

Finally, I find additional support for my conclusion in legislative history. The House Report from the Federal Coal Mine Health and Safety Act of 1969,¹¹ is instructive on lock and tag out procedures and the training required for work performed on electrical wiring or equipment. The Report states that the standard:

“requires an operator to disconnect electric power from all electric wiring and equipment before repairs are made . . . Only persons supervised by competent electricians may work on medium and high voltage distribution equipment and circuits. Switches must be locked in an open position where the power is disconnected to prevent accidental reclosing. The persons performing the work must retain possession to the key to guard against such reclosing.”

House of Representatives Report No. 91-563, 1969 Coal Act. Instead of using the term “electrical work,” the report states that power must be disconnected from all electrical wiring and equipment before repairs are made. The purpose of this safeguard was to “prevent accidental reclosing” of a switch. House Report No. 91-563, 1969 Coal Act.¹²

In sum, I find that the Secretary’s interpretation that Browning and Martin were performing electrical repair or maintenance on the shuttle car cable under section 75.511 was reasonable and entitled to deference. The standard was violated because Browning and Martin were not certified electricians or working under the direct supervision of a certified electrician, and the shuttle car trailing cable on which they were working was not locked or tagged out to prevent it from being energized.

¹¹ Public Law 91-173, 83 Stat. 742, amended by the Federal Mine Safety and Health Act of 1977, Public Law 95-164, Federal Mine Safety and Health Act of 1977, Public Law 95-164, 91 Stat. 1290, amending 30 U.S.C. ch. 22 Sec. 801 et. seq.

¹² The 1969 Coal Act was the precursor to the underground coal safety standards in 30 C.F.R. §75.1 *et seq.* The relevant portion of the House Report was a summarization and clarification of the interim standards applicable to underground coal mines. Electrical equipment standards are described in the record and were discussed *infra* to illustrate legislative intent. The analog standards are found in Section 305 of the Federal Coal Mine Health and Safety Act of 1969. Section 305 addressed the requirements for electrical equipment, while the present standard governing electrical equipment begins in Subpart F of 30 C.F.R. Ch. I. Section 305(f) of the 1969 Coal Act uses language nearly verbatim to that used in standards codified in 30 C.F.R. §§75.509, 510, and 511.

B. The Violation of Section 75.511 was Significant and Substantial

The Mine Act describes an S&S violation as one “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). The Commission has held that a violation is S&S “if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the Commission’s subsequent *Mathies* test: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. See *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); accord *Buck Creek Coal*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria). An evaluation of the reasonable likelihood of injury is made assuming continued normal mining operations. *U.S. Steel Mining Co. (U.S. Steel III)*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co. (U.S. Steel I)*, 6 FMSHRC 1573, 1574 (July 1984)). Accordingly, when evaluating an S&S designation, the Commission looks to the particular facts surrounding the violation, in the context of continued mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988).

For the reasons explained above, I have found the underlying violation of mandatory safety standard 75.511 as Browning and Martin were performing electrical work without the proper qualifications and the circuit was not locked and tagged out.

With regard to the second *Mathies* factor, the violation created a discrete safety hazard or measure of danger to safety. The Secretary need only identify a safety hazard associated with the putative S&S violation. *Highland Mining Co.*, 34 FMSHRC 3434, n. 5 (Dec. 2012). This prong of the test does not require a “reasonable likelihood” analysis. *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280 (Oct. 2010). Respondent’s failure to lock and tag the shuttle car cable being repaired leaves open the possibility that anyone could reset the circuit when power is restored and miners still working on the cable would be exposed to energized inner conductors. Accordingly, I find that the second *Mathies* factor is satisfied.

The third *Mathies* factor is typically the most disputed aspect of an S&S analysis, and often the most difficult to apply. The Secretary must prove a reasonable likelihood that the hazard contributed to by the violation will result in an event in which there is an injury. *U. S. Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985).

The Secretary demonstrated a reasonable likelihood that the hazard contributed to by the violation, i.e., exposure to energized inner conductors because of the failure to lock and tag out,

was reasonably likely to result in a shock or burn injury to two miners when power was restored during continued mining operations. Robinson credibly testified as follows:

Q. How was it reasonably likely?

A. Because the circuit was energized right there while I was at the power center. There was no lock and tag on the circuit. Unannounced to those miners. Nobody called to the miners to let them know that the power was coming on. The power was restored to the section transformer and the branch circuits to all the equipment began to be energized.

Q. And what was the danger?

A. The danger is electric shock, burns, a cable blowing up in somebody's face or hands.

Q. How many persons did you say were affected?

A. I affected two people, because both of those miners that were pulling the cable were in contact with the cable. And depending on the type of fault condition, or an exposed conductor, current can actually travel down the outer jacket of those cables depending on where it finds its ground. So both miners were handling the cable, so it was likely both miners would be injured.

Tr. 56-57.

Consistent with the standard, Robinson testified that any time one works on an electrical circuit, they should lock and tag it themselves “[b]ecause that is the only way that you can guarantee one hundred percent that that circuit you’re working on cannot be energized.” Tr. 59. Robinson testified that an acquaintance had died as a result of working on a continuous miner cable that was not locked and tagged out when an unannounced restoration of power occurred after mine-wide power outage. Tr. 59.

Even though Robinson failed to examine the cable for damage, the record establishes that areas of the cable had already been spliced and the damaged areas were being re-taped. Given the failure to lock and tag out the circuit, miners who continued to pull the trailing cable from hand-to-hand, looking for nicks to tape and re-taping already damaged splices, were reasonably likely to encounter the hazard of exposed inner conductors when power was restored, which would result in a lost-workdays or restricted-duty injury from electric shock or burn. Evaluating the specific facts as inspector Robinson found them before the citation was written, had the miners continued their task with the circuit unlocked when power was restored, a shock and burn injury was reasonably likely to have occurred. In these circumstances, I conclude that an injury was reasonably likely to occur from the failure to lock and tag out the shuttle car cable once power was restored during continued mining operations.

Concerning the fourth *Mathies* factor, I find a reasonable likelihood that any such injury would be of a reasonably serious nature and result in lost work days or restricted duty. During continued normal mining operations, once power was restored, the likely exposure to energized inner conductors because of the failure to log and tag out during electrical repair or maintenance of the cable was reasonably likely to result in a shock or burn injury, which the Commission has found to be a reasonably serious injury. *See e.g., Karst Robbins Coal Company, Inc.*, 10 FMSHRC 1708, 1713 (Dec. 1988) (ALJ) (operator showed gross negligence and reckless disregard for cited safety standards by directing an unqualified and unsupervised miner to do electrical work on a trailing cable, and by failing to de-energize and lock out or tag the electrical circuit while the miner attempted to work on the cable. The miner received an electrical shock with serious burns, and probably would have been killed had a fellow employee not pulled the cable from his hands); *Spartan Mining Co.*, 29 FMSHRC 465, 466 (June 2007) (ALJ) (electrician electrocuted while repairing a continuous miner trailing cable that was not locked and tagged out when mine power was restored and circuit breaker for miner was closed by another miner).

Robinson credibly testified that once the cable was energized there was a danger that an exposed conductor would cause electrocution, shock or burns. Tr. 39, 40, 57. Robinson also testified that once an energized cable with a damaged outer layer was bent, exposed inner conductors could touch, creating a fault condition and “blowing up.” Tr. 39. This would result in an arc flash causing an explosion, which could burn or blind miners. Tr. 56. Kelly, who instructed the miners to perform the electrical work, admitted that the miners could be shocked or electrocuted from handling an energized cable. Tr. 342. These injuries are all reasonably likely to occur from exposure to energized conductors on a trailing cable, and they are all of a reasonably serious nature. Accordingly, the Secretary has established a reasonable likelihood that an injury resulting from the hazard contributed to by the violation was reasonably likely to be serious.

Based on the factors above, I find that the violation of Section 75.511 was properly designated as significant and substantial.

C. Respondent’s Negligence was Appropriately Designated as Reckless Disregard

The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

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

to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d).

The Respondent challenges Robinson's designation of its negligence as reckless disregard. The level of negligence is properly designated as "reckless disregard" when "the operator displayed conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3 Table X.

Robinson credibly testified that after further investigation the day after writing the citation, Robinson modified negligence from moderate to reckless disregard because

foreman, Mr. Kelly, instructed these miners to perform this electrical work. He knew the circuit wasn't locked and tagged that these miners were working on. He knew that those miners weren't qualified or certified, and he showed the slightest degree of care for the safety of these miners.

Tr. 58.

I affirm the reckless disregard designation. As further explained below under unwarrantable failure factor C.4., section foreman Kelly created a substantial and unjustifiable risk of harm to unqualified miners by assigning them to perform electrical work without taking the minimal step of ensuring that the electrical circuit was locked and tagged out, thereby demonstrating indifference to the risk and exalting production over safety. There were no safeguards in place to ensure that these miners would not be handling a live cable if power were to be restored. No mitigating factors were presented. In these circumstances, I find that the Secretary properly designated the level of negligence as reckless disregard. *See e.g., Karst Robbins Coal Company, Inc.*, 10 FMSHRC 1708, 1713 (Dec. 1988) (ALJ) (respondent displayed gross negligence and reckless disregard for cited safety standards by directing an unqualified and unsupervised miner to do electrical work on a trailing cable, and by failing to de-energize and lock out or tag the electrical circuit while the miner attempted to work on the cable).

D. The Unwarrantable Failure Designation Was Appropriate

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d at 136.

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative

condition, whether the operator has been placed on notice that greater efforts are necessary for compliance with the standard, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See, e.g., Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (2009); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). The Commission and its judges must take into account all of the factors, but may determine, when exercising discretion, that some factors are not relevant, or are much more or less important than other factors under the circumstances. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Excel Mining, LLC* 497 F. App'x 78, 79 (D.C. Cir. 2013); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (2001).

I discuss below, the applicability, *vel non*, of all of the relevant factors.

1. The Extent of the Violative Condition

The Commission has viewed the extent of a violative condition as an important element in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1351-52 (Dec. 2009). This factor considers the scope or magnitude of the violation. *See Eastern Associated Coal*, 32 FMSHRC at 1195, citing *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988). Extensiveness involves the degree of the violation and is a question of fact regarding the material increase in the degree of risk posed to miners as a result of the violation. *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010). In some situations, extensiveness depends on the number of people affected by the violation. *See Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681 (July 2002).

Here, the violation is the performance of electrical work (maintenance) on the shuttle car trailing cable by non-qualified persons without locking and tagging out the machine. Several miners in addition to Browning and Martin were performing the same type of electrical work on the trailing cable. Martin, two other shuttle car operators, and two roof bolters were instructed by foreman Kelly to pull the shuttle car cables off and re-tape over splices. Tr. 232-33. Thus, five miners were placed at risk of electric shock injury as a result of the violation, although Robinson wrote the citation as only affecting two persons. Further, this was not the first time miners were instructed to do such a task and they may have been asked to do it again, but for the issuance of Citation No. 8201921-01. I find that the violation was fairly extensive and would have continued during normal mining operations, absent intervention by MSHA. Accordingly, this factor weighs in favor of an unwarrantable failure finding.

2. The Duration of the Violation

The Commission has emphasized that the duration of the violative condition is a necessary element of the unwarrantable failure analysis. *See, e.g., Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (remanding for consideration of duration evidence of cited conditions). The duration or length of time that the violation existed is particularly critical, as the longer a violative condition or practice exists, the more likely miners would be injured. *Coal River Mining, LLC*, 32 FMSHRC 82, 92 (Feb. 2010). It must be noted, however, that a violation

can be found unwarrantable even when the duration is a relatively short period of time, where the violation poses a high degree of danger, involves a foreman, and would have continued, but for the occurrence of an accident. *Midwest Material Co.*, 19 FMSHRC 30, 34-36 (Jan. 1997); *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1145-48 (Oct. 1998).

There is marginal evidence of exactly how long the miners were re-taping the trailing cable. Martin testified that he only performed the task for a few minutes, but the electrician and troubleshooter indicated that the power was off for one to two hours. Tr. 146, 194. During this time, no lock out or tag out of the cable occurred. The trailing cable on shuttle cars is at least a few hundred feet long, which meant greater exposure to nicks, splices, and damaged areas as the task continued, but for Robinson's issuance of the citation and Respondent's subsequent instruction to the miners to stop working. Tr. 147. Furthermore, as noted above, the violative practice occurred as a direct result of direction from foreman Kelly and the violation posed a high degree of danger of electric shock injury should power be restored during continued normal mining operations. In these circumstances, I conclude that the duration factor weighs in favor of an unwarrantable failure finding.

3. Whether the Operator Was on Notice that Greater Efforts Were Necessary for Compliance with Section 75.511

The Commission has stated that repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *IO Coal*, 31 FMSHRC at 1353-55; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001). The purpose of evaluating the number of past violations is to determine the degree to which those violations have "engendered in the operator a heightened awareness of a serious . . . problem." *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007), *citing Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994). The Commission has also recognized that "past discussions with MSHA" about a problem "serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *Id.*, *citing Consolidation Coal*, 23 FMSHRC at 595.

Regent had no previous citations for a section 75.511 violation. P. Ex. 4. Furthermore, the Secretary failed to establish any prior discussions with Regent about any problem failing to comply with section 75.511. In these circumstances, I find that the Secretary has failed to establish that Respondent was placed on notice that greater compliance efforts with 30 C.F.R. § 75.511 were necessary. Accordingly, this factor militates against a finding of unwarrantable failure.

4. Section Foreman Kelly's Knowledge and Reckless Disregard for the Existence of the Violation

The Commission has held that knowledge is established by showing "the failure of an operator to abate a violation [that] he knew or *should have known* existed." *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-03 (Dec. 1987); *see also*, Senate Subcommittee on Labor, Committee on

Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1602 (1975) (“Coal Act Legis. Hist.”). In the absence of past violations, an operator’s knowledge may be established “where an operator reasonably should have known of a violative condition.” *IO Coal Company, Inc.* 31 FMSHRC 136, 1356-57 (2009); *Drummond Co., Inc.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991), quoting *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). Further, the Commission has held that the extent of the involvement of supervisory personnel in a violation should be taken into account in determining whether an unwarrantable failure occurred, because supervisors are held to a higher standard of care. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001); *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998). A section foreman is held to a “demanding standard of care in safety matters.” *Youghioghenny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987)(quoting *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (April 1987)). A mine superintendent is also held to a heightened standard of care. *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent).

Regent miners Martin and Browning, who were not qualified to perform electrical work, performed electrical maintenance on a trailing cable that had not been locked or tagged out under the direction of section foreman Kelly. With power down and an inspector on his way underground, section foreman Kelly instructed the five miners to begin taping the splices on the trailing car cable, aware that the cable was not locked out and that the miners were not certified electricians. Tr. 333, 334-36.¹³

Kelly also knew that Regent had received a citation for a poorly maintained trailing cable less than a year before. Tr. 319-20. He remembered it well because the fine was \$5,900, enough to buy two new cables. Tr. 321. Kelly testified that he wanted to prevent another citation like that. Tr. 320-21, 334. “Why sure. That’s my job, to take care of the mine, see that that mine makes money.” Tr. 334. So when power went down, Kelly told the miners “. . . to get some tape -- because there wasn’t no power on the catheads, I told them to get some tape, pull the cable off the cars, go over their splices and tape them back up. That’s not the first time we done that.” Tr. 335.

Q: Did you put a lock and tag on the cathead on this occasion?

A: No, I did not, because there wasn’t no power underground.

Q: Did you watch them work on the cable?

A: No, I did not.

¹³ As noted, Clark and Hubbard were listed as the only qualified electricians working underground on day shift at the time of the January 28 inspection. Tr. 47. Clark was working about 30 crosscuts away from where the miners were examining the trailing cable. Tr. 48, 52. Hubbard was working outby. Tr. 53.

Q: Is Mr. Martin a certified electrician.

THE COURT: We know neither one of them is.

.....

Q: You weren't aware that the blades were logged and tagged out at the time you were issued the citation.

A: No, I was not, because, see that, that don't fall in my category of running the section. That's an electrician's category.

Tr. 336-37.

Kelly's prioritization of section production over safety is the type of indifference and reckless disregard for safety that justifies designating this particular violation an unwarrantable failure to comply with a safety standard. "Reckless" is commonly understood as "without thinking or caring about the consequences of an action." *The New Oxford American Dictionary* 1414 (Erin McKean ed., 2d ed. 2005). The term "disregard" is commonly understood as "to treat without fitting respect or attention: to treat as unworthy of regard or notice: to give no thought to: pay no attention to. *Webster's Third New International Dictionary (Unabridged)* 665 (1993). For civil penalty purposes, 30 C.F.R. §100.3, Table X, defines "reckless disregard" as "conduct which exhibits the absence of the slightest degree of care."

As a legal term, "reckless" has been described as conduct—

[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash.... Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do.

Black's Law Dictionary 1298 (8th ed. 2004). For comparative purposes, in tort law—

a person acts recklessly in engaging in conduct if: (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.

Restatement (Third) of Torts: Phys. & Emot. Harm § 2 (2010).

Superintendent McClanahan aptly captured Kelly's indifference when Kelly informed McClanahan of the violation because the circuit was not logged and tagged out. Robinson overheard McClanahan admonish Kelly, "You know better than that; that's stupid." Tr. 41. I

find McClanahan's statement to be an admission that foreman Kelly grossly deviated from what a reasonable person would have done, i.e., take the minimal precaution of ensuring that the cable was logged and tagged out.

In short, section foreman Kelly knew or should have known of the violation. This knowledge, rises to the level of reckless disregard, and strongly supports an unwarrantable failure finding. Kelly created a substantial and unjustifiable risk of harm to unqualified miners by assigning them to perform electrical work without taking the minimal step of ensuring that the trailing cable was locked and tagged out, thereby demonstrating indifference to the risk and exalting production over safety.

5. Whether the Violation was Obvious

The failure to lock and tag out the circuit, including the catheads, was obvious upon inspection. Robinson testified that "Mr. Kelly knew that the circuit was not locked and tagged because when he came to the power center he told me it's locked on the surface. So by him knowing that it was locked on the surface, he had to know that it was not locked there. And it was obvious. Anyone could walk by the power center and tell that there's no locks or tags installed on any of the plugs." Tr. 65. McClanahan's admission that Kelly knew better and his failure to lock out was stupid supports the obviousness of the violation. Tr. 41.

Further, Robinson testified that it was obvious that the miners designated by Kelly to do the work were not on the list of qualified individuals to perform electrical work. Tr. 61-62. Further, Robinson opined that Kelly knew or should have known that Clark, but not the roof bolters and shuttle car operators, were certified to perform the work. Tr. 65. Accordingly, the factor of the obviousness of the violation supports an unwarrantable failure finding.

6. Whether the Violation Posed a High Degree of Danger

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See e.g., BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals*, 10 FMSHRC 705, 709 (June 1988). For purposes of evaluating whether violative conditions pose a high degree of danger, it is often necessary to consider the same facts already considered as part of the gravity evaluation in an S&S analysis. *See San Juan Coal, supra*, 29 FMSHRC at 125, 132-33 (remand for failure to apply S&S findings to danger factor in unwarrantable failure analysis).

The degree of danger is a relevant factor, but not a threshold requirement for determining whether a violation is unwarrantable. It is but one factor to be considered in evaluating whether a violation is unwarrantable. *Manalapan Mining Company, Inc.*, 35 FMSHRC 289, 294 (2013), citing *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999) (Commission recognizes a number of factors relevant to determining whether a violation is the result of an operator's unwarrantable failure). The factor of dangerousness may be so severe that, by itself, it warrants a finding of unwarrantable failure, but the converse is not true, i.e., that the absence of danger precludes a finding of unwarrantable failure. *Manalapan, supra*, 35 FMSHRC at 294. Further,

the Commission has held that a violation may be aggravated and unwarrantable based on “common knowledge that certain equipment, such as power lines, are hazardous and that precautions are required *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). A serious hazard warrants heightened precautions by an operator. *LaFarge Construction Materials*, 20 FMSHRC 1140, 1146 (1998); *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997).

Inspector Robinson testified that the violation was dangerous because the unlocked circuit can become energized and the miners would be working with a live circuit in their hands and would be unqualified to determine whether they were taping single damaged conductors or damaged multiple phase conductors creating other fault conditions. Tr. 64-65. The danger was electric shock, burns, or a cable blowing up in a miner’s face or hands. Tr. 57. Robinson testified that an acquaintance of his had died as a result of working on a continuous miner cable that was not locked and tagged out when an unannounced restoration of power occurred after mine-wide power outage. Tr. 59.

Section foreman Kelly, who instructed the unqualified miners to perform the electrical work without ensuring that the circuit was laced and tagged out, acknowledged the danger of shock or electrocution when handling a trailing cable that could become energized. Kelly testified that it was possible for the miners to contact an energized conductor if they touched a nick in the outer jacket of the cable. Tr. 342. Mechanic Addington acknowledged that bending and examining cable with power not locked and tagged out could cause injury if the insulation was not adequate. Tr. 223. This testimony of Regent personnel supports a finding that unqualified miners working on a circuit that was not locked or tagged out was an obvious danger in violation of a safety standard.

In short, the degree of danger supports an unwarrantable failure finding. See *Karst Robbins Coal Company, Inc.*, 10 FMSHRC 1708, 1713 (Dec. 1988) (ALJ) (electric shock with serious burns resulted from operator’s gross negligence and reckless disregard by directing an unqualified and unsupervised miner to do electrical work on a trailing cable, and by failing to de-energize and lock out or tag the electrical circuit while the work was done on the cable; *Spartan Mining Co.*, 29 FMSHRC 465, 466 (June 2007) (ALJ) (electrician electrocuted while repairing a continuous miner trailing cable that was not locked and tagged out when mine power was restored and circuit breaker for miner was closed by another miner).

7. The Operator’s Efforts in Abating the Violative Condition

An operator’s efforts to abate a violation are relevant to an unwarrantable failure determination. Thus, where an operator has been placed on notice of a problem, the level of priority that the operator places on abatement of the problem is relevant. *IO Coal, supra*, 31 FMSHRC at 1356, citing *Enlow Fork Mining, supra*, 19 FMSHRC at 17. The focus is on abatement efforts made prior to issuance of the citation or order. *Id.* An operator’s efforts to abate a violation before a citation or order issues, even during an inspection, may be a mitigating factor in an unwarrantable failure analysis. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1934 (Oct. 1989). Here, Respondent was never placed on notice of a problem under section 75.511. Respondent made no efforts to abate the violation before the Citation was issued. *IO Coal*

Company, Inc., 31 FMSHRC 1346, 1356 (2009); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). I find that this factor is neutral in the unwarrantable failure analysis.

E. Conclusion on Unwarrantable Failure Issue

In sum, after considering the relevant Commission factors, I find that the factors of extensiveness of the violation, duration of the violation, obviousness of the violation, high degree of danger posed by the violation, and section foreman Kelly's knowledge and reckless disregard for the existence of the violation all support an unwarrantable failure finding. Regent was not placed on notice that greater efforts were necessary for compliance with section 75.511 and this factor militates against a finding of unwarrantable failure. Regent's efforts in abating the violative condition is a neutral factor. On balance, however, the five aggravating factors and Kelly's reckless disregard suffice to establish aggravated conduct and an unwarrantable failure beyond ordinary negligence.

F. Civil Penalty Assessment Principles

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

The principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria: [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

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

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper

consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In exercising this discretion, the Commission has reiterated that a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). In addition, the de novo assessment of civil penalties does not require “that equal weight must be assigned to each of the penalty assessment criteria.” *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). However, when a penalty determination “substantially diverge[s] from those originally proposed, it behooves the . . . judge[] to provide a sufficient explanation of the bases underlying the penalties assessed.” *Spartan Mining*, 30 FMSHRC at 699. Otherwise, without an explanation for such a divergence, the “credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.” *Sellersburg*, 5 FMSHRC at 293.

As Senior Judge Zielinski explained in *American Coal Co.*:

The purpose of explaining significant deviations from proposed penalties is to avoid the appearance of arbitrariness. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Similarly situated operators, determined to be liable for violations with similar gravity, negligence and other penalty criteria, ideally should be assessed similar penalties. Absent some guideline, however, a judge has no quantitative reference point to aid in specifying a penalty within the current statutory/regulatory range of \$100 to \$70,000. The Secretary’s regulations for determination of a penalty amount by a regular or special assessment, 30 C.F.R. §§ 100.3, 100.5, take into consideration the statutory factors that the Commission is obligated to consider under section 110(i) of the Act. The product of these assessment formulae provide a useful reference point, which promotes consistency in the imposition of penalties by Commission judges.¹⁴

Accordingly, in determining a penalty for the litigated violations, the penalty produced by application of the Secretary’s assessment formula will be used as a reference point, and adjusted depending on the particular findings with respect to the statutory penalty criteria in section 110(i). The tables and charts in the regulations provide a limited number of categories for some factors. For example, the table for operator’s negligence consists of

¹⁴ *See Magruder Limestone Co.*, 35 FMSHRC 1385, 1411 (May 2013) (ALJ) (regular assessment regulations provide a helpful guide for assessing an appropriate penalty that can be applied consistently).

five gradations, ranging from “No negligence” to “Reckless disregard.” 30 C.F.R. § 100.3(d). In reality, however, the degree of an operator’s negligence will fall on a continuum, dictating that adjustments will generally be required. Other unique circumstances may dictate lower or higher penalties. Violations involving extreme gravity and/or gross negligence, or other unique aggravating circumstances may dictate substantially higher penalty assessments. A party seeking a reduced or an enhanced penalty must assume the burden of producing evidence sufficient to justify any requested adjustment. Where the Secretary urges a penalty higher than that derived by reference to the assessment process set forth in 30 C.F.R. § 100.3, he will have the burden of establishing the appropriateness of the higher penalty, based upon the statutory penalty criteria.

35 FMSHRC 1774, 1823-24 (May 2014) (ALJ).

Under the regulations, penalty points are assigned based on the size of the operator and the operator’s controlling entity; the operator’s history of previous violations; the operator’s history of repeat violations of the same standard; the degree of the operator’s negligence; and, the gravity of the violation, including the likelihood of an occurrence of an event against which a standard is directed, the severity of injury or illness if the event were to occur, and the number of persons potentially affected if the event were to occur. A proposed penalty is determined by applying the total of the points assigned to a “Penalty Conversion Table,” which specifies proposed penalties ranging from \$112 for 60 or fewer points, up to the statutory/regulatory maximum of \$70,000 for 144 or more points for non-flagrant citations and orders. That figure may then be adjusted by reducing it by 10% if the operator demonstrated good faith in abating the violation. 30 C.F.R. § 100.3(f). A further reduction may occur if the operator can demonstrate to MSHA’s District Manager that the penalty will adversely affect its ability to continue in business. 30 C.F.R. § 100.3(h).

The undersigned recognizes that the Secretary has developed, pursuant to his authority under 30 C.F.R. § 100.5, a process for the special assessment of proposed penalties. MSHA, Office of Assessments, Accountability, Special Enforcement & Investigations, Special Assessment General Procedures (Sep. 7, 2011), <http://www.msha.gov/PROGRAMS/assess/SpecialAssess/SpecialAssessments2011.pdf>. These procedures, however, have not been codified as binding regulations, and thus, have not been subject to notice and comment rule making, unlike the normal assessment procedures in section 100.3. Where the Secretary has provided adequate documentation of how he determined the specially assessed penalty and is able to demonstrate the appropriateness of proposing a specially assessed penalty, the guidance in the Special Assessment General Procedures may also provide a helpful guide for assessing an appropriate penalty.

The Secretary has not done so here. MSHA specially assessed the proposed penalty at \$20,900, but testimony elicited by the Secretary from the inspector was limited to the fact that

the penalty was recommended for special assessment. Tr. 130-32. The Narrative Findings for Special Assessment contained in the Commission case file were not offered into evidence. No testimonial support for special assessment was given.

I have evaluated the Secretary's proposed penalty in light of the principles announced in my recent *Big Ridge* decision. *Big Ridge Inc.*, 36 FMSHRC_1677, 1681-82 (June 19, 2014) (ALJ). Accordingly, consistent with my findings above, section 110(i) criteria, and regular assessment criteria, I normally would find a penalty of \$6,997 to be appropriate. However, because MSHA established a factual, although not an evidentiary basis for a special assessment, I conclude that a greater penalty is warranted here. Applying section 110(i) criteria with particular emphasis on the serious gravity of the violation and the reckless disregard level of negligence of the operator, I assess a penalty of \$11,500 for the S&S, unwarrantable failure violation, with reckless disregard.

VII. ORDER

For the reasons set forth above, I **AFFIRM** Citation No. 8201921, as written and modified. It is **ORDERED** that the operator pay a civil penalty of \$11,500 within 30 days of this decision.¹⁵

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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¹⁵ Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 27, 2015

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

v.

WAKE STONE CORP.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2010-0095-M
A.C. No. 31-02071-197617

Mine: Nash County Quarry

DECISION ON REMAND

Before: Judge L. Zane Gill

This case is before me upon remand by the Commission to determine an appropriate civil penalty for Citation Nos. 6512366 and 6512367.

On April 18, 2014, the Commission decided that Wake Stone Corp. (“Wake Stone” or “Respondent”) violated 30 C.F.R. § 56.14132(a) for both Citation Nos. 6512366 and 6512367 because the service horns on the Caterpillar 345B excavator and the Komatsu D65Px dozer were “not maintained in functional condition.” *Wake Stone Corp.*, 36 FMSHRC 825 (Apr. 2014). This now constitutes the law of the case. *See Pepper v. United States*, 131 S. Ct. 1229, 1250 (2011).

The undisputed material facts in this matter are as follows:

- On July 14, 2009, MSHA issued Citation No. 6512366 to Respondent at the Nash County Quarry.
- Citation Number 6512366 alleges a violation of 30 C.F.R. § 56.14132(a).
- The service horn on the Caterpillar 345 B excavator (Company Number 16052), which was located in the rock breaker area of the pit, was inoperative at the time of the inspection performed by MSHA on July 14, 2009.
- During the course of this inspection, the inspector requested to inspect the Caterpillar 345 B excavator that was not in operation during the course of the shift.
- Christopher Pons, the Superintendent of the Nash County Quarry, instructed that a pre-operation examination be completed before the equipment was operated and inspected.
- During the course of the pre-operation inspection, the operator conducting the pre-operation exam discovered that the service horn of the excavator was not properly functioning, and informed the MSHA inspector of this.

- The MSHA inspector issued Citation No. 6512366 because of the inoperable horn.
- On July 14, 2009, MSHA issued Citation No. 6512367 to Respondent at the Nash County Quarry.
- Citation Number 6512367 alleges a violation of 30 CFR 56.14132(a).
- The service horn on the Komatsu D65Px dozer, which was located in the pit area of the mine, was inoperative at the time of the inspection performed by MSHA on July 14, 2009.
- Also During the course of this inspection, the MSHA inspector requested to inspect the Komatsu D65Px dozer that was not in operation during the course of the shift.
- Christopher Pons again instructed that a pre-operation examination be completed before the equipment was operated and inspected.
- During the course of the pre-operation inspection, the operator conducting the pre-operation exam discovered that the service horn of the dozer was not properly functioning, and informed the MSHA inspector of this.
- The MSHA inspector issued Citation No. 6512367 because of the inoperable horn.

Discussion

As the Commission has ruled that Wake Stone did violate 30 C.F.R. § 56.14132(a) for Citation Nos. 6512366 and 6512367, I must now determine the penalty amounts for each based on negligence and gravity. The MSHA inspector determined that the violations for Citation No. 6512366 and 6512367 were unlikely, lost workdays or restricted duty, non-significant and substantial, and low negligence.

Here, the two pieces of equipment, the Komatsu D65Px dozer and the Caterpillar 345 B excavator, were not in operation at the time the MSHA inspector was inspecting the mine. Since the pieces of equipment were not in operation, the Respondent required a pre-operational inspection to be completed before the equipment could be operated and inspected by MSHA. Only during the course of the pre-operational inspection, which is required before any piece of equipment is placed in operation, 30 C.F.R. § 56.14100(a), did the Respondent discover the horns were malfunctioning. As such, it is reasonable to infer that if the Komatsu D65Px dozer and the Caterpillar 345 B excavator were to be placed in operation, and any such defect would have been discovered before the equipment was operated and before miners were exposed to hazards. That is what happened in this case. These facts mitigate the Respondent's negligence. Therefore, I agree with the Secretary's assessment that an injury or illness was unlikely¹ and the operator's negligence was low.²

¹ The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sep. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) and *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987)). The gravity analysis focuses on factors such as the likelihood
(continued...)

The purpose of a horn is to warn people and other equipment in the area. The lack of an operating horn makes a collision more likely to occur. Therefore, I agree with the Secretary that if an injury were to occur because of the failure of the excavator or dozer operator to sound the horn, the injury or illness would reasonably be expected to be lost workdays or restricted duty.

Penalty

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

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator’s history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C. § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) (“[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.”); *See American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ Zielinski). Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

The proposed penalty for Citation Nos. 6512366 and 6512367 and is \$100.00 each. The operator has no relevant violation history for the fifteen months prior to the latest citation date. I have considered the size of the operator based on the operator’s report to MSHA’s data retrieval system. The gravity of the violation is unlikely to result in injury and the negligence is low. There was no indication that the operator would not be able to continue in business from a \$200.00 penalty. Additionally, the operator demonstrated good faith in abating the violation.

¹ (...continued)

of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

² Low negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” 30 C.F.R. § 100.3(d).

As such, I assess a penalty of \$100.00 for Citation No. 6512366 and \$100.00 for Citation No. 6512367.

WHEREFORE, it is **ORDERED** that Wake Stone pay a penalty of \$200.00 within thirty (30) days of the filing of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 27, 2015

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

v.

DULIN CONSTRUCTION INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-655-M
A.C. No. 45-01429-349489

Mine: Pit #1

DECISION AND ORDER

Appearances: Donald S. Horn, CLR, U.S. Department of Labor, Mine Safety and Health Administration, Vacaville, CA for Petitioner¹

Mark Dulin, Dulin Construction Inc., Centralia, WA for Respondent

Before: Judge Barbour

This case is before the court upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). In his petition, the Secretary of Labor (“Secretary”) asks the court to fine Dulin Construction, Inc. (“Dulin”) \$100 for allegedly violating mandatory safety standard 30 C.F.R. § 56.11011.² The violation allegedly occurred when Dulin allowed aggregate to accumulate around and under a ladder used by one of its employees to access a work platform to service the head pulley of a conveyor belt. Section 56.11001 requires safe access to be maintained to working places and the Secretary charges that the accumulated aggregate made access to the cited area unsafe.³

¹ As a preliminary matter, the Conference and Litigation Representative (“CLR”) is accepted to represent the Secretary of Labor in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

² Dulin is a small contractor that as part of its business crushes aggregate (gravel) to size at a gravel pit it operates in Lewis, Washington, and \$100 is the lowest penalty the Secretary can propose. 30 C.F.R. § 100.3.

³ Dulin was originally cited for an alleged violation of 30 C.F.R. § 56.20003(a), a mandatory standard requiring among other things, that “workplaces [and] passageways . . . be kept clean and orderly[.]” The Secretary moved the court to modify both the citation and the petition to allege a violation of section 56.11001, Dulin did not object to the motion, and it is **GRANTED**.

