

August 2011

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Revelation Energy, LLC. v. Secretary of Labor, MSHA, Docket No. KENT 2011-71-R. (Judge Moran, June 30, 2011)

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Mach Mining, LLC. v. Secretary of Labor, MSHA, Docket No. LAKE 2009-716-R, LAKE 2010-190. (Judge Miller, July 22, 2011)

There were no cases in which Review was denied during the month of August 2011.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 03, 2011

SECRETARY OF LABOR,	:	Docket No. KENT 2009-1101
MINE SAFETY AND HEALTH	:	A.C. No. 15-19180-176388
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	
	:	
M3 ENERGY MINING COMPANY	:	
	:	
and	:	
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 2009-1102
MINE SAFETY AND HEALTH	:	A.C. No. 15-10753-176367
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	
	:	
CLEAN ENERGY MINING COMPANY	:	

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

ORDER

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 22, 2009, the Commission received from M3 Energy Mining Company (“M3 Energy”) a motion made by its counsel, Dinsmore & Shohl LLP (“Dinsmore”), 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). Also on May 22, 2009, the Commission received from Clean Energy Mining Company (“Clean Energy”) a motion made by Dinsmore seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary has not opposed either the M3 Energy or Clean Energy motions.

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. *Id.*

The circumstances of the M3 Energy and Clean Energy cases are identical. As the motions state, they were filed contemporaneously. Except for the company names and the case numbers, the two motions are identical. The individuals involved in the two cases are the same people, and the relevant actions are the same in both cases. The companies are sister companies with the same controller, Massey Energy Corporation, according to the Secretary's Mine Data Retrieval System, and they share the same address. Hence, we will consider these cases together.¹

On February 11, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 176388 to M3 Energy, proposing civil penalties for certain citations. On the same day, MSHA issued Proposed Assessment No. 176367 to Clean Energy. The proposed assessments were not contested in either case. MSHA issued notices of delinquency to M3 Energy and Clean Energy pertaining to the above proposed assessments on May 12, 2009.

The two motions state, with respect to Proposed Assessment Nos. 176388 and 176367, that Steve Endicott, Safety Director for both companies, faxed the proposed assessments to Dinsmore on February 25, 2009.² The motions allege that although the proposed assessments were faxed to Dinsmore by Mr. Endicott, they were "apparently not received." The motions further state that at the time the proposed assessments were faxed, Dinsmore had a temporary receptionist, and that there is no record of receipt of the faxes in counsel's facsimile log. The motions state that Mr. Endicott did not learn that the penalties had not been contested until he received MSHA's May 12, 2009 delinquency notices.

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate Docket Nos. KENT 2009-1101 and KENT 2009-1102, as the dockets involve similar procedural issues and factual backgrounds. 29 C.F.R. § 2700.12.

² Attachment 2 to both motions is the identical page containing a fax "transmission verification report" relating to Proposed Assessment No. 176388 issued to M3 Energy. Although we have not received documentation of the faxing of the proposed assessment issued to Clean Energy, we will assume that it was faxed at the same time, as alleged. The "transmission verification report" indicates that the fax went through without problem.

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).

However, the Commission has also made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not shown grounds for reopening the assessment. *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Elk Run Coal Co.*, 32 FMSHRC 1587, 1588 (Dec. 2010); *Oak Grove Res. LLC*, 33 FMSHRC 103, 104-05 (Feb. 2011); *see Gibbs v. Air Canada*, 810 F.2d 1529, 1537-38 (11th Cir. 1987).

The reasons offered by M3 Energy and Clean Energy do not amount to mistake, inadvertence or excusable neglect within the meaning of Fed. R. Civ. P. 60(b), and do not constitute good cause to reopen final orders of the Commission. The motions from M3 Energy and Clean Energy show a lack of documentation and a pattern of inadequate office procedures on the part of the companies and their counsel.

The assertion that Dinsmore did not receive the two assessments faxed on February 25, 2009 is not supported by sufficient documentation. The motions are accompanied by an affidavit from Sue Smith, Dinsmore's regular receptionist who was on a six-week sick leave on February 25, 2009. However, Ms. Smith has no personal knowledge of events that day, and her affidavit does not claim any direct knowledge. The motions do not contain affidavits from Mr. Endicott, his administrative assistant Pat Pinson whose name appears on the proposed assessments with the notation that she faxed them on February 25, 2009; the temporary receptionist who was replacing Ms. Smith; or anyone else at Dinsmore who was responsible for office procedures that day. The only evidence offered is Dinsmore's redacted "facsimile log," which purports to show the faxes received on February 25 and 26, 2009, and does not specifically include faxes from M3 Energy or Clean Energy. However, Dinsmore's "facsimile log" does not appear to have been kept in a reliable manner, and some of the information provided does not appear to be accurate.³

If these were isolated instances of inadequate office procedures, the Commission might consider granting the requested relief. However, the entities and individuals involved in these

³ An inspection of the facsimile log reflects confusion between a column that is headed "Sender" and the column headed "Names." Some logged faxes do not have a sender listed. Other columns have not been completed. The manner in which faxes are logged in does not clearly indicate which faxes were received on February 25 and which were received on February 26. Entries are not all in chronological order. Review of the log suggests that at least some documents were not logged in at the time they were received, but were logged in together at a later time.

cases have demonstrated a pattern of failing to deal adequately with proposed assessments received from MSHA.

On April 30, 2008, the Commission issued orders in three cases where Kentucky subsidiaries of Massey Energy (one of which was Clean Energy) failed to contest proposed assessments and requested that the Commission reopen the final orders to permit them to contest the penalties. Each of these cases reflected inadequate and unreliable office procedures, specifically the failure to transmit or receive faxes or electronic mail on the part of Dinsmore. In *Clean Energy Mining Company*, 30 FMSHRC 224 (Apr. 2008), the operator faxed the proposed penalty assessment to Dinsmore's Morgantown office, which received it. It was then supposed to have been faxed to Dinsmore's Charleston office, but apparently the transmission was not successful and thus the proposed assessment was not contested. *Id.* at 224-25; Resp't Mot. to Reopen Civil Penalty Proceeding at 1-2. In *Road Fork Development Company*, 30 FMSHRC 220 (Apr. 2008),⁴ Dinsmore received the fax of the proposed assessment from Mr. Endicott. A paralegal at Dinsmore attempted to scan the assessment form and send it by electronic mail to the attorneys responsible for handling Road Fork matters, but because of an unspecified "technical failure," the attorneys did not receive the email and the contest was not filed. *Id.* at 220-21; Resp't Mot. to Reopen at 2, Attach. 1. In *Long Fork Coal Company*, 30 FMSHRC 228 (Apr. 2008),⁵ the facts were identical to those in *Road Fork Development*. *Id.* at 228-29; Res't Mot. to Reopen at 1-2. The Commission remanded each of these cases to the Chief Administrative Law Judge ("ALJ") for good cause determinations on April 30, 2008, and all three cases were subsequently reopened. *Clean Energy Mining*, 30 FMSHRC at 226; Unpublished Order dated Sept. 4, 2008; *Road Fork Dev.*, 30 FMSHRC at 222; Unpublished Order dated Sept. 4, 2008; *Long Fork Coal*, 30 FMSHRC at 230; Unpublished Order dated Sept. 16, 2008. In all three orders, the Commission stated that this was one of three proceedings "involving the same law firm where a breakdown in office procedures has been cited as the reason for contests not being filed." *Clean Energy Mining*, 30 FMSHRC at 225 n.2; *Road Fork Dev.*, 30 FMSHRC at 221 n.2; *Long Fork Coal*, 30 FMSHRC at 229 n.2. We agreed with the recommendation of the Secretary "that counsel take steps to ensure that such breakdowns do not continue and that penalty assessments are timely contested." *Clean Energy Mining*, 30 FMSHRC at 225; *Road Fork Dev.*, 30 FMSHRC at 221; *Long Fork Coal*, 30 FMSHRC at 229.

Thus, in three separate decisions issued less than a year before the events which gave rise to the defaults in these cases, the Commission explicitly called attention to the type of problem which caused the defaults here, and warned "that counsel take steps to ensure that such breakdowns do not continue and that penalty assessments are timely contested."

⁴ Road Fork Development Co. is a Massey subsidiary with the same mailing address and same Safety Director (Steve Endicott) as Clean Energy Mining. Resp't Mot. to Reopen, Attach. 1.

⁵ Long Fork Coal Co. is a Massey subsidiary located in the same town as Clean Energy Mining and Road Fork Development Company. Resp't Mot. to Reopen, Attach. 1.

The three cases decided on April 30, 2008 were not the first cases addressing the kind of transmittal problems that are presented in the cases currently under review. In *Rockhouse Energy Mining Company*, 29 FMSHRC 380 (May 2007), Safety Director Steve Endicott marked the citations the operator wished to contest and faxed the proposed assessments to Dinsmore but omitted one page, and so the 11 proposed penalties on the missing page were not contested. *Id.* at 380. The Commission remanded the case to the Chief ALJ for a good cause determination, and the penalties were subsequently reopened. *Rockhouse Energy Mining*, 29 FMSHRC at 381; Unpublished Order dated Sept. 16, 2008.

Similar problems occurred in two cases where the defaults occurred prior to the warnings issued on April 30, 2008, but the Commission decision was issued after that date. In *Sidney Coal Company*, 31 FMSHRC 562 (May 2009), Safety Director Endicott faxed the proposed assessment to Dinsmore, but due to an “undetected mechanical failure” the assessment was not received. *Id.* at 562. The Commission remanded the case to the Chief ALJ for a good cause determination, and the case was subsequently reopened. *Sidney Coal*, 31 FMSHRC at 563; Unpublished Order dated Nov. 9, 2009. In *Freedom Energy Mining*, 31 FMSHRC 593 (June 2009), Safety Director Endicott faxed the proposed assessment to Dinsmore, but the contest was not filed. Resp’t Mot. to Reopen Civil Penalty Proceeding at 1-2; Attach. The Commission denied this request to reopen, because it was filed more than one year after the proposed assessment became a final order. *Id.* at 594.

Moreover, we note that the *M3 Energy Mining* case and this *Clean Energy Mining* case are not the only cases where this type of problem occurred after the warnings contained in the three decisions issued on April 30, 2008. In *Clean Energy Mining Company*, 31 FMSHRC 370 (Apr. 2009), Safety Director Endicott gave the proposed assessment to his administrative assistant, Pat Pinson, to fax to Dinsmore but the assessment apparently was not actually faxed, and so the contest was not filed. Mot. to Reopen Civil Penalty Proceeding at 2. The Commission reopened the case. *Clean Energy Mining*, 31 FMSHRC at 372. In *Rockhouse Energy Mining Company*, 31 FMSHRC 847 (Aug. 2009), the facts of the default are identical to those in *Clean Energy Mining*, 31 FMSHRC 370. *Rockhouse Energy Mining*, 31 FMSHRC at 848; Mot. to Reopen Civil Penalty Proceeding at 2-3. The Commission remanded the case to the Chief ALJ for a good cause determination, and the case was subsequently reopened. *Rockhouse Energy Mining*, 31 FMSHRC at 849; Unpublished Order dated July 19, 2010.

Thus, in addition to the two cases herein and the three cases where the Commission issued warnings on April 30, 2008, there have been five other cases before the Commission where intended contests of proposed assessments were not filed because of inadequate or unreliable office procedures involving Safety Director Endicott and counsel Dinsmore. This pattern does not indicate reasonable diligence. See *Mammoth Coal Co.*, 33 FMSHRC ___, slip op. at 2-3, No. WEVA 2010-1423 (June 9, 2011) (“Mammoth’s argument about the severe consequences of the finality of the assessment is undercut by its failure to exercise reasonable diligence.”).

The fact that many of the inadequate and unreliable office procedures in these cases occurred at counsel's office rather than the office of the operators does not affect our analysis. As the Commission noted in *Keokee Mining, LLC*, 32 FMSHRC 64, 66 n.1 (Jan. 2010), "[i]n requesting relief from a final order, a client may be held accountable for the acts and omissions of its attorney." *Keokee Mining* relied on *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 397 (1993),⁶ where the Supreme Court made clear that when a party's failure to meet a deadline was caused by the actions of its counsel, and the issue is whether the party would be exonerated on the basis of "excusable neglect," the party would "be held accountable for the acts and omissions of [its] chosen counsel." This is because the party "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." *Id.* (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962)).

For the reasons stated herein, we conclude that these motions by M3 Energy and Clean Energy have failed to make a showing of circumstances that warrant reopening of the penalty assessments, and accordingly the motions are denied.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Patrick Nakamura
Patrick Nakamura, Commissioner

⁶ *Pioneer Investment Services* involved the application of the "excusable neglect" provision of Federal Bankruptcy Rule 9006(b)(1), but the Court recognized that the "excusable neglect" standard in the Federal Bankruptcy Rule was the same as Fed. R. Civ. P. 60(b)(1). *Id.* at 393-94.

Commissioner Duffy and Commissioner Young, dissenting:

We respectfully dissent from our colleagues' denial with prejudice of the requests for relief filed by M3 Energy Mining Company ("M3") and Clean Energy Mining Company ("Clean Energy"). We find considerations in the record that weigh against denial.

In these proceedings, the safety director for M3 and Clean Energy received notices on May 12, 2009, from the Department of Labor's Mine Safety and Health Administration ("MSHA") informing the operators that they were delinquent in paying the subject proposed civil penalties and that the penalties had become final Commission orders. *Mots.* at 2. On May 22, 2009, the Commission received the operators' requests for relief from the final orders. We view the operators' promptness in filing its requests for relief as a factor weighing favorably toward granting relief. *See, e.g., Genesis, Inc.*, 32 FMSHRC 770, 771 (July 2010).

We also find relevant that Commission precedent denying relief in instances in which the operator's failure to timely contest was due to its inadequate or unreliable internal processing system has largely developed after the time that the subject requests were filed. M3 and Clean Energy filed their requests with the Commission in May 2009, more than two years ago. Until the time of that filing, the Commission's denial of relief due to an operator's inadequate processing system, as in the *Pinnacle* orders cited by the majority (*slip op.* at 3), was relatively rare. Rather, in such circumstances, the Commission generally had a long history of granting relief when the operator adequately substantiated its rationale or remanding when the operator failed to substantiate its rationale. *See, e.g., Texas Mining, L.P.*, 24 FMSHRC 520, 521 (June 2002) (granting relief where operator's allegations that failure to contest was due to internal mishandling and allegations were supported by affidavit); *Performance Coal Co.*, 29 FMSHRC 576, 577 (July 2007) (remanding where the operator did not substantiate allegations that problems in internal processing resulted in its failure to timely contest, and noting that the issues raised "involve fact-finding that is the province of an administrative law judge in the first instance"); *Applegate Shale*, 24 FMSHRC 495, 496 (May 2002) ("where an operator has failed to timely submit a hearing request due to internal mishandling, the Commission has remanded the matter to a judge for further consideration.") (citation omitted).

Here, M3 and Clean Energy submitted affidavits and copies of fax logs and fax transmission verification reports in an effort to support their claims that their safety director timely faxed the operators' counsel the proposed assessment forms for contest but that the forms were not received. The Secretary of Labor did not oppose the operators' requests for relief and made no argument that the documentation was insufficient to support the relief. As noted by our colleagues, Attachment 2 to Clean Energy's request to reopen Proposed Assessment No. 176367 appears to be a transmission verification report relating to a different proposed assessment. The affidavits, which support the operators' allegations, were submitted by an employee who was absent during the time of the alleged fax transmissions. We conclude that, in these circumstances, the Commission's resources would have been best served if the determination of whether the documentation is adequate to support the operators' claims had

been made by a Commission Administrative Law Judge, who is empowered to rule on offers of proof and receive any additional relevant evidence. *See* 29 C.F.R. § 2700.55.

Accordingly, for the foregoing reasons, we would have remanded these proceedings to the Chief Administrative Law Judge for a determination of whether good cause exists for the operators' failure to timely contest the penalty proposals and whether relief from the final orders should be granted.

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 04, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2010-1038-M
v.	:	A.C. No. 11-00111-224247
	:	
CALHOUN QUARRY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On September 29, 2010, the Commission received from Calhoun Quarry, Inc., a motion requesting that the Commission 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). On October 28, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 10, 2011

SECRETARY OF LABOR,	:	Docket Nos. PENN 2009-775
MINE SAFETY AND HEALTH	:	PENN 2009-825
ADMINISTRATION (MSHA)	:	PENN 2010-63
	:	PENN 2010-191
v.	:	PENN 2010-275
	:	PENN 2010-291
SHAMOKIN FILLER COMPANY, INC.	:	PENN 2010-381
	:	PENN 2010-465
	:	PENN 2010-515
	:	PENN 2010-745
	:	PENN 2011-16
	:	PENN 2011-104
	:	PENN 2011-129
	:	PENN 2011-189

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

ORDER

BY: Commissioners Duffy, Young, and Cohen

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). In this order, we address three particular requests pending in this matter.