After the petition was filed, the court ordered the parties to engage in discussions to determine if they could settle the matter. Although they could not reach a settlement, they agreed to forego a trial and to ask the court to decide the case based on stipulations and exhibits. Accordingly, pursuant to Commission Rule 67, 30 C.F.R. § 2700.67, the CLR filed jointly agreed upon stipulations and a motion seeking summary decision on the one citation at issue.

THE STIPULATIONS

The court accepts the following stipulated facts to be undisputed:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction over this proceeding.
2. Pit #1 is a surface mine that extracts construction sand and gravel, and is subject to the Federal Mine Safety and Health Act of 1977.
3. At all times relevant to these proceedings, Dulin Construction Inc. operated the Pit #1 Mine.
4. Joshua Mark Mathisen was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued citation number 8610507, and . . . the citation was properly served upon an agent of the respondent.
5. The violation was promptly abated.
6. Payment of the proposed penalty will not affect the Respondent's ability to continue in business.
7. [T]he Respondent's mine size is small, and . . . the employment hours documented in Exhibit A of the Petition for Assessment are correct.
8. [The] Respondent's history of violations as documented in Exhibit A of the Petition for Assessment is correct.
9. [T]he photographs submitted as Exhibits P1, P2 and P3 are authentic and are factual representations of the conditions observed by the inspector.
10. [T]he document submitted as Exhibit P4 [(a copy of Dulin's answer)] is authentic and was submitted by the Respondent to FMSHRC in response to the Secretary's Petition for Assessment.
11. [T]he area described in [the c]itation and depicted in the photographs marked Exhibit P1, P2 and P3 is a workplace.
12. [T]he material build-up described in Citation No. 8610507 blocked the base of the ladder.
13. [T]he material was measured by the inspector to be three feet deep at the base of the ladder.
14. [T]he material was sloping away from the base of the ladder for a distance of approximately five feet as measured by the inspector.

15. [T]he ladder is the only means of access to the finish belt head roller and work platform. (Exhibit P1) [(Photograph of the aggregate, ladder, and work platform.)]
16. Respondent was aware of the material build-up described in [the c]itation. (Exhibit P4)
17. Respondent was aware that a person (greaser man) would walk over this build-up of material. (Exhibit P4)
18. While the Secretary believes the cited standard, 30 C.F.R. § 56.20003(a), is appropriate, the Secretary moves to amend the citation to reflect, instead, a violation of 30 C.F.R. § 56.11001 as even more appropriate.

Motion to Amend Citation and Order for Summary Judgment 2-3

THE REGULATION

30 C.F.R. § 56.11001: Safe Access

Safe means of access shall be provided and maintained to all working places.

SUMMARY DECISION

Commission Rule 67(b) provides that a “motion for summary decision shall be granted only if the entire record, including the pleading, depositions, answers to interrogatories, admissions, and affidavits shows: (1) That there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.64(b). Here, the burden is on the Secretary, as the moving party, to establish his right to summary decision, and I conclude that the Secretary has met his burden.

DISCUSSION

To prove a violation of section 56.11001, the Secretary must establish that the area involved was a “means of access” to a “working place” and that the means of access was not “safe”. The parties have stipulated to the fact that the cited area was a working place. Stip. 11. The parties have also stipulated that the material build up described in the citation blocked the base of a ladder that provided access to a belt head roller and work platform and that a greaser man would walk over the material when accessing the area.⁴ Stip. 12, 15, 17. The only question remaining is whether the cited conditions made it unsafe for the greaser to access the work platform.

The stipulations establish that the material was three feet deep at the base of the ladder and sloped approximately five feet away from that base. Stip. 13, 14. The Secretary’s photographs depict a sizable build-up of large, uneven pieces of gravel, sloping upwards toward a ladder. *See* Ex. P1, P2. There is no question that a miner navigating this area in order to access the ladder and work platform would risk injury from slipping and falling. These conditions render the area unsafe. The photographs and undisputed facts clearly establish a violation.

⁴ The original citation describes this material as “1 ¼ inch minus crushed aggregate.” The company describes it as crushed gravel. Ex. P4. Both terms are correct.

The company's primary defense is that "the gravel pile arrangement is part of a worthy safety system[,]" because it acts as a "safety berm" for the ladder and for the legs of a 25 foot high overhead conveyer in that very same area. Ex. P4. The gravel protects the ladder and conveyer from a wheel loader that accesses the area daily in order to gather product. *Id.* It thereby prevents the loader from knocking over the conveyer and causing a "catastrophic event." *Id.* In short, the company argues that the cited conditions prevent an even greater safety hazard.

Section 101(c) of the Mine Act allows the Secretary to modify the application of any mandatory safety standard to a mine if such application will result in a diminution of safety to the miners. 30 U.S.C. § 811(c). Dulin is effectively alleging that application of the mandatory safety standard at issue in this matter will result in a diminution of safety. However, a section 101(c) modification is solely within the jurisdiction of the Secretary, instead of the Commission. The Commission has held "that diminution of safety may not be raised as a defense to violation in an enforcement proceeding unless the Secretary has first entered a finding of such diminution in a modification proceeding." *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (Nov. 1989) (citing *Sewell Coal Co.*, 5 FMSHRC 2026, 2029 (Dec. 1983)). Modification cases are heard by Department of Labor Administrative Law Judges. If Dulin wishes to resolve this diminution of safety issue, the company must first raise it in a modification proceeding before the Department of Labor.

The court also agrees with the Secretary's gravity and negligence determinations. The citation stated that "the finish belt head pulley was accessed approximately once per month for greasing." While any injury that occurred from a slip or fall could reasonably be expected to result in lost workdays or restricted duty, the ladder was not accessed frequently enough to make an injury likely. Therefore, the court finds the gravity of the violation to be of minor seriousness. The court further finds that Mr Dulin's awareness that a miner would have to walk over the build-up of material establishes the company's negligence (Stip. 17), but his good faith belief that "the gravel pile arrangement [was] part of a worthy safety system" mitigates the company's negligence to "moderate" as originally designated in the citation. Ex. P4.

CIVIL PENALTY ASSESSMENT

The court has found a violation and it must assess a civil penalty taking into account the statutory civil penalty criteria. 30 U.S.C. § 820(i). The court has further found that the violation was only slightly serious, that an accident was unlikely, and that the violation was due to moderate negligence. The parties have stipulated that the mine is small, that the violation was promptly abated, that payment of the proposed penalty will not affect the company's ability to continue in business, and that the company's history of violations as documented in Exhibit A of the Petition for Assessment is correct. Stip. 5, 6, 7, 8. The court finds that the exhibit reflects a small history.⁵

⁵ Exhibit A of the Petition states that 13 violations have become final orders for the company in the preceding 15 months.

The Secretary has proposed a penalty of \$100, and given these findings and the civil penalty criteria, the court finds that a penalty of \$100 is appropriate.

ORDER

Within 30 days of the date of this decision, Dulin is **ORDERED** to pay to the Secretary a civil penalty of \$100.00, and upon payment of the penalty this case is **DISMISSED**.⁶

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

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⁶ Payment may be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390.

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April 28, 2015

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

v.

HECLA LIMITED,
Respondent

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

v.

DOUG BAYER, employed by
HECLA LIMITED
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2012-760-M-A
A.C. No. 10-00088-283636-02

Docket No. WEST 2012-986-M
A.C. No. 10-00088-289913

Lucky Friday Mine

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-591-M
A.C. No. 10-00088-347067 A

Lucky Friday Mine

DECISION AND ORDER

Appearances: Patricia Drummond, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington and Cheryl L. Adams, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;¹
Laura E. Beverage, Esq., and Karen L. Johnston, Esq., Jackson Kelly PLLC, Denver, Colorado, for Respondents.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Hecla Limited and Doug Bayer pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Act” or “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Coeur D’Alene, Idaho, filed post-hearing briefs, and filed reply briefs.

¹ Matthew Vadnal of the Office of the Solicitor in Seattle, Washington, also represented the Secretary in these cases until his retirement in October 2014.

Hecla Limited operates the Lucky Friday Mine in Mullan, Idaho. One section 104(d)(1) citation and three section 104(d)(1) orders brought against Hecla and a civil penalty proceeding brought against Hecla's mine superintendent Doug Bayer under section 110(c) of the Act were adjudicated at the hearing.

I. BACKGROUND

The Lucky Friday Mine is a silver, lead, and zinc mine in the Coeur D'Alene Mining District of northern Idaho. The mine is divided into two sections: the Gold Hunter section and the Lucky Friday section. On April 15, 2011, a large fall of ground occurred in cut 3 of stope 15 west at the 6150 level of the Gold Hunter section ("15 west"). Larry Marek was fatally injured in the accident.

A. Mining Method²

The Lucky Friday Mine is subject to intense horizontal pressure that significantly exceeds the vertical pressure in the Mine. This intense horizontal pressure is a characteristic of the Coeur D'Alene Mining District. The pressure prompted Hecla Limited to refine a mining technique known as underhand cut and fill mining, as described below.

The mining process consists of five stages: drilling, ramping, slotting, stoping, and backfilling. Drifts are developed horizontally from the mine shaft. Ramps are then developed that spiral up or down from a drift. Slots are developed from the ramp, perpendicular to the ore vein. The slot is used to access the vein. The mining of ore takes place in the stope, which extends to the right and to the left of a slot. The stope is mined to follow the vein or veins of silver, lead and zinc. Each slot is used to access 50 vertical feet of ore in five separate cuts in the stope. These five cuts make up a sublevel. Each cut is ten feet high.

The crew follows the same sequence of events in each cut in the two sides of the stope. They muck out rock from the previous shift, bolt the area, drill the next round, and blast the next round at the end of the shift. This process is repeated many times, extending the ten feet high and twenty foot wide stope up to several hundred feet horizontally to the limits of the ore vein. After completing the extraction of ore from a cut in the stope, the miners prepare to backfill the entire length of the stope before moving down to the next level. The engineered backfill is a combination of cement, water, and classified mill tailings. The backfill is mixed on the surface and pumped underground through a series of pipes. This backfill is often referred to as "sandfill" or "pastefill." In preparation for backfilling the stope, miners place a one to two foot layer of prep muck over the stope floor. Miners install what are called "Dywidag" bolts in a designated pattern in the prep muck on the stope floor. This pattern is specified in the "Lucky Friday Ground Support Standards." The bolts, which stand upright, act as rebar giving strength to the backfill.

² The description of the mining method is taken from the "Parties' Joint Stipulations" and is supplemented by undisputed testimony.

Miners build a sandwall to contain the cement backfill during the pouring process. The sandwall and backfill extend from the floor of the stope to approximately two feet below the back.³ Once the backfill has hardened, the next cut is taken about 10 feet below the backfill with the result that the hardened backfill from the previous cut becomes the back (roof) of the next cut. Although the pastefill is firm and solid, it has enough elasticity to withstand the horizontal pressure exerted upon it. (Tr. 419, 531-32). The horizontal pressure holds the backfill in place.

Hecla used extensive engineering and geological expertise to refine this underhand cut and fill method. This method made mining safer by reducing rock bursts and roof falls. Hecla's work to improve this mining method is well known in the mining industry. The Secretary does not take issue with this mining method in ordinary circumstances.

In stope designation, the first number refers to the sublevel; the second number is the stope; and the third number is the specific cut within a sublevel. The sublevel designation is determined by the depth of the sublevel measured in feet from the collar of the shaft. Sublevel 615 is 6150 below the top of the shaft. The fatal accident occurred in 615-15-3.

Cuts in the 15 stope were typically 18 to 20 feet wide. Under the mine's ground support standards, cuts were permitted to be wider, but extra ground support was necessary if the cut exceeded 20 feet for a distance of 25 feet. (Ex. R-19 p. 3). Cuts that exceeded 20 feet slowed the mining process because muck could not be removed quickly enough and the ratio of ore containing rock and waste rock usually decreased. Both Hecla and its miners sought to speed the mining process by keeping the width of cuts under 20 feet.

At the Lucky Friday Mine, miners bid to work in specified areas of the mine and the most senior miners get first priority and are able to pick the area that they will mine as well as the miners who will be on their mining team. After winning a bid, miners work in the same area for a long period of time, allowing the miners to become familiar with that area. A bid covers two sublevels (10 cuts) which typically takes two years to complete. (Tr. 456). The pay for miners working in the stope is based on the number of feet that they advance the stope. (Tr. 517).

B. Events Leading up to the Accident

The primary source of silver and the economic lifeblood of the Gold Hunter Section is the 30 vein. There are other ore veins in that section, some of which are economical to mine while others are not. Hecla deemed that mining the 41 vein was also economically beneficial and simultaneously mined the 30 and 41 veins in the Gold Hunter section. Mine geologists regularly visited the stope and prepared a cut projection map, which provided miners the information they need to advance the stope. In the 15 west stope, miners advanced cut 1 as a single 20 foot wide cut but after advancing approximately 50 feet, they were instructed to create two roughly parallel entries that split like the tines on a barbecue fork, following each vein separately.⁴ The 15 east

³ The roof is generally referred to as the "back" at the Lucky Friday Mine. I use the terms "roof" and "back" interchangeably in this decision.

⁴ The horizontal distances referenced in this decision are not exact but are approximations based upon the testimony and the projection maps presented at the hearing. (*See e.g.* Tr. 80, 143, 214-15; Exs. P-9, R-1, R-6, R-8).

stope was mined in the same manner. Thus, there were four advancing faces at the opposite ends of the stope, two on the west side and two on the east. The width of the cut for each vein was significantly narrower than 20 feet. Mining advanced more than 200 feet on each side of the stope in this fashion. This method of mining was common in the Gold Hunter section of the mine. The space between the veins was not mined, creating a pillar of unmined rock.⁵ The miners followed the procedure described above when backfilling the cuts so that in the area where the veins diverged, there were two backfilled areas on each side of the slot separated by the waste rock pillar that was not mined. A similar procedure was followed in cut 2 of the 15 stope. The solid waste rock left between the two advancing faces on the west side of stope 15 cut 2 varied in width between six and nine feet. Mine geologists determined that 30 vein merged with the 41 vein in the area of cut number 3, however. At Hecla's direction, the miners removed all of the rock in the west stope, including the rock directly under the waste rock pillar that was left in cuts 1 and 2, for a distance of about 75 feet. The plan was that miners would proceed in this fashion into the stope until the veins diverged again 75 feet or more into the cut. At that point miners would again leave a waste pillar down the middle of the stope.

The mining of 615-15-2 started on January 27, 2011 and was completed on March 16, 2011. The mining of 615-15-3 started on March 30. In cut three, miners in both the east and west stopes were extracting the ore-bearing rock under the pillar that was present in cuts 1 and 2. On April 13, 2011, Hecla Management toured all the active stopes, including 15 west. Management evaluated the geology, ground conditions, and general characteristics of the active areas and found no problem with the back or ribs in the area or with the fact that miners were not leaving a pillar down the middle of the cut.

On April 15, 2011, the back and the waste rock pillar above cut 3 in stope 15 west fell into cut 3, fatally crushing miner Larry Marek in the west stope. By all accounts, the rock fall was massive. Following the rock fall, both Hecla and MSHA initiated rescue efforts, but were unable to save Larry Marek. Michael Marek, Larry's brother, was working in the east stope at the time of the accident.

MSHA investigated the rock fall and issued the citation and orders at issue. Numerous MSHA personnel were involved in the investigation, but Rodric B. Breland was the lead inspector. The Secretary of Labor alleges that Hecla failed to control ground in the east and west 15 stope as well as the 12 stope. He also alleges that Hecla failed to properly examine the ground in the 15 west stope. The Secretary charged Doug Bayer with a violation of section 110(c) of the Mine Act. That charge relates to the failure to properly examine ground conditions.

At hearing, both the Secretary of Labor and Hecla Limited presented numerous witnesses and exhibits focusing upon the geology, engineering, and events leading up to the rock fall at the mine. The Secretary called Inspector Kevin Hirsh, an Assistant District Manager, Inspector Rodric Breland, a Field Office Supervisor and the Lead investigator of the rock fall, Paul Tyrna, a Geologist for MSHA Technical Compliance, and Ron Krusemark, Lucky Friday's Chief

⁵ This unmined rock between the veins was referred to as "waste rock" at the hearing because it did not contain valuable ore. It was also referred to as the "pillar" or "waste rock pillar." Pillars are not part of the ground control system at the mine. (Tr. 209, 408). Pillars are not designed to support the weight of the roof as pillars are in a "room and pillar" mine.

Engineer at the time of the rockfall. The Secretary also presented three miner witnesses: Mike Marek, Tom Ruff, and Doug McGillis. Hecla called as witnesses Doug Bayer, the current general manager of the Mine who was mine superintendent at the time of the rockfall, Terry DeVoe, the Mine's chief geologist, Nick Furlin, a senior geologist, Scott Hogamier, the safety supervisor, John Jordan, Hecla's Vice President of technical services who was the general manager at the time of the rockfall, John Lund, a Mine foreman, Cliff Shiner, an assistant mine foreman, and Bruce Cox, lead production geologist. John Jordan, Terry DeVoe and John Lund were principal witnesses for the Secretary as well as Hecla.

II. Citation No. 8559607 and Order No. 8559608; WEST 2012-986-M

On August 8, 2011, MSHA Inspector Rodric B. Breland issued Citation No. 8559607 and Order No. 8559608 under section 104(d)(1) of the Mine Act. Citation No. 8559607 states:

A fatal accident occurred at this mine on April 15, 2011, when a miner was struck by falling material while working in the 6150-15-3 West stope. A substantial quantity of material (measuring approximately 25 feet in width, 74 feet in length, and 25 feet in height) fell 10 feet from the stope back after portions of a supporting pillar were removed to extract ore. Ground support was necessary in the stope to mine safely, but the ground support utilized was not adequate. The ground control was not designed, installed, and/or maintained in a manner that was capable of supporting the ground in such a wide stope when the support pillar was removed. Mine management has engaged in aggravated conduct constituting more than ordinary negligence by directing the pillar to be mined as the stope advanced and allowing miners to work under inadequately supported ground. This is an unwarrantable failure to comply with a mandatory standard.

(Ex. G-1 at 1). Citation No. 8559607 alleges a violation of section 57.3360 of the Secretary's safety standards, which requires in pertinent part:

[g]round support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks.

30 C.F.R. § 57.3360. Order No. 8559608 states, in pertinent part:

Management failed to adequately examine and test the ground conditions to determine if additional measures needed to be taken. This was necessary due to constantly changing ground conditions, they were mining a wide stope and removing the support pillar. The operator has engaged in aggravated conduct constituting more than ordinary negligence, as they needed to make examinations and conduct tests to ensure that all feasible precautions were taken. This is an unwarrantable failure to comply with a mandatory standard.

(Ex. G-1 at 8). Order No. 8559608 alleges a violation of section 57.3401 of the Secretary's safety standards, which requires:

[p]ersons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways and surface area highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

30 C.F.R. § 57.3401. The Secretary proposed a penalty of \$159,100.00 for each alleged violation. For both Citation No. 8559607 and Order No. 8559608 Inspector Breland determined that a fatal injury occurred. Further, he determined that the violations were Significant and Substantial ("S&S"), the operator acted with reckless disregard, and that one person was affected. The penalties were proposed under section 110(b)(2) of the Mine Act for flagrant violations.

MSHA also proposed a penalty against Doug Bayer under section 110(c) for the conditions set forth in Order No. 8559608, alleging that he knowingly authorized, ordered, or carried out the violation of Section 57.3401. The Secretary proposed a \$4,500.00 penalty for this alleged violation.

A. Discussion and Analysis

1. Section 57.3360, Ground Support - Citation No. 8559607

Both parties agree that whether section 75.3360 was violated turns on what action a reasonably prudent person familiar with the facts and the protective purpose of the safety standard would have taken to provide the protection intended by the standard. *Canon Coal*, 9 FMSHRC 667, 668 (April 1987).⁶ Hecla argues that the safety standard must be interpreted in the context of the conditions and experience specific to the mine and notes that the Commission has held that "experience" includes "practical wisdom resulting from what one has encountered, undergone, or lived through" and that a "mine's 'operating experience' broadly encompasses all relevant facts tending to show the condition of the mine roof in question and whether, in light of the roof condition, roof support is necessary." *Copper Range Co., White Pine Copper Div.*, 5 FMSHRC 825, 836 (May 1983) (interpreting § 57.3-20, the predecessor for the cited standard). The Commission further stated that "this determination takes into account the operating history

⁶ After the parties filed their briefs, the Commission issued its decision in *Jim Walter Resources, Inc.*, 36 FMSHRC ____, No. SE 2007-203-R etc. (March 31, 2015). In that decision, the Commission discussed issues surrounding the use of the reasonably prudent person test set forth in *Canon Coal* when there has been a fall of ground. Commissioner Robert F. Cohen stated in a concurring opinion that the Commission decision in *Jim Walter* "effectively overrules the Commission's decision in *Canon Coal*["] Slip op. at 6. I have applied the reasonably prudent person test in the present cases. Because of my holdings in this decision, I need not reach the issues raised by the Commission in *Jim Walter*.

of the mine (*i.e.*, its past mining practice), geological conditions, scientific test or monitoring data and any other relevant facts tending to show the condition of the mine roof in question and whether in light of those factors roof support is required in order to protect the miners from potential roof fall.” *Copper Range Co.*, 5 FMSHRC at 838.

Hecla contends that whether a reasonably prudent person would have installed ground support requires the review of a number of factors including the drumminess of the ground, the presence of visible fractures, the presence of sloughed material, whether popping or snapping sounds emanated from the roof, whether the operator was complying with its ground control plan, and the operating experience at the mine. It argues that, in this instance, the evidence demonstrates that a reasonably prudent person would have concluded that Hecla’s ground control plan was sufficient to protect miners from roof falls. First, there were no audible or visual indications that additional roof support was necessary. Second, the ground support met or exceeded the standards set forth in Hecla’s ground support standards. Miner Eric Tester installed additional bolts and wire mesh in the back on April 13 but this fact does not support the finding of a violation. Rather, it shows that Hecla took appropriate actions when the need for additional support was appropriate. There was no indication of a pending back failure in the 15 stope.

Hecla also contends that it was reasonable for it to believe that mining rock between a split stope did not present an unusual or higher level of risk. The evidence demonstrates that stopes often split and then re-converge at the mine given the geometry of the ore veins. “This was simply another instance of two veins merging together and the mining plan calling for the pillar nose to be mined on multiple successive cuts.” (Hecla Br. 30, citing Tr. 533-34). The mine’s “operating experience” supported management’s conclusion that the existing support was adequate to maintain the stability of the back. Hecla contends that mining an area below a waste rock pillar on successive cuts was not an unusual practice. Thus, “the overall experience of the mine in mining in this configuration in various stopes without back instability supports the mine’s conclusion that the existing support of reinforced backfill and bolting was sufficient.” (Hecla Br. 31).

Findings of Fact and Analysis

Fact of Violation

I find that the Secretary established that the circumstances leading up to the fall of ground would have put reasonably prudent person on notice that additional measures were required. The back of cut 3 was not the typical 20 foot wide expanse of backfill from the previous cut. The back of the west and east stope in cut 3 consisted of three parts once the miners advanced beyond the point where the pillar existed in cut 2. There was backfill on either side abutting the north and south ribs. The remnant of the waste rock pillar, called the “nose of the pillar” at the hearing, ran down the center of the cut parallel to the ribs. There was nothing below the nose of the pillar in cut 3 to directly support it. Hecla had installed extra support in the backfill itself as directed in its ground support standards. The crew placed timbers across the backfill as it was being formed on the floor of cut 2. But these timbers were not in the area where the rock fall occurred but were

placed closer to the slot where the stope was wider than 20 feet.⁷ At least one of these timbers is visible in a post-accident photograph. (Ex. R-16 p. 1). These timbers did not help support the nose of the pillar.

I find that the conditions cited in Citation No. 8559607 violated section 57.3360 of the Mine Act. The pertinent part of section 57.3360 requires that in locations (1) where ground support is necessary (2) the support system shall be designed and installed to control the ground (3) in places where persons work or travel. 30 C.F.R. § 57.3360. The cited area of the mine clearly required ground support; the Mine's Ground Support Standards mandate numerous requirements for underhand stopes. (Ex. 7 at 2-4). There is no doubt that 15 west was a place where persons work or travel. Although the conditions cited in Citation No. 8559607 complied with the Hecla's Ground Support Standards, the standards were not designed to control the ground in situations where a pillar will be undercut for more than a few feet. Supplemental ground support was necessary in the cited work area and Hecla did not design or install additional ground support, violating section 57.3360.

Based on the evidence presented at the hearing, I find that a reasonably prudent person familiar with the facts and the protective purpose of the safety standard would have recognized that additional measures were required to protect miners working in the stope. I have relied on the record as a whole, but the evidence summarized below is particularly pertinent to my finding of a violation and my findings with respect to S&S and unwarrantable failure.

Dan McGillis testified for the Secretary. He was employed as a miner at the Lucky Friday Mine for 38 years. He testified that he and other miners asked their shift bosses what was holding up the pillar in cut 3. He stated that he was never given a direct answer but was told that the pillar would not come down. (Tr. 324-25). McGillis further testified that Eric Tester, another miner, told him that when he was bolting the back on the west side "the whole back just started dribbling." (Tr. 325, 340). This reported condition worried McGillis enough that he talked to Bayer about it. He told Bayer that he was concerned about a cave in. *Id.* He offered several suggestions. (Tr. 325-26, 331-32). Bayer replied that he would "look into it" and "[m]aybe next cut we can do something different." (Tr. 326, 343). McGillis testified that the miner's felt uncomfortable working on both sides of the stope in cut 3. (Tr. 327). McGillis could only recall one other time when he was involved in undercutting a pillar and, in that instance, the crew only set off set off one or two rounds under the pillar. (Tr. 338). As a consequence, only a small part of the pillar was undermined. He was the most senior miner working in the 15 stope at that time and I credit his testimony.

⁷ There is no dispute that the stope was four to five feet wider in cut 3 than called for in the projection map on April 13, 2011. (Tr. 585, 658). The mine's ground support standard provides for extra support when stope width exceeds 20 feet for a distance of more than 25 feet. (Ex. R-10 p. 3). The parties' briefs discuss this issue at length and they disagree as to the significance of the testimony presented. Although it is possible that the width of the stope may have contributed to the fall of ground, I have not relied on issues surrounding the width of the stope in reaching my findings and conclusions in this decision.

Mike Marek, the Larry's brother, testified that he was worried about the stability of the pillar above cut 3 and asked his shift boss, Cliff Shiner, if the crew could install 10 by 10 timbers in the stope wedged up tight against the back. (Tr. 296). He was told that timbers were not going to be installed.

Tim Ruff, a mine geologist, testified that miners voiced concerns to him about mining under the pillar. (Tr. 356-57). Tim Ruff testified that he told another mine geologist that the "cement waste backfill on either side of the pillar" could not hold the pillar up "because the [backfill] was designed to crush." (Tr. 354). Ruff raised these concerns with Bayer when they were both in the 15 stope. The face of cut 3 had advanced about 40 feet under the pillar on the west side at the time of their conversation. (Tr. 357). Ruff suggested that a pillar be started with the next round so that there would be two 10 foot wide stopes on either side of a pillar. He testified that Bayer seemed to understand his concerns and told him that the miners would only take one more round under the pillar. *Id.* When Ruff came to the mine a day or two later, he could see that more than one round had been taken. He confronted Bayer in his office and was told "[w]ell, let me think about it." (Tr. 358).

Ron Krusemark was Hecla's chief mining engineer at the Lucky Friday Mine at the time of the roof fall. He testified that mining under a pillar in the manner that was performed in cut 3 was "way out of the norm." (Tr. 143-44, 153). He was not directly included in the planning for undercutting the pillar and did not know it was occurring until after the accident. (Tr. 150). After the accident, he investigated the mining of pillars at the mine going back a few years. Other than instances where pillars were undercut for short distances, he found only three situations where large pillar undercuts of 50 to 70 feet were taken. (Tr. 159). These undercuts occurred in the 15 stope west cut 3, 15 stope east cut 3 and in the 12 stope. Finally, Krusemark testified that if he had been consulted about undercutting the pillar, he would not have approved it without an engineered ground support plan. (Tr. 153).⁸

Paul Tyrna, a geologist from MSHA's technical support group, visited the accident site. He concluded that because the fallen material consisted of large blocks of rock, the ground had separated along faults, joints and other geologic features. (Tr. 234). He was not familiar with the practice of undercutting a pillar so he decided to investigate whether the practice had been validated. He testified that a practice can be validated by engineering analysis and by a history of successful operation. (Tr. 216). As part of his investigation, Tyrna gathered technical information and talked to miners, managers, mine engineers and geologists. He also reviewed documents including cut and projection maps. He concluded that the fall occurred because the stope was too wide, no additional ground support had been installed under the pillar, and there was a

⁸ I recognize that after a fatal accident witnesses will always testify that the mine operator should have provided additional protection. That is self-evident; everyone would agree with such a conclusion in this case. Nevertheless, I credit Krusemark's testimony in this regard and I credit his conclusion that undercutting pillars in the Gold Hunter section of the mine was not the normal method of mining. Krusemark had only been the chief engineer for a short period of time and might not have been aware of some of the earlier discussions about undercutting pillars.

significant fault cutting across the pillar. (Tr. 214, 221-22, 225, 233-34). Although six- to eight-foot Dywidag bolts had been installed, they were not long enough to intersect the fault. (Tr. 227).

Hecla believed that this pillar nose would act like a keystone and that the horizontal pressure would keep it in place. (Tr. 507, 645, 657). A keystone only works when placed at the top of an arch.⁹ Here the back was entirely horizontal with this nose protruding down a little from the backfill that was on either side of the nose. The host rock is subject to slips, strikes, dips, faults, and fractures. A reasonably prudent person familiar with the mine would comprehend that, with nothing to support the weight of the nose of the pillar, rock would tend to fall if any fractures or faults were present. The weight of the rock would tend to put stress on any fractures or faults above the nose. Separation of rock at a fault or fracture was likely given the lack of support. Placing rock bolts in the nose would not provide sufficient protection from roof fall. Inspector Breland estimated that the rock fell from as high as 25 feet above the back of cut 3. Krusemark estimated that pillar had separated about 50 above. (Tr. 150). Thus, a substantial portion of the waste rock pillar fell into cut 3. The fall was a catastrophic failure of the entire system of roof support. It was foolhardy to believe that horizontal pressure applied to the backfill on either side of the nose of the pillar would be strong enough to hold up the fractured rock in the pillar above cut 3 with the addition of some 6 or 8 foot roof bolts. I recognize that the mine is subject to tremendous horizontal pressure, but that pressure was obviously not enough to overcome the weight of the rock in the pillar above cut 3.¹⁰

If Hecla wanted to remove the pillar in Cut 3, it should have analyzed its ground support standards to determine whether they were sufficient to control the ground in the cited area including the pillar. As Krusemark testified, Hecla should not have undercut the pillar “without a tested, designed, engineered ground support plan” because undercutting the pillar was “way outside of the norm.” (Tr. 151). At hearing, Hecla used only conclusory statements to defend its decision to undercut the pillar in 15 west without providing additional ground support, as its witnesses testified that they were not worried about a ground fall and that the horizontal pressures of the mine made a fall unlikely. (Tr. 440). Hecla did not present any data, evidence, or test results to demonstrate that the horizontal pressures were sufficient to support the ground

⁹ A keystone is defined as a “symmetrically tapered piece at the center or crown of an arch.” Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 297 (2d ed. 1977).

¹⁰ Doug Bayer drew an analogy with an example involving a stack of books. (Tr. 507). If you pick up three books hold them horizontally and apply pressure to the two outside books with your hands, the book in the middle will not fall. There is a significant problem with this analogy. It assumes that the three books weigh about the same amount. If you put a heavier book, such as an unabridged dictionary, in the middle surrounded by two paperback books, you will have a difficult time keeping the dictionary from falling no matter how hard you squeeze. At the mine, you had a heavy rock pillar in the middle and backfill on either side. Although the backfill had considerable strength, the mass of the pillar was too great even accounting for the horizontal pressure.

under these conditions.¹¹ Hecla violated section 57.3360 because it did not design or install a support system adequate to control the ground in the cited area.

Significant and Substantial

I find that the Secretary established that the violation was S&S. A lengthy analysis is not required for this finding. A violation occurred that contributed to a discrete safety hazard, a measure of danger to safety. The Secretary established that there was a reasonable likelihood that the hazard contributed to by the violation would result in an event in which there is an injury. The discrete hazard was a fall of ground and such a fall was reasonably likely because the pillar was inadequately supported. The roof did fall and a miner was killed. Thus, all four elements of the Commission's S&S test were met.¹²

Unwarrantable Failure

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991).¹³

¹¹ The parties agree that the standard ground support used by Hecla was tested and safe under usual mining conditions. Undercutting a pillar for a distance of 75 feet, however, was an unusual situation. Hecla's argument that it was planning on creating a new pillar in cut 3 after mining about 75 feet into the stope does not support its position.

¹² An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). The Commission has held that "[t]he test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury." *Musser Eng'g, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

¹³ Aggravating factors include: (1) the length of time that the violation has existed, (2) the extent of the violative condition, (3) whether the operator has been placed on notice that greater efforts are necessary for compliance, (4) the operator's efforts in abating the violative condition, (5) whether the violation was obvious or posed a high degree of danger, and (6) the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June (continued...))

I find that the violation was the result of Hecla's reckless disregard and unwarrantable failure to comply with the safety standard. The Secretary argues that Hecla was fully aware that undercutting the pillar in 15 West could cause a ground fall, but that Hecla risked miner safety due to its desire to "chase ore." Hecla, conversely, argues that it had undercut pillars many times without incident and had no reason to believe that the roof support would be inadequate in this instance. Although I do not believe that Hecla intentionally risked the lives of miners, I find that Hecla should have known that the roof support in 15 west beneath the waste pillar would endanger miners and violate section 57.3360. Previously, Hecla only undercut waste pillars for a horizontal distance of 10 to 20 feet. The pillar in 15 west was undercut for about 75 feet. Hecla provided no data to substantiate its claim that the provisions in its ground control standards would control the back when a pillar is undermined for a significant distance. Hecla only significantly undercut pillars in two other locations, which was not enough history to prove that those actions were safe. It was reckless for Hecla to mine ore in a more invasive manner than it had in the past without considering whether additional ground support was required. It should have been obvious that a large, unsupported rock mass could endanger miners, yet Hecla did not ascertain whether the waste pillar in 15 stope was adequately supported.

Several other factors contribute to my finding that Citation No. 8559607 was the result of Hecla's reckless disregard and unwarrantable failure. As stated above, the rock at the Lucky Friday Mine was subject to faults and fractures.¹⁴ The cited condition was extensive; the rock fall measured about 25 feet wide, 25 feet deep, and 75 long. Everyone agreed that it was a massive ground fall, with many witnesses saying it was the largest fall they had ever seen. This violation posed a high degree of danger, evidenced by the death it caused. The standard requires that ground support be designed in a manner to control the ground. The failure to analyze the risks posed by removing a pillar for a distance of 75 feet demonstrates aggravated conduct because it shows that Hecla made no effort to properly design its ground support in this situation. Hecla's aggravated conduct and unwarrantable failure led to a violation of the Mine Act for its failure to design and install adequate ground control in cut 3.¹⁵

¹³ (...continued)

2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC at 353.

¹⁴ Testimony was presented at the hearing relating to whether Hecla knew or should have known about a particular fault in the rock above the third cut. I do not resolve the disputed testimony because I find that a reasonably prudent person would have recognized that faults and fractures were a common occurrence in the Gold Hunter section of the mine and that the ground support system had to be designed to account for fractures, faults, and other geologic structures, known and unknown, when undermining a pillar. Hecla should have designed a support system that would assure that the pillar would stay in place even if a fracture was present and a large section of rock began to separate from the remainder of the pillar above it.

¹⁵ Hecla started mining cut 3 on March 30, 2011. Miners started undercutting the pillar on the west side of the stope on April 4 or 5. Thus, the condition was created 10 days before the roof fall. The violation was extensive and obvious. It posed a high degree of danger. The operator had
(continued...)

For the reasons set forth above, Citation No. 8559607 is **AFFIRMED** as written by Inspector Breland.

2. Section 57.3401, Examinations of Ground Conditions - Order No. 8559607

Section 57.3401 contains two important requirements. “First, areas where work is to be performed must be examined for loose ground before work is started, after blasting, and as conditions warrant. *Asarco, Inc.*, 14 FMSHRC 941, 945 (June 1992). “Second, where applicable, ground conditions in work areas must also be tested.” *Id.* The Commission held that “[n]either the presence of loose materials, nor the fact that the roof fell, by themselves, indicate that the area was not properly examined.” *Id.* at 946. I find that the back and ribs in cut 3 of Stope 15 were examined numerous times by management and hourly employees.

The Secretary did not establish a violation. Section 57.3401 “does not specify how testing for loose ground is to be performed, nor has the Secretary described the procedure or set forth guidelines in her Program Policy Manual or other interpretative material.” *Asarco, Inc.*, 14 FMSHRC at 947 (June 1992). The standard is intentionally broad to cover a variety of situations. The back of the stope was 10 feet above the floor, putting it only a few feet above miners’ heads. Management employees and miners examined the back and ribs and found no problems. Miners were trained to examine ground conditions by looking at the angle of the bolts, assessing whether the bolts are taking any weight, looking at the plates around the bolts to see if they are being sucked up into the backfill, and evaluating the condition of the backfill. (Tr. 474-75). The miners can also use a scaling bar to scale and sound the back. There is no evidence that Hecla did not perform such examinations on a regular basis as cut 3 was being advanced.

There was no “loose ground,” as that term is generally used, in cut 3 in the days leading up to the fatal accident.¹⁵ Larry Marek was not stuck and killed by loose ground that could be detected by a visual examination or by sounding the back. Rather, there was a sudden and catastrophic failure of the entire ground support system in the west side of stope 15. The Secretary suggests that examinations were not adequate because miners did not know how to examine the area and that engineering analysis was required. “The evidence shows that Hecla management failed to design any sort of ground examination system in 15 stope west that could pinpoint problems with ground support before they became a hazard.” (Sec’y Br. 19) The

¹⁵ (...continued)

not been placed on notice that greater efforts were necessary for compliance. I reject the Secretary’s argument that previous rock bursts gave the requisite notice that greater efforts were necessary. These rock bursts were not related to undercutting pillars. Nevertheless, as stated above, Hecla had not performed an analysis of the risks posed by undermining the pillar. Hecla did not attempt to abate the condition before the citation was issued because it did not consider the condition to be a violation of the safety standard.

¹⁶ As stated above, McGillis testified that Tester told him that the back “started dribbling” when he was bolting the back on the west side. (Tr. 325, 340). Although this dribbling concerned McGillis and Tester, it does not help establish that thorough examinations were not being conducted. Extra bolts and mesh were installed as a result of this examination.

standard requires observation and careful examination of ground conditions not an engineering analysis.¹⁷ There is no test or examination technique that could allow Hecla's employees to determine that rock was starting to fracture and separate 25 feet above the back. The failure to perform engineering analysis before undermining the pillar relates directly to the requirement to design suitable ground control under section 57.3360. Citation No. 8559607 for that violation has been affirmed in all respects. Although Hecla failed to design adequate ground support, it carefully examined the back and ribs in the cited area with sufficient thoroughness to comply with section 57.3401.

For the reasons set forth above, Order No. 8559607 is **VACATED**.

III. WEST 2014-591-M; § 110(c) Penalty Proposed Against Doug Bayer

In WEST 2014-591-M, the Secretary filed a civil penalty case against Doug Bayer, who was the mine superintendent, under section 110(c) of the Mine Act. 30 U.S.C. § 810(c). This penalty case alleges that Bayer was an agent of Hecla "who knowingly authorized, ordered, or carried out" the violation of section 57.3401 as alleged in Order No. 8559608. The Secretary contends that Hecla failed to adequately examine and test the ground conditions in the west stope. In his brief, the Secretary states that Bayer approved the plan to undermine the pillar on the third cut without conferring with Hecla's engineering department and without conducting any studies to see if additional ground support would be necessary. (Sec'y Br. 21). The Secretary relies on evidence that Bayer failed to advise upper management that undercutting a pillar for such a long distance had never been tried before. With a degree mining engineering, Bayer should have known that undermining the pillar was risky and that Hecla's normal methods of examining and testing the back were inadequate during cut 3 in 15 Stope west. *Id.* at 23. He concludes that "Doug Bayer is guilty of aggravated conduct beyond ordinary negligence and he should pay a personal penalty . . . of \$4,500[.]" *Id.*

The Secretary does not allege that Bayer "knowingly authorized, ordered, or carried out" a violation of section 57.3360 for inadequate ground support in the west stope. Rather, he alleges that Bayer violated section 57.3401 for inadequate examinations of the stope. A necessary prerequisite to section 110(c) liability is a finding that the corporate operator violated the safety standard. I vacated Order No. 8559608 so the penalty proceeding brought against Bayer cannot stand. The proposed penalty brought against Bayer is **VACATED** and WEST 2014-591-M is **DISMISSED**.

IV. Order Nos. 8559609 & 8559610; WEST 2012-760-M-A

Also on August 8, 2011, Inspector Breland issued Order No. 8559609 under section 104(d)(1) of the Mine Act, alleging a violation of section 57.3360. The order states, in part:

Portions of a supporting pillar were removed to extract ore in the 6150-15-3 East stope. The section of removed pillar measured approximately five to nine feet

¹⁷ Inspector Breland testified that the examination should have been conducted by "an individual with a geomechanic background" who would have advised management "[n]ot to mine it that way." (Tr. 118). Such an examination is not required by the safety standard.

wide by 85 feet long. This stope is approximately 18 to 20 feet wide and was mined similar to the 6150-15-3 west stope that resulted in a fatal accident when the pillar fell.

(Ex. G-1 at 11). Inspector Breland determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, that one person would be affected, and that the alleged violation was an unwarrantable failure. The Secretary of Labor proposed a penalty of \$20,900 for this alleged violation.

Also on August 8, 2011, Inspector Breland issued Order No. 8559610 under section 104(d)(1) of the Mine Act, alleging a violation of section 57.3360. The order stated, in part:

The pillar separating the 30 and 41 veins was undercut in the 6100-12 stope. A 56 foot long portion of the pillar longitudinally spans the 3-way slot intersection in 6100-12-1 that is seven to 10 foot wide. The intersection is approximately 22 feet wide and was mined similar to the 6150-15-3 west stope that resulted in a fatal accident when the pillar fell.

(Ex. G-1 at 12). Inspector Breland determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, that one person would be affected, and that the alleged violation was an unwarrantable failure. The Secretary of Labor proposed a penalty of \$20,900 for this alleged violation.

Both orders contain the following additional language to support the alleged violations:

Ground support was necessary in the stope to mine safely, but the ground support utilized was not adequate. The ground control was not designed, installed and/or maintained in a manner that was capable of supporting the ground in such a wide stope when the support pillar was removed. Mine management has engaged in aggravated conduct constituting more than ordinary negligence by directing the pillar to be mined as the stope advanced and allowing miners to work under inadequately supported ground. This is an unwarrantable failure to comply with a mandatory standard.

For the reasons set forth below, I affirm both Order Nos. 8559609 and 8559610.

Discussion and Analysis

Although Order Nos. 8559609 and 8559610 concern different areas of the mine, for the purposes of section 57.3360, I consider the two orders together. The area where the violations are located is immaterial here; the focus is upon the action of significantly undercutting a pillar without providing additional ground support. Hecla undercut waste rock pillars for long distances in both of the cited areas, using the same ground support in each without analyzing whether that support was adequate. Although the undercut area was of a different size in each

order, both were significant: the pillar was undercut for a distance of 85 in the east side of stope 15 and for a distance of 56 foot in the 6100-12 stope

I find that the condition cited in Order Nos. 8559609 and 8559610 violated section 57.3360 for the same reasons I found a violation of the standard with regard to Citation No. 8559607, discussed above. The ground control used in all three cited area was inadequate for the same reason; a large portion of a waste rock pillar was undercut and miners worked beneath that pillar. Although Order Nos. 8559609 and 8559610 did not contribute to fatal injuries, these two orders address the same practices and the same safety standard. In each of these stopes, Hecla undercut pillars for a significant distance without analyzing the possible outcomes of doing so. Although neither of the cited undercut pillars cited in Order Nos. 8559609 and 8559610 collapsed, the ground support used in those areas was the same as the support used in the area cited by Citation No. 8559607, which was not properly designed to support the ground under a waste pillar and was therefore inadequate under the standard. Hecla relied on the horizontal pressure to support the nose of the pillar in each location. I credit the testimony of Inspector Breland, Krusemark, and several other witnesses that this ground support was inadequate. I find that both Order Nos. 8559609 and 8559610 violated section 57.3360 because the ground support used in those areas was proven to fail under similar conditions.

I find that Order Nos. 8559609 and 8559610 were S&S and highly likely to cause a fatal injury. Both orders violated section 57.3360. Inadequate ground support contributes to the hazard of a rockfall, which can clearly cause a fatality. Miners worked in both of these stopes. Hecla's own experience shows that significantly undercutting pillars while using its normal ground control standard can lead to ground falls. I credit the testimony of Inspector Breland that the conditions were highly likely to contribute to a rockfall and a serious or fatal injury.

As discussed above, I affirmed MSHA's determination that the violation in the 14 west stope was the result of Hecla's reckless disregard as alleged in Citation No. 8559607. MSHA determined that Order Nos. 8559609 and 8559610 were the result of Hecla's high negligence. At the hearing, Inspectors Hirsch and Breland testified that they could have designated the level of negligence for these two violations as reckless disregard for the same reasons as the violation in Citation No. 8559607. (Tr. 43, 98-99). I affirm MSHA's negligence determination as set forth in the two orders and find that Hecla's high negligence contributed to the violations.

I also affirm MSHA's unwarrantable failure designation for each order for the reasons set forth above with respect to Citation No. 8559607. Failing to adequately support a large section of roof in areas where miners work constituted aggravated conduct greater than ordinary negligence. This practice posed a significant hazard as the fall in 15 West demonstrated. The inadequately supported roof in each cited area was extensive. It was obvious that these large rock masses posed a danger if inadequately supported, but Hecla made no effort to ascertain whether the ground support was effective, which demonstrated aggravated conduct.

V. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Report, which was

submitted by the Secretary. (Ex. G-5). Respondent was issued 55 section 104(a) citations and 1 section 104(g)(1) order in the 24 months prior to April 15, 2011, and 12 of these violations were designated as S&S. The Secretary determines the size of a metal mine operator by calculating the employee-hours worked during the previous year. 30 C.F.R. § 100.3(b). MSHA records show that the Lucky Friday Mine worked 407,847 hours which makes it a medium to large mine operator. MSHA's records show that the hours worked for Hecla Limited was 1,189,458, which makes it relatively large. The violations were abated in good faith. The parties stipulated that if the "assessed penalty, if affirmed, will not impair Hecla's ability to remain in business." (Joint Stips. ¶ 18).

I find that the penalties for Order Nos. 8559609 and 8559610 should be increased from \$20,900 for each violation to \$50,000 each. I reached this conclusion because of the serious safety hazard created by these violations and Hecla's high negligence. Management knew that (1) fractures and faults were often present in the host rock; (2) miners were going to undercut the pillars for a considerable distances; (3) undercutting pillars for significant distances was not a typical practice in the Gold Hunter section of the mine, and (4) no engineering study or any other study had been undertaken to determine whether its ground support plan would adequately support the roof under such conditions. Hecla also relied on a misplaced theory that the nose of the pillar would act as a keystone to hold up the pillar and the back.

Penalty for Flagrant Violation

The Secretary proposed a higher penalty for Citation No. 8559607 because he deemed the violation to be flagrant. The flagrant violation provision was added to the Mine Act in section 110(b)(2) by the Mine Improvement and New Emergency Response Act of 2006. The provision defines a flagrant violation to mean "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2).

The Commission has not yet had the opportunity to issue a decision concerning this provision as relevant to the present case. The lead administrative law judge decision is *Stillhouse Mining LLC*, 33 FMSHRC 778 (Mar. 2011) (Judge Paez). There is no dispute that the Mine Act's enforcement scheme is designed to provide "increasingly severe sanctions for increasingly serious violations or operator behavior." *Emery Mining*, 9 FMSHRC 1997, 2000 (Dec. 1987). Assessing a flagrant penalty is one of the more severe sanctions in the Mine Act.

The issue in this case is whether Hecla's conduct amounted to a reckless failure to make reasonable efforts to eliminate a known violation of a mandatory safety standard. As applied to this case, the four point test set forth by Commission Judge Paez is whether there was:

- (1) A reckless failure to make reasonable efforts to eliminate
- (2) A known violation of a mandatory safety standard
- (3) That substantially and proximately caused
- (4) Death or serious bodily injury.

Stillhouse, 33 FMSHRC at 802. In his decision, Judge Paez analyzed the flagrant violation provision at length. His analysis was detailed and well-reasoned. *Stillhouse* 33 FMSHRC 798-808. I agree with his analysis and incorporate it herein by reference.

I find that the Secretary establish that the civil penalty for Citation No. 8559607 should be assessed under the Mine Act's flagrant violation provision. I find that Hecla's decision to undercut the pillar in cut 3 was reckless. As stated by Judge Paez, "an operator is 'reckless' for the purposes of a flagrant violation when it consciously or deliberately disregards an unjustifiable risk of harm arising from its failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard." *Id.* at 803. In determining whether a risk of harm is "unjustifiable," a judge should compare the "burdens of ameliorating the risk" to the severity of the risk of harm created by the violation. *Id.* at 803-04. In this instance, Hecla could have either mined cut 3 without removing a substantial portion of the pillar or conducted an engineering study to develop a method to support the pillar as mining progressed. I find that Hecla created an unreasonable risk of harm and that it could have taken reasonable efforts to eliminate this risk. Hecla did not "take the steps that a reasonably prudent person 'familiar with the mining industry and the protective purposes of' the safety standard would have taken to support the back. *Id.* at 805.

A flagrant penalty cannot be assessed unless the Secretary establishes that there existed a "known violation of a mandatory health or safety standard." 30 U.S.C. § 820(b)(2) (emphasis added). In the present case, Hecla management had knowledge of the cited conditions. Management authorized miners during cut 3 to undercut the pillar that had been left in cuts 1 and 2. Hecla, contends, however, that this condition did not violate section 57.3360. I hold that the use of the term "known" in the context of a flagrant violation contemplates an objective test. As Judge Paez held:

In the legal context, "knowledge" may be understood as "actual" or "constructive." *Black's Law Dictionary* at 888 [8th ed. 2004]. Actual knowledge may be "express," which is "[d]irect and clear knowledge," or it may be "implied," which is "[k]nowledge of such information as would lead a reasonable person to inquire further." *Id.*

33 FMSHRC at 806.

Hecla's management knew that miners were going to undercut the pillar for a distance of about 75 feet during cut 3, knew that it was unusual for miners to undercut a pillar for such a significant distance in the Gold Hunter section of the mine, and knew that no engineering study or any other study had been undertaken to determine whether its existing ground support standards would adequately support the roof or the pillar under such conditions. Hecla also knew that the rock structure in the host rock was subject to faults and fractures in the rock. It is universally recognized that a keystone will support weight only if it is placed at the top of an arch, so Hecla's theory that the nose of the pillar would act as a keystone lacks credibility. Management did not ask its own engineering group at the mine to analyze the matter. Hecla

simply assumed that the horizontal pressure would keep the nose of the pillar and the rock above it securely in place. I find that Hecla had at least implied knowledge of the violation.¹⁸

I also conclude that the violation substantially and proximately caused the death of Larry Marek. If the pillar had not been undermined the roof would have been adequately supported so long as the mine followed its ground support standards. In the alternative, Hecla may have been able to engineer a ground support system that would have allowed it to mine the pillar in cut 3 without the risk of a fall of ground.

In conclusion, I assess a penalty for Citation No. 8559607 in accordance with section 110(b)(2) of the Mine Act. I find that a civil penalty of \$180,000 is appropriate for this violation. I increased the penalty above that proposed by the Secretary for same reasons discussed with respect to Order Nos. 8559609 and 8559610.

VI. ORDER

For the reasons set forth above, Citation No. 8559607 is **AFFIRMED** and a penalty of \$180,000 is assessed for the violation, Order No. 8559608 is **VACATED**, Order Nos. 8559609 and 8559610 are **AFFIRMED** and a penalty of \$50,000 is assessed for each violation. WEST 2014-591-M, the proceeding brought against Doug Bayer, is hereby **DISMISSED**. Hecla Limited is **ORDERED TO PAY** the Secretary of Labor the sum of \$280,000 within 40 days of the date of this decision.¹⁹

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

¹⁸ The “known violation at issue in a flagrant case need not have been previously cited by MSHA at the time the operator recklessly failed to eliminate it.” *Stillhouse*, 33 FMSHRC at 807.

¹⁹ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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TELEPHONE: 202-434-9958 / FAX: 202-434-9949

April 29, 2015

VIRGINIA DRILLING COMPANY,
LLC,

Contestant

v.

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

Respondent

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

Petitioner

v.

VIRGINIA DRILLING COMPANY,
LLC,

Respondent

CONTEST PROCEEDING

Docket No. KENT 2011-1466R
Citation No. 8262897; 8/24/2011

Mine: Blackhawk No. 2 Surface Mine

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 2012-182
A.C. No. 15-18998-270046-F279

Mine: Blackhawk No. 2 Surface Mine

Docket No. KENT 2012-183
A.C. No. 15-19515-270059-F279

Mine: No. 4

DECISION AND ORDER

Appearances: Thomas J. Motzny, Esq., Office of the Solicitor, Department of Labor,
Nashville, Tennessee for Secretary of Labor

Todd C. Myers, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC,
Lexington, Kentucky for Virginia Drilling Co., LLC

Before: Judge McCarthy

I. Statement of the Case

These cases are before me upon a Notice of Contest and two related Petitions for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of

1977, 30 U.S.C. § 815(d).¹ Of the three original citations in these dockets, only Citation No. 8262897 remains at issue.

On August 24, 2011, MSHA inspector Ronnie L. Fletcher issued the citation to Virginia Drilling (Respondent) under §104(a) of the Act, 30 U.S.C. §814(a), for an alleged violation of 30 C.F.R. §77.404(a). Section 77.404(a) states:

Mobile and stationary machinery and equipment shall be maintained in a safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

The “condition or practice” section of the citation states:

THE RED MACK ANFO TRUCK #SL170 IS NOT BEING MAINTAINED IN SAFE OPERATING CONDITION. THE DRIVER SIDE SEAT IS WORN OUT. ALSO, A DIESEL FUEL LINE IS LEAKING FUEL ONTO THE EXHAUST MANIFOLD. DUE TO THE HIGH DEGREE OF HEAT IN THIS AREA, THIS CONDITION CREATES A FIRE HAZARD. THIS WOULD ALLOW THE FUEL TO IGNITE AND ACCELERATE A FIRE. THIS EXPOSES THE MINER TO SMOKE INHALATION AND/OR FATAL BURN INJURIES. ALSO, THIS TRUCK IS LOADED WITH APPROXIMATELY 9 TONS OF ANFO, WHICH IS AN EXPLOSIVE FUEL OIL MIXTURE. THIS TRUCK IS USED DAILY TO LOAD HOLES. THE OPERATOR REMOVED THIS TRUCK FROM SERVICE IMMEDIATELY.

Inspector Fletcher designated the condition or practice as significant and substantial (S&S), and he designated the gravity as highly likely to result in an injury or illness that could reasonably be expected to be fatal, with one person affected. P. Ex. 2. Respondent’s negligence was designated as moderate. MSHA proposed a penalty of \$63,000, which included a 10% reduction for the operator’s good-faith abatement.

The Respondent denies that it violated section 77.404(a) and contends that the truck was safe for operation. Even if there was a violation, Respondent contests the significant and

¹ Prior to hearing, the parties agreed to settle Citation No. 8262896 in Docket No. KENT 2012-182 and Order No. 8262457 in Docket No. KENT 2012-183. Citation No. 8262896 alleged a violation of 30 C.F.R. § 77.404(a). Section 104(g)(1) Order No. 8262457 alleged a violation of 30 C.F.R. § 48.31. Tr. I, 4, 11; Jt. Ex. 2. According to the terms of the proposed settlement, Citation No. 8262896 and Order No. 8262457 remain unchanged, but the Secretary of Labor justifies respective reductions in proposed penalties from \$3,405 to \$2,900 and from \$4,810 to \$3,848 by stating that there are legitimate factual and legal disputes regarding gravity and negligence. Jt. Ex. 2. I have considered the representations and documentation submitted with the partial settlement under the criteria set forth in section 110(i) of the Act, and I approve the proffered settlement as consistent with the purposes of the Act.

substantial (S&S) designation, gravity determinations, negligence designation, and the appropriateness of the proposed penalty. R. Br. 13-29.

A hearing was held in Beckley, West Virginia. The parties presented lay and expert witness testimony, expert witness reports, and other documentary evidence.² Witnesses were sequestered.

The primary issues presented are whether Respondent failed to maintain the Mack ANFO truck in safe operating condition under § 77.404(a) because the driver's side seat was worn out and the diesel fuel line was leaking fuel onto the exhaust manifold; whether the alleged violation was S&S, whether the gravity designations -- that an injury was highly likely and could reasonably be expected to result in a fatal injury to one person -- were correct; whether the "moderate" negligence designation was appropriate; and whether the \$63,000 proposed penalty assessment was appropriate.

After careful review of the record, I affirm the S&S designation and find that the fuel line leak was reasonably likely to result in a fire hazard that was reasonably likely (not highly likely) to result in a fatal injury to the driver of the truck, and that Respondent's level of negligence was appropriately designated as moderate. Applying the criteria set forth under Section 110(i) of the Act in light of my findings herein, I assess a \$37,416 penalty against Respondent.

On the entire record, including my observation of the demeanor of the witnesses,³ and after considering the post-hearing briefs, I make the following:

II. Findings of Fact

A. Stipulations of Fact and Law

The parties agreed to the following stipulations.

- 1) Virginia Drilling Company, LLC, Contractor I.D. No. F279, was an "operator" at Blackhawk #2 Surface Mine, as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803, at all times relevant to these proceedings, and is therefore subject to the Federal Mine Safety and Health Act of 1977.
- 2) Blackhawk #2 Surface Mine is a "mine" as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 803(h).

² Jt. Exs. 1-2, P. Exs. 1-4, and R. Exs. 1-8 were received into evidence. Tr. I, 100; Tr. II, 8, 67, 182, 411.

³ In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

- 3) Virginia Drilling Company, LLC is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the presiding Administrative Law Judge has authority to hear this case and issue a decision.
- 4) At all times relevant to these proceedings, Blackhawk #2 Surface Mine and the operations of Virginia Drilling Company, LLC had an effect upon interstate commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.
- 5) Virginia Drilling Company, LLC is a medium-sized operator, with 314,215 hours worked in 2010 and 369,759 hours worked in 2011.
- 6) Copies of the citation in contest in this case and notes pertaining thereto are authentic and the citation was served on the Respondent by an inspector employed by the Mine Safety and Health Administration.
- 7) The violation was abated in good faith.
- 8) The Respondent timely contested the violation.
- 9) The proposed penalty will not affect the Respondent's ability to continue in business.
- 10) A "certified blaster" is an agent of the operator.

Jt. Ex. 1.

B. The Inspection and Citation at Issue

Virginia Drilling is a blasting contractor and subsidiary of Virginia Explosives & Drilling Company (VEDCO). Austin Sales and Virginia Drilling have separate MSHA identification numbers. Tr. II, 225. Austin Sales owned the cited truck, performed maintenance and pre-shift examinations on the truck, and placed its logo on the door. P. Ex. 3; Tr. II, 70-71, 76, 275. Counsel for the Secretary explained that MSHA cited Virginia Drilling and not Austin Sales because the shot truck work was being performed under the Virginia Drilling contractor number at the time of the citation. Tr. II, 72.

On the morning of August 24, 2011, inspector Fletcher⁴ arrived at the Blackhawk #2 surface mine, a small mine less than a mile long, to conduct an EO1 inspection. Tr. I, 36-38. At

⁴ Ronnie Fletcher is a certified surface mine inspector with MSHA. Inspector Fletcher received his authorized representative card in the fall of 2010, about one year before he issued the instant citation. Tr. I, 31, 67. Fletcher is a high-school graduate, with some college credit and 22 years of experience in the mining industry in production and maintenance capacities. Tr. I, 32-33. Fletcher has a welding certificate with the state of West Virginia and surface mine foreman papers from the states of Kentucky and West Virginia. Tr. I, 32, 34-35.

2:27 p.m. that afternoon, as a part of his general inspection, Fletcher inspected a red Mack ANFO truck. Tr. I, p. 41.⁵ At the time of the inspection, the truck was idling on the drill bench, in front of a loader spread, about a half mile uphill from the parking lot. Tr. I, 41-42. A blaster and blaster helper from Virginia Drilling were drilling holes near the truck when Fletcher arrived. Tr. I, 44.

The truck was carrying about nine tons of ammonium nitrate and fuel oil (ANFO), a pre-mixed chemical compound that is offloaded into blasting holes. Tr. I, 59, 89; Tr. II, 35-36, 86, 350. Fletcher testified that a typical ANFO truck safety inspection takes about thirty minutes and consists of checking the brakes, lights, steering and leakage. Tr. I, 45.

When inspecting the truck, Fletcher determined that the driver side seat was worn out. Tr. I, 45-47; P. Ex. 1, p. 6; P. Ex. 2. With regard to the seat, Fletcher testified that most of the vinyl was torn off the bottom of the seat and the foam cushion was badly worn on the left side more than the right side. Tr. I, 47. The driver told Fletcher that the seat was “wearing him out.” Tr. I, 48. Fletcher opined that the driver would not be able to sit in the seat properly in such worn condition, which could cause him to lean on one side, slide around the seat, and possibly lose control of the vehicle. Tr. I, 49-51.

Fletcher testified from personal experience that he developed blisters, which required bandaging on his tailbone and buttocks, from driving equipment with “bad seats.” Tr. I, 52. Fletcher did not provide any testimony that the worn seat condition compromised the seatbelt.

I find it unnecessary to decide whether Respondent’s failure to maintain the driver side seat made the truck unsafe to operate or whether the worn seat was a significant and substantial violation of a mandatory safety hazard because I find below that the fuel leak itself was a significant and substantial violation. Certainly, the worn seat did not render the truck any safer.

While checking the engine area, Fletcher observed that the second cylinder fuel line was leaking directly onto the exhaust manifold. Tr. I, 52-53. Fletcher further observed moisture around that area and a steady drip of fuel about every three seconds. Tr. I, 53. The leaking fuel line was about 3-7 inches from the turbocharger, the hottest part of the engine. Tr. I, 53-54.

A marked photograph of engine areas, including the manifold, turbocharger, injection pump, radiator fan, and area of diesel fuel leak is in evidence as R. Ex.2. Tr. 91-95. The exhaust manifold allows fumes to exit the cylinder head and away from the engine. Tr. II, 92. The turbo charger is bolted to the exhaust manifold at the center and it pushes more air into the engine to make it more efficient. Tr. II, 93, 99. The injector pump delivers a metered amount of fuel to each injection line that goes into the engine and excess fuel is returned to the fuel tank. Tr. II, 98-100, 106, 129. The radiator fan is on the front of this particular engine and blows over the top of the engine to help cool the temperature. Tr. II, 97-98. The fuel injection line that was leaking was from the second cylinder. Tr. II, 95-96.

⁵ The truck is Mack brand R-model, with a 6-cylinder turbo-charged, 300-horsepower diesel engine. The shot truck is usually kept at the powder bin or magazine. Tr. II, 85.

Fletcher opined that if the leak was left uncorrected, it “would catch fire” because the “leak would eventually get faster or maybe even turn into a spray.” Tr. I, 54. Fletcher did not observe any smoking, sizzling or smoldering associated with the dripping diesel fuel onto the exhaust manifold. Fletcher did not conduct a heat test because he did not have a heat gun available. Tr. I, 78, 79-80.

Fletcher asked the blaster helper whether the leak had been disclosed on a pre-operational check of the vehicle. Tr. I, 55. Fletcher testified that the blaster helper could not recall whether he had checked under the hood for leaks before the shift began. Tr. I, 55.

As a result of his observations, Fletcher issued Citation No. 8262897 alleging that Respondent failed to maintain the truck in safe operating condition because the "driver side seat [was] worn out" and the "diesel fuel line [was] leaking fuel on to the exhaust manifold." Tr. I, 45-46; P. Exs. 1-2. Fletcher designated the condition or practice as significant and substantial (S&S). He designated the gravity as highly likely to result in an injury or illness that could reasonably be expected to be fatal, with one person affected. P. Ex. 2.

On direct examination Fletcher initially explained his gravity determination of “highly likely” to result in an injury, as follows: “Well, anytime you are dealing with heat - a heat source and flammable liquid, you know, you automatically assume, you know, it's probably highly likely that it's going to ignite.” Tr. I, 57. On further redirect, in an apparent effort to blunt a pre-trial deposition concession that the gravity should be written as “reasonably likely,” Fletcher conceded that after further reflection, the gravity of the citation should have been written as “reasonably likely to result in an injury.” Specifically Fletcher testified as follows:

Q. [Mr. Motzny] Okay. And I think at your deposition you said that you would possibly write it as reasonably likely today.

A. Yes, I would. I feel that it's probably more reasonably likely.

Q. Can you explain your reasoning for that?

A. Yeah. It's right there with -- well, yeah, maybe I can. I don't know. I'll try. I just think it's more reasonably likely than highly likely. I think it's a good chance that it would happen, but highly likely to me means, you know, it's going to happen. I think it's possible that it wouldn't happen, but I think it's reasonably likely that it would, if that makes any sense.

The Court: How come you didn't write it as reasonably likely to begin with?

The Witness: I'm going to lay it off on my inexperience at the time in that area. That's what I think.

The Court: Did the fact that it was an ANFO truck factor into your highly likely [designation]?

The Witness: Yes, sir.

The Court: Go ahead, Mr. Motzny.

Q. [Mr. Motzny] How did that factor in?

A. Well, you know, it had approximately nine ton of ANFO on it, you know? And if that thing catches on fire and an explosion was to happen, I think that debris is going to go all over the place.

Tr. I, 58; see also Tr. I, 68 (where Fletcher conceded on cross examination that based on additional experience since issuing the citation, he would mark the gravity differently).

When asked why he designated the gravity of the type of injury that could reasonably be expected to occur as “fatal,” Fletcher testified, “. . . if that thing caught on fire and an explosion occurred, I feel that it would probably be fatal.” Tr. 60. He described possible injury scenarios to the driver of the truck as smoke inhalation from a fire, and death from burn injuries, entrapment, or an explosion. Tr. I, 60-62.

Two of Virginia Drilling's witnesses, Ralph Roark, maintenance supervisor for Austin Sales, and Anthony Kidd, a representative from VEDCO Holdings, parent company for Virginia Drilling and Austin Sales, testified that the leak was caused by a deteriorating "O-ring" inside the engine cylinder. Tr. II, 240-41. The O-ring seals the fuel line connection and helps return unused fuel back to the fuel tank (i.e., return fuel). When an O-ring deteriorates, it allows the return fuel to seep out from the connection between the fuel line and cylinder. Tr. II, 244-45. Roark conceded that the O-ring at issue could have deteriorated further, but opined that Respondent would have caught it and made a repair. Tr. II, 127.

To abate the citation, Virginia Drilling ordered two new fuel injector lines, O-rings, and a new seat. Tr. II, 84, 130-31; R. Ex. 1. Field mechanic, Aaron Pressley, made the repairs. Tr. II, 99. Pressley did not testify.

Roark did not observe the cited diesel fuel leak. Roark testified that he has encountered about 50 similar “small type of seeps” throughout his tenure. Tr. II, 99-100. Roark opined that such leaks are caused by deterioration of the O-ring on an injection line, which allows return fuel from the engine to seep out around the stem of the injection line where the nut meets the cylinder head, instead of returning to the fuel tank. Tr. II, 99-101, 126-27. On direct, Roark testified that there was no broken fuel line, which causes a different type of leak. Tr. II, 103. On cross, however, Roark conceded that he never determined whether there was a problem with the fuel line or with the O-ring and that he does not normally examine pre-operational records. Tr. II, 131, 135. Like the blaster helper, Roark did not know whether a pre-operational check had been done on the cited truck. Tr. II, 136.

Roark testified that the type of leak at issue can happen at any time, that it is typically discovered during a pre-operational check or a separate 250-mile maintenance check, and that it is fixed by taking the engine part, replacing the O-ring, and usually replacing the injection line,

without any attention given to the turbocharger. Tr. II, 102-05. Roark further testified that the working temperature on the engine in these Mack trucks is about 180 degrees because there is a 180-degree thermostat, which opens and closes to control the antifreeze flowing through the motor to maintain the temperature. Further, there is a belt-driven water pump at the front of this engine, which pulls water from the radiator and pushes it through the block and head assembly and then back through the radiator again. Tr. II, 102.

Roark testified that he has done diagnostic testing with a heat gun to measure the temperature of an exhaust manifold on a similar shot truck, and most manifolds run around 200 to 250 degrees. Tr. II, 105. Roark testified that the operating range of this truck engine is about 500 RPMs to a maximum of 2100 RPMs, as regulated by a governor, which keeps the engine from over revving. Tr. II, 106, 132-33.

More specifically, Roark testified that after the citation was written, two of Respondent's witnesses (Roark and Kidd) started up a similar Mack truck with the same type of engine and "held the throttle down until we got the temperature up to an operating temperature." Tr. 108-09. They then measured the surface temperature of the exhaust manifold with a heat gun at 246 degrees Fahrenheit, while the truck was idle. Tr. II, 108-09; R. Ex. 3.⁶ During this test, which lasted about 30 minutes, Respondent did not drive the truck around and Roark could not recall how long Kidd kept the throttle down. Tr. II, 110-12.