First, on June 9, 2011, Shamokin Filler Company, Inc. (“Shamokin”) filed a petition for reconsideration pursuant to Commission Procedural Rule 78, 29 C.F.R. § 2700.78. Shamokin seeks reconsideration of an order issued by the Commission on June 2, 2011, denying Shamokin’s petition for interlocutory review of Judge John Kent Lewis’s March 11, 2011 order. In his order, the judge determined that Shamokin’s carbon plant is under the regulatory jurisdiction of the Mine Safety and Health Administration (“MSHA”). 33 FMSHRC 725 (Mar. 2011) (ALJ).

Second, on July 29, 2011, the Secretary filed an unopposed petition for interlocutory review pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76. This petition seeks review of a June 23, 2011 order which denied a joint motion for reconsideration issued by Judge Lewis. The June 23, 2011 order denied a joint motion by the Secretary and Shamokin to reconsider the judge’s May 20, 2011 Notice of Hearing and Order to File a Prehearing Report,

which required the parties to submit all direct examination in the form of written affidavits. Specifically, the May 20, 2011 order instructed the parties to

submit all direct examination of each witness in written form at least 48 hours prior to the hearing. The direct examination shall be in the form of an affidavit, signed under oath and shall include only items that are appropriate for direct examination of the witness. All exhibits used by the witness must be numbered (or lettered) and attached to the direct testimony. The witness must appear at hearing and will be subject to cross-examination and redirect examination only. The parties may present, at hearing, any objection to the written direct examination or attached exhibits. Failure to include a witness, to provide the written direct examination or failure to include an exhibit or to specify in detail the items that remain in dispute, **will** result in their exclusion at hearing.

Prehearing Order at 3 (emphasis in original).¹

Third, on July 29, 2011, the Secretary also filed an unopposed motion for expedited consideration of its petition for interlocutory review and an unopposed motion to stay the proceedings below. Trial is scheduled for September 6, 2011.

A. The Petition for Reconsideration

On April 6, 2011, Shamokin had filed a petition for discretionary review seeking review of the judge's March 11, 2011 order. The Commission determined that the order was not a final decision that ended the judge's jurisdiction over this matter and that, although he resolved the jurisdictional issue and determined that Shamokin's carbon plant is under the regulatory jurisdiction of MSHA, he made no findings regarding the violations and penalties at issue. As a result, the Commission ruled on April 8, 2011, that Shamokin's petition was not a valid petition for discretionary review of a final decision under section 113(d) of the Mine Act, 30 U.S.C. § 823(d).

On April 8, 2011, Shamokin filed a motion for certification of interlocutory review with Judge Lewis, which was denied on April 12, 2011. On April 25, 2011, Shamokin filed a petition for interlocutory review with the Commission pursuant to Rule 76, seeking review of Judge Lewis' March 11, 2011 order. As noted above, the Commission denied the petition on June 2, 2011, and Shamokin then filed the petition for reconsideration.

In considering both Shamokin's petition for reconsideration of our previous order denying its petition for interlocutory review and the Secretary's petition, we look to the criteria

¹ On July 18, 2011, the judge denied the Secretary's unopposed motion to certify the issue for interlocutory review.

set forth in Commission Procedural Rule 76 for granting a petition for interlocutory review. That rule states that such review may be granted “upon a determination that the Judge’s interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding.” Commission Procedural Rule 76(a)(2), 29 C.F.R. § 2700.76(a)(2).

The Commission considers the petition for reconsideration pursuant to Commission Procedural Rule 78, 29 C.F.R. § 2700.78. *See Island Creek Coal Co.*, 23 FMSHRC 138 (Feb. 2001). Shamokin’s motion in effect requests that we rule on the jurisdictional issue prior to trial. Shamokin contends that the jurisdictional issue is a controlling question of law. Shamokin also contends that the language “as is usually done by the operator of the coal mine” in section 3(i) of the Act, 30 U.S.C. § 802 (i), excludes Shamokin’s facility because it only purchases coal that has been prepared for market. Pet. for Recons. at 1-2.

The petition for reconsideration brought to the attention of the Commission, for the first time, the fact that “there are currently pending approximately 14 civil penalty dockets and 77 notice of contest dockets involving 78 Citations and Orders, which have been challenged [by Shamokin] both on the basis of lack of jurisdiction and for factual reasons.” *Id.* at 3 (footnote omitted). The petition further avers that “resolution of the legal question of jurisdiction is necessary before the parties can engage in settlement efforts both for this docket and any of the other dockets currently pending before the Review Commission.” *Id.* Additionally, attached to the petition for reconsideration is a copy of the Secretary’s response to Shamokin’s motion to certify the decision for interlocutory review, filed before the judge. In this document, the Secretary states that

resolving the issue of jurisdiction in this matter with finality is likely to materially advance the final disposition of both this proceeding and others involving Respondent. . . . Until jurisdiction over the Carbon Plant is resolved, meaningful settlement negotiations concerning all these matters cannot take place As a result, a rapid resolution of the jurisdictional issue in this matter is likely to promote resolution of many cases without further protracted litigation.

Sec’y’s Resp. to Mot. to Certify at 1-2.

We now conclude that immediate resolution of the jurisdictional issue is a controlling question of law which would materially advance the final disposition of these proceedings, as provided in Rule 76(a)(2). Hence, in the interest of judicial economy, we grant the petition for reconsideration and grant interlocutory review of the judge’s ruling on the jurisdictional issue.

B. The Secretary’s Petition for Interlocutory Review

We now turn to the Secretary’s unopposed petition for interlocutory review of Judge Lewis’s notice of hearing and order to file prehearing report. The Secretary argues that the requirement that all parties submit all direct examination testimony in the form of written

affidavits in the upcoming trial denies both parties the opportunity to present oral direct testimony in violation of section 556(d) of the Administrative Procedure Act (“APA”), 5 U.S.C. § 556(d) and Commission Procedural Rule 63, 29 C.F.R. § 2700.63, which gives the “parties the right to determine the form of evidence.” Sec’y’s Pet. at 3. The Secretary contends that the issues presented in its petition are “pure legal issues” and “matters of first impression” for the Commission. *Id.*

In addition, the Secretary notes that controlling questions of law may involve practical concerns which have an impact on how the litigation is to be conducted. *Id.* at 4. The Secretary cites several such practical concerns. For example, the Secretary notes that “[t]he written direct testimony requirement presents the parties with significant obstacles to introducing documentary evidence, such as maps or diagrams, which might assist the Court in its understanding of the issues.” *Id.* at 10. We conclude that the issue regarding written direct testimony involves practical procedural questions, the resolution of which will materially advance the final disposition of the case and should be resolved prior to the beginning of the trial. Accordingly, we grant the Secretary’s petition for interlocutory review.

C. Request for Expedited Consideration and Stay of Proceedings

The Secretary has requested expedited consideration on whether to grant her petition for interlocutory review.² She has also asked the Commission to stay the proceedings below pending a decision on the issues she presented for interlocutory review in light of the trial date set for September 6, 2011, and the parties’ need to prepare for the trial. The motion for stay is hereby granted.

² This request for expedition is now moot.

Accordingly, for the reasons set forth above, Shamokin's petition for reconsideration is granted, and its petition for interlocutory review is granted. The Secretary's petition for interlocutory review and motion to stay are also granted.³ Proceedings in this case before the administrative law judge are stayed pending further order of the Commission. Briefing in this matter before the Commission is also stayed pending further order of the Commission.

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

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

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

³ Chairman Jordan and Commissioner Nakamura would deny Shamokin's petition for reconsideration and the Secretary's petition for interlocutory review but would grant the Secretary's motion to stay proceedings pending Commission review in light of the fact that review has been granted.

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August 11, 20011

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. KENT 2008-712
	:	A.C. No. 15-19076-141789-01
NALLY & HAMILTON ENTERPRISES, INC.	:	
	:	

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

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”), the Secretary of Labor (“Secretary”) issued a citation to Nally and Hamilton Enterprises, Inc. (“Nally”) alleging a failure to maintain the reverse warning alarm on a lube truck in violation of 30 C.F.R. § 77.410(c).¹ 31 FMSHRC 689, 690-93 (June 2009) (ALJ). Administrative Law Judge Jerold Feldman concluded that the Secretary had not demonstrated Nally’s failure and vacated the citation. The Secretary subsequently filed a petition for discretionary review challenging the judge’s decision, which the Commission granted. For the reasons stated herein, we reverse the judge’s decision and remand for further findings on gravity and for the assessment of a civil penalty.