Two or three weeks before trial, Virginia Drilling personnel again tested the cited truck with a heat gun. Tr. II, 113-115. Respondent measured the temperature of the manifold surface at 30.9 degrees before the truck was started. Tr. II, 114-15; R. Ex. 4. Respondent then ran the engine to an operating temperature of 180 degrees and measured the surface temperature of the manifold with a heat gun at 232 degrees. Tr. II, 115-16; R. Ex. 5. Respondent then twice drove the truck with an estimated 3/4 load of powder from the magazine site down to the tippie and then back up the steepest grade (45 degree angle) and measured the surface temperature of the manifold after each run at about 409 degrees. Tr. II, 116-19; R. Ex. 6. Roark unconvincingly estimated the size of the load by tapping the side of the truck with his hand to determine the sound, but he did not load the truck. Tr. II, 120. Roark was unable to testify that these road tests were typical of a drive from the magazine site to the bench because the route is always different. Tr. II, 124. In fact, Roark was not employed at the mine when the citation was written and did not know the daily routes of the powder trucks to the bench. Tr. II, 125. Roark was unsure whether the temperature inside of the engine ever exceeded the auto-ignition temperature of the diesel fuel. Tr. II, 134.

Roark testified that Respondent's powder trucks have had fuel leaks, but he is unaware of any powder trucks that have caught fire because of a fuel leak, and unaware of any Virginia Drilling or Austin Sales miner injured in a vehicle fire. Tr. II, 121-22. When asked by the undersigned why Respondent repaired such fuel leaks, Roark testified rather evasively that Respondent did not want any petroleum product to leak on the ground and cause a slipping hazard. Tr. II, 122-23. In Roark's opinion, the small amount of diesel return fuel that was

⁶ On cross examination, the Secretary's expert witness, James Louis Angel, agreed that such a temperature reading sounded about right, based on his experience. Tr. II, 10-11.

leaking was unlikely to start a fire because the temperature of the engine block would not get hot enough to ignite the fuel. Tr. II, 123.

I find Respondent's testimony concerning the results of its field tests to be of little probative value in determining whether the cited fuel leak contributed to the reasonable likelihood of a fire hazard. These tests were performed in anticipation of litigation, after the citation was issued. The simulated conditions were executed with knowledge that temperature readings would be taken. This likely affected the operation of the vehicle, which was not the cited truck. No video evidence of the tests was submitted and the Secretary was not present during the test. Finally, the tests were conducted over a short period of time and did not reflect a typical work day involving continuous engine load.

C. Expert Testimony Regarding the Likelihood of a Fire Caused by the Fuel Leak

Whether this particular fuel leak was reasonably or highly likely to result in a fire turns on whether the engine manifold or turbo charger on the Mack ANFO truck could reach a temperature high enough to ignite the leaking diesel fuel. The Secretary and the Respondent presented expert witnesses on the fire hazard and possible ANFO explosion issues.

1. Testimony from the Secretary's Expert, James Louis Angel

As noted, James Angel testified as an expert witness for the Secretary. Angel is a mechanical engineer in the mechanical engineering and safety division of MSHA's Approval and Certification Center, in Triadelphia, West Virginia. Tr. I, 107; Tr. II, 62. Angel works closely with the Center's diesel lab to review test information and procedures that primarily involve underground equipment, including tests of diesel engines on underground equipment. Tr. I, 112, 153; Tr. II, 56-57. Angel testified that the temperatures ranges for ignition tests on surface and underground equipment essentially would be the same. Tr. II, 57.

Angel has been employed by MSHA for over thirty years. *Id.* Before that, he spent two years working at Westinghouse Electric in Pittsburgh. Tr. I, 106. Angel earned a Bachelor's of Science degree in Mechanical Engineering from the University of Dayton, and holds an authorized representative card for technical assistance and accident investigation. Tr. I, 107, 152. Angel serves on several committees for the Society of Automotive Engineers, a national organization for consensus standards involving all forms of self-propelled vehicles. Tr. I, 111.

Angel's expert witness report (P. Ex. 3) was undertaken to determine whether the truck presented an acceptable safety risk because of the leak of the fuel injector. Angel was concerned with the risk of fire. Tr. I, 108. Angel testified that a fire risk exists when four elements are present: (1) a source of fuel, such as a flammable or combustible material; (2) oxygen (always present in the atmosphere (Tr. 127); (3) a source of ignition energy; and (4) factors that bring the first three elements together. Tr. I, 108.

Angel testified that the fire risk associated with diesel fuel is typically based on the auto-ignition temperature of the combustible fuel. Tr. I, 109. Auto-ignition temperature is the lowest temperature at which a combustible material ignites in air without a flame or spark. P. Ex. 3, p. 4,

n. 16. By contrast, the flash point is defined as the lowest temperature at which a liquid gives off vapors at a sufficient rate to support a momentary flame across its surface. P. Ex. 3, n. 14.

In order for diesel fuel to ignite, a competent heat source must reach the auto-ignition temperature and then contact the fuel or its vapors. Angel testified that a potential competent heat source could ignite the diesel fuel because the fuel was leaking onto the exhaust manifold below, and the turbo charger was close to the fuel leak. Tr. I, 114.

The auto-ignition temperature for fuel is determined in a laboratory setting by heating the fuel in an oven until it ignites into flame. Tr. I, 109. Angel testified that the auto-ignition temperature for diesel fuel generally ranges from 450 to 500 degrees Fahrenheit. Tr. I, 109. Petroleum Company No. 2 diesel fuel, the diesel fuel used at the time the citation was issued, has a published auto-ignition temperature of 500 degrees Fahrenheit, as listed on the manufacturer's Material Safety Data Sheet (MSDS). P. Ex. 3, n. 14; see also Tr. I, 109. Angel testified that many "real-world" environmental conditions may result in a much higher auto-ignition temperature. Tr. I, 110.

Based on National Fire Protection Article (NFPA) article 921, Angel testified that when an accident investigator tries to identify the most likely ignition sources for a fluid at an accident scene *after* a fire occurs, he looks for ignition sources at least 360 degrees higher than the auto-ignition temperature, although that it is not a hard and fast number. Tr. II, 27. That after-the-fact analysis, which Angel was hesitant to adopt, would put likely ignition at about 860 degrees Fahrenheit. Tr. II, 26.

Before a fire occurs, Angel testified that "you have to take a more conservative approach. . ." and "look at a range of temperatures where that fuel could possibly ignite. . ." Tr. II, 28. Based on a study testing droplets of diesel fuel on stainless steel materials, Angel testified that he would expect the droplets of diesel fuel in this case to ignite in the range of 750 to 1050 degrees Fahrenheit, and approaching 100% certainty at 1050 degrees Fahrenheit. Tr. I, 110; Tr. II, 28, 46; P. Ex. 3, p. 4, n. 17. Angel did not recall what the Mack truck's manifold was made of, although he testified that they are typically cast iron, which tends to be more porous than stainless steel, and would have a lower ignition temperature because the greater porosity would hold the fluid longer and generate more vapors that could ignite. Tr. II, 29, 55-56.

When asked whether the amount of fuel dripping on the manifold factored into his analysis, Angel testified it did not because any fuel leaking onto a hot surface presents a hazard of fire and the conditions of fire containment at that point become less important than the fact that there has been a loss of control in the development of a fire. Tr. I, 113; see also Tr. II, 65. Angel candidly conceded that in most cases, a fine mist or spraying leak provides more of a mechanism for ignition than droplets of fuel, although he alluded to research that shows the opposite. Tr. I, 113; Tr. II, 23.⁷ Based on experience, Angel testified that temperatures in the

⁷ On cross, Angel admitted that three of the four accident reports referenced in his expert report primarily involved sprayed hydraulic fuel, as opposed to a dripping fuel leak, and the other one involved a splash of diesel fuel, i.e., seven gallons of diesel fuel that was splashed on the turbocharger and manifold area while refueling a drill that was idling at 530 degrees

(continued...)

range of 700-800 degrees were a competent ignition source for hydraulic fuel, and he would look for higher temperatures for diesel fuel in the 750-1000 degree range, with temperatures approaching 1000 degrees Fahrenheit to have a 100% probability of ignition. Tr. II, 39.

Angel next identified the exhaust manifold and the turbo charger as two potential heat sources at the location of the fuel leak that could ignite the diesel fuel. Tr. I, 114. When asked why Angel considered the turbo charger in his heat source analysis, Angel testified that the vapors released from the drops of fuel on the exhaust manifold are ignited by hot surfaces. He testified that even if the temperature of the manifold was insufficient by itself to ignite those vapors, "...having a large amount of material in close proximity where those vapors could travel, it would be more likely that they could also be ignited by that much hotter surface." Tr. I, 118.⁸

Angel explained how a diesel engine functions as a compression-ignition engine. When diesel fuel is injected into the cylinder, the piston compresses the mixture of fuel and air, and heat from the compression causes the mixture to ignite and release thermal energy that turns the crankshaft and powers up engine output. Tr. I, 114. Angel explained that the manifold gets hot because the burnt fuel-air mixture exits the engine through the manifold and turbo charger and heats up both as it exits the exhaust system. Tr. I, 114. Angel further explained that the turbo charger uses energy from escaping hot exhaust gases to spin a turbine on the compressor side of the turbo charger, thereby forcing more air into the engine, which allows use of a greater amount of fuel and results in greater power. Tr. I, 115.

Angel expected gas temperatures exiting the engine to be at the high end of 1200 degrees Fahrenheit for turbo-charged diesel engines, regardless of engine design. Tr. I, 116. Angel testified that the exterior surface of the turbocharger and manifold would be slightly less than the exhaust-gas temperature, although he had not done any research comparing the variations in temperature. Tr. II, 58, 59. Angel further testified that the turbo charger could reach a maximum temperature of 1200 degrees Fahrenheit during normal operations, because the gases must exit the exhaust and make a loop around and constantly impinge upon the walls of the turbine, whereas the manifold would reach temperatures slightly less. Tr. I, 118; Tr. II, 14; Tr. II, 58.⁹

⁷ (...continued)

Fahrenheit, after a five minute cool down from running at high load. Further, with regard to the splash of diesel fuel on the drill, MSHA considered whether the drill operator had been smoking a cigarette. Tr. II, 19-22, 60-61.

⁸ Angel testified that the distance the vapors would travel was dependent on the amount of air flow around the engine, and as the gas expanded, it would take up volume along the manifold and turbo charger. Tr. 119. Although not specifically familiar with radiator fans on Mack engines, Angel testified that most radiator fans blow toward or over the engine, and such a fan would be a source of air that could dissipate some of the vapors and cool the engine's surface temperature. Tr. I, 119; Tr. II, 10; Tr. II, 51-52. If the engine is turned off, however, there is no fan ventilation to cool the engine or dissipate remaining vapors. Tr. I, 178.

⁹ On cross, Angel recalled that this 1200 temperature reading was taken after underground testing on a Brookville locomotive. Tr. II, 14.

When asked by the undersigned what “slightly less” meant, Angel testified that the flat area of the manifold near the fuel leak at the number two cylinder, would be around 900 degrees Fahrenheit when the truck was operating at full load. Tr. I, 121; Tr. II, 16. Angel testified that areas of the manifold at the end of the cylinders, such as the elbows, would reach about 1000 degrees Fahrenheit during normal operation at full load. Tr. I, 120; Tr. II, 15-16. Angel had no information from Respondent that there was any shielding or insulated material on the manifold to keep the outside surface of the manifold cooler. Tr. I, 125-26; see also Tr. II, 63-64.

When Angel used a dynamometer to test an idle engine running at about 600-800 RPM’s, the engine temperature measured about 200 to 250 degrees Fahrenheit. Tr. I, 141. A dynamometer measures force torque or power by placing a simulated load on an engine. Tr. I, 141. The load is the force counteracting the force of burning fuel firing the pistons inside the cylinder. Tr. 141. Dynamometer tests are conducted in a laboratory setting for the purpose of checking engine power capability. Tr. II, 254. Many MSHA tests relied upon by Angel were executed using a dynamometer. Tr. II, 166.

Angel testified that engine load affects how hot engine components will become. As engine load increases, power demand also increases. If a truck operator presses the accelerator pedal, more fuel is injected into the engine, and the greater mass of fuel flowing within the engine is “. . . able to heat up the surfaces to a hotter area to overcome any cooling on the external surfaces.” Tr. I, 121.

Angel testified that the engine load would have to reach 75 percent of the full torque value of the engine, such that the engine temperature would rise to *at least* 700 degrees or higher, in order to ignite the diesel fuel. Tr. I, 121-22, 140; Tr. II, 47. Angel testified that he would expect the engine temperature to reach this 75% threshold under normal mining operations. Tr. I, 122.

- Q. Okay. Would you think that this red Mack ANFO truck would get under that much load during normal mining operations?
- A. I would expect the engine to be able to operate up to its full load. Mining conditions change. Steepness of the road, the load on the truck, all these factors play into an expectation that the trucks going to be used to reach its maximum power outlet that’s controlled by the engine.

Tr. I, 122.

Angel testified that the truck would reach the 75 percent threshold when it was performing its maximum work traveling up steep hills with a heavy load at a high rate of speed. Tr. I, 140; Tr. II, 63. On cross examination, Angel testified that he would expect the truck to reach full capacity based on his knowledge of the mining industry and the heavy-duty use that such equipment endures: “The truck capabilities are typically fully used in mining applications. They’re heavy duty use, so I would expect that in a mining application it would encounter conditions that would require full-power control. Tr. II, 17.

Angel was skeptical about the accuracy of Respondent's field tests to measure engine temperature under normal mining conditions.

Q. Would it be difficult to test this engine -- to do a field test of an engine of this type?

A. It would be difficult to control the load on the engine in the field. You could test the engine over some specific course, you would expect the mining conditions to change to require the engine to need to develop more power, therefore higher temperatures.

It would be difficult to do one test of the engine over a specific mine road and say that it is applicable to the full range of operation of the truck.

Tr. I, 123-24.

In sum, Angel concluded that the requisite confluence of factors was present that would start a fire, i.e., leaking diesel fuel mixing with atmospheric oxygen on an engine component that can reach temperatures that will ignite the diesel fuel. Tr. I, 127. Angel opined that if the leaking fuel line were left unabated, "I would expect the vibration corrosion mechanical stresses to keep on degrading the system, causing the leak to increase." Tr. I, 127.

When asked whether or not the cited condition contributed to a fire risk, Angel testified that "... the hazard of a fire is a high likelihood and the consequence of a fire, injury to personnel who are - - that may report a possible explosion of the ANFO, presents an unacceptable safety risk to the person." Tr. I, 127. Angel testified that if a fire started in the engine compartment, the leaking diesel fuel would burn until it reached other combustible material present, such as rubber fuel lines lubricating the oil lines that go to the turbocharger or the hood, and generally as the fire spreads past the firewall of the engine, it consumes the entire vehicle, resulting in fatality for the driver trapped in the cab. Tr. I, 127-28. Angel recalled a loader accident that he had investigated in which a hydraulic fuel line ruptured and was most likely ignited by a hot engine manifold or turbo charger, which caused a large fire trapping the operator inside the cab. Tr. I, 128.

Addressing the issue of whether the ANFO was capable of exploding in the event of a fire on the truck, Angel testified that "... it's not generally accepted in the industry that ANFO can explode if it's subject to a fire. Most likely, it would burn, but under conditions where it's contained, the ammonium nitrate can heat up and become more sensitive to explosion and result in an explosion rather than just burn." Tr. I, 129.

When asked by the undersigned whether "an explosion here was highly likely to occur, or a fire was highly likely to occur, or both," Angel testified as follows:

THE WITNESS: The hazard is the fire. I believe that that had a likelihood of occurrence. The possible consequences could have been injury or death of the

single individual operating the vehicle, or in the worst case scenario, that fire could spread to the ANFO truck and result in a large explosion.

That would have exposed people in a large area around the truck. So the overall risk estimate from the likelihood of the hazard to the possible consequences presents a high risk and an unacceptable safety condition.

JUDGE McCARTHY: And why do you believe that the hazard of a fire was highly likely as opposed to reasonably likely?

THE WITNESS: Because we have indications that all three -- or all four elements of the -- all three elements of the fire triangle are present. They're not only present, but they have been brought together, and that makes it highly likely for a fire -- presents a high likelihood that the fire will occur. If there was some separation of the fuel source from the ignition source, that would lower the likelihood. In this case, all of the elements had been brought together.

Tr.1, 129-130.

On cross examination, Angel confirmed that his report found a high likelihood of a fire occurring because all three legs of the fire triangle (fuel, competent ignition source, and oxygen) were brought together. Secondary factors, such as fire prevention, other flammable materials present, and the flow of air over the fire, can control or prevent the consequences of a fire, but a high likelihood of fire is reached once the three legs of the triangle are brought together. Tr. II, 43-46. Angel declined to comment on inspector Fletcher's gravity designation because he had not been trained in that, but for purposes of his risk evaluation, Angel testified that "for a reasonable expectation of a fire, there has to be a high likelihood or a high likelihood of a fire. Those are both the same." The high likelihood is reached when the three elements of the fire triangle conjoin. Tr. II, 49.

In support of his position, Angel's testimony and expert report relied on a 2006 draft report from his Center evaluating an emulsion truck explosion at ASARCO's Ray Open Pit Cooper Mine near Kearny, Arizona. P. Ex. 3, n. 18. Angel explained that the report was a draft because it was based on technical support findings to the district, and that only MSHA headquarters is responsible for issuing any final report. Tr. I, 132-33. The Secretary waived any deliberative process privilege concerning the contents of the draft report, and over Respondent's objection, I received the report into evidence, with concerns about weight to be given to the draft report, as opposed to its admissibility. See Tr. 1, 131-38; Tr. II, 66-67. On cross examination, Angel did not know why a final report was not published, although he testified that such a result was not unusual for non-fatal accident reports. Tr. I, 29-31.

Thereafter, Angel testified, over Respondent's hearsay objection, to a discussion with the report's drafter, Mr. Lob, a purported expert in explosives, which Angel was not. Angel was told by Lob that the cited scenario at Virginia Drilling and the situation involving the Ray Open Pit "were analogous, that there were conditions where the ammonium nitrate on both trucks could become sensitized by fire and result in an explosion." Tr. I, 139; Tr. II, 33-34. On questioning

from the undersigned, Angel admitted that he brought the Ray Open Pit incident to Lob's attention, not vice versa. Tr. II, 37. On cross, Angel testified that MSHA had concluded that a spraying hydraulic fuel leak was the fuel source for the Ray Open Pit fire and that hydraulic fuel would ignite in the 700-800 degree range, whereas diesel fuel would ignite at a higher temperature range, but approach 100% probability at 1000 degrees. Tr. II, 40-41. The ignition range would vary based on the type of hot-surface material, the way the fuel is deposited on the hot surface, and the way the vapors are dissipated. Tr. II, 41-42. Angel testified that the vapors can move several inches, and within several inches, you find the turbocharger at a higher temperature. Tr. II, 43.

Angel testified to his understanding that the blending or mixing of the ammonium nitrate and fuel oil occurred on board the cited Mack ANFO truck, and the mixture was then discharged. The record establishes that this understanding was based on what Lob told Angel based on what Angel told Lob. Tr. II, 34-36. On this issue, I find more reliable the testimony of maintenance supervisor Roark. Roark testified that the truck does not have a mechanism to mix the fuel and powder. Rather, the ANFO is mixed in a delivery truck in the powder bin before being loaded on the shot truck. Tr. II, 86-87.

Although Angel never tested the specific type of Mack engine at issue, he testified that the combustion of diesel fuel is the same across engines, and that manufacturers generally want to achieve the maximum power out of the engine, so they regulate the fuel to get that power. Tr. I, 124. On cross, however, Angel conceded that diesel engines can run different (hotter or cooler) depending on the size and type of equipment and its function. Tr. II, 23.

Respondent's cross examination attempted to chip away at the competency of Angel's testimony. Respondent established that Angel has never personally tested or designed a diesel engine or participated in any heat tests done on the engine components or exhaust air temperatures of a Mack truck. Tr. I, 112, 153; Tr. II, 9; see also Tr. II, 56. Angel has never heard of a fuel leak on a Mack truck manifold that caused a fire. Tr. II, 11. Angel is not a mechanic and has never repaired a Mack engine or turbocharger. Tr. I, 154-55. He does not have a commercial driver's license and has never driven a commercial vehicle or a Mack truck. Tr. I, 152-53. None of the testimony Angel provided regarding engine temperature had anything to do with a Mack truck on a diesel engine. Tr. I, 153. His temperature range estimates were based on what he had learned about MSHA tests on underground equipment. Tr. II, 8-9, 11. Further, Angel is not a certified fire or explosives investigator. He has no formal education or courses in fire sciences, explosives, or thermodynamics, other than mechanical engineering courses, although he has had a lot of experience and interaction on fire protection issues. Tr. I, 153-54.

Angel conceded that in the event of an ignition, he would expect the diesel fuel to burn and smoke, and that one would be able to smell it. He testified that the absence of these conditions at the time of the citation would indicate that the temperature was below the competent ignition-source threshold. Tr. II, 11-12. In fact, if the truck was stopped and idling on the bench while powder was being augured, Angel would not expect such auxiliary functions to tax the engine to a level high enough to cause an ignition. Tr. II, 12-13. Rather, Angel testified that the engine is designed to operate at its full range of power and if it reached that level, the fuel leak could cause surface temperatures to ignite. Tr. II, 13.

2. Testimony from Respondent's Expert, Lon Dimitrios Santis

Lon Dimitrios Santis testified as an expert witness for Virginia Drilling. Santis is a consultant with Explosives Risk Managers, LLC. Tr. II, 314. At hearing, Santis had about 20 hours invested in this case. Tr. II, 395.

Santis has a Bachelor's and Master's degree in Mining Engineering from the University of Pittsburgh. Tr. II, 315. He has worked in the explosives industry since 1986, including a 12-year stint with the U.S. Bureau of Mines and time spent at the National Institute of Occupational Safety and Health (NIOSH). Tr. II, 317. Thereafter, he became manager of technical services for the transportation, distribution and security of explosives at the Institute of Makers of Explosives (IME). Tr. II, 317-18. He is chairman of the technical committee on explosives at the NFPA, a nationally recognized organization that establishes fire safety standards. Santis serves on the NFPA's lightning and electrical committees. Tr. II, 323-24.

Santis has testified before Congress as a representative for the explosives industry regarding bulk transport of explosives equipment in a hearing about the DOT special-permit process, and he testified on another occasion regarding the need for MSHA to update explosives regulations. Tr. II, 319-21. Santis has published 40 articles on a wide variety of explosives topics. Tr. II, 322. He holds secret clearance from the Department of Homeland Security (DHS) for classified information concerning explosive threats to the homeland. Tr. I, 322-23.

Santis was retained by Respondent to evaluate the citation issued and to provide an expert opinion on whether a violation of the cited standard occurred, and the appropriateness of inspector Fletcher's assessment of gravity. Tr. II, 315. Santis prepared an expert report and supplemental report, R. Exs. 7 and 8, respectively. Tr. II, 314. Santis has never testified in an MSHA case before, and he could only recall reading one Commission case, which involved storage of explosives in a magazine. Tr. II, 334-35, 341.

Santis has never been involved in a case concerning a similar type of diesel fuel leak, although he understood such leaks to be a common occurrence with diesel engines. Tr. II, 325-26. Santis testified that there were no photographs of the leak, and based on Fletcher's testimony, Santis perceived the leak to be very small. Tr. II, 325.

Santis characterized ANFO as a blasting agent, a less sensitive form of explosive that required a stronger stimulus and both a detonator and booster to cause an explosion. Tr. II, 331-32; R. Ex. 7, p. 6. He testified that ANFO is on the low end of the explosives sensitivity scale, and to detonate, the amount of heat input into the explosive by the fire must exceed the amount of heat that can be given off by the explosive. Tr. II, 352; R. Ex. 7, p. 9.

Santis opined that a violation of section 77.404(a) did not occur because in order for equipment to be unsafe, there has to be a reasonable probability of harm, and there was no reasonable probability that a fire could occur from the diesel leak. Tr. II, 333, 366-67. Santis explained that the temperature measurements made on the manifold of the vehicle "came nowhere near approaching the temperatures necessary to cause ignition of the diesel fuel and also

the amount of fuel that was leaking was so small.” Tr. II, 336, 399.¹⁰ Santis favorably cited Angel’s stainless-steel, diesel-fuel drop laboratory study in which diesel fuel did not ignite below 752 degrees Fahrenheit. Tr. II, 355; R. Ex 8, p. 6, referencing P. Ex. 3, n. 17. Santis testified on cross examination that engine temperatures would have to approach 750 to 800 degrees Fahrenheit before he considered the diesel leak unsafe due to the probability of fire, and that a larger volume of fuel would make the fire more dangerous. Tr. II, 396-97.

Given the location of the radiator fan blowing ventilation over the area while the engine was running, Santis could not see any way that an ignition could occur under such conditions. Tr. II, 336. Santis noted that Angel’s report was based on vapor igniting and not on the ignition of the actual liquid that had dropped on the surface. He further testified that the ventilation fan blowing across the manifold would quickly disperse any vapors off the manifold before they could accumulate to the point of ignition. Tr. 361. Santis testified that ignition was dependent upon the volume and surface area of the leak and the length of time that the vapors were exposed to the ignition temperature, which time was reduced by the movement of air by the radiator fan across the manifold. Tr. II, 361-62. Santis further testified that had the small amount of dripping fuel ignited, it would have been readily extinguished, and unlikely to have spread quickly or resulted in a conflagration. Tr. II, 363. On cross, however, Santis had no knowledge of how quickly a leak like this would be caught and repaired by Respondent, nor whether most leaks are caught before the truck is put in service. Tr. II, 390-91.

Based on his experience and research, Santis was not aware of a fire starting in a vehicle based on the cited conditions and he found no hazard. Tr. II, 336-37, 390. Based on assumption piled on assumption, Santis estimated that a vehicle fire from all causes would occur about every 4 million vehicle days. Tr. II, 353-54. Santis acknowledged, however, that a hydraulic leak was alleged to have caused the vehicle fire in the “Ray pit” case relied on by Angel. Tr. II, 338. Santis testified that there was a much lower likelihood of injury in the current case than in the incidents cited in Angel’s report, which involved either a spray of high-pressure hydraulic fluid, or a spill of a large volume of fuel during a refueling activity. Tr. II, 364-65.

Based on the MSDS, Santis testified that at 360 degrees Fahrenheit, 5% of the diesel fuel would have started to vaporize. Santis noted that Fletcher did not see any smoke or vapors coming off the manifold. Tr. II, 339-40. Santis testified that well before temperatures became high enough to cause an ignition, smoke and vapors would be visible. Tr. II, 339.

Santis further opined that it was extremely unlikely that the cited condition would lead to a fatality because three improbable events had to occur: a fire; loss of control of the fire, and the detonation of explosives actually harming people. Tr. II, 343. In fairly leading testimony on direct, Santis testified that even in the unlikely event that a fire occurred, the fire was unlikely to detonate the ANFO, although detonation was a possibility, as evidenced by a Canadian incident in which a tractor-trailer carrying a mixed load of explosives rolled over, burned and detonated. Tr. II, 345, see also Tr. II, 393 (instant ANFO mixture could undergo a DDT and detonate in 30 minutes). Santis also emphasized that Virginia Drilling had evacuation procedures and had trained their employees on how to respond to a vehicle fire. Tr. II, 347. On cross, however,

¹⁰ Santis testified that the leak was only a couple of ounces per hour. Tr. II, 342.

Santis conceded that 9 tons of burning ANFO would give off some fumes, even if it did not explode, and one would want to stay upwind from the burning ANFO. Tr. II, 392.

Santis attempted to distinguish the Ray pit incident cited by Angel because that case involved a batch mixer for ammonium nitrate, slurry, fuel, a sensitizer and perhaps other chemicals, whereas Respondent used just ammonium nitrate and diesel fuel, which were premixed. Tr. II 349-50, 394; R. Ex. 8, last page, figure 2. Santis opined that only the material in the batch mixer detonated at the Ray pit, and there was ammonium nitrate prell and portions of the truck that did not detonate. Tr. II, 351. Further, no one was hurt. Tr. II, 352.

Santis was rather evasive on initial cross. Tr. II, 367-71, 384, 386-87. Santis has never tested diesel engines or measured engine temperatures when a radiator fan is on and off. Tr. II, 372, 378. Santis never measured the truck's exhaust manifold temperatures or the turbo charger temperature, although he purportedly gave Respondent some email instructions about conducting its tests once the truck reached its steady temperature. Tr. II, 373-74, 376-77, 379. Those instructions were not offered into evidence.

Santis relied on Respondent's measurements and Respondent's design of the tests. Tr. II, 373, 382. The temperatures cited in his report were based on those measurements and Santis played no role in gathering the data. Tr. II, 378, 380. Santis testified that he knew that Respondent measured multiple points on the manifold because, "That's what I told them to do, and that's what they did. Tr. II, 379. Santis recommended that Kidd measure the temperature on the manifold in operating condition. Tr. 400. Santis did not recommend that Respondent have independent testing performed, or that Respondent use a dynamometer during testing. Tr. II, 400.

Santis did not observe the tests, but was told by Respondent that they ran the truck up a hill for 10 minutes during the second test. Tr. II, 374, 376. Santis conceded that he did not know whether the test course would elicit the hottest temperature that the manifold would reach, but he testified that the load would be greater than that needed to move around a shot bench and unload ANFO with an auger. Tr. II, 377-78. More importantly, Santis conceded on cross examination that in rendering his expert opinion, he did not consider what would happen to the leaking fuel line under continued normal mining conditions. Tr. II, 395. Rather, his opinion was confined to the condition of the truck as found on the bench by Fletcher. *Id.*

3. Limited Rebuttal Testimony from Angel

In an effort to rebut Kidd's testimony that the source of the leak was from return fuel, Angel testified that he had no information about whether the source of the leak other than the fact that the citation indicated that the leak came from the diesel fuel injector line, which meant that the supply of fuel to the cylinder was escaping and would degrade the system and increase over time. Tr. II, 403-08.

IV. Analysis and Disposition

A. The Violation of Section 77.404(a)

Section 77.404(a) imposes two duties upon a mine operator: (1) to maintain both mobile and stationary machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service immediately. The Commission has held that derogation from either duty violates the standard. *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979).

The Mack ANFO truck cited by inspector Fletcher was mobile equipment. It is undisputed that such mobile equipment was in service when cited. The dispute is whether the truck was maintained in safe operating condition. I find that the truck was not maintained in safe operating condition because of the fuel leak, and was not removed from service. Accordingly, Respondent derogated both duties. I find the violation.

Equipment is in unsafe operating condition under section 77.404(a) when a reasonably prudent person familiar with the factual circumstances surrounding the alleged hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. *Ambrosia Coal & Construction Company*, 18 FMSHRC 1552, 1557 (Sept. 1996) (citing *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982)). Applying this test, I find that a reasonably prudent person familiar with driving a loaded Mack ANFO truck up and down 15-20% graded mine terrain would recognize that a diesel fuel line leaking fuel onto the exhaust manifold in close proximity to the turbo-charged engine constitutes failure to maintain the truck in safe operating condition, free from hazards that require corrective action. Accordingly, I find that the Secretary has proven by a preponderance of the evidence that Respondent violated Section 77.404(a) by failing to maintain the Mack ANFO truck in safe operating condition, and by failing to remove it from service.

B. The Fuel Leak Violation of Section 77.404(a) was Significant and Substantial

1. Legal Principles

The Mine Act describes an S&S violation as one “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). The Commission has held that a violation is S&S “if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). Consistent with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC at 1575. “The fact that injury [or a condition likely to cause injury] has been avoided in the past or in connection with a particular violation may be ‘fortunate, but not determinative.’” *U.S. Steel IV, supra*, 18 FMSHRC at 867, quoting *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (Feb. 1986). See also *Elk Run Coal Co.*, 27 FMSHRC 899, 906-07 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the Commission's subsequent *Mathies* test: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. See *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); accord *Buck Creek Coal*, *supra*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria). An S&S determination must be based on the particular facts surrounding the violation and in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

Often, it is the third element of the S&S test that is difficult to apply. This element is established if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985). “The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (quoting *Musser Engineering, Inc. & PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). Moreover, the Secretary is not required to prove that the hazard contributed to will actually result in an injury causing event. *Youghioghemy & Ohio Coal Co.*, 9 FMSHRC 673, 678 (April 1987).

Rather, “[t]he third element of the *Mathies* test ‘requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.’” *Ziegler Coal Co.*, 15 FMSHRC 949, 953 (June 1993), quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (emphasis in original); but see *Peabody Midwest Mining, LLC, v. FMSHRC*, 762 F.3d 611, 616 (7th Cir. 2014) (shortcutting S&S analysis and holding that question is not whether it is likely that the hazard would have occurred, but only if the hazard occurred, regardless of likelihood, it was reasonably likely that a reasonably serious injury would result). When examining the third element of the *Mathies* test for those violations that involve hazards of fire, ignition, or explosion, the Commission has held that the Secretary must prove that such a hazard is reasonably likely to occur, in addition to proving that the hazard is reasonably likely to result in an injury. *Ziegler Coal*, 15 FMSHRC at 953, citing *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988); see also *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 184 (Feb. 1991). That is, when evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether the requisite “confluence of factors” is present based on the particular facts surrounding the violation. *Enlow Fork Mining Co.*, 5 FMSHRC 5, 9 (Jan. 1997), citing *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988).

2. S&S Analysis

I conclude that the violation of § 77.404(a) was significant and substantial. The violation contributed to a discrete fire hazard that was reasonably likely to result in injury, and the injury was reasonably likely to be of a serious nature.

For the reasons explained above, I have found the underlying violation of mandatory safety standard 77.404(a).

With regard to the second *Mathies* factor, the violation created a discrete fire hazard and discrete explosion hazard, both measures of danger to safety. My finding of a violation *a fortiori* requires a finding of a discrete measure of danger to safety as the standard violated requires a failure to maintain mobile equipment (the Mack ANFO truck) in safe operating condition, free from hazards that require corrective action. Ergo, if the truck is not maintained in safe operating condition there is necessarily a discrete measure of danger to safety.

Furthermore, under the second *Mathies* prong, the Secretary need only identify a safety hazard associated with the putative S&S violation. *Highland Mining Co.*, 34 FMSHRC 3434, n. 5 (Dec. 2012). The record evidence establishes that the diesel fuel leaking onto the exhaust manifold in close proximity to the turbo-charged engine created a discrete fire hazard, and because the violation contributed to a fire hazard and the truck was loaded with ANFO, the violation also contributed to a separate explosion hazard if the ANFO exploded because of the fire. Both fire, and explosion because of fire, were hazards that were measures of danger to safety for the driver of the truck.

The record establishes that that diesel fuel is capable of catching fire at a certain temperature point and that the manifold and turbo charger in question can reach high temperatures, during continued normal mining operations. Whether they could reach temperatures high enough to ignite the diesel fuel is discussed below under the third prong of *Mathies*. The record testimony of the experts, however, is in apparent conflict as to whether the ANFO is capable of exploding in the event of a fire on the truck.