I.

Factual and Procedural Background

Nally operates the Chestnut Flats surface coal mine in Bell County, Kentucky. 31 FMSHRC at 690; PDR at 2. From January 3 to January 5, 2008, MSHA Inspector David A. Faulkner conducted an inspection of the Chestnut Flats mine. 31 FMSHRC at 690. During the course of his inspection, Faulkner observed the production pit where trucks and loaders remove the overburden in order to expose the coal seam. 31 FMSHRC at 690; Tr. 23. Lube trucks that

¹ 30 C.F.R. § 77.410(c) provides that “[w]arning devices shall be maintained in functional condition.”

carry liquids such as fuel, oil, and antifreeze enter the area to service mobile equipment. 31 FMSHRC at 690; Tr. 22, 29. While there, Faulkner observed a white RD-600SX Mack lube truck service several vehicles. 31 FMSHRC at 690; Tr. 23. At the same time, Faulkner noticed three of the operators whose trucks were being serviced standing adjacent to the mobile equipment on the opposite side of the lube truck. 31 FMSHRC at 690; Tr. 24.

At 2:15 p.m., after the lube truck had completed servicing the mobile equipment, Faulkner inspected the truck and discovered that the back-up alarm was not operational. 31 FMSHRC at 690; Tr. 22, 65. The back-up alarm warns individuals in noisy environments to avoid walking in the truck's path while it is moving in reverse. 31 FMSHRC at 690; Tr. 25. The alarm is particularly important to pedestrians in the area, because it is a high noise environment, and the tanks positioned on the back of the truck obstruct the operator's view. 31 FMSHRC at 690; Tr. 24-26, 31-32, 58. Because of the limited view, the truck operator must rely on his rear and side view mirrors when backing up. 31 FMSHRC at 690; Tr. 24-26; *see also* Tr. 40-41.

As a result of Faulkner's observation, he issued Citation No. 7557475, alleging a significant and substantial ("S&S")² violation of 30 C.F.R. § 77.410(c). The "Condition and Practice" section of the citation states:

The operator failed to maintain the automatic reverse warning device in a functional condition on the White RD-600SX lube truck, S/N 2189, that is in operation at this mine. Warning devices shall be maintained in functional condition. The truck is being used around employees on foot and congested equipment areas while performing routine maintenance.

31 FMSHRC at 690; G. Ex. 2.

According to the 6:00 a.m. pre-shift record, the back-up alarm on the truck was working during the pre-shift examination. 31 FMSHRC at 691. Inspector Faulkner testified that he had no reason to believe that the alarm was not working at that time. *Id.* at 691-92; Tr. 47-49. Nally first learned that the alarm had malfunctioned when it was cited by Faulkner. Tr. 65. Once the operator became aware of the hazard, the truck was taken out of service and fixed. Tr. 62. Nally contested the citation, and the matter proceeded to hearing.

The judge vacated Citation No. 7557475, finding that the Secretary had not demonstrated Nally's failure to maintain the back-up alarm in a functional condition. 31 FMSHRC at 693. In reaching this conclusion, the judge examined the definition of "maintenance," which has been defined as "the labor of keeping something (as building or equipment) in a state of repair or efficiency: care, upkeep . . . and [p]roper care, repair, and keeping in good order." *Id.* at 691 (quoting *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997), *aff'd*, 156 F.3d 1076 (10th Cir. 1998) (citation omitted)). He then reasoned that it was necessary to determine the length of time

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

that the alarm had been disabled in order to determine whether Nally had failed to keep the back-up alarm in “good [working] order.” 31 FMSHRC at 691.

The judge recognized that pre-shift examinations are a means of identifying defects that are in need of repair. *Id.* at 693. In reaching his decision, he relied on the pre-shift report, which indicated that the back-up alarm was working prior to commencement of the shift. *Id.* at 692. He also relied on Faulkner’s opinion that the back-up alarm had become dysfunctional sometime between 6:00 a.m. and 2:15 p.m., after the pre-shift examination on January 3. *Id.* at 691-92; Tr. 46-49. The judge stated that “[w]hile ignoring a pre-shift report that noted a defective back-up alarm clearly would constitute a violation of section 77.410(c), Faulkner does not contend that [the] pre-shift examiner determined that the back-up alarm was inoperable.” 31 FMSHRC at 692. In addition, the judge found that there was no evidence that repair of the alarm was not performed in a timely manner. *Id.* at 693. He reasoned that “[f]undamental fairness dictates that a mine operator must be given a reasonable period of time to address defects after they are noted by the pre-shift examiner, an opportunity that the evidence reflects was unavailable to [Nally] in this case.” *Id.*

II.

Disposition

The Secretary argues that the judge erred in finding that Nally did not violate section 77.410(c). PDR at 6. She submits that Nally violated the standard because the back-up alarm was not functioning when Inspector Faulkner inspected the truck. *Id.* at 7. The Secretary asserts that the plain meaning of section 77.410(c) requires Nally to “keep up,” “continue,” and “preserve from decline” the functional condition of the back-up alarm. *Id.* at 6-7. She argues that a back-up alarm is not kept-up or continued in functional condition if it does not work, and that the inclusion of “maintain” in the standard makes clear the continuous nature of the requirement and includes an ongoing responsibility on the operator to ensure that warning devices be functional at all times. *Id.* at 7; Sec’y Reply Br. at 2-3. She also suggests that the judge’s conclusion that the operator be given a reasonable opportunity to address warning devices is not supported by the standard’s language. PDR at 7-10. The Secretary further contends that, in the event that the regulation’s meaning is not plain, her interpretation is owed deference because it is consistent with the terms of the standard and compatible with the standard’s purpose. *Id.* at 6, 10-11.

Nally responds that the judge did not err because “maintain” is a verb and the words used in defining it are verbs. Nally Br. at 3-4. Specifically, it asserts that “to maintain” necessarily requires some overt or affirmative act or occurrence, and the failure to maintain necessarily requires some willful inaction or omission. *Id.* It contends that because there is no evidence demonstrating that Nally engaged in any affirmative, willful inaction or omission constituting a failure to maintain the warning device, there was no violation of the standard. *Id.* at 4-5. The operator further argues that when it learned of the inoperative warning device it immediately removed the equipment from service and repaired it. *Id.* at 5. Nally asserts that this immediate action constituted “maintaining” the device in “functional condition,” as required by the standard. *Id.* It also contends that it is impossible for it to perform “an act of maintenance . . . if

it is without actual or constructive knowledge that the device is inoperative.” *Id.* Nally argues that due process requires that it be, at least, in a position to prevent an alleged violation before being charged with it under the Act. *Id.* at 6. The operator further asserts that because the regulation does not define “maintain,” it does not provide constitutionally sufficient warning of what it requires. *Id.* at 7. Nally insists that the test is whether a reasonably prudent person familiar with the circumstances of the industry would have protected against the condition at issue. *Id.*³

The Secretary replies that nothing in the standard’s language suggests a knowledge requirement and that such a requirement is inconsistent with the long-established principle that an operator may be held liable under the Act even if it had no knowledge of the facts giving rise to the violation. Sec’y Reply Br. at 5-6. She states that accepting Nally’s argument would “eviscerate the no-fault scheme of the Act.” *Id.* at 5-6. The Secretary further contends that Nally’s argument that the standard lacks constitutional notice should not be considered because it failed to raise this argument before the judge. *Id.* at 3. If it is considered, the Secretary asserts that the argument fails because the standard’s language is not unconstitutionally vague and gives fair notice that the back-up alarm is to be continuously “maintained” in functional condition. *Id.* at 4.

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 such a meaning would lead to absurd results. *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006) (quoting *Dyer v. Unites States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citation omitted)); *Alan Lee Good*, 23 FMSHRC 995, 997 (Sept. 2001); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 707 (July 2001); *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1765 (Nov. 1997). It is only when the meaning is ambiguous that deference to the Secretary’s interpretation is accorded. See *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must “look to the administrative construction of the regulation if the meaning of the words used is in doubt”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltd. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (“Deference . . . is not in order if the rule’s meaning is clear on its face.”) (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984); see also *Jim Walter Res.*, 28 FMSHRC at 987; *Jim Walter Res.*, 19 FMSHRC at 1765; *Cannelton Indus., Inc.*, 26 FMSHRC 146, 151 (Mar. 2004).

The Commission has not previously interpreted section 77.410(c). Accordingly, we shall begin with an examination of the standard’s language as this “is the starting point for its interpretation.” *Sedgman*, 28 FMSHRC 322, 329 (June 2006); *Jim Walter Res.*, 28 FMSHRC at 987; *Alan Lee Good*, 23 FMSHRC at 997. Section 77.410(c) requires that “[w]arning devices shall be maintained in functional condition.” 30 C.F.R. § 77.410(c). The term “maintained” is

³ Nally also contends that the Secretary’s petition for discretionary review should be denied because it failed to separately number each issue presented for review as required under 29 C.F.R. § 2700.70(d). Nally Br. at 9. This argument is without merit because the Secretary only presented one question for review, i.e., whether the judge erred in finding no violation of 30 C.F.R. § 77.410(c). See PDR at 1-2.

not defined in 30 C.F.R. Part 77. In the absence of a statutory definition or a technical usage of a term, the Commission applies its ordinary meaning. *Sedgman*, 28 FMSHRC at 329; *Jim Walter Res.*, 28 FMSHRC at 987; *Jim Walter Res.*, 19 FMSHRC at 1765. “Maintain” is defined as “to keep in state of repair, efficiency or validity: preserve from failure or decline.” *Sedgman*, 28 FMSHRC at 329 (quoting *Webster’s Third New International Dictionary* 1362 (1993)); *Lopke Quarries*, 23 FMSHRC at 707-08; *Jim Walter Res.*, 19 FMSHRC at 1765; *Jim Walter Res.*, 28 FMSHRC at 987-88; *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997). It is also helpful to consider the definition of “functional,” which means “capable of performing; operative.” *The American Heritage Dictionary of the English Language* 711 (4th ed. 2009).

Although not interpreted in the context of section 77.410(c), the Commission has consistently construed “maintain” in relation to other standards to require a continuing functioning condition. In *Lopke Quarries*, the Commission, in affirming the judge’s finding of a violation, examined Webster’s definition of “maintained” and determined that based on its plain meaning, “the inclusion of the word ‘maintain’ in the standard . . . incorporates an ongoing responsibility on the part of the operator . . .” 23 FMSHRC at 707-08. *See also Alan Lee Good*, 23 FMSHRC at 996-98 (affirming the judge’s finding that, because the regulation required that braking systems on equipment be “maintained in a functional condition,” and the operator conceded that the parking brake was inoperative, the evidence established that there was a violation of the cited standard); *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979) (finding that a violation of section 77.404(a) was established where the operator admitted the presence of a hydraulic leak and, therefore, admitted that the forklift was not maintained in “safe operating condition”); *Jim Walter Res.*, 19 FMSHRC at 1765-66 (affirming a judge’s finding that a “monitor was not being ‘maintained’ in ‘proper operating condition,’” as required by 30 C.F.R. § 75.342 where the operator intentionally routed air believed to contain methane on a path that would prevent methane monitor detection). *See also Sedgman*, 28 FMSHRC at 329-30.

Consistent with analogous Commission precedent, we apply the ordinary meaning of “maintain” and conclude that the term is not ambiguous as it is employed in section 77.410(c). We also find that its literal meaning is less complicated than what is suggested by the operator. Inclusion of the term “maintain” makes clear that warning devices shall be capable of performing on an uninterrupted basis and at *all* times. Congruent with our holding in *Lopke Quarries*, to “maintain” imposes a continuing responsibility on operators to ensure that safety alarms do not fall into a state of disrepair.

Moreover, reading the standard to require that operators “preserve from decline” the functional condition of back-up alarms is wholly consistent with the safety objectives of the Mine Act. It fits squarely within the intended purpose of the standard, which is to provide unsuspecting pedestrians with a potentially life-saving warning against the obvious danger of being run over. Because the operator’s vision is impaired when the truck is moving in reverse in a noisy environment, the back-up alarm provides a critical warning to an individual who might be crouching, kneeling, have his back turned to the vehicle, or simply be distracted.

Nally has conceded that when Inspector Faulkner performed the inspection, the back-up alarm on the truck was not working. 31 FMSHRC at 690; Tr. 65; Nally Br. at 2. Consequently,

the alarm was not being “preserve[d] from failure or decline,” as it was not “capable of performing” or “operative” at the time of Faulkner’s inspection. Based on these facts, we conclude that Nally violated the standard.

We further conclude that the judge, by reasoning that an operator should be accorded a “reasonable period of time to address defects after they are noted by the pre-shift examiner” (31 FMSHRC at 693), erroneously added a knowledge requirement to the standard that is not intended by its text.⁴ While interpreting a similar Part 77 regulation (30 C.F.R. § 77.404(a)), the Commission determined that “[t]he regulation requires that operators maintain machinery and equipment in safe operating condition and imposes liability upon an operator *regardless of its knowledge of unsafe conditions*. What the operator knew or should have known is relevant, if at all, in determining the appropriate penalty, not in determining whether a violation of the regulation occurred.” *Peabody Coal*, 1 FMSHRC at 1495 (emphasis added). Therefore, under these facts, what Nally knew at the time the citation was issued is only relevant to determining Nally’s degree of negligence and the resultant penalty.

Lack of knowledge is also not a defense to liability in light of the strict liability nature of the regulations. *See Rock of Ages Corp. v. Sec’y of Labor*, 170 F.3d 148, 156 (2d Cir. 1999) (holding that Mine Act regulation “imposes strict liability on mine operators . . . regardless of whether the operator has knowledge” of hazard); *Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1184 (9th Cir. 1998) (“knowledge and culpability, however, are not relevant to the determination of whether there was a violation. As we have observed, the FMSHA imposes ‘a kind of strict liability on employers to ensure worker safety’” (citations omitted)). In any event, restricting an operator’s liability to hazards identified in pre-shift examinations runs counter to the Act’s safety objectives and would lead to perverse incentives. For instance, overlooking a hazard during a pre-shift examination could insulate an operator from being cited for a violation during the shift. Requiring that operators continuously keep machinery in operational condition encourages more vigilance with instituting and enforcing effective maintenance procedures.

Accordingly, we reverse the judge’s determination that there was no violation of section 77.410(c). Because we find the standard’s language plain and unambiguous, we do not reach the Secretary’s deference argument or Nally’s notice argument. *See Exportal Ltd.*, 902 F.2d at 50; *Jim Walter Res.*, 28 FMSHRC at 987; *Jim Walter Res.*, 19 FMSHRC at 1765; *Cannelton*, 26 FMSHRC at 151; *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997) (holding that

⁴ In contrast, other standards do require an operator’s knowledge in order to establish liability. In *Lopke Quarries*, 23 FMSHRC at 714-15, the Commission affirmed the judge’s finding of no violation of 30 C.F.R. § 56.14100(b), which requires operators to correct defects in a “timely manner,” after concluding that there was no evidence indicating when the device became defective. Critical to its analysis, the Commission concluded that “[w]hether the operator failed to correct the defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence.” *Lopke Quarries*, 23 FMSHRC at 715. *See also* 30 C.F.R. § 56.4102 (requiring removal or control of flammable spill or leak “in a timely manner”).

when the language of the standard is found to be clear and unambiguous, fair and adequate notice to operators is provided).

III.

Conclusion

For the reasons set forth herein, we reverse the judge's finding that Nally did not violate 30 C.F.R. § 77.410(c) and remand this case to the judge for a determination of whether the violation was S&S and the assessment of a civil penalty.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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August 18, 2011

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

v.

OLIVUE SAND & GRAVEL

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Docket No. LAKE 2011-391-M
A.C. No. 20-02937-234805

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 18, 2011, the Commission received from Olivue Sand & Gravel, a request 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).¹ On March 1, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessments.