Angel testified that "... it's not generally accepted in the industry that ANFO can explode if it's subject to a fire. Most likely, it would burn, but under conditions where it's contained, the ammonium nitrate can heat up and become more sensitive to explosion and result in an explosion rather than just burn." Tr. I, 129. To support his position, Angel's expert report relied on a 2006 draft report from his Center evaluating an emulsion truck explosion at ASARCO's Ray Open Pit Cooper Mine near Kearny, Arizona. P. Ex. 3, n. 18. Over Respondent's objection, I received the report into evidence, with concerns about weight to be given to the draft report, as opposed to its admissibility. Tr. I, 131-38. Based on a hearsay discussion with the report's drafter, an expert in explosives, which Angel was not, Angel was told that the cited scenario at Virginia Drilling and the situation involving the Ray Open Pit "were analogous, that there were conditions where the ammonium nitrate on both trucks could become sensitized by fire and result in an explosion." Tr. I, 139.

On the other hand, Santis, Respondent's expert, testified that ANFO had a very low probability of detonating by fire based on testing done at Department of Transportation (DOT) laboratories concerning transportation quantities of ANFO. Tr. II, 3443-44. Based on the definition of "blasting agent" provided in one of his reports (R. Ex. 7, p. 6), Santis testified that ANFO was a less sensitive form of explosive than other forms of explosives that are transported, which means that "it takes a stronger stimulus to cause a reaction." Tr. II, p. 331. Santis testified that "[a] detonator should not initiate a blasting agent." Tr. II, p. 332.

Santis then explained how ANFO is detonated by Respondent. Respondent places a detonator inside a booster, either a stick powder or cast booster, made of cast pentolite, a mixture of PETN and PNT. The detonator sets off the booster, and then the booster sets off the ANFO. Tr. II, 332. In his report (R. Ex. 7, p. 9), Santis states, “ANFO is on the low end of the explosive sensitivity scale. It is one of the least likely of all explosives to undergo a deflagration to detonation transition (DDT).” Santis explained that DDT “is the mechanism that causes an explosive to detonate from fire. Essentially, what happens is that the amount of heat input into the explosive exceeds the amount of heat that can be given off by the explosive. You develop a heat feedback loop that keeps putting more heat into the material. Eventually, that can be enough energy to start a detonation.” Tr. II, 352.

Santis distinguished incidents involving other trucks or trailers carrying a “mixed load of explosives” that caught fire, burned, and detonated. Tr. II, 345-347. With regard to the Ray Open Pit incident relied on by Angel, Santis testified that it involved a truck with a batch mixture of ammonium nitrate, slurry, fuel, a sensitizer, and perhaps other chemicals, and the ammonium nitrate prell did not detonate when the batch mixer detonated; rather, it “just got thrown all over the place.” Tr. II, 349-51. Santis testified that the ANFO truck used by Respondent involved just two pre-mixed components, ammonium nitrate and fuel oil, which in his opinion, as noted, was unlikely to detonate. Tr. II, 350.

Despite this apparent conflict in testimony, the second prong of the *Mathies* test does not require a “reasonable likelihood” analysis. *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280 (Oct. 2010). Accordingly, I need not resolve the conflict of whether a fire or an explosion was reasonably likely to occur when discussing the second prong of *Mathies*. Santis’ testimony did not rule out the possibility that an explosion, albeit it unlikely, could occur if the ANFO detonated as a result of a truck fire. Consequently, I find that the violation contributed to two discrete hazards. First, a fire hazard if the engine manifold or turbocharger reached a temperature sufficient to ignite the diesel fuel. Second, an explosion hazard if the fire detonated the ANFO. Accordingly, I find that the second *Mathies* factor is satisfied by either hazard.

Regarding the third *Mathies* factor, the Secretary need not prove that the violation itself is reasonably likely to cause injury. The test under the third element is whether there is a reasonable likelihood that the hazard(s) contributed to by the violation will result in injury. *Musser Eng’g*, 32 FMSHRC at 1281. In this case there was one violation and two hazards, fire if the leaking diesel fuel ignited, and explosion if any fire detonated the ANFO. Through the expert testimony of Angel, the Secretary demonstrated a reasonable likelihood that the fire hazard contributed to by the leaking diesel fuel violation would result in an injury, during continued mining operations.

All the elements of the fire triangle sufficient to establish the confluence of factors necessary to start a fire were present. Diesel fuel, which ignites under sufficient heat, was leaking onto the engine manifold near the turbocharger, both sources of ignition energy. If left uncorrected, vehicle vibration, mechanical stress, and corrosion would degrade the fuel line and augment the leak. Tr. I, 127. There was oxygen present in the atmosphere near the diesel fuel leak. The essential issue in dispute with regard to the fire hazard is whether the exhaust manifold or turbocharger were heat sources that could reach a temperature hot enough that it was

reasonably likely that the leaking diesel fuel would ignite and cause a fire that would result in an injury, under continued normal mining operations.

Angel credibly testified that the auto-ignition temperature for diesel fuel can range from 450 to 500 degrees Fahrenheit. Tr. I, 109. The Petroleum Company No. 2 diesel fuel at issue has a published auto-ignition temperature of 500 degrees Fahrenheit, as listed on the manufacturer's MSDS. P. Ex. 3, n. 14; Tr. I, 109. Santis testified that before reaching a temperature high enough to cause ignition, there would be visible smoke and vapors, and that five percent of the diesel fuel would have started to vaporize at 360 degrees Fahrenheit, the boiling point listed on the MSDS. Tr. II, 338-39. Although Angel also testified that environmental or "real-world" factors may result in a much higher auto-ignition temperature, he explained that testing of the auto-ignition temperature of diesel fuel droplets on stainless steel at MSHA's diesel lab established that the fuel would ignite at 750 to 1050 degrees Fahrenheit. Tr. I, 110; P. Ex. 3, n. 17.

Angel credibly testified that the load the engine is under will affect how hot the engine components will become and that the engine load would have to be about 75 percent of the full torque value of the engine, for the engine components to reach *at least* 700 degrees Fahrenheit and get hot enough to ignite the diesel fuel. Tr. I, 121-22. Angel further credibly testified that he would expect the engine to be able to operate up to its full load potential during normal mining operations. Tr. I, 122. Angel explained that mining conditions change, and the steepness of the road, the load on the truck, and other operating conditions, factor into his expectation that the Mack ANFO truck would be used to reach its maximum engine potential. Tr. I, 122. By contrast, Santis relied on Respondent's test data, the probative value of which I have discounted, and unlike Angel, he did not consider the violation in the context of continued normal mining operations. Tr. II, 373, 382, 395.

The record establishes a reasonable likelihood that both the engine manifold and turbocharger could reach a temperature of 750 to 1050 degrees Fahrenheit near the area where the diesel fuel was leaking, which would be sufficient to ignite the diesel fuel during continued normal mining operations. Angel credibly testified that the flat area of the manifold near the fuel leak at the number two cylinder would reach about 900 degrees Fahrenheit. Tr. I, 121. Angel also credibly testified that areas of the manifold at the end of the cylinders, such as the elbows, would reach about 1000 degrees Fahrenheit. Tr. I, 120. In addition, Angel credibly testified that the gas temperatures exiting the turbo-charged engine could reach 1200 degrees Fahrenheit, a temperature higher than the manifold itself. Tr. I, 117-18.

Although the radiator fan would dissipate some of the vapors around the manifold and cool it down, once the engine was turned off, the fan would no longer provide ventilation to cool the engine and dissipate the vapors. Tr. I, 118-20, 178-81. Prior to such cooling, the exhaust manifold and turbocharger would still be hot enough to ignite the leaking diesel fuel after a heavy load above 75 percent of engine potential. Tr. 178-81. Angel credibly testified that the engine can reach that potential, depending on the steepness of the road, the load on the truck, and other varying conditions. Tr. I, 122.

Finally, Angel persuasively testified that if a fire were to start in the engine compartment, leaking diesel fuel would burn until it reached other combustible material and ultimately

consume the entire vehicle, which was reasonably likely to result in entrapment of the operator inside the cab and death or other injury (burns, smoke inhalation) to the truck operator. Tr. I, 128. Given this record evidence and confluence of factors, I find that the Secretary established both that a fire was reasonably likely to occur under normal mining operations if the violation was left unabated, and that the fire hazard contributed to by the violation was reasonably likely to result in an injury.¹¹ Accordingly, I find that the third prong of the *Mathies* test has been satisfied with respect to the fire hazard.¹²

With regard to the fourth *Mathies* factor, I find a reasonable likelihood that the injury resulting from the fire would be of a reasonably serious nature and likely fatal. The type of injury that would likely result from a fire on the Mack ANFO truck would be operator burns, smoke inhalation, and/or death. Cf., *Buck Creek, supra*, 16 FMSHRC at 542-43 (ALJ) (finding that “smoke and gas inhalation” would cause a reasonably serious injury “requiring medical attention” for S&S purposes), *aff’d* 52 F.3d at 135-36 (7th Cir. 1995). The Commission has recognized that auto ignitions and explosions are major causes of death and injury to miners. *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985). Accordingly, because it was at least reasonably likely that the occupant of the truck would sustain a reasonably serious or fatal injury as a result of a fire contributed to by the leaking fuel violation, I find that the fourth element of the *Mathies* test has been established.

¹¹ The Secretary litigated this case as a fire hazard case and not an explosion hazard case, or both. Accordingly, I find it unnecessary to resolve the conflict in expert testimony as to whether it was reasonably likely that the ANFO would explode in the event of a fire under the third prong of *Mathies*.

¹² Respondent and its expert argue that it is unlikely that a fire will occur from the fuel leak on the ANFO truck because there have been only a few fires reported for bulk-explosive transport trucks over the past 50 years and none at Virginia Drilling. See Tr. II, 337; Resp. Ex. 7. These arguments are not persuasive. The Secretary need not produce quantitative evidence of the frequency of a hazard to show that it was reasonably likely under the circumstances. *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132-33 (May 2014) (requiring the Secretary to essentially prove a statistical frequency of a hazard occurring would impose an unwarranted standard that extends beyond reasonable likelihood). Further, although Kidd testified that Virginia Drilling has never had an ignition from this type of condition (Tr. II, 263), the fact that a fuel leak ignition or fire has not occurred at Virginia Drilling in the past, does not mean that it cannot or will not happen when the requisite confluence of factors is present making such occurrence reasonably likely. *Ambrosia Coal & Construction Company*, 18 FMSHRC 1552, 1560 (Sept. 1996). See also *Elk Run Coal Company*, 27 FMSHRC 899 (Dec. 2005); *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 238 (Feb. 1997) (the absence of previous instances of over travel does not establish that an accident would not be reasonably likely to occur, given the nature of the hazards presented); *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996) (assertions that the operator had no history of accidents, and that the truck had been operated in the cited condition for many months without incident, are not dispositive of a finding that the third *Mathies* element has not been established).

Respondent contends that because the truck has fire extinguishers and there is an emergency plan in place, there is no risk of fatality in the event of a fire. R. Br. 23; see also Tr. II, 305. I reject these arguments. The presence of fire-fighting equipment and other precautions does not lessen the risk or severity of injury or death to a miner due to a truck fire caused by a leaking fuel line. *Buck Creek*, 52 F.3d at 136 (in the event of a fire, the mere presence of . . . firefighting equipment does not mean that fires do not pose a serious safety risk to miners); *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992) (for purposes of analyzing whether a violation is S&S, a hazard continues to exist regardless of whether caution is exercised). Furthermore, even with an emergency plan in place, there is no guarantee that a miner will respond appropriately under the stress of emergency conditions. Likewise, there is no guarantee that an endangered truck operator will be able to access the fire-fighting equipment and use it effectively. As I have previously noted, the Commission interprets safety standards to take into consideration “ordinary human carelessness.” *Beckley Crane & Constr., Inc.*, 33 FMSHRC 372, 382 (Feb. 2011) (ALJ), quoting *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984).

A. Respondent’s Negligence was Properly Designated as Moderate

The Respondent contends that the citation’s negligence designation should be classified as low, rather than moderate. The Act defines negligence as “conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risk of harm.” 30 C.F.R. § 100.3 (d). An operator is required to “take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* In order for a citation to be designated as moderate negligence it must be determined that “the operator knew, or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. §100.3 Table X. On the other hand, for a citation to be properly designated as low negligence there must be considerable mitigating circumstances present. *Id.* A mitigating circumstance may include actions taken to prevent or correct hazardous conditions. 30 C.F. R. §100.3(d).

The Respondent should have known that there was a fuel leak on the vehicle’s engine manifold. Respondent should have insured that a pre-operational check was performed on the truck in question prior to operation. Mack’s maintenance manual for this particular truck requires that as part of the driver’s daily schedule, the driver check for “signs of leaking, fuel, oil or coolant” as well as inspect under the hood for “oil, fuel and air leaks.” The manual further states that the driver should “make sure any problem is corrected before using the vehicle.” P. Ex. 3, Ref. 6, p. 2. Respondent’s safety director, Anthony Kidd, did not know whether a pre-operational check of the vehicle had been performed. Tr.II, 276. At the very least, such ignorance paints a picture of lax enforcement of a pre-operational inspection policy and imprecise recordkeeping on the part of the Respondent.

To support its contention that the negligence should be lowered from moderate negligence to low negligence, Respondent argues that the location of the leak is a mitigating factor. While the leak is under the hood and not visible without lifting the hood of the truck, I have found that the Mack maintenance manual requires checking under the truck’s hood for fuel leaks prior to daily use. Although inspector Fletcher conceded that this type of leak could occur after a driver does a pre-shift examination (Tr. I, 76), Respondent failed to establish that one was done. Moreover, the Commission has held that the execution of a pre-operational inspection

does not relieve the operator of its duty to maintain equipment in safe operating equipment, and to hold otherwise would run counter to the strict liability nature and safety objectives of the Mine Act. *Wake Stone Corp.*, 36 FMSHRC 825, 829 (April 2014).

Furthermore, the Respondent's argument that Austin Sales maintains the truck and is responsible for pre-operational inspections, does not relieve Respondent from its duty to maintain vehicles in safe working condition as required by the mandatory safety standard. Finally, Respondent's argument that the blaster helper operating the truck at the time of the citation was not an agent of Respondent is not a mitigating circumstance. Respondent should have a vigilantly monitored system in place to ensure that pre-operational checks have been completed and that mobile equipment is maintained in safe operating condition.

Accordingly, I find no mitigating circumstances that would justify reducing the negligence designation from moderate to low. Respondent should have known of the violative condition and its negligence was properly designated as moderate.

B. Civil Penalty

The Act requires that when evaluating a civil monetary penalty the Commission shall consider six statutory penalty criteria: 1) the operator's history of previous violations; 2) the appropriateness of the penalty to the size of the business; 3) the operator's negligence; 4) the operator's ability to stay in business; 5) the gravity of the violation; and 6) any good faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for a substantial divergence from the proposed penalty under the criteria. *Spartan Mining Co.*, 30 FMSHRC 699. 723 (Aug. 2008).

As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary's assessment formula as a reference point. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 19, 2014) (ALJ). This formula is not binding, but operates as a lodestar, since factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Further, unique aggravating or mitigating circumstances may call for higher or lower penalties, and will be taken into account.

When assessing the gravity of this violation under section 110(i) criteria in light of the penalty principles outlined above, I credit and find persuasive inspector Fletcher's testimony at hearing that the citation was more appropriately written as reasonably likely to result in an injury, rather than highly likely to result in an injury. Tr. I, 58; see also Tr. I, 68. In essence, Fletcher candidly reassessed his analysis after additional experience on the job. The gravity was very serious, however, given the reasonable likelihood of a fire and the potential for a fire to result in explosion. To the Respondent's credit, the violation was quickly abated in good faith when Respondent ordered parts for the truck and had a mechanic from Austin Sales promptly repair the vehicle. R. Ex. 1. The parties stipulated to this prior to hearing. Jt. Ex. 1. Accordingly, applying the remaining section 110(i) criteria to my findings set forth herein, I assess a civil penalty of \$37,416 against Respondent for the instant violation of section 77.404(a).

V. Order

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

The contest of Citation No. 8262897 is **DISMISSED**

It is further **ORDERED** that Citation No. 8262897 be modified to reduce the likelihood of injury or illness from “highly likely” to “reasonably likely.”

To the extent Respondent has not already done so, within 40 days of the date of this decision, Respondent, Virginia Drilling, Inc., is **ORDERED TO PAY** a total civil penalty of \$44,164, i.e., \$37,416 for the litigated citation and \$6,748 for the settled citations.¹⁵

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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¹⁵ Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 29, 2015

MIDWEST FUELS, INC.,
Contestant

v.

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

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

v.

MIDWEST FUELS, INC.,
Respondent

CONTEST PROCEEDINGS

Docket No. LAKE 2013-0046-RM
Citation No. 8660952; 09/26/2012

Docket No. LAKE 2013-0056-RM
Order No. 8660955; 10/09/2012

Mine: Plant No. 32
Mine ID: 47-02405

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2013-0157-M
A.C. No. 47-02405-307333 V480

Mine: Plant No. 32

DECISION AND ORDER

Appearances: Barbara Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner

Joshua Schultz, Esq., Law Office of Adele Abrams, P.C., Beltsville, MD for Respondent

Before: Judge L. Zane Gill

This case arises from a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”). It involves one 104(a) citation, Citation No. 8660952, and one 104(b) order, Order No. 8660955,¹ issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Midwest Fuels, Inc. (“Midwest Fuels” or “Respondent”) at the Plant No. 32 mine. 30 U.S.C. § 814(a), (b). The parties presented testimony and documentary evidence at the hearing held in La Crosse, Wisconsin on April 1, 2014.²

¹ Order No. 8660955 is a non-assessable 104(b) order.

² At the end of the Secretary’s case-in-chief, Midwest Fuels moved to dismiss the case. (Tr. 76:22-24) I denied the motion. (Tr. 79:6-23)

For the reasons listed below, I vacate both Citation No. 8660952 and Order No. 8660955.

Stipulations

At the hearing, the following stipulations were incorporated into the record by reference:
(Tr. 13:1-11)

1. This 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.
2. The individual whose signature appears in Block 22 of the Citation at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.
3. A duly authorized representative of the Secretary served the Citations and terminations of the citations upon the agent of the Respondent at the date and place stated therein as required by the Mine Act, and the Citations and terminations may be admitted into evidence to establish their issuance.
4. On September 26, 2012, MSHA Inspector James Alan Hines (“Hines”) issued Citation No. 8660952 to Midwest Fuels (The company’s legal name Midwest Industrial Fuels, Inc., a Wisconsin corporation) pursuant to Section 104(a) of the Mine Act at Plant #32. It alleged a violation of 30 C.F.R. § 46.9(a).
5. Plant #32, Mine ID No. 47-02405, is a portable crushing plant owned by Milestone Materials, a division of Mathy Construction Company, a Wisconsin corporation (“Mathy”). On September 25, 2012, Plant #32 was stationed in a quarry owned by Mathy near Rochester, Minnesota, named the Hammond Quarry.
6. Under the heading and caption “Condition or Practice” the citation alleged as follows:

Records of training have not been provided for a miner fueling mining related equipment while on an active mine site. These records were either New Miner or Experienced Miner training forms depending on whichever one is appropriate and annual refresher and task training records. These records have been requested and confirmed to be non-existent through Corporate Counsel and the Corporate Safety Officer. Without these records, MSHA cannot confirm compliance with this standard.
7. The citation was designated non-significant/substantial, the occurrence of injury or illness deemed “no likelihood” and “no lost workdays,” and the operator’s alleged negligence determined to be moderate.

8. Midwest Fuels delivers various fuels, including propane, home heating oil, diesel fuel, gasoline, kerosene, and lubricants and fuels equipment at private residences, businesses, farms, mines, construction sites and trucking companies.
9. Travis Pearson (“Pearson”) is a fuel delivery truck driver employed by Midwest Fuels. Pearson began his employment with Midwest Fuels on May 3, 2010. His job is to deliver fuel and fuel equipment to private residences, businesses, farms, mines, construction sites and to trucking companies, in and around Rochester, Minnesota. The delivery sites are regulated by either OSHA or MSHA.
10. On September 25, 2012, the day of the MSHA inspection, Pearson was delivering fuel to various types of equipment and tanks, located in and around Rochester, Minnesota, including equipment in the Hammond Quarry. At the time, Pearson was one of four Midwest Fuels employees responsible for delivering and fueling equipment in the Hammond Quarry. Pearson and the three other Midwest Fuels employees who fuel equipment performed substantially the same tasks.
11. While stationed at the Hammond Quarry in September of 2012, Plant #32 was operating five days a week and was fueled each day. During that same time at the Hammond Quarry, Plant #59, a Wash Plant, located 100 to 150 yards from Plant #32, was operating five days a week and was being fueled every other day. Also, a stripping crew operated, when needed, and was fueled as needed.
12. When Pearson arrived to deliver fuel at the Hammond Quarry, he regularly stopped at the scale house to sign in and notify the Foreman that he was on the property. Upon entering the quarry, Pearson, who had a two-way CB radio in his fuel delivery truck, communicated with not only the miners in the Hammond Quarry, but also the customer trucks picking up product at the quarry.
13. Pearson had received Site Specific Hazard Awareness Training for the Hammond Quarry, in accordance with 30 C.F.R. § 46.11, on August 29, 2012.
14. On September 25, 2012, when Pearson arrived to fuel mining-related equipment at Plant #32, he drove into the pit unaccompanied for approximately ½ mile.
15. Customers and visitors who have received Site Specific Hazard Awareness Training travel into the pit unaccompanied.
16. The Hammond Quarry does not have a central fuel receptacle or storage tank, so Pearson parked in a central location in the Hammond Quarry, a distance of 40 to 50 feet from Plant #32, where vehicles would approach him to receive fuel. The vehicles, such as loaders and haul trucks, would park and the motors would be turned off during fueling. Then, if necessary, Pearson would travel from Plant #32 to Plant #59, approximately 100 to 150 yards, to reposition his delivery vehicle in order to fill that equipment.

17. On September 25, 2012, there were five miners present in the Hammond Quarry. Foreman Don Smith was operating Plant #32, with Loader Operators Brandon O'Connor and Steve Mueller. One loader was the Feed Loader, which was charging Plant #32 with previously blasted rock, while the other loader, which was the Take Away Loader was pushing material off the bench for the crusher. At the time, Plant #32 was crushing wash feed which was being transferred up to Wash Plant #59. There were no customer trucks near Plant #32. Meanwhile, Quarry Loader Jerome Blogett who was not assigned to either Plant was helping load wherever he was needed. Wash Plant #59 was being operated by Foreman Justin Hedger. After the material was washed it was stockpiled according to size. It was these stockpiles where customer trucks were loaded with material.
18. Customer trucks that picked up product from the stockpiles used the same roadways as Midwest Fuel employees who were delivering and fueling equipment.
19. When Pearson fueled Plant #32, he unrolled the hose from a reel on his delivery vehicle and stretched the hose about 40 feet to the fuel cap of Plant #32. The hose is a 1 ³/₈ inch wide rubber hose. Pearson hooked the hose on a hose hangar located on the side of the Plant and then climbed up a four-rung ladder. He then lifted the hose up to the fuel cap. The Plant was in operation while it was being fueled. At the time all of the moving parts on Plant #32 were guarded. The trough-shaped conveyor belt is approximately 5 feet away from the fuel cap. It took Pearson approximately 30 to 45 minutes total to fuel Plant #32.
20. On September 25, 2012, Pearson also fueled the generator by stepping up the stairs, with handrails, while carrying an industrial fuel hose into the trailer of the generator. The generator was operating while Pearson delivered fuel to it. The generator contains a diesel powered engine which requires fuel to operate. There are electrical connections in cabinets inside the generator trailer.
21. Prior to September 25, 2012, Pearson had received the U.S. Department of Transportation ("DOT") HazMat driver training to prepare commercial truck drivers to transport hazardous materials, annual DOT Facility & Transportation Security, DOT Driver Training, DOT HAZMAT Rail Training, DOT Function Specific Training and DOT Hazardous Materials General Awareness Training.
22. Prior to September 25, 2012, Pearson had also received OSHA training annually covering the following subjects: First Aid, Fall Protection and Prevention, Respiratory Protection, Personal Protective Equipment, Powered Industrial Truck, Hazardous Energy Control (Lockout/Tagout), Confined Space, Hearing Conservation, Hazard Communication Standards, Fire Prevention, Electrical general Safety Awareness, Storm Water Training, Shop and Welding Safety, Incident Reporting, General Safety Awareness (weather), Vehicle Safety, Avoiding Falls and Slip Hazards, Housekeeping, Safe Lifting, Using Ladders Safely and Underground Utilities Awareness.

23. Midwest Fuels has not certified either New Miner training pursuant to 30 C.F.R. § 46.5 or Newly-hired experienced miner training pursuant to 30 C.F.R. § 46.6 for Pearson.
24. Pearson does not perform mine development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine; repair of mining equipment; or associated haulage of materials within the mine from these activities.
25. On April 14, 2009, MSHA Inspector James Hines issued Citation No. 6494042 against Milestone Materials Div./Mathy Construction for failing to provide Greg Hall, a fuel delivery truck driver for Midwest Fuels, with 24-hour new miner training in violation of 30 C.F.R. § 46.5. After the hearing was adjourned, but before Judge Barbour issued a decision, the Secretary vacated the citation. From August 4, 2009, through September 26, 2012, Midwest Fuels continued to deliver fuel to various quarries and MSHA has not issued citations to Midwest Fuels for a violation of 30 C.F.R. §§ 46.5, 46.6, 46.8, or 46.9.
26. Pearson performs no duties other than delivering fuel to fuel receptacles and fueling equipment.
27. Pearson's job duties do not include repair of client vehicles or equipment at mine sites or any delivery work sites.

Jt. Stip.

The Arguments

The Secretary argues that under the plain meaning of the cited regulation, Midwest Fuels is liable for failing to produce certification of Pearson's new or experienced miner training. He argues that Pearson should be considered a "miner" because he fuels the crusher, generator, and loaders at an active mine site five days a week, in the same general vicinity as miners engaged in mining operations. (Sec. Br. at 8-9) In doing so, Pearson is exposed to hazards of mining operations, such as slip and fall, electrical hazards, noise, moving machine parts, traffic patterns, and flying material. *Id.*

Alternatively, the Secretary argues that Pearson should be considered a maintenance or service worker. The Secretary argues that Pearson is a service worker, not a mere vendor or delivery worker who is not required to obtain new miner training, because refueling mine machinery is a "service" that Midwest Fuels provides to meet the operational needs of the mine. (Sec. Br. at 15-18) Additionally, the Secretary argues that Pearson's refueling work keeps the machinery in functioning order and is necessary to maintain operations at the plant. *Id.* Thus, Pearson's fueling activities should be considered "maintenance of mining equipment." *Id.*

Because both miners and maintenance or service workers are required to undergo comprehensive new or experienced miner training, the Secretary argues that Midwest Fuels is required to produce records of Pearson's new miner training and is liable for the failure to do so. *Id.*

Midwest Fuels argues that its fuel truck drivers are delivery workers or vendors under the Part 46 regulations, and should not be considered miners. (Resp. Br. at 7-11) Because Pearson was not a miner, the Respondent contends, he was not required to receive new miner training, and Midwest Fuels did not violate the Part 46 training requirements. *Id.* In response to the Secretary's contention that Pearson was a miner because he was exposed to the hazards of mining operations and was on the mine site for frequent and extended periods, Midwest Fuels argues that the training requirements do not apply to vendors and delivery workers, as those terms are defined in section 46.2(g)(2). *Id.* Midwest Fuels further argues that Pearson should not be considered a maintenance or service worker because his work at the mine site was limited to delivering fuel and refueling equipment, which is not maintenance work. *Id.* Finally, the operator argues that the Secretary's attempt to apply the training requirements for miners to Pearson is arbitrary and capricious, and therefore not entitled to deference, because the interpretation is inconsistent with prior history and enforcement. *Id.* at 12-17.

Resolution of this dispute turns on whether the definition of "miner" is clear or ambiguous under 30 C.F.R. § 46.2(g), and whether Pearson's classification as a miner was warranted.

Basic Legal Principals

The Commission has found that when interpreting the Secretary's Regulations:

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1990); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is of 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Secretary's interpretation of her regulations is reasonable where it is "logically consistent with the language of the regulation[s] and ... serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted).

Lodestar Energy, Inc., 24 FMSHRC 689, 692 (July 2002); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (September 1996). "It is only when the plain meaning is doubtful or ambiguous that the issue of deference to the Secretary's interpretation arises." *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984); *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1028 (June 1997). Further, "the statutory provision underlying the regulation, as well as any related statements

accompanying the regulation's publication in the *Federal Register*, may illuminate the regulation's meaning." *Lehigh Southwest Cement*, 2011 WL 7463296, at *5 (Dec. 2011) (ALJ Paez) (quoting *Lodestar Energy*, 24 FMSHRC at 693). Additionally, "[i]n the absence of a statutory or regulatory definition of a term, or a technical usage, we look to the ordinary meaning of the terms used in a regulation." *Bluestone Coal Corp.*, 19 FMSHRC at 1029; *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996).

The Supreme Court has said that when reviewing a challenged interpretation of regulatory language, the Secretary's interpretation of his own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." See *Auer v. Robbins*, 519 U.S. 452, 461 (1997). However, "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris Cnty.*, 529 U.S. 576, 588, (2000). Courts determine the plainness or ambiguity of a regulation by referring to "the language itself, the specific context in which that language is used, and the broader context as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

For the reasons set forth below, I find that the meaning of 30 C.F.R. § 46.2(g) is clear and unambiguous, and the Secretary's interpretation of the standard is not entitled to deference.

Definition of "Miner" under 30 C.F.R. § 46

Midwest Fuels was cited for a violation of 30 C.F.R. § 46.9(a), which requires each operator to "record and certify on MSHA Form 5000-23, or on a form that contains the information listed in paragraph (b) of this section, that each *miner* has received training required under this part." (emphasis added) In order for the Secretary to prevail, he must first prove that Pearson, a fuel delivery truck driver, is a "miner" as defined by 30 C.F.R. § 46.2(g).

In Section 46.2(g) a miner is "[a]ny person, including any operator or supervisor, who works at a mine and who is engaged in mining operations [...] and [a]ny construction worker who is exposed to hazards of mining operations." 30 C.F.R. § 46.2(g)(1). "Mining operations" cover "mine development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine; maintenance and repair of mining equipment; and associated haulage of materials within the mine from these activities." 30 C.F.R. § 46.2(h)

Further, the definition of "miner" "*does not include* scientific workers; *delivery workers*; customers (including *commercial over-the-road truck drivers*); vendors; or visitors. This definition also does not include maintenance or service workers who do not work at a mine site for frequent or extended periods." 30 C.F.R. § 46.2(g)(2) (emphasis added).

Persons who are not miners under Section 46.2 are required to receive site-specific hazard awareness training for those areas of the mine property where mining-related activity takes place. Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines, 64 Fed. Reg. 53080-01, 53126. This includes "office or staff personnel; scientific workers; *delivery workers*; customers, including *commercial over-the-road truck drivers*; construction workers or employees of independent contractors who are not miners under §46.2; maintenance or service

workers who do not work at a mine site for frequent or extended periods; and vendors or visitors.” *Id.* (emphasis added).

The plain language of this regulatory provision is clear and unambiguous. The provisions must be enforced as they are written, and I must look to the ordinary meaning of the terms used in the regulation. *Bluestone Coal Corp.*, 19 FMSHRC at 1029; *Lodestar Energy, Inc.*, 24 FMSHRC at 692; *Pfizer Inc. v. Heckler*, 735 F.2d at 1509. The language of 30 C.F.R. § 46.2(g) means exactly what it states. It explicitly excludes “scientific workers; delivery workers; customers (including commercial over-the-road truck drivers); vendors; or visitors [...] [and] maintenance or service workers who do not work at a mine site for frequent or extended periods” from the definition of a “miner.” This is plain and unambiguous language whose meaning is apparent from any reasonable reading of the regulation. Indeed, in promulgating the regulation, the Secretary made clear what the definition of “miner” included and excluded, and what the definition of “mining operations” included.

According to the Merriam Webster online dictionary, the ordinary meaning of the word “delivery” is the “act of taking something to a person or place,” and “delivery man” means a “person who delivers wholesale or retail goods to customers usually over a regular local route.” <http://www.merriam-webster.com/dictionary/delivery%20man>; <http://www.merriam-webster.com/dictionary/delivery>. Further, the ordinary meaning of “maintain” is “to keep in an existing state (as of repair, efficiency, or validity); preserve from failure or decline,” and “maintenance” is “the upkeep of property or equipment.” <http://www.merriam-webster.com/dictionary/maintain>; <http://www.merriam-webster.com/dictionary/maintenance>.

Despite the plain meaning of the regulation and the ordinary meaning of the words “to maintain” and “maintenance,” the Secretary argues that his interpretation of the “maintenance or service worker” exception to the definition of “miner” is reasonable and must be accorded deference. As discussed below, I have carefully considered the Secretary's arguments in this regard but cannot give them any credence.

A Fuel Delivery Truck Driver, Is Not A “Miner” Under 30 C.F.R. § 46

The Secretary argues that Pearson should be considered a miner because he works at an active mine site near miners engaged in mining operations, and as such is exposed to the hazards of mining operations. The Secretary proffers that “[a] person’s status as a miner turns on whether he is engaged in, or exposed to the hazards of, ‘mining operations.’” (Sec. Br. at 9) This is not true. While the definition of a “miner” does turn on whether he or she is engaged in “mining operations,” 30 C.F.R. § 46.2(g)(1)(i), it does not turn on whether a “miner” is “exposed to hazards of mining operations.” 30 C.F.R. § 46.2(g)(1)(ii). The only mention of a person being a “miner” by exposure to the hazards of mining operations is when that person is a “construction worker.” 30 C.F.R. § 46.2(g)(1)(ii) At no point in the hearing or in his post hearing brief did the Secretary argue that Pearson was a “construction worker.” The Secretary is trying to improperly conflate two distinct sections of the regulation. I reject the Secretary’s argument that Pearson was a miner because he worked at an active mine site near miners engaged in mining operations, and as such was exposed to the hazards of mining operations.

Additionally, the Secretary stipulated that Pearson did not engage in “mining operations” such as “mine development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine; repair of mining equipment; or associated haulage of materials within the mine from these activities.” (Jt. Stip. at 24 (citing 30 C.F.R. § 46.2(h))). Therefore, under Section 42.2(g)(1), I cannot find that Pearson engaged in “mining operations.”

A fuel delivery truck driver also comes under the exception to the definition of “miner.” The regulation makes it very clear that the definition of “miner” “*does not include* scientific workers; *delivery workers*; customers (including *commercial over-the-road truck drivers*); vendors; or visitors.” 30 C.F.R. § 46.2(g)(2) (emphasis added). These exclusions to the definition of “miner” are included without reference to the exposure of mining hazards. In fact, as plainly written, they are explicit exclusions with no limitations. Indeed, these exclusions in the definition of “miner” in 30 C.F.R. § 46 were described in the Final Rule published by MSHA in September, 1999, where MSHA stated “*we intended to exclude customers and delivery personnel from the definition of ‘miner’ [...].*” Section 42.2(g)(2) also indicates that commercial over-the-road truck drivers may be considered “customers” under the final rule and excluded from the definition of “miner.”” 64 Fed. Reg. 53080-01, 53096.