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

¹ The request to reopen was sent by Ronald J. Baril, Sr., who describes himself as a “Safety Consultant.” Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an “owner, partner, officer or employee” of certain parties, or “[a]ny other person with the permission of the presiding judge or the Commission.” 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Baril satisfied the requirements of Rule 3 when he filed the operator’s request. We have determined that, despite this, we will consider the merits of the operator’s request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Baril must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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Chief Administrative Law Judge Robert J. Lesnick
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601 New Jersey Avenue, N. W., Suite 9500
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 18, 2011

SECRETARY OF LABOR,	:	Docket No. PENN 2011-178
MINE SAFETY AND HEALTH	:	A.C. No. 36-05018-233124
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	
	:	
LINCOLN CONTRACTING &	:	
EQUIPMENT COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 1, 2011, the Commission received a request from Lincoln Contracting & Equipment Company, Inc., 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). On February 8, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 18, 2011

SECRETARY OF LABOR,	:	Docket No. WEST 2011-580-M
MINE SAFETY AND HEALTH	:	A.C. No. 04-01614-240316
ADMINISTRATION (MSHA)	:	
	:	
v.	:	
	:	
PACIFIC ROCK, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 3, 2011, the Commission received a request by Pacific Rock, Inc., 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).¹ On February 18, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

¹ Although the operator appears to have mistakenly paid the assessment, it states that it seeks reopening to have the penalties reduced.

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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August 18, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2011-110-M
v.	:	A.C. No. 30-03446-238528
	:	
HARRIS TRUCKING, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 24, 2011, the Commission received a request from Harris Trucking, LLC, requesting 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). On March 4, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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August 19, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2010-316
v.	:	A.C. No. 18-00781-207392
	:	
HERITAGE COAL & NATURAL	:	
RESOURCES, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 2, 2010, the Commission received from Heritage Coal & Natural Resources, LLC (“Heritage”), a request that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On December 30, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000207392 to Heritage. On March 31, 2010, MSHA sent Heritage a notice indicating that the penalty had become final and now was delinquent. In its letter, Heritage asserts that it had contested the citations in question "in a timely manner." However, Heritage does not provide any documentation or explanation which demonstrates that it filed a contest of the citation or proposed penalty on time.

The Secretary opposes reopening, stating that there is "no record of MSHA receiving a pre-penalty contest for this citation, or a contest of proposed penalty in this case." She further indicates that because the operator did not respond to the delinquency notice, the assessment was sent to the U.S. Department of Treasury for collection on July 8, 2010. The Secretary asserts that it was only after receiving the Treasury collection notification that Heritage requested reopening.

Having reviewed Heritage's request to reopen and the Secretary's response thereto, we determine that the operator has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. The operator's contention that it had contested in a timely manner lacks sufficient detail and documentation, and is not supported by the record. In addition, Heritage has failed to explain why it delayed approximately four months in responding to the delinquency notice sent by MSHA.¹

Accordingly, we hereby deny without prejudice Heritage's request to reopen. *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Heritage may submit another request to reopen the Assessment No. 000207392.² Any

¹ In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 10-11 (Jan. 2009).

² If Heritage submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Heritage should include a full description of the facts supporting its claim that it timely contested the citation or of its mistake or other problem that prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Heritage should also submit copies of supporting documents with its request to reopen. Heritage should further explain and document in similar detail why it delayed in responding to MSHA's delinquency notice.

amended or renewed request by the operator to reopen this assessment must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.³

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

³ We note that in *Heritage Coal & Natural Res., LLC*, 31 FMSHRC 1009, 1011 (Sept. 2009), the Commission denied without prejudice Heritage's request to reopen in a prior case. We strongly caution Heritage to take all necessary procedures to ensure that it timely contests penalty assessments in the future.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 23 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 2011-349-M
ADMINISTRATION (MSHA)	:	A.C. No. 09-01038-188254
	:	
	:	
v.	:	
	:	
CARMEUSE LIME AND STONE	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 25, 2011, the Commission received a motion by counsel for Carmeuse Lime and Stone (“Carmeuse”) requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On June 17, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent to Carmeuse the proposed penalty assessment at issue. Carmeuse claims that it timely sent the contest form to MSHA's Civil Penalty Compliance Office in Arlington, Virginia, and that MSHA has erroneously determined that it did not receive the contest form. Its assertion that the contest form was timely filed is based on an affidavit of its safety manager.

The Secretary opposes the request to reopen. Although she acknowledges that MSHA timely received payment for the other penalties contained in the proposed assessment, she states that there is no record of MSHA receiving the contest form and no independent evidence that the contest form was sent. She further states that the penalties at issue became a final order on July 23, 2009. Although the Secretary mailed a delinquency notice to the operator at its address of record in September 2009, the notice was returned as undelivered. The case was subsequently sent to the U.S. Department of Treasury for collection, and Carmeuse received two collection notices with respect to the delinquency – one in March 2010 and another in December 2010. The Secretary also points out that the outstanding balance for the penalties (\$8,000) was shown on all of the monthly proposed assessments issued to the operator after the case became delinquent. On these grounds, she opposes reopening because Carmeuse did not seek reopening until February 2011 – more than one year and seven months after the proposed assessment became a final order of the Commission, despite receiving collection notices and proposed assessments indicating that the outstanding balance was owed.

In response, Carmeuse argues that because it allegedly filed a timely contest, did not receive the delinquency letter from MSHA, and explained its position to the private collection companies hired by the Treasury Department, reopening should be granted despite the fact that more than a year has passed since the proposed assessment became a final order.

Under Rule 60(c)(1) of the Federal Rules of Civil Procedure, any motion for relief from a final order pursuant to Rule 60(b) must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. Here, Carmeuse requests reopening of the proposed assessment more than one year after it became a final Commission order.

We conclude that there is no basis in this case for ignoring the one-year deadline in Rule 60(c)(1). The operator should have been aware that MSHA had determined that it had not received the contest form and that the \$8,000 in penalties was overdue. In particular, the fact that the outstanding balance of \$8,000 was included on *every* subsequent monthly statement issued to the operator should have alerted a reasonably diligent operator that there was a problem. Moreover, after receiving a notice from a private collection agency in March 2010, stating that the penalties were delinquent, a reasonably diligent operator would have contacted MSHA promptly to determine what had happened. However, Carmeuse waited an additional ten months before contacting MSHA.

Because Carmeuse did not seek relief from the final order until more than one year had passed, its request is untimely. *Freedom Energy Mining Co.*, 31 FMSHRC 593 (June 2009) (denying request to reopen filed more than one year after penalty proposal had become a final

order); *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004) (same). Accordingly, Carmeuse's request to reopen is denied.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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August 23, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2009-857
ADMINISTRATION (MSHA)	:	A.C. No. 46-08751-152739
	:	
v.	:	Docket No. WEVA 2009-1131
	:	A.C. No. 46-08751-159510
KINGWOOD MINING COMPANY, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 12 and April 7, 2009, the Commission received from Kingwood Mining Company, LLC (“Kingwood”) motions by counsel to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹ The Secretary opposed both motions to reopen.

On April 19, 2011, Kingwood filed motions to withdraw its requests to reopen. The operator requests that its earlier motions be dismissed without prejudice in order that Kingwood, which has ceased mining operations at the mine subject to the penalties at issue, may enter into a global settlement of all outstanding penalties that the mine owes to the Department of Labor’s Mine Safety and Health Administration. Kingwood’s motions to withdraw did not indicate the Secretary’s position on the matter, and she has not responded to the motions.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-857 and WEVA 2009-1131, both captioned *Kingwood Mining Company, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

Having considered Kingwood's motions to withdraw, we hereby grant its requests and dismiss its earlier motions to reopen without prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

/s/ Patrick K. Nakamura
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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August 24, 2011

SECRETARY OF LABOR :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
 :
 :
 :
v. : Docket No. KENT 2008-712
 : A.C. No. 15-19076-141789-01
NALLY & HAMILTON ENTERPRISES, INC. :

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006). On August 11, 2011, the Commission issued a decision reversing the judge's decision to vacate a citation issued to Nally & Hamilton Enterprises, Inc. ("Nally") by the Mine Safety and Health Administration. 33 FMSHRC ___, Docket No. KENT 2008-712 (Aug. 11, 2011). On August 18, 2011, the Commission received from Nally a Petition for Reconsideration of its August 11 decision pursuant to Commission Procedural Rule 78(a), 29 C.F.R. § 2700.78(a), and a request that the filing of its petition stay the effects of the decision. *See* 29 C.F.R. § 2700.78(b).

Upon consideration of the petition, we hereby deny Nally's request for reconsideration and its request to stay the effect of the August 11, 2011, decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
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August 26, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2011-240-M
v.	:	A.C. No. 40-02210-234371 A
	:	
MICHAEL R. TAYLOR	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On January 7, 2011, the Commission received from Michael R. Taylor (“Taylor”) a motion by counsel seeking to reopen a penalty assessment against Taylor under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In his motion, Taylor states that he did not receive MSHA’s proposed penalty assessment, which was sent in October 2010. Taylor explains that during the special investigation, he provided the MSHA investigator both his work and home addresses. Taylor asserts the proposed assessment was sent via certified mail to a different address and was returned undelivered to MSHA. He contends that he discovered the penalty assessed against him on December 8, 2010, when a representative of the Secretary contacted his counsel. He asserts that the assessment was final when he received it and thus filed this request to reopen.

The Secretary states that she does not oppose Taylor’s request to reopen the penalty assessment.

Here, Taylor never received notification of the proposed penalty assessment as required

under Commission Rule 25.¹ Under the circumstances of this case, we conclude that Taylor was not notified of the penalty assessment within the meaning of the Commission's Procedural Rules, until at least December 8, 2010, when his counsel was notified of the assessment from MSHA. Under the circumstances of this case, we conclude that Taylor timely contested the proposed penalty, once he had actual notice of the proposed assessment. *See John R. Hurley*, 31 FMSHRC 1331, 1332 (Dec. 2009) (concluding that the proposed assessment was not final because the agent did not properly receive the proposed assessment and construing the agents' submission as a timely contest); *Michael Cline*, 31 FMSHRC 354, 355-56 (Mar. 2009) (same); *Stech, employed by Eighty-Four Mining Co.*, 27 FMSHRC 891, 892 (Dec. 2005) (same).

¹ Commission Procedural Rule 25 states that the "Secretary, by certified mail, shall notify the operator or *any other person against whom a penalty is proposed* of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment." 29 C.F.R. § 2700.25 (emphasis added).

Accordingly, the proposed penalty assessment is not a final order of the Commission. We remand this matter to the Chief Administrative Law Judge for assignment to a judge. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 26, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-507-M
v.	:	A.C. No. 26-02286-232862
	:	
DMC MINING SERVICES	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On January 19, 2011, the Commission received from DMC Mining Services a motion by counsel 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). On February 1, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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Chief Administrative Law Judge Robert J. Lesnick
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On February 16, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000211482 to WA. WA's representative, James Bowman, contends that the proposed assessment was served on WA's bookkeeper on or around February 18, who in turn faxed the assessment to Bowman, so that he could file a contest of the assessment. Bowman states that during the week of February 15, 2010, he experienced power outages due to severe weather and never received the fax. Bowman asserts that his fax machine does not produce a history of received faxes. In her affidavit, WA's bookkeeper explains that her fax machine does not produce a log and thus she has no record of the fax transmission. Bowman attributes the failure to timely file a contest here to "electrical error" beyond his control, rather than clerical error.

The Secretary opposes WA's request to reopen. She states that WA's inadequate and unreliable internal office procedures do not constitute grounds for relief under Rule 60(b). The Secretary also notes that the operator has two other delinquencies from the same time period.

Although Bowman argues that the power failures were to blame for the failure to timely contest the assessment, we cannot conclude that WA's failure amounts to mistake or inadvertence warranting relief. Assuming that WA's bookkeeper faxed the assessment as she contends in her affidavit, given the weather conditions, the frequent power outages, and the significant penalty amount at stake, all parties involved should have been more vigilant in ensuring that the paperwork was properly handled in this case. Neither the bookkeeper nor the operator, after having been consulted by its bookkeeper, confirmed Bowman's receipt and handling of the proposed assessment. Moreover, even after being notified of the delinquency, WA delayed more than a month and a half in seeking to reopen the assessment.

Based on the foregoing, we conclude that WA has failed to provide an adequate basis for the Commission to reopen the penalty assessment. *See Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062-63 (Dec. 2008) (denying relief because operator's excuse was insufficient); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067-68 (Dec. 2008) (same). Accordingly, we deny WA's request to reopen.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

/s/ Patrick K. Nakamura
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ADMINISTRATIVE LAW JUDGE DECISIONS

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August 1, 2011

HILDA L. SOLIS, Secretary of Labor,)	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH)	
ADMINISTRATION (MSHA),)	
Petitioner)	DOCKET NO. KENT 2010-354
)	A.C. No. 15-19270-203618-01
v.)	
)	
)	
ROAD FORK DEVELOPMENT)	MINE: LOVE BRANCH SOUTH
COMPANY, INC.,)	
Respondent)	

DECISION

Appearances: J. Malia Lawson, Esq., Robert E. Motsenbocker, Esq.
Nashville, Tennessee, on behalf of the Secretary of Labor

Carol Ann Marunich, Esq., Dinsmore & Shohl, LLP
Morgantown, West Virginia, for the Respondent

Before: Judge Moran

At issue in this proceeding under the Mine Act are two section 104(d)(1) Orders. One involves an alleged failure by the Respondent, Road Fork Development Company, Inc., at its Love Branch South Mine, to comply with its roof control plan by failing to have the required support where multiple hill seams were encountered. The plan requires timbers and cross collars to be installed under such circumstances and the inspector found various instances of non-compliance regarding those supports. The other (d)(1) Order alleges a related violation by virtue of those non-compliances with the roof control plan not being noted in the preshift examination book. Both Orders included special findings asserting that the violations were “significant and substantial” and unwarrantable failures. A hearing was held in Pikeville, Kentucky on April 11, 2011. For the reasons which follow, the violations and the associated special findings are affirmed and the civil penalties imposed are the same as those originally assessed, totaling

\$9,774.00.¹

Order No. 7446458

On September 16, 2009, while conducting an E01 inspection at the mine, Inspector Larry Wolford issued the Respondent a section 104(d)(1) order for not complying with its roof control plan.² Ex. S 2, and S 3, the Order and the continuation form for that order, respectively.³ Tr. 13-14. The evidence associated with this matter is as follows. Inspector Wolford arrived on the working section at about 10 a.m. on September 16th, accompanied by mine employees John Urconis and Ed Hatfield. Tr. 20. After attending to other matters, Wolford stated that he found “multiple hill seams” which were not being supported, contrary to the requirements of the mine’s roof control plan.⁴ The inspector described “hill seams” as a “crack in the mine roof that goes near the surface of the mine . . . [that is to say a crack that goes] up to the surface.” Tr. 20-21. These are problematic because if one has “multiple hill seams, which [are] two cracks going down an entry, there’s separation between the roof on the sides; and it will allow the roof to fall out in between those cracks.” Tr. 20-21. Accordingly, hill seams are significant as, where two cracks are present, the rock in between such cracks may fall out. Tr. 26. That hill seams are a significant concern is also attested to by virtue of their inclusion in the mine’s roof control plan.

¹ Both post-hearing briefs, together with the reply and response were fully considered. The absence of a specific reference to a contention made means that the Court considered that it was unnecessary to particularly address such matter or that it was inferentially addressed in the decision.

² Inspector Wolford has been an MSHA inspector for approximately 3 ½ years. In addition, he has had about seven years of experience as a coal miner, working in Kentucky and West Virginia. Tr. 11-12. In that latter work, his experience included working as a ventilation man, scoop operator, continuous miner operator and as a section foreman

³ Wolford identified Gov.Ex. S 2A, relating to Docket KENT 2010-354, for the violation numbers in issue, numbers 7446458 and 7446459, which exhibit reflects the proposed penalties for those, with the former assessed at \$2,000 and the latter at \$7,774, for a total of \$9,774. Respondent stipulated to the admission of Government Exhibits S 3, 4, 5 and S 6, the inspector’s notes related to his Orders in this matter. Tr. 17.

⁴ An additional factor of concern, the Inspector referred to the map, Ex. S 8, and the listing of “Sunny Ridge Surface Mine,” an area marked with perpendicular yellow lines. The witness marked this area on the exhibit with a blue pen and added his initials. Tr. 38. That mine is a surface mine which is next to, that is to say, close to, the Respondent’s mine. The significance of that, according to Wolford’s unchallenged testimony, is that activity at that surface mine, such as blasting, affects the Respondent’s mine because that is likely to weaken the roof of the Respondent’s mine. Wolford stated that the overburden, that is the amount of mountain one has above the mine, is important because, as the overburden lessens, more hill seams may be present as one gets closer to the surface. Tr. 35. In this area, the inspector stated that the amount of overburden in that area is between 1 to 200 feet. Tr. 36.