In the stipulations submitted to the court and the testimony heard at the hearing, the Secretary admitted that Pearson was a delivery truck driver employed by Midwest Fuels to deliver fuel to the Hammond Quarry. (Jt. Stip. at 9, 10; Tr. 36:11-21) On September 25, 2012, the day of the MSHA inspection, Pearson was delivering fuel to equipment in the Hammond Quarry.³ (*Id.* at 10) It took Pearson approximately thirty to forty-five minutes to fuel Plant #32. (*Id.* at 19) During this time, Pearson parked his truck in a central location in the Hammond Quarry where vehicles, such as loaders and haul trucks, approached him to receive fuel. (*Id.* at 16) On the date the citation was issued, Pearson also fueled the diesel powered generator by pulling up to the generator, climbing a ladder with handrails, and hooking up the fuel hose to the fuel intake on the generator. (*Id.* at 20) These actions are clearly consistent with a *delivery* operation, which is purposely excluded from the definition of “miner.” I find that Pearson was a “delivery worker” because he entered the mine property briefly to deliver fuel.⁴ As a fuel delivery truck driver, Pearson was not a “miner” under Part 46 of the regulations.⁵

Pearson Was Not A “Maintenance or Service Worker” Under 30 C.F.R. § 46

In Section 46.2(g)(2), the definition of “miner” “does not include maintenance or service workers who do not work at a mine site for frequent or extended periods.” 30 C.F.R. §

³ At the time, Pearson was one of four Midwest Fuels employees responsible for delivering and fueling equipment in the Hammond Quarry. (Jt. Stip. at 10)

⁴ Although not necessary for the purposes of this case, I also find that Pearson was a “commercial over-the-road truck driver” because he was required to have a CDL driver’s license in order to work as a fuel delivery truck driver. (Tr. 92:20-24)

⁵ The Respondent also made the argument that Midwest Fuels is a “vendor” and as such also falls under Section 46.2(g)(2). I find it unnecessary to address this point because I found that Pearson is a “delivery worker.”

46.2(g)(2). Nonetheless, the Secretary argues that Pearson should be considered a maintenance or service worker under Section 46.2(g)(2) because refueling mine machinery is a service that Midwest Fuels provides to meet the operational needs of the mine. More specifically, fueling is a service performed to keep mine machinery in “functioning order” and is necessary to maintain plant operations. (Sec. Br. at 16) As a result, Pearson’s fueling activities should be considered “maintenance of mining equipment”⁶ despite the exclusion mentioned above.⁷

The case law cited by the Secretary in support of categorizing Pearson as a maintenance or service worker involves independent contractors. For example, *Joy Technologies*, 99 F.3d 991 (10 Cir. 1996) refers to construction workers who fall under 46.2(g)(1)(ii) and not (g)(1)(i). Further, both *Joy Technologies* and *Otis Elevator*, 921 F.2d 1285 (D.C. Cir. 1990) equate “service” work with repairing and troubleshooting problems with equipment. *Id.* Additionally, *Musser Engineering*, 32 FMSHRC 1257, 1270 (Oct. 2010), categorized the company in that case as an independent contractor because it performed engineering support, mapping, and surveying services. Despite the fact that the Secretary is not claiming Midwest Fuels is an independent contractor, the work done in the cases cited by the Secretary involve much more than delivering fuel for equipment at a mine, e.g., doing repairs, troubleshooting, providing engineering, mapping, and surveying services. Therefore, I cannot adopt the Secretary’s reasoning that these cases show that Pearson was servicing or maintaining equipment to keep it in functioning order. Delivering fuel and fueling equipment are quite different than doing equipment upkeep, repair, troubleshooting, or any form of engineering or mapping services.

Additionally, MSHA’s Program Policy Manual⁸ describes maintenance or repair work as “upkeep or alteration of equipment or facilities. Replacement of a conveyor belt would be considered maintenance or repair.” III MSHA, U.S. Dep’t of Labor, *Program Policy Manual*,

⁶ Hines believed Pearson’s activity required new or experienced miner training because of exposure to hazards, time spent on site, and that by fueling the equipment, Pearson went beyond simple delivery of fuel. (Tr. 74:21-72:20) This is because in Hines’ experience, delivery workers at mines go to a designated location, drop off parts, and leave. (Tr. 40:14-22)

⁷ The Secretary’s argument is an example of a logical fallacy referred to as *reductio ad absurdum* or *argumentum ad absurdum*. This type of argument seeks to demonstrate that a statement is true by showing that an absurd result would follow from its denial, i.e., the underlying thesis must be accepted because rejecting it would be untenable. <http://www.iep.utm.edu/reductio/>. According to the Secretary’s argument, Pearson provided fuel without which the mining equipment would not work and mine production would cease, therefore Pearson “maintained” the equipment. It is clear that the equipment would not function without fuel, but it does not follow that because Pearson delivered the fuel, he was doing maintenance or service work.

⁸ The Commission has long held that the PPM is not binding on the Secretary or the Commission. *See D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996) (quoting *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981)). Nevertheless, the PPM is a policy statement that, in this instance, complements the Secretary’s regulation.

Part 46, at 37 (2006). Further, according to MSHA's Module Number 12 of Instruction Guide Number 43 for surface metal and nonmetal field maintenance of machinery:

Field maintenance is performed by such personnel as mechanics, electricians, and their helpers; and by greasers or oilers, and the operators of various machines. Maintenance/repair work may involve: 1. Inspecting, troubleshooting, evaluating condition 2. Towing 3. Deenergizing, securing, releasing pressure 4. Removing and replacing guards or safety devices 5. Lubrication 6. Manual or powered materials handling 7. Use of hand and power tools 8. Welding and cutting 9. Changing component parts 10. Inspecting and testing completed work

On-The-Job Training Modules For Surface Metal And Nonmetal Mines Field Maintenance of Surface Machinery, at 2, *available at* http://www.msha.gov/safetypro_in_a_box/IG%2043%20OJT%20training%20modules%20surface%20MNM/IG%2043%20OJT%20modules%20Surface%20MNM%20Full%20Text.pdf.

The Secretary stipulated that Pearson performed no duties other than delivering fuel to fuel receptacles and fueling equipment, and his job duties did not include repair of client vehicles or equipment at mine sites or any delivery work sites. (Jt. Stip. at 26-7) At no time had Pearson ever been asked to help fix equipment at the Hammond Quarry, or any quarry. (Tr. 103:12-17) None of the Midwest Fuels truck drivers performed any service or maintenance of mining equipment at the mines, nor were they trained to do so. (Tr. 134:1-6) Willie Hardin,⁹ safety director for Mathy, testified that Midwest Fuels drivers did not perform service or maintenance at Milestone Quarries. (Tr. 153:21-23)¹⁰

From this it is sufficiently clear that Pearson did not engage in the upkeep or preservation of equipment at the Hammond Quarry. A fuel delivery truck driver who delivers fuel and fuels equipment is not a "maintenance or service worker" under the plain meaning of Section 46.2(g)(2)¹¹ and is not a "miner" under Section 46.2.

⁹ In September 2012, Hardin was the safety director for Mathy. (Tr. 152:2-11) At the time of the hearing Hardin was semi-retired. (Tr. 152:3-5) Hardin has been Mathy's safety director for asphalt since 1987 and for aggregate since 1994 or 1995. (152:12-13) At Mathy, Hardin was in charge of over 400 mining facilities. (Tr. 152:15-25)

¹⁰ Hardin understood "service or maintenance" to mean activities that prolong and preserve the life of equipment, or the replacement or modification of equipment. (Tr. 153:24-154:4)

¹¹ Even assuming *arguendo* that Pearson was a maintenance or service worker, he still would not be covered under Section 46.2 (g)(2). The Secretary claimed that Pearson was at the mine "frequently," thus meeting the second prong of the definition. While Pearson was present at the mine approximately five days a week, each day he was only on the mine site thirty to forty-five minutes, delivering and fueling the equipment and generator. (Jt. Stip. at 11, 19) Therefore, Pearson was on the mine site for a very short period of time during each visit, and as such, does not fall under the exception to 30 C.F.R. § 46.2(g)(2).

Conclusion

Midwest Fuels was cited for allegedly violating 30 C.F.R. § 46.9(a), which requires each operator to record and certify that each *miner* has received requisite miner training. The Secretary failed to prove that Pearson, a fuel delivery truck driver, was a *miner* as defined by 30 C.F.R. § 46.2(g). Therefore, Midwest Fuels cannot be cited for a violation of 30 C.F.R. § 46.9(a).

WHEREFORE, Citation No. 8660952 and Order No. 8660955 are **VACATED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 30, 2015

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of SEAN MILLER,
Complainant.

v.

SAVAGE SERVICES CORPORATION,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-404-DM
MSHA Case No. RM-MD-14-01

Mine: Freeport-McMoRan Morenci
Mine ID: 20-00024

DECISION ON LIABILITY

Appearances: Jeannie Gorman, Esq., Department of Labor, Seattle, WA, for Complainant
Daniel Wolff, Esq., Crowell & Moring, Washington, DC, for Respondent

Before: Judge Moran

This discrimination proceeding is before the Court under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2012) (“Mine Act”). In this case, the Secretary of Labor and Sean Miller (“Complainant”), with Mr. Miller being a miner within the meaning of section 3(g) of the Mine Act, allege that Miller’s employer, Respondent Savage Services Corporation (“Savage”), an operator as defined in section 3(d) of the Mine Act, terminated him in response to his protected activities as a miner. For the reasons that follow, the Court finds that Miller engaged in protected activity and that Savage terminated him because of such activity. The Court also finds that Savage did not establish a credible affirmative defense that it would have taken the adverse action for unprotected activity alone.

I. INTRODUCTION

This action began on October 21, 2013, when Miller filed a discrimination complaint with MSHA.¹ The testimony and exhibits referred to below were introduced at a hearing in Safford, Arizona, on June 10 and June 11, 2014. The Secretary contends that Miller’s employment was terminated by Savage for engaging in protected activity, which was composed of several safety complaints to the operator, a hazard complaint to MSHA, and a prior discrimination complaint to MSHA. In its defense, Savage argues that it fired Miller for violating “an express company policy as stated in the employee handbook,” Answer to Second Amended Complaint 4, namely, that he was absent in violation of the no call/no show rule contained in the Employee Handbook. *See* Ex. R-1 at 35-36.

¹ On January 21, 2014, the Secretary filed a Complaint, followed by an Amended Complaint, a Second Amended Complaint, and, finally, a Third Amended Complaint on May 21, 2014. Sec’y’s Third Am. Compl. at 2.

The Commission reviews 105(c) claims under the *Pasula-Robinette* framework. The framework requires a miner to “establish[] a prima facie case of discrimination by showing (1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action that was motivated in any part by that protected activity.” *Pendley v. FMSHRC*, 601 F.3d 416, 423 (6th Cir. 2010). The complainant bears the ultimate burden of persuasion on these issues. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980). To rebut this *prima facie* showing, the operator may show “either that no protected activity occurred or that the adverse action was in no part motivated by protected activity.” *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). If the operator cannot rebut the *prima facie* case, it may still have an affirmative defense if it can prove “that it also was motivated by the miner’s unprotected activity and would have taken the adverse action for the unprotected activity alone.” *Id.* at 329. Savage has the burden of proof on its affirmative defense, and it must prove this defense by a preponderance of the evidence. *Pasula*, 2 FMSHRC at 2799-800.

In the complaint, the Secretary identifies several instances of protected activity, which he asserts led to Miller’s termination. Savage does not dispute that Miller engaged in protected activity. Post-Hr’g Br. of Resp. Savage Servs. Corp. 18 (“Savage Brief”). Furthermore, because the adverse action in this case was termination, Savage does not dispute that an adverse action occurred. It instead argues that the Secretary failed to prove that Miller was terminated *because of* his protected activities.

At the hearing, four individuals testified for the Complainant: Sean Miller, the Complainant; David Funkhouser, an MSHA Investigator; Brian Hancock, a mechanic employed contemporaneously with Miller at Savage; and Kenneth Valentine, an MSHA Special Investigations Manager. Three individuals testified for the Respondent: Matthew Wheeler, a Savage Supervisor; Chris Thomas, a Savage Human Resources representative; and Richard Bjerke, another Savage Supervisor. In discussing the testimony and evidence from the hearing, the Court made determinations of credibility and relevance. This decision is also made from full consideration of all contentions made by the parties in their post-hearing briefs. Any omission of discussion of particular testimony or evidence should not be interpreted by the parties as a failure to consider the entire record.

II. FINDINGS OF FACT

Savage Services is a supply chain organization of roughly 3100 employees with operations in the United States, Canada, and Saudi Arabia. Tr. 583. It has four business groups: rail industrial chemical logistics; oil and gas midstream; energy and oil field services; and energy and power plant. Tr. 584. Savage’s operation at the Morenci mine in Morenci, Arizona, is part of the energy and power plant business unit. *Id.* Among Savage’s roughly 2900 employees in the United States, approximately 800 to 900 are truck drivers. Tr. 585.

Sean Miller was employed by Savage Services as a truck driver from November 2012 until September 3, 2013, the date he was terminated. Tr. 18; Tr. 515. Miller received his Commercial Driver’s License in 2005, and, prior to his time with Savage, had driven for several companies. Tr. 60-61. For Savage, Miller would transport molten sulfur from Safford, Arizona,

to the Morenci mine, a distance of approximately 57 miles each way, up to three times per day. Tr. 20. Miller was also required to perform twice-daily safety inspections of his truck, one at the beginning of his day (“pre-trip inspection”), and one at the end of his day (“post-trip inspection”). Tr. 19. The Secretary and Miller identified six safety complaints that he made in the months prior to his termination. Tr. 21.

A. The Safety Complaints

Miller’s first complaint was made on January 30, 2013, when he discovered, during his pre-trip inspection of a trailer which had been newly assigned to him, that “the brakes were completely . . . gone, well beyond repair.” Tr. 29. Miller had used that trailer previously and, according to the mechanic, Brian Hancock,² had talked to his first-line supervisor, Isaiah Krass, several times about the brakes on that trailer. Tr. 355.

In making his safety complaint about the brakes, Miller also texted a picture of the condition to Brian Cotton, the General Manager and VP of the sulfur transportation unit.³ Tr. 30, 461-62. Although brake wear is an ordinary occurrence for Savage because their trucks run 24/7, Tr. 611, the brake pad from this truck was worn to such an extent that the rivets that hold the pad onto the plate were protruding past the pad itself. Tr. 30-31, 355; *see also* Ex. C-9 at 17. In fact, the pads were so far gone that the metal-to-metal contact ruined the brake drums, which had to be replaced. Tr. 32; *see also* Ex. C-9 at 14.

Typically, if a driver has a problem with brake pads, he would take the truck out of service by simply notifying the mechanic about the problem, Tr. 485, but, in addition to texting Mr. Cotton, Miller took one of the pads to his immediate supervisor, Isaiah Krass,⁴ who said that

² Mechanic Hancock worked for Savage from August 2012 to August 2013. Tr. 349. He was initially hired as a truck driver, but almost immediately was reassigned as a mechanic. *Id.* A month into his job, he was a “supervisory truck foreman [/] mechanic.” *Id.* At various times, for short periods, Hancock filled in as a supervisory foreman. Tr. 351.

³ Throughout Miller’s time with Savage, Cotton was located in Houston, Texas, and was Miller’s third-line supervisor. *See* Tr. 462. He was present at the hearing but did not testify.

⁴ Isaiah Krass was listed as one of Savage’s witnesses, but did not testify. The Secretary would have the Court draw an adverse inference that the testimony of Krass and Cotton would have been detrimental to Savage’s defense due to Krass’s inclusion as a witness and Cotton’s presence in the courtroom. Sec’y Br. 26. Savage candidly responds that it had “no obligation . . . to call a single witness,” but that “both Cotton and Krass would have had nothing to add, and calling them would have unnecessarily prolonged the hearing.” Resp. Br. of Resp’t Savage Servs. Corp. 4-5 (“Savage Response”). The Court agrees that Savage had no obligation to call any witnesses, much less any particular individual. That said, it is noted that Miller made several safety complaints to Cotton, and that Krass, as Miller’s first-line supervisor, potentially could have provided enlightening testimony, especially regarding the five (out of six) safety complaints that occurred prior to Wheeler’s installment at the Morenci Mine. Those observations aside, the
(continued...)

“[t]hey needed the truck,” which Miller took to mean that he was to continue driving the vehicle without getting the brakes repaired. Tr. 33, 39, 356.

Miller made his second complaint, regarding an air leak in his brakes, on March 1, 2013. Tr. 251. During pre-trip and post-trip inspections, drivers are required to perform a seven-step air test in which the driver turns the engine on, builds pressure in the brakes, turns the engine off, and holds the brakes. Tr. 42. If the brakes lose too much air, the truck may lose pressure while driving and the brakes will fail. Tr. 42. In this instance, the tractor had severe air leaks and was losing air even when Miller was not applying pressure. Tr. 42-43. Upon finding the safety issue, Miller contacted Krass and Hancock, and refused to drive the truck. Tr. 43-44. Hancock “tagged out”⁵ the truck, and Miller drove another truck that shift. Tr. 45. The defects on the truck were such that they had probably existed for a longer period of time. Tr. 252.

Miller’s third complaint, which occurred on March 19, 2013, concerned bald trailer tires. Tr. 34. All eight tires were spent, and some were showing the metal radial cords normally covered by the rubber of the tire. *Id.* Upon discovering the condition, Miller told mine management⁶ about the problem, even though he could have just taken the truck out of service with the mechanic. Tr. 38, 485. Miller refused to drive the vehicle. Tr. 40.

The fourth, and most contentious, safety complaint occurred on April 28, 2013. Tr. 252. On that day, Miller was making a run and, after loading his truck and getting weighed at the weigh-out gate, he learned that his truck was overweight. Tr. 47-48. The truck that he was driving was a rental, and the tractor was heavier than those normally used by Savage. Tr. 155. Because he was overweight, he was not allowed to leave the mine. Tr. 154. So, he returned to the nearby Savage Yard and called his supervisor, Richard Bjerke. Tr. 157.

Bjerke gave Miller two options: either wait for Krass to offload some of the material from his trailer, or disconnect from the trailer and use one of the other Savage trucks. Tr. 158. It would take Krass an hour and a half to get to Miller and offload the material. Tr. 624. Miller originally chose to have Krass offload the material, out of fear that the trailer, once disconnected from the tractor, would sink into the ground, but, after talking with another driver, he changed his mind and chose to use a new tractor rather than offload the material. *Id.* Bjerke, in response, started up the replacement truck while Miller unhooked the rental truck to hook up the trailer to the new truck. Tr. 626. Miller did not do a pre-trip inspection before driving the truck, but he said that he could not do a full pre-trip because there are parts of it that must be done before starting the truck. Tr. 172.

⁴ (...continued)

Court will not speculate as to why these sources of possible information did not testify, and will not draw the adverse inference requested by the Secretary. This decision is based solely on the evidence of record and the Court’s conclusions therefrom.

⁵ “Tagging out” is a term describing when an employee literally puts a tag on the steering wheel of the truck and takes the truck out of service. Tr. 44.

⁶ The record does not disclose which management individuals were informed.

Miller drove the truck to the scales⁷ to weigh-out, but had issues on the way and called Hancock, the mechanic, to ask what was wrong with the truck. Tr. 55. The replacement truck had three bad tires and no highway horn, according to Miller. Tr. 174-75. Hancock, however, said that the truck was DOT legal, even though there was a smooth spot on a tire and the air horn did not work. Tr. 334. He did not tag out the truck before he left the Savage Yard earlier that night, but thought that someone would have called him before taking the truck out of the garage. Tr. 335. The operating procedure for taking trucks from the shop changed often, but while Hancock was at Savage, if a truck was in the shop, nobody would touch it except for Hancock. Tr. 358-59. Miller and Hancock disagreed about whether Hancock told Miller to do a pre-trip. *See* Tr. 176, 428. Miller told Hancock that the truck was BO,⁸ and that he was “sick of Savage’s bullshit.” Tr. 375.

After talking with Hancock, Miller called Bjerke and asked him why he had dispatched a BO truck. Tr. 631. Bjerke told Miller that the truck was not BO’d at the time, and that’s why drivers do pre-trips — to check for the types of problems that Miller found. *Id.* He then told Miller to wait for Krass, who would help get him moving. *Id.* Miller then called back and screamed at Bjerke, calling him and the company incompetent. *Id.*

Bjerke called Cotton to discuss the call, and Cotton and Bjerke decided to put Miller on a last chance agreement for being disrespectful. Tr. 632. However, after talking to Miller, they agreed to set the agreement aside. *Id.* After the April 28th incident, Bjerke testified that he and Miller got along fine.⁹ Tr. 643. Accordingly, for the purposes of this decision, the last chance agreement became a non-issue.

Miller made another safety complaint on June 21, 2013. Tr. 178. He was driving on his route, and had to take a detour which involved a sharp turn that required him to drive on the berm. Tr. 60. There were flaggers, but he was three to four feet up the berm. *Id.* Miller called Cotton and reported the issue of the excessively sharp turn. Tr. 62. Bjerke called Miller back and left a voicemail telling Miller to park the truck if he felt unsafe. Tr. 182. Miller parked the truck, but the three other trucks made the turn and continued along the route. Tr. 62. This condition was on Freeport McMoRan property, not Savage property. Tr. 178.

⁷ The weigh-out scales are located approximately half a mile from the Savage Yard. Tr. 487.

⁸ “BO” stands for “bad order,” which means that the truck either was taken out of service or should be taken out of service. Tr. 631.

⁹ Miller also made a hazard complaint to MSHA regarding this incident, but MSHA made no findings. Tr. 636. During the testimony about this instance of protected activity, the parties argued at length about whether Savage orchestrated Hancock’s absence during the hazard inspection by sending him to safety training in Salt Lake City and whether Savage forged an email from Hancock. The Court was not convinced by the Secretary’s arguments, but the Court finds that the conflicting versions of this side issue are not critical to the core determinations in this case. Consequently, as discussed more fully, *infra*, even if the Court were to find that Hancock’s recollection on this was faulty, his overall credibility was intact.

Miller made his final complaint, this time concerning a leaky hose, on July 24, 2013. Tr. 184. When his truck was being loaded for the first load of that night, Miller noticed that molten sulfur was leaking onto his truck and pooling on the ground. Tr. 66. Miller asked the lead operator,¹⁰ Javier Lopez, to stop loading the truck, but he would not. Tr. 68. Lopez was the crew leader and lead safety specialist on the shift. Tr. 490. When Miller called his supervisor, Matt Wheeler,¹¹ to make the complaint, he said that they were to continue loading the vehicle. Tr. 68. Wheeler called Lopez following his conversation with Miller. Lopez told Wheeler that he had wrapped the hose and put a “containment bin” under the leaking hose and felt it was safe. Tr. 490. Wheeler called Miller back and said that they would not be stopping production. Tr. 68. After the truck was loaded, Miller and others cleaned off the truck, and he continued on his route. *Id.*

Molten sulfur can be dangerous, especially when the sulfur is pressurized, as it is in the hoses used to load Savage’s trucks. Tr. 70-71. Under pressure, the lead operator can get splashed.¹² Tr. 71. Pinhole leaks in the hose can develop near the end of a hose’s three-to-four-month lifespan, and Savage replaced this hose the following morning. Tr. 498.

Miller made safety complaints in a different manner than other drivers. As Savage mechanic Brian Hancock testified, “[h]is safety complaints were above and beyond other safety complaints. Most drivers would complain. . . . But Mr. Miller was adamant to make sure that his safety issues were recognized by me and that they would be fixed.” Tr. 353. Miller also took

¹⁰ The lead operator is the person who loads the trucks with molten sulfur. Tr. 66.

¹¹ Matt Wheeler became the operations manager for Savage Services at the Morenci Mine in July 2013. Tr. 459. He has a Commercial Driver’s License, which he obtained in 1990. Tr. 460. He was hired by Savage Services as a truck driver in March 2005, then, in June 2009, he was transferred to the mountain business unit in Price, Utah, to work as a hire and training manager. Tr. 461. After Price, he was transferred to an Elko, Nevada, startup operation, in which he had his first title of operations manager. Tr. 461. He was there until his current job at the Morenci mine.

¹² Wheeler testified that upon escaping the hose, molten sulfur is no longer dangerous as it solidifies and cools upon hitting the air. Tr. 496. Sulfur, however, has a melting point of 119.6 °C or approximately 247 °F, *Periodic Table of Elements: LANL*, Los Alamos National Laboratory, <http://periodic.lanl.gov/16.shtml>, and Miller stated in his interview that molten sulfur is kept at 380 °F. Ex. C-1 at 10. The Court does not know if Miller is accurate, but in order to remain “molten,” the sulfur must be kept above its melting point. Consequently, at some point before reaching ambient temperature, this sulfur, due to its scalding temperature, could cause injury. More importantly, safety complaints need only be based on a “good faith, reasonable belief that a hazard exists”; they need not be scientifically accurate. *McClanahan v. Wellmore Coal Inc.*, 17 FMSHRC 1773, 1785 (Oct. 1995) (ALJ) (citing *Robinette*, 3 FMSHRC at 810-12).

trucks out of service three times as often as other drivers.¹³ Tr. 354. Whereas Miller “wanted to make sure that the truck he was driving . . . was safe[, o]ther drivers would just ask to get it fixed. If it didn’t get fixed, they didn’t really care.” *Id.*

B. Other Protected Activity

The Secretary identified two other instances of protected activity: a hazard complaint and a prior discrimination complaint, both of which were made to MSHA. The hazard complaint made by Miller arose out of the April 28th “replacement truck” incident. Tr. 178. MSHA Inspector Larry Lunsford conducted the hazard investigation, and found that there was no violation because “the vehicle in question never left the mine site on the date of the complaint.” Ex. R-6.

The prior discrimination complaint was filed by Miller in May 2013. Special Investigator (“SI”) David Funkhouser, who investigated the current complaint and testified in this discrimination case, also investigated the prior complaint, which was designated by MSHA as Investigation Case No. 13-08. Tr. 241. Although SI Funkhouser believed that the prior complaint was meritorious, on August 22, 2013, MSHA declined to pursue that first complaint.¹⁴ Tr. 246; Ex. C-6.

¹³ This is an appropriate point for the Court to note that it found Brian Hancock to be a credible witness for the Secretary and Miller. Hancock’s testimony was instructive in several aspects. It demonstrated that Miller’s safety complaints were genuine and, while not essential to support the good faith belief aspect of safety complaints, Miller’s complaints were also founded in fact. Further, Hancock’s testimony established that Miller’s complaints were of a different order than the routine safety issues raised by other drivers for Savage. In all these regards, the Court, upon a close evaluation of Hancock during his testimony, concluded that he was an extremely credible witness. In tacit recognition of the adverse impact Hancock’s testimony had on Savage’s case, attempts were made by it to challenge his credibility. Those efforts began during the hearing and escalated with Savage’s post-hearing motion to supplement the record. One of these avenues involved Mr. Hancock’s denial that he sent an email that attached the last two documents of Exhibit C-4, and Mr. Bjerke’s testimony that Hancock did send those directly to him. As the Court stated during a conference call post-hearing on this issue, that matter is collateral. Consequently, Respondent had to take Hancock’s denial, with the subject of whether the issue impacted his credibility left up to the Court. Other attempts to challenge Hancock’s credibility were of the same ilk. As such, they were not effective in supporting Savage’s goal of undermining the Court’s determination of that witness’s credibility. For example, Savage argues that Hancock claimed to have had *one* phone conversation with Miller on the evening of April 28, 2013, but maintains that there actually were *two* conversations. Savage believes that Hancock’s claim that there was but one call, not two, should impact the Court’s credibility assessment of him. The Court does not agree.

¹⁴ Miller has filed a separate complaint appealing MSHA’s determination, which is before this Court under Docket No. WEST 2014-7-D.

C. Miller's Termination

In August of 2013, Miller asked Wheeler if he could have a few days off at the end of the month. Tr. 76-80. Wheeler told Miller to fill out a leave-request form, on which Miller requested three days off, indicating "Doctors" as the reason. Tr. 77; Ex. C-5 at 4. A doctor's appointment was a valid reason for requesting leave, as indicated on the "Time Off Request" form. *See* Ex. C-5 at 4 (providing "[p]lease use the following space to provide necessary information for requested days off, such as a critical appointment you cannot miss or reschedule (court, doctor, etc.)"). Miller's request for leave was approved by Krass. Tr. 505. Wheeler did not review or approve it. Tr. 505-07. Miller took his approved leave August 26th through 28th, 2013. Tr. 87.

The afternoon of August 28th, Miller called Wheeler, telling him that he would not be returning to work on August 29th because his doctor had changed his medication and he needed time to adjust to it. Tr. 81-83. During this phone call, Miller did not tell Wheeler when he would be back at work or how much time he thought he might need. Tr. 83. On the call, Wheeler requested a doctor's note from Miller. Ex. C-1 at 7. Miller stated that Wheeler said he needed the medical release as soon as possible, and Miller did not see the doctor again until September 2nd, at which time he got the medical release. *Id.* Miller maintains that he interpreted this request as requiring a doctor's note upon his return to work, noting that other miners had been allowed to extend their leave with a phone call in similar situations. *Id.*; Tr. 231-32. This expectation would have been consistent with the experiences of other miners interviewed during the investigation, who, according to Special Investigator David Funkhouser, were allowed to extend their leave with a telephone call to their supervisor and provide a doctor's note upon their return to work. Tr. 277. On the other hand, Wheeler testified that he asked Miller to provide a doctor's note by 4 p.m. on August 29th and he maintained that Miller agreed to do so. Tr. 504; Savage Br. 8. Miller did not bring a doctor's note on August 29th, nor did he show up for his shifts on August 29th, 30th, and 31st. Tr. 218-19, 509-10.

During this time, Wheeler stated that he called Miller once on Friday, August 30th, the day before the Labor Day weekend. Tr. 509. He asserted that he did not leave a message; instead, he let the phone ring three times and hung up.¹⁵ Tr. 510. Wheeler stated that this was his usual practice, and that as a rule he never left messages, as, in his view, they are a waste of time. Tr. 510.

Savage's internal business records state otherwise, contradicting Wheeler. Specifically, they state, "9/3 - supv & manager left messages scheduled to work, no medical note received[.] [C]alled at start time, not coming in." Ex. C-5 at 3. No Savage witness testified that messages were ever left, or that two people made calls. Furthermore, Miller asserted that he did not miss a call nor did he receive a message from Wheeler. *See* Tr. 273. Given the discrepancy between Wheeler's account, in which he asserts that he called Miller on August 30th but did not leave a voicemail, and Savage's business records, which state that Wheeler and another person left

¹⁵ During the hearing, the Secretary produced Miller's phone records, which did not show a phone call from Wheeler on August 30th. Savage argued that phone calls where no message is left and that are not picked up may not show up on the telephone bill. This disagreement is not important.

messages on *September 3rd*, the Court credits Miller's testimony and finds that Wheeler did not in fact call Miller.

Wheeler stated at the hearing that he made the decision to terminate Miller on the morning of September 3, 2013. Tr. 550. He spoke with Brian Cotton and Chris Thomas¹⁶ about his decision because he wanted to be certain that his decision was consistent with Savage policy. Tr. 512. Thomas testified that Wheeler's determination was consistent with company policy. Tr. 591. He also stated that the discussion was "*solely around him not showing up to work.*" Tr. 592 (emphasis added). Savage's position is that Miller had unexcused absences for the previous three days he had been scheduled to work, in violation of Savage's no call/no show policy, which states:

If you are absent two consecutive shifts *without calling to report your absence directly to your supervisor*, we will assume you have abandoned your job. If you are having trouble seeing the importance of being to work regularly and on time, we ask you to consider your situation very carefully and to make a commitment to meet future work schedules as a condition of continuing to be a part of the Savage work team.

Ex. R-1 at 36 (emphasis added). Thomas admitted at the hearing that no provision in Savage's employee handbook requires an employee to submit paper documentation for an absence. Tr. 594. Under Savage's "coaching" model of discipline, as opposed to a "progressive discipline" model, "depending on the circumstances, an infraction might result in anything from mild counseling to termination under a one-strike-you're-out philosophy." Savage Br. 10.

When Miller called on the afternoon of September 3rd to tell Wheeler that he would be returning the work the following evening, Wheeler informed him that he was terminated because he was not a "good fit" with Savage's culture. Tr. 515. An internal Savage document states that Miller was terminated due to "cultural fit," *see* Ex. C-5 at 1, and Wheeler told MSHA that what he meant was that "our policy is that an absentee without a call-in, a no-call, no-show after three days is considered a quit." Ex. C-2 at 7. Wheeler stated that Miller's August 28th call did not meet the definition of "call" for the no call/no show policy:

[H]e just said he wasn't coming in and he had been taken out of work by a doctor. And then I said I need the note. And until I had that note, it's just a call saying, he's not going [to] be there, with no end date, with no details.

It doesn't give me anything to use when I'm discussing the [molten sulfur] levels with the customer. It's part of the policy. I have to — everybody's under this policy. If I let him just go absent without calling or showing up or communicating why he's gone, then that affects everybody.

Tr. 518. According to Wheeler, Miller insisted on the September 3rd call that Wheeler tell him why he was being fired. Ex. C-2 at 8. Wheeler stated that "at that point [Miller] was pretty irate

¹⁶ Chris Thomas, at the time of the hearing, was a "VP of People Services" for Savage, which is equivalent to a human resources department. Tr. 580. He worked out of Savage's Salt Lake City headquarters and had held his title for over two and a half years. *Id.*

and [Wheeler] didn't want to get into a yelling match with him on the phone," so he did not give any more specific explanation than that Miller "[didn't] seem to be a good fit with the Savage culture." *Id.* He never told Miller that the basis for his termination was the no call/no show rule.

D. The MSHA Investigation

David Funkhouser was the MSHA investigator for Miller's complaint. He has been with MSHA since 1997, when he joined as a mine inspector. Tr. 236. From 2000 to 2007 he did special investigations in addition to his normal duties, and in 2007 he began doing special investigations full time. *Id.* He reports to Ken Valentine and is headquartered in the Salt Lake City field office for metal/nonmetal mines. *Id.* As a special investigator, he conducts Section 105 and Section 110 investigations. *Id.* In total, Funkhouser has done 70-75 investigations for discrimination complaints. Tr. 238. He made a recommendation of discrimination in this case. *Id.*

Funkhouser also investigated the previous discrimination complaint by Miller, 13-08, in which he interviewed Richard Bjerke and Isaiah Krass. Tr. 241. For the prior complaint, Funkhouser's investigation identified four protected activities by Miller, each present in this case: the January 30th incident, the March 1st incident, the March 19th incident, and the April 28th incident. Tr. 242-45. Funkhouser had recommended that the previous case go forward, but someone above him turned the case down. Tr. 246. The adverse action in the earlier complaint was harassment, not termination. Tr. 247.

The four 13-08 incidents dealt with taking a truck out of service. Tr. 248. Funkhouser found that Miller went beyond the pre-op requirements in those incidents, including during the January 30th brake shoe incident in which Miller took it off, showed it to Bjerke and Krass, and sent a photo of it to Cotton. Tr. 249. Funkhouser said that it is uncommon for a driver to go beyond pre-op and post-op requirements, Tr. 253, yet Miller did that in several instances.

Regarding Savage's reason for firing Miller, Funkhouser concluded that Respondent gave conflicting reasoning. First, the termination form stated that the reason for his termination was for "cultural fit." Tr. 263; Ex. C-5 at 1. However, Wheeler, in his interview, told Funkhouser that Miller was fired for being a no call/no show for three days. Tr. 264. In the face of that claim, Funkhouser saw that on the absentee calendar and related comments, Ex. C-5 at 2-3, Miller had approved time off at the beginning, then, as he should have done, Miller called to say that he would not be in on the 29th and subsequent days. Tr. 266. Yet, both the 29th and 30th were marked "no call, no show" on the comments page of Miller's absentee calendar. *Id.*; see Ex. C-5 at 3. Wheeler said that he had not seen Miller's time off for the doctor, so from his perspective, Miller's request was a last minute request over the phone. Tr. 269.

Funkhouser was also interested in the connection between the Secretary's notification in the 13-08 matter that he would not be bringing charges and the timing of Miller's termination. The letter declining to proceed on Miller's first complaint was dated August 22, 2013. Tr. 274; Ex. C-6 at 1. MSHA's district office, located in Salt Lake City, received a copy on August 27, 2013. Tr. 275. Funkhouser stated that "we [MSHA] always have a concern that once an operator[] [is] notified of a negative finding[], that . . . they don't perceive it as justification to get rid of somebody." Tr. 276. During Wheeler's interview in October, there was an indication

that Savage had received MSHA's August 22nd letter, but Funkhouser was unable to determine exactly when it was received. Tr. 275. Funkhouser assumed that Savage, headquartered in Salt Lake City like MSHA's district office, received the letter on the 27th. *Id.* Funkhouser considered Miller's original complaint to be protected activity, and he did not want the company to view the negative determination as reason to discharge Miller. Tr. 276.

Funkhouser also interviewed other drivers to see how they were treated with respect to medical leave. They informed him that if they needed more time off than the initial request, they were asked to provide a doctor's note *once* they returned to work. Tr. 277.

Funkhouser thought that Miller had met the policy in the employee handbook, and that, in addition to the medical leave request, he had been treated differently than other employees prior to that. Tr. 279. In a prior incident, Miller ran into a fuel island, denting a rim on his truck and for that he was issued a counseling statement. Tr. 281. In contrast, others involved in a spillage incident on a highway received a safety performance interview. *Id.* Miller's counseling statement also said that the matter would be reviewed at a later date; no other piece of discipline reviewed by Funkhouser had that "subsequent review" requirement. Tr. 289.

On cross-examination, Funkhouser stated that he believed Wheeler was influenced by others when he made the decision. Tr. 307. Funkhouser also interviewed two other miners. He did not ask for records or documentation because then those interviews would not be confidential. Tr. 318. Even without their statements, Funkhouser would have submitted the case as discriminatory, albeit slightly less enthusiastically.¹⁷ Tr. 321.

III. DISCUSSION

A. The Secretary's *Prima Facie* Case and Savage's Rebuttal

The Secretary clearly met his burden of establishing a *prima facie* case of discrimination. He contends that Miller was targeted not simply for engaging in protected activity, but also for the manner in which and frequency with which he did so. Noting that Miller engaged in several instances of alleged protected activity, the Secretary identified six safety complaints, in addition to the hazard complaint and an earlier complaint of discrimination made by Miller. Sec'y of Labor's Closing Br. 16 ("Secretary Brief"). The Court finds that each of Miller's six safety complaints constituted protected activity because they were based on Miller's "good faith, reasonable belief in a hazardous condition." *Robinette*, 3 FMSHRC at 812. The only instance in

¹⁷ During cross-examination Funkhouser seemed to agree that Savage's application of its no call/no show policy was not unreasonable, "*to a guy who's missed three days in a row.*" Tr. 324 (emphasis added). Savage's counsel, however, then tried to move the question from the abstract to the concrete, by tying Miller's missing three days in a row as an example of such a "not unreasonable" application. Thus the testimony was unclear if Funkhouser was referring to the specific circumstances of this case, or to a situation in which Miller or another employee was absent for three days in a row without calling in to report their absence. The Court would add that, apart from the impossibility of interpreting Funkhouser's response to the vague question, the "not unreasonable" application was not within the four corners of the policy and, in any event, Miller's action cannot be categorized as a "no call."

which Savage disagreed with Miller's opinion of a safety hazard was the July 24th incident involving a hose leaking molten sulfur, but the Court finds that Miller reasonably believed that leaking molten sulfur was hazardous. Miller's hazard complaint arising out of the April 28th replacement truck incident and his prior discrimination complaint, both of which were made to MSHA, were also protected activity. That Miller suffered an adverse employment action, termination, is not disputed by Savage.

The Commission has stated that "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Where direct evidence of motivation is unavailable, the Commission has identified several indicia of discriminatory intent, including, but not limited to: "(1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Chacon*, 3 FMSHRC at 2510). When considering indirect evidence, the Court may draw reasonable inferences from the facts. *Id.* Regarding the analysis of Savage's motivation for terminating Miller, the Court will analyze each of the *Chacon* factors and Savage's rebuttal testimony and evidence.

1. Knowledge of Protected Activity

Miller made six safety complaints directly to Savage management. Savage knew that Miller filed the hazard complaint with MSHA following the replacement truck incident. *See* Tr. 664-65, 668-69. Regarding MSHA's declination of Miller's previous discrimination action, 13-08, a reasonable inference can be drawn that Savage knew of it prior to firing Miller since the determination letter was sent 12 days before the termination, and MSHA's office in Salt Lake City, the same city where Savage's headquarters is located, received the letter on Tuesday, August 27th, a week before Miller was fired. However, this decision does not depend upon this inference to reach the conclusion that Savage had knowledge of the six safety complaints. Rather, the inference merely adds to that conclusion.

Savage failed to rebut the Secretary's knowledge showing. First, Wheeler admitted knowledge of both Miller's hazard complaint to MSHA arising out of the April 28th replacement truck incident and Miller's prior discrimination complaint to MSHA. Tr. 480. He also admitted that he knew, generally, about prior safety complaints. Tr. 483. Savage's argument that Wheeler did not know of some of Miller's protected activity because he was not working for Savage at the time is unpersuasive. The Commission has long held that "[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions." *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984); *see also Wiggins v. Eastern Associated Coal Corp.*, 7 FMSHRC 1766, 1771 (Nov. 1985); *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 301 (Mar. 2000) (quoting *Metric* for the same proposition).

Significantly, Miller made his complaints to several people, all of whom were still employed at Savage when Miller was fired. During the January 30, 2013, safety complaint,

Miller spoke with Isaiah Krass in person about the issue and texted Brian Cotton a picture of the condition. Tr. 30, 33. On March 1, 2013, Miller told Krass that his tractor had severe air leaks. Tr. 43. Miller made his March 19, 2013, complaint to mine management “[b]y phone and face-to-face.” Tr. 38. Although it is unclear from the testimony whom Miller made this complaint to, mine management at that time consisted of Krass, Bjerke, and Cotton. Miller made his fourth complaint, occurring on April 28, 2013, to Richard Bjerke, Tr. 631, and he made his fifth complaint on June 21, 2013, to Cotton, although Bjerke called Miller back about the incident. Tr. 62, 182. Miller’s sixth and final safety complaint was made on July 24, 2013, directly to Wheeler. Tr. 68. Bjerke stated at the hearing that he knew, at the time of the hazard inspection following the April 28th incident that Miller was the one who made the complaint. Tr. 668-69. Finally, Bjerke and Krass were both aware that Miller had made his prior discrimination complaint.

In sum, Miller made his safety complaints to Bjerke, Krass, and Cotton over the course of his time at Savage, and each of those three people was still employed by Savage when Miller was fired. Wheeler interacted extensively with all three of these management personnel in the course of his employment with Savage. As the Secretary aptly characterized the subject, citing Wheeler’s testimony extensively,

[i]nformation flowed freely between the managers. Tr. at pp.: 462: 4-9 (Mr. Wheeler spoke to Mr. Cotton daily initially, down now to every other day); 479: 18-24 (Mr. Wheeler spoke to Mr. Bjerke upon his arrival at Morenci); 480: 5-17 (Mr. Bjerke informed Mr. Wheeler of Mr. Miller's [prior] discrimination complaint, EEOC complaint and investigation); 482: 16-23 (Mr. Wheeler spoke with Messrs. Cotton and Thomas before terminating Mr. Miller); 501 (Mr. Bjerke told Mr. Wheeler about Mr. Miller's complaint; Mr. Thomas told Mr. Wheeler about MSHA' s findings regarding Mr. Miller's complaint); 512: 11-16 (Mr. Wheeler spoke to Messrs. Cotton and Thomas before terminating Mr. Miller); 516: 15-16 (Mr. Krass told Mr. Wheeler about Mr. Miller's leave status); 518: 25 to 519: 4 (Mr. Wheeler confirms he spoke with Messrs. Cotton and Thomas before terminating Mr. Miller); 548: 22 to 549: 6 (Mr. Bjerke told Mr. Wheeler who made the MSHA complaint).

Sec’y of Labor’s Reply to Resp’t’s Post-Trial Br. 8-9 (“Secretary Reply”). Accordingly, the Court rejects the claim that Savage and Wheeler did not have knowledge of Miller’s protected activity that occurred prior to Wheeler’s installment as a Savage manager.

Regarding MSHA’s decision not to pursue Miller’s prior discrimination claim, 13-08, the Court finds that the letter reflecting that decision was received by Savage prior to Miller’s firing. Moreover, since Wheeler spoke with Chris Thomas, the vice president of people services (Savage’s human resources department), the Court infers that Wheeler specifically knew that Miller’s previous discrimination claim had been dismissed and that this was one of several reasons that Miller was fired.

It is noted that Savage argues that the Secretary has not produced sufficient evidence from which the Court can infer that it received MSHA’s letter denying Miller’s prior

discrimination claim. It argues that as it was sent by regular mail, there was no tracking, and that it was sent to Savage headquarters, which was in Salt Lake City, far from the Savage Yard in Safford.¹⁸ Savage Br. 24.

This assertion, however, fails to account for the presumption of receipt afforded to the Secretary via the common law “mailbox rule,” which presumes that a letter, properly mailed, “reached its destination at the regular time, and was received by the person to whom it was addressed.” *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884). Courts in various jurisdictions have continually recognized that “[u]nder the common law Mailbox Rule, proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee.” *Dandino, Inc. v. U.S. Dept. of Transp.*, 729 F.3d 917, 921 (9th Cir. 2013) (quoting *Mahon v. Credit Bureau of Placer Cnty. Inc.*, 171 F.3d 1197, 1202 (9th Cir. 1999) (internal quotation marks and citations omitted)); see also *Konst v. Fla. E. Coast Ry. Co.*, 71 F.3d 850, 851 (11th Cir. 1996).¹⁹

The Commission has stated that it “presume[s] that a properly mailed letter reach[es] its destination,” and found that a “declaration by counsel . . . does not rebut the presumption.” *H&K Materials, Inc.*, 33 FMSHRC 2709, 2711 n.1 (Nov. 2011) (denying motion to reopen). Commission judges, similarly, have applied the presumption that “[w]hen mail is properly addressed and deposited in the United States mail, there is a rebuttable presumption of the fact that it was received by the addressee in the ordinary course of the mail.” *Lund v. Anamax Mining Co.*, 4 FMSHRC 249 (Feb. 1982) (ALJ); see also *Jones v. D & R Contractors*, 6 FMSHRC 1312 (May 1984) (ALJ) (assuming five days for the mailing of a letter).

¹⁸ Savage also argues, in the alternative, [that] MSHA’s denial of Miller’s claim was not protected activity, so it is therefore irrelevant. Savage Br. 24. The Court need barely address this argument, except to say that it is *entirely plausible* that an employer will refrain from terminating an employer while awaiting word of an MSHA investigation, then believe that it is “home free” when it receives a letter declining to prosecute the employer for prior discrimination. In fact, Special Investigator Funkhouser addressed this exact scenario: “[MSHA] always ha[s] a concern that once an operator’s notified of a negative finding[], that . . . they don’t perceive it as justification to get rid of somebody.” Tr. 276.

¹⁹ In *Dandino*, an action under Title VII, the court applied a three-day rebuttable presumption of receipt of a right-to-sue letter from the EEOC. 729 F.3d at 922 (citing *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 148 n.1 (1984)). Similarly, the court in *Lozano v. Ashcroft*, 258 F.3d 1160, 1165 (10th Cir. 2001), stated that “[w]hen the receipt date for an EEOC right-to-sue letter is unknown or disputed, federal courts have presumed various receipt dates ranging from three to seven days after the letter was mailed.” The court then concluded that a presumption of receipt of an EEOC decision to an *employer* is appropriate where “the actual receipt date is unknown or disputed.” *Id.* The issue before the court in *Lozano* was similar to the one at hand. The EEOC mailed a decision to the parties on September 29, 1993, and the employer had sixty days to modify or reject the EEOC’s findings. *Id.* at 1162. The employer alleged that it did not receive the EEOC decision until October 14th. *Id.* at 1163. The other party received the letter on October 5th. *Id.* The employer produced an affidavit based on hearsay and a disputed photocopy of the date-stamped copy of the EEOC decision, but the court found both insufficient under the Federal Rules of Evidence and applied a five-day presumption, finding that the employer failed to rebut it. *Id.* at 1166-67.

In the present case, Savage does not dispute receiving MSHA's denial, which proves that the letter was, in fact, mailed. Furthermore, the MSHA field office, located in the same city as Savage's headquarters, received the letter on August 27, 2013, bearing a stamp dated August 22, 2013. Ex. C-6 at 1. From these facts, the Secretary has created a presumption that Savage received the letter prior to its termination of Miller on September 3, 2013, a full 12 days following the mailing date of the letter.

The Court finds that Savage has failed to rebut this presumption and that it had adequate notice that the timing of this determination letter would be an issue at trial. *See* Third Am. Compl. 3. Savage elicited testimony from Inspector Funkhouser that he did not know when Savage received the letter or what address it was sent to, but Savage did, of course, receive the letter. Tr. 338. It is noted that Wheeler presented some rebuttal testimony, stating that he did not learn of MSHA's determination until the middle of September through a phone call with Chris Thomas (although he could not specify the date of the alleged call), and that he had not seen the actual letter until after litigation had begun. Tr. 502-03. Chris Thomas, although he testified, was not asked by either party about when the letter was received. Absent corroborating evidence, the Court cannot find that Wheeler's vague, self-serving testimony rebuts the presumption, leading to an inference that Savage's termination of Miller was motivated, at least in part, by Miller's prior discrimination complaint.

Although the Court finds that Savage knew of MSHA's negative determination, that finding is neither integral nor necessary to support a finding of discrimination in this case. Savage's knowledge of the other instances of protected activity, the manner in which Miller engaged in protected activity, and the shifting, inconsistent rationale provided by Savage for the termination also support the conclusion that Savage fired Miller for his protected activity.

2. Hostility Towards the Protected Activity

While the Secretary does not contend that Savage was ever openly hostile toward Miller, he states that two of Miller's complaints demonstrate Savage's hostility toward his protected activity. Sec'y Br. 18. The first instance was during the April 28th overweight truck incident. The Secretary argues that by choosing an unsafe, out-of-service truck, Bjerke "communicated his disinterest in Mr. Miller's safety." *Id.* Wheeler's disagreement with Miller over the spilling of molten sulfur over the side of a truck, similarly, showed an absence of support for Miller, especially considering the pictures Miller took of the incident. *Id.*

In rebuttal, Savage cited to Miller, Bjerke, and Wheeler's testimony that they got along fine with each other, and Miller even stated that he had a "fairly positive view" of Wheeler and did not feel that Wheeler was personally motivated to terminate him for his prior acts. Savage Br. 37; Tr. 478, 184, 208, 608. Savage also argued that on July 24th, when Miller called Wheeler about the leaky molten sulfur hose, he was not there. Consequently, Wheeler had two accounts to rely on in evaluating Miller's reasonable belief that the condition presented a hazard: that of Miller, and that of Javier Lopez, the lead operator. Those accounts conflicted, and Wheeler went with Lopez's characterization. Savage Resp. 9. The Court notes that Wheeler's decision does not undercut the reasonable belief held by Miller that the sulfur leak presented a hazard.

The Court finds that Savage, on several occasions, demonstrated a marked disregard for driver safety based on the well-established incidents that Miller complained about. In Miller's first complaint, for example, the evidence is clear that the brake pads on his trailer had deteriorated to the point that the rivets were protruding past the pad itself, ruining the brake drums. Tr. 30-32. Miller's third complaint concerned bald trailer tires, some of which were so worn that the radial cords were showing. Tr. 34. Those conditions were likewise unrefuted. Such conditions would have appeared and worsened over the course of several shifts, meaning that, until Miller forced Savage to address the situation, the dangerous condition had been allowed to remain, unabated.²⁰

3. Coincidence in Time Between the Protected Activity and the Adverse Action

The Court does agree that the Secretary's evidence of a temporal nexus, i.e., evidence of discrimination based solely on the amount of time between the protected activity and the adverse action, gives rise to an inference of discrimination. The Secretary characterizes the temporal proximity of the protected activity to the termination in the following manner:

Miller made safety complaints from January 30, 2013 to July 24, 2013. On or around August 27, 2013, Savage learned that MSHA would not be litigating 13-08 [Miller's first discrimination complaint] on Mr. Miller's behalf. *See* TE C-6, p. 1. A day after Savage's notification of the non-litigability of 13-08, Mr. Miller called his supervisor to advise that he would need an unspecified amount of more time on leave. Four workdays after that, Savage terminated Mr. Miller for failing to advise his supervisor he would not be available for work.

Sec'y Br. 19.

Savage failed to rebut this evidence. First, as stated earlier, the Court does not agree that MSHA's determination not to file an action on his behalf in connection with Miller's prior complaint is irrelevant, as Savage argues. *See* Savage Br. 24. Because Savage, upon receiving the letter, knew that MSHA did not find discrimination in the earlier case, the determination is relevant to Miller's protected activity of filing the prior discrimination complaint, especially considering the overlapping protected activity alleged in each discrimination complaint.

²⁰ While "hostility towards the protected activity" is one of the factors the Court can consider to support an inference of discrimination, *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC at 1066, the Court cannot connect Bjerke's actions on April 28th, when he chose a truck from the garage for Miller, to any of Miller's protected activity, nor can the Court infer that Bjerke would intentionally give Miller a tagged out truck. On that night, Miller had yet to make his safety complaint, and the Court sees no reason to infer Bjerke's action was in response to any of Miller's prior protected activity. Wheeler's reaction to Miller's leaky hose complaint, similarly, does not rise to the level of "hostility"; as noted, Wheeler received two different accounts of the incident and went with the more experienced view of the lead operator. The Secretary's reference to pictures taken by Miller of the scene are irrelevant — at the time of the complaint, Miller had not sent those pictures to anyone. *See* Sec'y Br. 18; Ex. C-9 at 4-8. The Court finds no evidence of *open* hostility to Miller's protected activity, but, then again, "[d]irect evidence of motivation is rarely encountered." *Chacon*, 3 FMSHRC at 2510.

The Commission has not established any rigid amount of time between protected activity and adverse action beyond which the Court may not find evidence of a discriminatory motive. *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 958 (Sept. 1999). For example, in *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361 (2000), the Commission found that a period of four months between a safety complaint and termination was sufficiently close in time. In the present case, Miller engaged in several instances of protected activity, beginning approximately eight months prior to his termination and continuing until approximately a month before he was fired. Miller's effectively continuous protected activity was close enough in time to his termination such that the Court can find discriminatory intent.

4. Disparate Treatment of the Complainant

The Secretary identifies two instances of alleged disparate treatment of Miller. The first instance was a requirement for additional follow-up in a "counseling statement" issued to Miller for hitting his tire rim on a fuel island and bending the rim.²¹ Sec'y Br. 20. During the course of Miller's employment, seven other disciplinary documents of varying seriousness were issued to others. Four employees were issued the least-severe "safety performance interview" statement: three for the employees' involvement in a molten sulfur spill, and one for an employee brushing his hand on a steam pipe. Ex. C-7 at 6-11. One employee was issued the most serious form of discipline, the "last chance agreement," for speeding. Ex. C-7 at 5. The only other employee issued a counseling statement, like Miller, was Miller's supervisor, Isaiah Krass, for "inappropriate conversations." Ex. C-7 at 3. Miller's counseling statement, however, indicated that "[t]hese matters will be reviewed on 4-19-13," a month after the date of issuance. Ex. C-7 at 13. The Secretary characterizes this as showing that Miller was disparately treated in that "he was subject to an additional obligation (future follow-up) which was not imposed on any other employee for what appear to be far more serious events." Sec'y Br. 21.

In rebuttal, Savage argues that the disciplined conduct for each employee was not sufficiently similar to be comparable, that the Secretary did not show that the safety performance interview was a less severe form of punishment than the counseling statement, and that the employees issued a safety performance interview statement also had their bonuses docked, which probably mattered more to them than what type of statement they got.²² Savage Br. 31; Savage Resp. 11.

²¹ The Secretary relegates to a footnote the argument that it was suspicious that Bjerke issued the counseling statement on April 28th, five weeks after the bent rim incident. Sec'y Br. 20. Insofar as the Secretary has not abandoned this argument, the Court does not find it persuasive. The statement was issued prior to the bad replacement truck incident on April 28th, so Bjerke could not have been issuing the statement in retaliation for that. Furthermore, Savage's explanation for the delay was persuasive. Bjerke worked days whereas Miller worked nights, and, while admitting that the delay was not normal, Bjerke was spending four-to-five days in Galveston every two weeks, and he stated that it was difficult to find a time to deliver it to Miller. Tr. 619.

²² Savage also argues that when assessing whether disparate treatment occurred, a Court should only make a "comparison between the complainant's adverse action and the treatment of
(continued...)

The Secretary's second instance of disparate treatment was that Savage did not allow Miller to call in his absence following his doctor's appointment, even though, "[d]uring MSHA's investigation of 13-08, two Savage employees told [Special Investigator] Funkhouser that they extended their leave with a phone call to their supervisor and provided a doctor's note upon their return to work." Sec'y Br. 21; *see also* Tr. 277, 290. Savage did not count Miller's call reporting his absence as satisfying the Employee Handbook's requirement that employees report their absences. *Id.* Savage also did not allow Miller to extend his medical leave over the phone, as other employees had done. *Id.* Finally, other employees were allowed to bring a doctor's note *upon their return to work* — Savage required Miller to do so while he was on leave. *Id.*

Savage argues in rebuttal that the Secretary failed to demonstrate that Wheeler's request for a doctor's note when Miller requested extended leave was inconsistent with Savage's treatment of other employees because the Secretary failed to show that any other employees were similarly situated to Miller. Savage Br. 28.

Regarding the counseling statement issued by Savage after Miller hit the fuel island, the Court does not find evidence of disparate treatment. The Commission has stated that in order to show disparate treatment, the Secretary must "introduce evidence showing that another employee guilty of the same or more serious offenses escaped the disciplinary fate suffered by the complainant." *Driessen*, 20 FMSHRC at 332 n.14. Yet, the Commission in *Pero* recognized that "in analyzing a claim of disparate treatment under traditional employment discrimination law, 'precise equivalence in culpability between employees' is not required." 22 FMSHRC at 1368 (quoting *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976)). When looking at the proffered examples of discipline, even considering the follow-up requirement, the Court cannot say that Miller bumping the tire rim on a fuel island was more or less dangerous or discipline-worthy than the spilling of sulfur on a highway, for example, or that a counseling statement is so much more serious than a safety performance interview when comparing such different infractions. Additionally, the Court notes that the counseling statement issued to Krass contained an even more severe statement than that issued to Miller: "I have advised the employee if this is to happen again that it would be grounds for termination." Ex. C-7 at 3. Thus, the Court cannot find evidence of disparate treatment arising out of the follow-up requirement contained in the counseling statement.

The Court, however, does find evidence of disparate treatment in the application of the no call/no show policy and Miller's subsequent termination. While Savage argues that there is not sufficient evidence for the Court to infer disparate treatment, the Court has credible testimonial and documentary evidence from which it finds disparate treatment. The Court has the statements of Investigator Funkhouser and Miller that two other employees were allowed to extend their leave with a doctor's note being provided upon *returning* to work, not *prior* to the return. Savage's own documentation, a 2012 absentee calendar for Larry Arrietta, corroborates

²² (...continued)

others who were similarly situated." Savage Resp. 10. Relying on this incorrect assumption, Savage reasons that because the issuance of the counseling statement following the fuel island incident is not the complained-of adverse action in this discrimination case, any evidence of disparate treatment in response to Miller hitting the fuel island is irrelevant. *Id.* The Commission, however, has never restricted the disparate treatment analysis in this way.

Funkhouser's testimony. It shows that Arrietta on September 17, 2012, was allowed to take off the rest of the week due to a problem with his foot. Ex. C-5 at 13. A week later, he was allowed to take off another week. *Id.* Then, on September 28th, he was allowed to take off a third week. *Id.* This document, Funkhouser's testimony, and Miller's testimony all support that Miller was treated differently from similarly situated employees. So, while Arrietta's medical situation was not exactly the same as Miller's, a driver being allowed to extend leave for foot problems and an employee being allowed to extend his leave *due to a doctor's orders, after a doctor's visit*, are clearly similar enough to be comparable.²³

5. Other Rebuttal Arguments by Savage

Savage offers several other rebuttal arguments, which the Court will briefly address. Savage argues that Miller could not have been terminated for his protected activities because Wheeler was not motivated to do so. As support, Savage cites Miller's testimony that "he was not alleging that Wheeler was motivated to terminate him on account of his protected activities. In fact, Miller testified that he had a 'fairly positive' opinion of Wheeler." Savage Br. 3. This assertion is slightly different than the question posed at the hearing:

Q. So you're not alleging here that Mr. Wheeler personally was motivated, by your prior acts, to terminate you on September 3, 2013, correct?

A. No.

Q. No, you're not alleging that?

A. That's correct.

Tr. 208. The Court draws a distinction between Wheeler's "personal" motivation and his business motivation as a Savage manager. Such personal motivation would likely have shown itself in Wheeler's interactions with Miller, affecting Miller's "fairly positive" opinion of Wheeler, and providing direct evidence of discriminatory intent on the part of Savage. Direct evidence is, of course, not necessary to support a finding of discrimination, and the absence of such evidence is not determinative. Wheeler may not have been personally motivated, but that does not disturb the Court's finding that *Savage, through Wheeler*, terminated Miller due to his hazard complaint to MSHA, his prior discrimination complaint to MSHA, and his numerous safety complaints that affected Savage's bottom line.

Savage also argues that Miller's protected activity, both legally and factually, comprised normal, everyday actions that all of its drivers take. Savage Br. 19. Factually, Savage points out that much of Miller's protected activity occurred during pretrip examinations, which all drivers

²³ Additionally, the Court notes that it does not agree with Wheeler's completely inapt comparison that a doctor's visit is "no different than taking a day to go fishing or shopping." Tr. 517. It does not take much to imagine other instances in which a doctor's visit gives rise to situations, like this one, requiring additional leave.

perform and which Savage and MSHA require.²⁴ Savage Br. 19. From this fact, Savage concludes that “[c]ommon sense says an operator would not be inclined to terminate an employee for doing his or her job.” Savage Br. 21. The Court, however, heard testimony that Miller took trucks out of service three times as often as other drivers, Tr. 354, and that the manner in which Miller reported these safety issues, by communications with his first, second, and third-line supervisors rather than merely taking them out of service with the mechanic, was different from the way other drivers made safety complaints.²⁵ Both of these factors set Mr. Miller apart from other drivers. When asked why it was important that Miller provide a doctor’s note by 4 p.m. the next day, Wheeler stated:

I’m responsible for keeping the [sulfur] levels at the appropriate mark with the customer. And when I don’t do that, the customer asks me why. I can’t just say, well, I have a driver that’s gone. I don’t know when he’s going to come back.

I need something to explain the reasoning why I shorted him the loads. I need to have some sort of documentation that tells me that the driver’s out on an excused absence, *the doctor’s taken him out of work*. That satisfies the customer. But just telling him, I don’t know when they’ll be back, that makes us look bad if our inventory levels drop. The customer’s not happy. That’s my whole job, to keep the customer happy and his inventory levels correct.

Tr. 511-12 (emphasis added). Wheeler’s statement is at odds with Savage’s policy and with its claimed reason for terminating Miller. Besides, Miller effectively did tell Wheeler that his “*doctor’s taken him out of work*” when he called Wheeler on August 29th. In addition, the Court can easily infer that, by tagging out trucks for safety defects at a greater rate than other drivers, thereby affecting inventory levels, and by doing so in such a vocal manner, Miller became a target for discrimination.

Savage also argues that the manner in which Miller made complaints is not protected — only the complaints themselves are. In support of this assertion, Savage declares that protecting the manner in which someone makes a complaint “is not the law.” Savage Br. 22. Savage cites no precedent, persuasive or otherwise, to support this claim. To follow Savage’s logic would be shortsighted and would greatly restrict the protections afforded miners under the Mine Act, as it would permit employers to discharge miners exercising their rights as miners, based on the manner in which they assert those rights. At least on the facts in this record, such a contention is not meritorious. Nor can it be ignored that Savage has never asserted that it fired Miller because of the manner in which he made his safety complaints.

²⁴ Savage misses the larger point — the fact that safety exams are part of every driver’s responsibility does not dilute Miller’s claim. Any driver who made a safety complaint and then suffered adverse action would be entitled to make a complaint if he believed the complaint spawned the adverse action, just as happened here.

²⁵ Savage also states that there is no reliable evidence in the record to support an inference that Miller made complaints in a different manner than other drivers. Savage Br. 23. This statement fails to take into account the testimony of David Funkhouser and Brian Hancock, which the Court credits.

The Court agrees with Judge Manning's statement in *Pollock v. Kennecott Utah Copper Corp.*, 26 FMSHRC 52, 59 (Jan. 2004), in which he stated that "[t]he Mine Act protects all miners who engage in protected activities[,] including those who do so in an aggressive manner or in a manner that mine management believes is not helpful or positive." Miller asserted his rights strongly, taking physical evidence of a defect to his supervisor, sending pictures to his third-line supervisor, and even becoming upset at what he thought was an intentional act of a supervisor to give him a tagged out truck. The Court need not decide, additionally, whether Miller's action, calling Bjerke "incompetent," was protected, because that issue is not central to the Secretary's *prima facie* case, nor is it related, in any way, to the proffered reason for firing Miller.²⁶ See generally *Sec'y of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 522 (Mar. 1984) (finding discrimination where the operator claimed the termination was for profanity during time at which protected activity occurred and not for the protected activity itself).

For the foregoing reasons, under the totality of the circumstances, the Court finds that the Secretary established a *prima facie* case of discrimination, and that Savage failed to rebut that case. Miller engaged in several instances of protected activity over the course of several months. Savage knew about each instance of protected activity. The proximity in time between Miller's numerous protected activities and his termination was sufficiently close to create a strong inference of discrimination. Cf. *Pero*, 22 FMSHRC at 1365 (finding that "uncontradicted record evidence of protected activity, employer knowledge of that activity, adverse action, and a close temporal proximity between protected activity and adverse action established a motivational nexus sufficient to make out a *prima facie* case of discrimination"). Finally, Savage's disparate treatment of Miller in connection with his termination provides further evidence of discrimination.

B. Savage's Affirmative Defense

The Secretary bears the ultimate burden of persuasion in this case, but, as noted, regarding the affirmative defense, that burden rests with Savage. In *Pasula*, the Commission stated clearly that the employer must prove its affirmative defense "by a preponderance of all the evidence . . . [and that] the employer must bear the ultimate burden of persuasion" on its affirmative defense. 2 FMSHRC at 2799-800. As the *prima facie* burden on the Secretary has been met and the Secretary's case has not been rebutted, the burden falls to the operator to prove that it would have fired Miller for his unprotected activities alone. See *id.* at 2800.

When evaluating an affirmative defense, the Court does not sit in judgment of an operator's business decisions. Instead, the Court follows the two-step analysis as outlined by the Commission in *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981). The first step of the *Chacon* analysis directs the Court to determine whether "the

²⁶ Regarding the April 28th replacement truck incident, Savage also attributed significance to the following facts: (1) Bjerke gave Miller a choice of using the truck or waiting an hour and a half until Isaiah Krass could get to the scales to offload some of the material, Tr. 624; and (2) Miller failed to perform a pre-shift examination, Tr. 172. The Court does not believe that these facts have any bearing on Miller's safety complaint that the truck he had been given the option to drive had three bad tires and no highway horn.

justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive.” 3 FMSHRC at 2516.²⁷

The Court finds that Savage’s proffered reason, Miller’s violation of the no call/no show rule, was pretextual. Miller complied with the leave policy on its face. In addition, the Secretary introduced testimony and evidence that the policy was applied differently to Miller than to at least one other employee, and Savage’s explanation for why it fired Miller shifted as time went on, each of which independently demonstrates that Savage’s claimed reason was pretextual.

Savage argues in its affirmative defense that even though Miller called to report his absences, the call on August 28th did not excuse his absences on August 29th, 30th, and 31st “because Miller had given [Wheeler] no end date . . . and Wheeler at least needed something in his file to document the reason, more than just that vague phone call.”²⁸ Savage Br. 49. Savage asserts that Wheeler required a doctor’s note prior to Miller returning to work for two reasons. First, Savage claims that he needed it to “substantiate the open-ended leave that Miller was requesting.” *Id.* at 50. Second, Wheeler claimed to need the note because he thought Miller might be on mind-altering medication that he would need to run by the company’s physician due to safety concerns. Tr. 507-09.

As noted, both at the hearing and in his interview with David Funkhouser, Wheeler stated that he fired Miller for violating the no call/no show policy. The relevant policy provides in its entirety:

Each person working for Savage and the job they perform is important. Savage makes an investment to provide you a job. Someone must be there to fill it. Everyone—customers, other employees and the Company **alike**—is hurt when our equipment sits idle, maintenance is not performed or work piles up. Everyone loses when an employee has to fill in for someone else. The absent person also loses some feeling of responsibility and possibly some pay.

²⁷ If the Court finds that the justification is *not* pretextual, that does not end the inquiry. At that point, the Court is to engage in a “*limited* examination of its substantiality.” *Chacon*, 3 FMSHRC at 2516. This involves the narrow question of “whether the reason was enough to have legitimately moved that operator to have disciplined the miner.” *Id.* at 2517. In either case, if the operator fails to prove that it would have fired Miller in the absence of his protected activity, the affirmative defense must fail.

²⁸ Page three of Exhibit C-5, according to Savage, shows Savage’s “present-sense intention on August 29 and 30 to treat Miller’s absences as no-call, no-show occurrences.” Savage Br. 26. As the Court stated earlier, it doubts the veracity of this document due to inconsistencies between it and Wheeler’s testimony regarding whether he left a voicemail or called Miller during his absence. Furthermore, Sherma Garner, the employee who kept the record, did not testify regarding the document. Consequently, the Court cannot find the record probative of showing a “present-sense intention” of Savage. More importantly, present-sense intention or not, that claim cannot rescue Savage’s core defense that Miller violated Savage’s “no call” policy, when the record is clear that Miller did call.

We ask all employees to make [a] special effort to develop good habits. You need to be at work, ready to work, on time—every time. If you have an emergency and cannot be to work on time, get in touch *directly* with your supervisor, as soon as possible. Whenever you are late or absent it is *your* responsibility to notify your supervisor in a timely manner.

If you are absent two consecutive shifts without calling to report your absence directly to your supervisor, we will assume you have abandoned your job. If you are having trouble seeing the importance of being to work regularly and on time, we ask you to consider your situation very carefully and to make a commitment to meet future work schedules as a condition of continuing to be a part of the Savage work team.

Ex. R-1 at 35-36 (last emphasis added). Examining the policy, it is clear that Miller complied with it. It is undisputed that on August 28th, Miller called Wheeler, his supervisor, to report his absences for the coming days, as required by the third paragraph of the policy above, and therefore fully meeting the requirements of the no call/no show policy. Thus, Savage's claim that "[t]he evidence . . . shows that Wheeler terminated Miller 'by the book,' literally" is clearly incorrect. Applying Savage's "by the book" theory actually works in Miller's favor. It was Miller who literally complied with the no call/no show policy, by the book. *See Savage Br. 4.*

In addition, as discussed *supra*, Miller and Funkhouser gave examples of two other employees that took time off and then asked for more time. Tr. 231-32, 277. As noted, Larry Arrietta's absentee calendar shows a period of three weeks where he was off due to a foot injury. In the calendar's comments, it merely states, "9/17 – problem with foot, off rest of week," "9/24 – off 2nd week," and "9/28 – off 3rd week." Ex. C-5 at 13. The testimony of Miller and Funkhouser corroborates that Arrietta was allowed to take off and extend his stay, providing a doctor's note only upon his return, not before the return.²⁹

The Court finds that, contrary to his claim, Wheeler did not, in fact, ask Miller to provide a doctor's note prior to returning to work. Even if Wheeler had made such a request, Miller's failure to provide a note prior to returning to work does not mean that Miller violated the no call/no show policy. The policy does not require a note, and it says nothing about the need to provide supporting documentation of the reason for requesting leave prior to returning to work. As for the rationale that Wheeler needed the doctor's note because he was concerned about Miller's statement that his medication was being adjusted and therefore needed to run those medications by Savage's own physician, in his interview with Funkhouser, Miller stated that he told Wheeler what medicine he was taking, why he was taking it, and that he already had

²⁹ Savage argues that "there is absolutely no evidence in the record that any other employee interviewed by Funkhouser was similarly situated to Miller in terms of the context of their leave." *Savage Br. 18.* As the Court previously stated, the testimony of Miller and Funkhouser, corroborated by the notes from Arrietta's absentee calendar, shows that the circumstances of Arrietta's leave were comparable to those of Miller's leave. Savage, additionally, did not bring in testimony or evidence to show that Arrietta's situation was so different that it could not be considered instructive, nor did it proffer any evidence that Savage's treatment of Miller was in line with its treatment of other employees.

disclosed the medication on his “long form,” but that he just hadn’t been taking it. Ex. C-1 at 7. While the parties did not highlight this statement at the hearing or in the briefs, Complainant’s Exhibit 1 was properly admitted, *see* Tr. 395, and is part of the record. Additionally, this putative reason for requiring the note is *completely unrelated* to Savage’s purported reason for firing Miller, and, to that extent, Wheeler’s request for the note, whenever he might have wanted it, is immaterial to the reason that Savage fired Miller.

The Court finds that Savage’s stated reason for terminating Miller was pretextual. The reason stated for firing Miller does not make sense given his actions and the policy under which he was fired. Miller was required to call Savage to report his absence — and he did so. Even Wheeler, Miller’s supervisor, acknowledged that Miller reported his absence. Tr. 562. The Court has already found that Wheeler did not ask Miller to get him a doctor’s note by 4 p.m. on August 29th, but even if the Court did make such a finding, that was not something required under the no call/no show policy, nor had it been asked of other miners in similar situations.

The Court has already stated that the Secretary has established that Savage was motivated to terminate Miller for engaging in protected activity. Savage’s claimed defenses, as discussed above, are rejected.

C. Conclusion

In its post-hearing brief, Savage concedes that the Court can rely upon circumstantial evidence as long as reasonable inferences can be made from it. Savage Br. 5.³⁰ This decision does just that — it marshals the circumstantial evidence and makes reasonable inferences from it. Accordingly, the Court finds that the Secretary has proven by a preponderance of the evidence that Savage Services discriminated against Sean Miller on the basis of his protected activity.

The Secretary identified six safety complaints, a hazard complaint to MSHA, and a discrimination complaint to MSHA, all of which were instances of protected activity. Savage had knowledge of each one at the time Miller was terminated, the activity occurred sufficiently close in time for the Court to infer discrimination, and Savage engaged in disparate treatment when it fired Miller under the no call/no show policy. The Secretary met his *prima facie* burden, showing that “by making so many safety complaints and elevating those complaints beyond his first-line supervisor and the mechanic, Mr. Miller identified himself as an individual engaging in protected activity under the Act,” and, consequently, a target of discrimination. Sec’y Br. 17. As the D.C. Circuit stated in *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772, 778 (D.C. Cir. 1974), “Safety costs money. . . . Miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine [foremen] or top management.”

³⁰ Savage’s reliance on *Mullens v. U.S. Steel Mining Co.*, 26 FMSHRC 62 (Jan. 2004) (ALJ), on page five of its post-hearing brief, is misleading. The ALJ in that case clearly relied on credibility determinations adverse to the complainant, and, in essence, found that the mine prevailed on its affirmative defense — that it did not fire the complainant for his protected activity. *Id.* at 72.

Savage's reason for firing Miller was not persuasive — it was pretextual. Savage, at first, fired him in the broadest possible terms, telling Miller that he was not a "good fit," only narrowing it to a violation of the no call/no show policy when questioned by the MSHA investigator. Yet even Wheeler, the individual who terminated Miller, admitted that Miller met the policy's requirements. Tr. 562-63. Instead, Wheeler said he fired Miller for not providing a doctor's note by 4 p.m. the day after Miller called to report his absence, a requirement not contained in the policy and one that other employees were not asked to meet. Because of this shifting explanation and the fact that Miller complied with the no call/no show policy, the Court finds that Savage's reason for firing Miller was pretextual, and Savage's affirmative defense is without merit.

At this point, the Secretary would have the Court rule on damages, Sec'y Br. 27, but damages were not discussed at the hearing. For now, pending the response to the Court's Order, that aspect must be postponed.

ORDER

Having determined that Sean Miller was discriminated against unlawfully, and unlawfully discharged, in violation of Section 105(c) of the Mine Act, it follows that he is entitled to the relief sought in his complaint. Accordingly, subject to the direction that the parties confer, as stated below, it is ORDERED that Respondent:

1. Expunge from Sean Miller's personnel file all references to Miller's unlawful termination and the circumstances involved in this matter.
2. Post this decision at all of its mining properties in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 days, with a notice stating that Savage Services will not violate section 105(c) of the Mine Act.
3. Reinstate Miller to his position as a truck driver, at the same rate of pay, along with all benefits that relate to that position, with the same shift assignment and the same or equivalent duties, and without any break in seniority, OR inform the Court within 14 days of this decision that the parties have arrived at a fixed amount of compensation, in lieu of reinstatement, and in full settlement of all claims regarding WEST 2014-404-DM that Miller has against Respondent.
4. Pay an appropriate civil penalty to MSHA for its violation of section 105(c)(1) of the Mine Act, in accordance with the provisions of section 110 of the Act.

The parties are also ORDERED to confer within 14 days of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that Respondent will undertake to carry out the remedies set out above. If an agreement is reached, it shall be submitted within 30 days of the date of this decision.

If an agreement cannot be reached, the parties are FURTHER ORDERED to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within 30 days of the date of this decision. For those areas involving monetary damages on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. If a further hearing is required on the remedial aspects of this case, the parties should so state.

This Court, or its duly appointed successor, retains jurisdiction in this matter until the specific remedies to which Mr. Miller is entitled are resolved and finalized and the civil penalty determination has been made by the Court. Accordingly, this decision will not become final until an order granting specific relief and awarding monetary damages has been entered.

SO ORDERED.

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

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 1, 2015

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

v.

POCAHONTAS COAL COMPANY, INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2014-1160
A.C. No. 46-08878-354868

Mine: Affinity Mine

**ORDER DENYING RESPONDENT'S MOTION
REQUESTING GARY CHILCOT TO TESTIFY**

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On February 27, 2015 Pocahontas filed a Motion Requesting Gary Chilcot to Testify in which it asserts that the testimony of Chilcot is relevant to the issues in this proceeding and that his testimony will aid the court. On March 18, 2015 the Secretary filed a response in opposition to Pocahontas' motion. For reasons that follow, Pocahontas' motion is **DENIED**.

On October 24, 2013, MSHA notified Pocahontas Coal Company, Inc. (hereinafter "Pocahontas") that it determined a pattern of violations existed at Pocahontas' Affinity Mine and issued Written Notice No. 7219153 (hereinafter the "notice" or "NPOV") pursuant to section 104(e)(1) of the Mine Act. Subsequently, MSHA issued multiple 104(e) withdrawal orders, six of which are at issue in this docket. The parties have filed a motion to approve settlement, resolving all issues in the case. However, the issue of the testimony of Chilcot will be raised many times in the upcoming cases set for hearing that contain 104(e) citations and orders. The parties will address the issue of the validity of the NPOV in the context of the 104(e) and the Respondent will seek to have the NPOV declared invalid. In each case involving the notice of POV, the mine will assert that Chilcot's testimony is necessary to show that the mine will suffer harm as a result of the orders issued after the mine was put on the pattern of violations. Therefore, I issue a decision on the matter in this case with the understanding that the ruling will be the same in all cases in which the validity of this particular NPOV is raised.

On December 17, 2014 the Secretary filed a Motion to Exclude Gary Chilcot in which he argued that Respondent should be precluded from offering any testimony, reports or other evidence from Chilcot in these proceedings. On December 30, 2014 Pocahontas filed a response in opposition to the Secretary's motion. Subsequently, on January 28, 2015, the court issued an order directing Pocahontas to provide an expert report to the Secretary and following that, file a motion requesting that Chilcot be allowed to testify as an expert witness and explaining the

relevance of, and need for, his expected testimony. On February 27, 2015 Pocahontas filed this motion and the Secretary has filed a response.

Pocahontas, in its motion, argues that Chilcot should be allowed to testify given that his expected testimony is relevant to this proceeding and, in the event the NPOV is vacated, will aid the court by showing the economic harm resulting from MSHA's impermissible utilization of its 104(e) withdrawal power. Chilcot is expected to testify about the financial harm that may be caused by stopping production at the mine to correct a violation as required by 104(e). The mine asserts not only that the NPOV violates the mine's due process but the refusal to allow its witnesses to testify violates its due process rights. In so arguing, Pocahontas asserts that while the Commission's decision in *Brody Mining LLC*, 36 FMSHRC 2027 (Aug. 2014), addressed whether the pattern of violations rule "provided adequate pre- and post-deprivation procedures once an operator is placed on pattern of violations status[.]" it did not reach the issue with regard to Pocahontas' interest in ensuring that it will not be erroneously deprived of a property interest when a NPOV is found to have been invalidly issued.

The Secretary argues that Chilcot's expected testimony regarding economic and market harm the mine may suffer should be excluded because it is irrelevant to the issues pending in this case. While there is no dispute that being placed on a pattern of violations may have an adverse economic impact on a mine, the issue is not relevant to question of whether the mine has demonstrated a pattern of violations. The Commission has already spoken to the issue of due process and determined that the pattern of violations rule adequately addressed the potential for erroneous deprivation. Further, Chilcot should not be allowed to testify as an expert witness under the Federal Rules of Evidence since his testimony will not aid the court in understanding any relevant issue in this proceeding, as is required by those rules and Supreme Court precedent. In addition, Chilcot's expected testimony is speculative, based on both inaccurate and insufficient information, and is not expressed with any degree of certainty.

I find that Chilcot's expected testimony is not relevant to the issues presented in this proceeding. Specifically, I find that, because the due process concerns articulated by Pocahontas were addressed by the Commission in *Brody* and need not be litigated here, and, because there is no legal authority for this court to award damages in the event the NPOV is found to have been invalidly issued, Chilcot's testimony is not relevant to this proceeding.

While Pocahontas argues that the Commission's decision in *Brody* does not reach the issue of whether due process is violated when miners are withdrawn when a 104(e) order is issued, based upon a NPOV that is later found to be invalid, I disagree. In *Brody* the Commission explained that the pattern of violations rule "adequately addresses the potential for erroneous deprivation and satisfies procedural due process." *Brody Mining LLC*, 36 FMSHRC 2027, 2044. (Aug. 2014). There, the Commission, in reaching its conclusion that due process was satisfied, weighed three factors: (1) the private interest affected, (2) the government interest, and (3) the risk of erroneous deprivation of the private interest. The Commission acknowledged that, while operators have a significant property interest in continuing mining operations and not having their miners withdrawn, the Secretary has a compelling interest in protecting public health and safety. *Id.* at 2042-2044. With regard to the third factor the Commission held that the pattern of violations rule adequately addressed the risk of erroneous deprivation through the multiple pre-

deprivation and post-deprivation protections available to mine operators. *Id.* at 2044-2047. I find that the Commission's decision in *Brody* directly addressed the issue of potential erroneous deprivation. The issue here, even if stated in slightly different terms, has been explicitly spelled out by the Commission. I find that the Commission's analysis in *Brody* is equally applicable here and that due process has been satisfied on the issue of potential erroneous deprivation of a property interest in the context of the pattern of violations provision.

Even if Pocahontas' due process argument were to remain a relevant issue in this matter, the court is without authority to grant relief in the form of damages to Pocahontas, in the event that the NPOV is found to have been invalidly issued. A review of the Act reveals no language granting the court power to award damages in the event the NPOV is invalidated. Moreover, Pocahontas cites no legal authority for its argument. In *Brody* the Commission explained that Congress intended that the pattern of violations provision, and MSHA's 104(e) withdrawal power, to parallel the unwarrantable failure provisions of section 104(d). Just as there is no right to damages in Commission proceedings where a 104(d) withdrawal order has been invalidly issued, there is also no right to damages in a Commission proceeding where a 104(e) withdrawal order has been invalidly issued. Given the size of this operator I do not address the potential for any award of fees or expenses under the Equal Access to Justice Act.

Finally, I do not agree that prohibiting the testimony of Chilcot will in and of itself be a violation of the due process rights of Pocahontas. Commission Procedural Rule 63(a) states that "[r]elevant evidence . . . that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). It is up to the Commission to determine what is relevant and therefore what is admissible in any given case. A Commission judge cannot, without some oversight, allow any person to testify when a party asserts the testimony is relevant. The cost to the parties and Commission is obvious in terms of time and resources. I find that this case is clear cut, that Chilcot has nothing to offer, provides no insight to the Court, and does not address any relevant issue and therefore should not be allowed to provide testimony. The mine has provided no other evidence, than a few statements, that barring Chilcot is a violation of its right. It is the mandate of Commission ALJS to ascertain that all parties be given the opportunity for a full and fair hearing, but in doing so must weigh the nature of the evidence, its relevance and importance, against the resources of the court and parties. Denying the testimony of Chilcot does not deny the mine of any other due process right.

Based upon the analysis here, I find that Chilcot's expected testimony is not relevant and denying his testimony, does not deprive Pocahontas of due process in this matter. I need not, and do not, reach the other arguments of the parties. Accordingly, Pocahontas' motion is **DENIED** and Gary Chilcot will not be allowed to offer testimony in these proceedings.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 8, 2015

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

v.

JACOBS FIELD SERVICES,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-96-M
A.C. No. 02-00024-333771 1PL

Mine: Freeport-McMoRan Morenci Mine

ORDER

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a motion to approve settlement.¹ The Court reviewed the motion and upon such review had some question relating to one of the citations. The motion stated:

Citation No. 8755380: Respondent was cited for a violation of 30 C.F.R. § 56.20003(a). Specifically, the Secretary alleges that the Respondent failed to keep the walkways free of protruding nails. There were four boards with nails protruding out of them located at the 4500 lay down yard. Respondent takes the position, and would have alleged at hearing, that the area was clean and the boards were not in a walkway and further that the nails were very small and would not cause a serious injury if stepped on. Without conceding any merit to Respondent's arguments, the Secretary acknowledges that there may be legitimate factual and legal disputes regarding gravity and negligence at hearing and therefore has agreed for settlement purposes to reduce the likelihood to unlikely, to remove the S&S designation and to reduce the proposed penalty from \$1,795.00 to \$800.00.

¹ The originally assessed amount was \$28,543.00, and the proposed settlement is for \$20,022.00. The Respondent agreed to pay the penalties for 11 out of the 19 violations as originally assessed by the Secretary.

Thereafter, on March 25, 2015, the Court sent an email to the parties' representatives, requesting additional information in light of the 55% reduction from the proposed penalty, stating:

[T]he Court directs the Secretary to provide the inspector's notes and any photographs taken for this citation. Second, the Court needs more information in support of the Respondent's contention that the boards were not in a walkway. It is not enough to simply state they were not in a walkway, nor does asserting that the 'area was clean' address the cited issue—protruding nails in 6 boards. The basis for that counter contention needs to be explained. In this regard, the Court notes its related concern that the cited standard is not limited to walkways but includes working places and passageways and that the definition of the former is quite expansive. Further, what is the support for the claim that the nails were 'very small?' The citation states they protruded 2 to 3 inches out. If one examines a ruler, it is plain that a 2 inch protruding nail could easily penetrate even a thick work boot sole and that a 3 inch nail would present a greater hazard. For these identified reasons, the Court needs the additional information described above.

The Court then received responses from both counsel. The Secretary's Counsel stated:

The Secretary requests that the Court issue a formal written order directing him to produce the requested information so that we may respond formally. I believe the Respondent is willing to provide further information and arguments to the Court, but in the event that is not enough, my superiors have directed me to request that the Court issue a formal order.

The Respondent's counsel, in response to the Secretary's request for an Order, provided the following information to the Court:

The Secretary informed Respondent that it would require the court to issue a formal order to produce the MSHA inspector notes and photographs pertinent to the court's request. Respondent also understands the court has requested additional information/documentation in support of its settlement position. While Respondent is working to pull together additional information, the key support to Respondent's settlement position are the MSHA inspector's notes and photographs the court requested from Petitioner. Respondent has the MSHA inspector notes and photographs supplied to it during discovery and is willing to provide them if Petitioner is not. Please advise on how to proceed.

The entirety of the Secretary's Motion in support of the reduction for this citation provided:

Specifically, the Secretary alleges that the Respondent failed to keep the walkways free of protruding nails. There were four boards with nails protruding out of them located at the 4500 lay down yard. Respondent takes the position, and would have alleged at hearing, that the area was clean and the boards were not in

a walkway and further that the nails were very small and would not cause a serious injury if stepped on. Without conceding any merit to Respondent's arguments, the Secretary acknowledges that there may be legitimate factual and legal disputes regarding gravity and negligence at hearing and therefore has agreed for settlement purposes to reduce the likelihood to unlikely, to remove the S&S designation and to reduce the proposed penalty from \$1,795.00 to \$800.00.

It should be noted that the Secretary merely recited its position and that of Respondent's but made no concession at all as to the accuracy of the Respondent's contention that "that the area was clean and the boards were not in a walkway and further that the nails were very small and would not cause a serious injury if stepped on." Instead, it remarked without any elaboration or identification "that there may be legitimate factual and legal disputes regarding gravity and negligence at hearing and therefore has agreed for settlement purposes to reduce the likelihood to unlikely, to remove the S&S designation and to reduce the proposed penalty from \$1,795.00 to \$800.00."

Given the large proposed reduction, the mere recitation of the parties' respective takes on the issue and the absence of any supportive information, the Court requested additional information so that it could carry out its responsibilities under Section 110(k) of the Mine Act. Oddly, and contrary to what one might anticipate, the posture of this case is such that the Respondent is quite willing to provide the requested information, but the Secretary is not. Now, given the Secretary's refusal to provide the requested information without an order from the Court, the Court hereby ORDERS the Secretary to provide the information, identified above, from its earlier email. In these settlement motions, which the Secretary continues to balk at providing sufficient information to enable the Commission to conduct an appropriate and informed review, the Secretary has repeatedly invoked its support for "transparency." It is in that spirit of transparency that the Court initially requested, and now Orders, the information in this instance.

SO ORDERED

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 9, 2015

ALPHA HIGHWALL MINING, LLC,
and REVELATION ENERGY, LLC,
successor in interest,
Contestant,

v.

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

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

v.

ALPHA HIGHWALL MINING, LLC,
and REVELATION ENERGY, LLC,
successor in interest,
Respondent

CONTEST PROCEEDINGS

Docket No. KENT 2012-1207-R
Citation No. 8270168; 05/29/2012

Docket No. KENT 2012-1208-R
Citation No. 8270169; 05/29/2012

CIVIL PENALTY PROCEEDING

Docket No. KENT 2013-142
A.C. No. 15-19621-301671

Mine: Bucyrus Highwall Miner #76

ORDER AMENDING PLEADING
AND
ORDER HOLDING JOINT MOTION TO
APPROVE SETTLEMENT IN ABEYANCE

Appearances: J. Malia Lawson, Esq., U.S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee, on behalf of the Petitioner;
Charles F. Bellomy, Esq., Hardy Pence, PLLC, Charleston, West Virginia, on
behalf of the Respondent.

Before: Judge Feldman

These consolidated civil penalty and contest proceedings are before me based on a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended (“the Act”), 30 U.S.C. § 815(d), against the Respondent, Alpha Highwall Mining, LLC (“Alpha Highwall”).

On March 11, 2015, the parties filed an amended joint motion to approve settlement naming Revelation Energy, LLC (“Revelation Energy”) as the successor in interest to Alpha Highwall. The parties aver that Revelation Energy has acquired Alpha Highwall’s subject highwall mine operation and any liability Alpha Highwall may have in these proceedings. I construe the parties’ March 11, 2015, joint motion as a motion to amend the pleadings. Good cause having been shown, **IT IS ORDERED** that Revelation Energy be added as a successor in interest in these proceedings.

The Secretary initially sought to impose a total civil penalty of \$90,000.00 for alleged violations of the mandatory safety standards in sections 30 C.F.R. § 77.1004(b) and 30 C.F.R. § 77.1713(a) that require the correction or posting of unsafe highwall conditions, and the daily inspection of highwalls for identification of hazardous conditions, respectively. The alleged violations were cited following a highwall failure that did not result in injuries. The Secretary initially attributed the alleged violations to unwarrantable failures.

A hearing was held on November 4, 2014, in Paintsville, Kentucky. At the hearing, the parties advised that, although the precise settlement terms had not been finalized, they had reached a comprehensive, but non-traditional, settlement agreement. Although not finalized, the settlement terms included a substantial reduction in civil penalty, as well as a significant expenditure for equipment to enhance the safety of mine personnel employed at Alpha Highwall’s surface mine sites. Consequently, the record was left open for the parties to submit a formal written motion for settlement approval.

The parties initially filed a joint motion to approve settlement and dismiss these matters on January 29, 2015. This settlement motion was superseded by the March 11, 2015, amended joint motion to approve settlement that clarified the real party in interest relationship between Alpha Highwall and Revelation Energy.

The settlement terms include a substantial reduction to the initial proposed civil penalty from \$90,000.00 to \$5,000.00. The substantial reduction in civil penalty is based, in large part, on the modification of 104(d)(1) Citation No. 8270168 and 104(d)(1) Order No. 8270169 to 104(a) citations, to reflect that the cited conditions were not attributable to unwarrantable failures.

In support of the removal of the unwarrantable designation in Citation No. 8270168, the Secretary does not dispute, for settlement purposes, the contention that instability of the highwall prior to its failure had been observed by the Alpha Highwall and that miners had been removed from danger prior to the issuance of the citation. In support of the removal of the unwarrantable designation in Order No. 8270169, the Secretary does not dispute, for settlement purposes, the contention that during the course of Alpha Highwall’s daily inspection, its highwall foremen had observed instability in the highwall, which enabled the foremen to remove miners from danger before the subject highwall failure occurred.

In further support of the substantial reduction in civil penalty, Revelation Energy, as the successor in interest, has agreed to implement improved safety measures at the mine site:

Alpha Highwall is no longer operating highwall miners. *Revelation Energy, LLC, has acquired any liability Alpha Highwall may have to the Secretary of Labor.* In addition to the payment of [the agreed-upon \$5,000.00 civil penalty], [Revelation Energy] by virtue of its acquisition [of Alpha Highwall's liability], [has] agreed to spend at least \$55,000 to purchase handheld two-way radios, cameras for the highwall miners, and shelters for the miners at [surface] mines operated by Revelation Energy [some of which were previously-operated by Alpha Highwall]. The handheld radios will be provided to the miners who work at the [surface] mines and the cameras and shelters will be installed on the highwall miners operated by Revelation Energy. [Revelation Energy] has agreed to purchase this equipment, and to install the equipment, at the mines by July 15, 2015. By this date, [Revelation Energy] has also agreed to provide the Secretary with receipts showing that the equipment was purchased. [Revelation Energy] has also agreed to update its ground control plan to specify that the equipment will be purchased and installed by July 15, 2015, and that the equipment will be maintained in good working order thereafter.

Jt. Mot. to Approve Settlement, at 2 (Mar. 11, 2015).

The March 11, 2015, joint settlement motion noted that "Revelation Energy, LLC agrees to carry out the terms of this settlement agreement." *Id.* at 3. The joint settlement motion was signed by Charles F. Bellomy, counsel for both Alpha Highwall and Revelation Energy. *Id.* at 6.

I have considered the representations and documentation submitted in this matter and I conclude that the proffered settlement terms, when performed by Revelation Energy, will be appropriate for approval under the criteria set forth in Section 110(i) of the Act. In tentatively approving the parties' settlement terms, I have deferred to the Secretary's judgment that the installation of the subject equipment will materially enhance the safety of miners employed at Revelation Energy's surface mines.

ORDER

In view of the above, as the terms of this settlement agreement are unconventional, in order to ensure compliance, **IT IS ORDERED** that the approval of the parties' settlement agreement **IS HELD IN ABEYANCE**. Approval of the parties' settlement agreement is contingent upon documented compliance by Revelation Energy, on or before July 15, 2015, of the acquisition and installation of the subject equipment specified in the parties' settlement terms, as well as the required modification of Revelation Energy's ground control plan.

IT IS FURTHER ORDERED that upon relevant satisfaction of the settlement terms the parties shall file, **on or before August 26, 2015**, a joint motion to approve their settlement agreement and to dismiss these matters.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution: (Regular and Certified Mail)

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/acp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

April 17, 2015

SHAMOKIN FILLER COMPANY,
INC.,

Contestant,

v.

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

CONTEST PROCEEDINGS

Docket No. PENN 2009-736-RM
Citation No. 7011691; 08/12/2009

Docket No. PENN 2009-737-RM
Citation No. 7011692; 08/12/2009

Docket No. PENN 2009-738-RM
Citation No. 7011693; 08/13/2009

Docket No. PENN 2009-739-RM
Citation No. 7010952; 08/20/2009

Docket No. PENN 2009-740-RM
Citation No. 7011695; 08/25/2009

Docket No. PENN 2009-741-RM
Citation No. 7011696; 08/25/2009

Docket No. PENN 2009-742-RM
Citation No. 7011697; 08/25/2009

Docket No. PENN 2009-763-RM
Citation No. 7011699; 08/27/2009

Docket No. PENN 2009-776-RM
Citation No. 7011700; 08/31/2009

Docket No. PENN 2009-777-RM
Citation No. 7011781; 08/12/2009

Docket No. PENN 2009-778-RM
Citation No. 7011782; 08/31/2009

Docket No. PENN 2009-779-RM
Citation No. 7011783; 08/31/2009

Docket No. PENN 2009-780-RM
Citation No. 7011784; 09/01/2009

SHAMOKIN FILLER COMPANY,
INC.,

Contestant,

v.

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

Docket No. PENN 2010-52-RM
Citation No. 7009791; 10/23/2009

Docket No. PENN 2010-53-RM
Order No. 7009792; 10/23/2009

Docket No. PENN 2010-54-RM
Order No. 7009793; 10/23/2009

Docket No. PENN 2010-55-RM
Citation No. 7009794; 10/23/2009

Docket No. PENN 2010-56-RM
Citation No. 7011792; 10/21/2009

Docket No. PENN 2010-57-RM
Order No. 7011793; 10/21/2009

Docket No. PENN 2010-58-RM
Order No. 7011794; 10/21/2009

Docket No. PENN 2010-59-RM
Order No. 7011795; 10/21/2009

Docket No. PENN 2010-60-RM
Order No. 7011796; 10/21/2009

Docket No. PENN 2010-61-RM
Order No. 7011797; 10/21/2009

Docket No. PENN 2010-146-RM
Citation No. 7009795; 11/17/2009

Docket No. PENN 2010-147-RM
Citation No. 7009796; 11/17/2009

Docket No. PENN 2010-354-RM
Citation No. 7000081; 03/04/2010

Docket No. PENN 2010-377-RM
Citation No. 7012104; 03/08/2010

Docket No. PENN 2010-378-RM
Citation No. 7012105; 03/09/2010

SHAMOKIN FILL COMPANY, INC.,
Contestant,

v.

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

Docket No. PENN 2010-390-RM
Citation No. 7012106; 03/16/2010

Docket No. PENN 2010-391-RM
Citation No. 7012107; 03/16/2010

Docket No. PENN 2010-577-RM
Citation No. 7012685; 06/21/2010

Docket No. PENN 2010-589-RM
Citation No. 7012687; 06/23/2010

Docket No. PENN 2010-650-RM
Citation No. 7012120; 07/15/2010

Docket No. PENN 2010-651-RM
Citation No. 7012441; 07/15/2010

Docket No. PENN 2010-652-RM
Citation No. 7012442; 07/15/2010

Docket No. PENN 2010-653-RM
Citation No. 7012443; 07/15/2010

Docket No. PENN 2010-654-RM
Citation No. 7012669; 07/15/2010

Docket No. PENN 2010-655-RM
Citation No. 7012670; 07/15/2010

Docket No. PENN 2010-656-RM
Citation No. 7012671; 07/15/2010

Docket No. PENN 2010-657-RM
Citation No. 7012672; 07/15/2010

Docket No. PENN 2010-658-RM
Citation No. 7012673; 07/16/2010

Docket No. PENN 2011-13-RM
Citation No. 7007198; 09/22/2010

Docket No. PENN 2011-122-RM
Citation No. 7007528; 12/10/2010

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

v.

SHAMOKIN FILLER COMPANY,
INC.,
Respondent.

Mine ID: 36-02945
Mine: Carbon Plant

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 2009-775-M
A.C. No. 36-02945-194224

Docket No. PENN 2009-825-M
A.C. No. 36-02945-197364

Docket No. PENN 2010-63-M
A.C. No. 36-02945-200482

Docket No. PENN 2010-191-M
A.C. No. 36-02945-206331

Docket No. PENN 2010-275-M
A.C. No. 36-02945-208680

Docket No. PENN 2010-291-M
A.C. No. 36-02945-209018

Docket No. PENN 2010-381-M
A.C. No. 36-02945-213119

Docket No. PENN 2010-465-M
A.C. No. 36-02945-216876

Docket No. PENN 2010-515-M
A.C. No. 36-02945-219682

Docket No. PENN 2010-745-M
A.C. No. 36-02945-229176

Docket No. PENN 2011-16-M
A.C. No. 36-02945-232342

Docket No. PENN 2011-104-M
A.C. No. 36-02945-238543

Docket No. PENN 2011-189-M
A.C. No. 36-02945-244057

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

v.

WILLIAM ROSINI, employed by
SHAMOKIN FILLER COMPANY, INC.,
Respondent.

Mine: Carbon Plant

CIVIL PENALTY PROCEEDING

Docket No. PENN 2011-129-M
A.C. No. 36-02945-241465-A

Mine: Carbon Plant

ORDER AMENDING FINAL DECISION AND ORDER
ORDER LIFTING STAY
ORDER TO PAY

On October 17, 2012, I issued a Final Decision and Order with respect to the above-captioned dockets. The Final Decision and Order contained several typographical errors and omissions. Several Contest Proceedings were not listed in the caption, despite the fact that the related Civil Penalty Proceedings (and therefore the citations contained in the Contest Proceedings) were settled and contained therein. The omissions include the following:

- Docket Nos. PENN 2010-52-RM, PENN 2010-53-RM, PENN 2010-54-RM and PENN 2010-55-RM dealt with citations contained in Docket No. PENN 2010-191-M.
- Docket Nos. PENN 2010-56-RM and PENN 2010-61-RM dealt with citations contained in contained in Docket Nos. PENN 2010-291-M and PENN 2011-129-M (an individual liability proceeding under §110(c) of the Mine Act).
- Docket Nos. PENN 2010-57-RM and PENN 2010-58-RM dealt with citations contained in Docket No. PENN 2010-381-M.
- Docket Nos. PENN 2010-390-RM and PENN 2010-391-RM dealt with citations contained in Docket No. PENN 2010-515-M.
- Docket No. PENN 2011-13-RM dealt with citations contained in Docket No. PENN 2011-104-M.

- Docket No. PENN 2011-122-RM dealt with citations contained in Docket No. PENN 2011-189-M.

In addition to these omissions, the Final Decision and Order listed Docket No. PENN 2010-378-RM incorrectly as PENN 2010-387-RM. All of these typographical errors and omissions have been corrected in the in the caption above. Further, it is hereby **ORDERED** that the Final Decision and Order be **AMENDED** to reflect these corrections.

The Final Decision and Order was stayed at the time of issuance to allow the parties to exhaust all appeals and obtain final resolution on whether MSHA had jurisdiction over Shamokin Filler Company, Inc.'s facility. On July 11, 2014 the Third Circuit denied Respondents' petition for review and affirmed the Secretary's assertion of jurisdiction. *Shamokin Filler Company, Inc., v. Federal Mine Safety and Health Review Commission*, 772 F.3d 330 (3rd Cir. 2014). On March 23, 2015 the Supreme Court denied cert in the instant matter. *Shamokin Filler Company, Inc., v. Federal Mine Safety and Health Review Commission*, 2015 WL 1280245 (March 23, 2015). On April 13, 2015 the parties confirmed that the appeals have been exhausted in this matter. Wherefore, it is hereby **ORDERED** that the stay be **LIFTED**.

It is further **ORDERED** that Shamokin Filler Company, Inc. pay the Secretary of Labor the sum of \$65,736.00 within 30 days of the date of this Order.¹ William Rosini is also hereby **ORDERED** to pay the Secretary of Labor the sum of \$5,164.00 within 30 days of the date of this Order. Upon receipt of these payments, this matter is **DISMISSED**.

/s/ John Lewis
John Lewis
Administrative Law Judge

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/tjb

¹Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390