Wolford noted that the roof control plan provides the *minimum* control requirements. Tr. 25. Pursuant to the mine's approved roof control plan, when multiple hill seams are encountered, for support, the plan requires the installation of cross collars or channels *together with posts*. Tr. 24-25. Wolford spotted this condition because "they were going parallel with the entries . . . [that is the cracks were] going in line with the entries that they [were] driving." Tr. 22. As just mentioned, the roof control plan⁵ requires that cross collars or a T 5 channel⁶ across the entries and posts (also referred to as 'timbers') are to be installed in such circumstances. Exhibit S 7A. Wolford stated that in some instances the mine had "half way" installed such collars and in other instances they had not done anything.⁷ Tr. 22.

Wolford further explained his findings of the violations by referring to Ex. S 12, a computer generated printout, which was used by the Secretary as demonstrative evidence to depict the section where Inspector Wolford found the violations.⁸ On that exhibit the inspector marked the eight entries and the coal feeder⁹ location. Tr. 44, 48. The inspector's order stated

⁵Ex. S 7 is the mine's approved roof control plan, dated August 21, 2009. Tr. 23.

⁶Cross collars and T 5 channels are a 3 inch by 8 inch piece of wood or a piece of metal that "goes across that entire entry," that is from rib to rib and, with those, posts are installed under each end of the wood or metal and these have to be installed on four foot centers. The four foot centers requirement means that the wood or metal supports must be installed every four feet as one progresses in an entry as long as such hill seams continue. Tr. 22-23, 46. Besides adding support, the presence of such timbers can serve as a warning since, if they bow or sag, it shows that the roof is sagging and that the timbers are taking on weight. Tr. 47. Timbers therefore provide required support and can serve as a warning too.

⁷ Although the issue was raised by the Respondent at the hearing, there is no question but that the Inspector was certain about his location in the mine where he found the conditions cited. Exhibit S 8 is a mine map of the Love Branch South mine, dated October 28, 2009, and Wolford identified on that map the location where he found the hill seams. He knew the location because he included the survey station numbers in his notes at the time of the inspection and compared that with a mine map that had such numbers on it. S 8 did not have the survey numbers included on it and for that reason Wolford consulted another map of the mine which did have those numbers. Tr. 29. The inspector marked the area here he found the hill seams on the exhibit, circling the area with a red marker, listing "hill seams" and adding his initials, "LW." Tr. 32, 34-35. The Respondent did not pursue this issue in its post-hearing briefs. The Court finds that the inspector knew his location in the mine where he found the conditions cited.

⁸ The Court determined that the demonstrative evidence, which was certainly material, had explanatory value and did not create prejudice nor confusion, nor did it mislead. Accordingly, using its discretion in such matters, the Court admitted the exhibit. *Rogers v. Raymark Indus.*, 922 F.2d 1426, 1429 (9th Cir. 1991), *Wright v. Redman Mobile Homes, Inc.*, 41 F.2d 1096, 1097-98 (5th Cir. 1976).

⁹ The coal feeder is a machine on which coal is dumped and it transports the coal to a conveyor belt. Tr. 43. A shuttle car hauls the coal to the coal feeder. On the exhibit, the coal feeder was identified by a triangle. Tr. 44.

that the number 1, 2 and 3 entries and the connecting crosscuts had multiple hill seams. While it was noted that wooden cross collars were installed, no timbers were present under each end of the cross collars. This problem began adjacent to the coal feeder and it extended two crosscuts inby.¹⁰ Tr. 44. In that area, while the collars¹¹ were present, no timbers had been installed. Tr. 49. The inspector marked four additional collars located between the 3 and 4 entries, where the same problem existed.¹² Wolford testified that in those areas where the collars were present, there was not a single timber installed. Tr. 51. As further explained in the discussion of the testimony, the Court finds this to have been the case and makes this as a finding of fact.

Following that, on the same demonstrative exhibit, the inspector then marked on heading number 3 where there were neither collars nor timbers.¹³ Tr. 53. Inspector Wolford stated that he found hill seams in every location where he marked red lines on the exhibit. Tr. 56. Using a silver ink marker, he then marked on the exhibit additional areas where he found hill seams. Those silver markings were in every area where the inspector had previously marked red and blue lines on the same exhibit, S 12. Thus, Exhibit S 12 provides a helpful guide to the hill seams the inspector found together with the roof control plan deficiencies associated with them; the silver ink markings representing the areas with hill seams; the blue line markings showing those areas with collars but without timbers (posts) and the red line markings identifying those area which had neither collars nor timbers present.¹⁴

¹⁰The inspector marked this area missing the timbers with diagonal blue lines on the exhibit. Tr. 44-45.

¹¹ The collars are held up by roof bolts and by the timbers on each end. Tr. 49.

¹² The inspector's *notes* indicated those areas, but his original order did not. For that reason he issued a "continuation" to his order to reflect those additional problem areas. Tr. 50-51.

¹³ The inspector's red markings on the exhibit reflected areas with neither posts nor collars. Tr. 54.

¹⁴ Referring to his markings on S 12, the inspector confirmed that the red marks indicated there were no collars installed. Tr. 93. Thus, in Entries 2 and 3, there were areas with no collars, as indicated by the red marks, nor did the areas of 7 and 8, as marked, have collars. Wolford, reading that his notes made no reference to it, did not know if cable bolts had been installed in the area. Tr. 95. For clarification, the Court asked the inspector about his red line markings on the exhibit, inquiring whether, if one were standing at 7 and 8, where the inspector marked the "no collars" lines, mining had occurred. The inspector confirmed that in that area the coal had been removed from 7 and 8. Tr. 129. Continuing with that area, Wolford agreed that when standing there, no collars were present and one could see the hill seams. Tr. 129-130.

Inspector Wolford's Order, No. 7446458, was issued as a D1 Order because the mine was already on a D sequence¹⁵ and because he determined that the failure was unwarrantable. Tr. 59 and Ex. S 2. Wolford marked the order as "reasonably likely" because miners were working in the area of the hill seams. Eleven (11) men were working in that section. Tr. 60-62. He considered that any such injuries would be permanently disabling because of crushing from falling rock. He marked the number affected as one, as it was likely that only one miner would be hit if rock were to fall, although 11 would be exposed to the risk. Wolford also noted that, if normal mining operations had continued, miners would have been in every entry, because each heading is cut into. Tr. 135. The inspector marked the violation as "high negligence" because the section foreman, Randall West, told him that he was aware of the problem when the inspector brought the subject up. West was on the section at the time that Wolford raised the matter and the conversation with him occurred within 10 minutes after Wolford detected the problem.¹⁶ Tr. 64. As Inspector Wolford expressed it, "[t]hey was (sic) running coal at the time [he] got up there, and they was (sic) making no effort to correct them." Tr. 63. The Inspector did not retreat, during cross-examination, from his assertion that both Urconis and West told him, as reflected in Wolford's notes, that the mine would have continued to mine coal, had the inspector not pointed out the hill seams and shut them down. Tr. 130-132.¹⁷

The inspector issued the violation as an unwarrantable failure because "the operator had been warned previously in the past about repeatedly violating this condition [that is, the inadequately supported hill seams Tr. 67]; and they knew about it and was (sic) aware that the men was (sic) working in those conditions, and they failed to correct them." Tr. 66. He had also

¹⁵ The underlying section 104 (d)(1) citation was issued on August 26, 2009. Tr. 059-60, citing Citation Number 8226728. That citation placed the mine on a 104(d) sequence. Under that, any further unwarrantable failure violations within a 90 day period results in the issuance of 104(d)(1) orders being issued. To stop the D sequence chain, a mine must have a 90 day period free of any unwarrantable failures. Tr. 60. If a violation is not "S & S" but is unwarrantable, the D sequence continues until such a 90 day period free of unwarrantable failures occurs.

¹⁶Wolford first spoke of the problem with Mr. Urconis, the mine's superintendent, as that individual was traveling with him. Urconis was present when Wolford spoke to Mr. West about the problem. Tr. 65. Neither individual denied the problem, and as noted, West admitted to it, according to Wolford. Urconis, according to Wolford, only asked that the inspector not write up the violation as an unwarrantable failure. Tr. 66. Wolford added that Urconis was concerned that his job could be in jeopardy if the violation was listed as an unwarrantable failure. Tr. 68.

¹⁷ Respondent's Counsel tried to diminish the impact of the inspector's remarks by noting that he did not recommend that the two be subject to reckless or intentional violations, nor did he issue an imminent danger order. However the inspector did order that the miners be withdrawn from the area and while Respondent's counsel noted that the men were then right back in the area, albeit to correct the hazard, the inspector observed that they were allowed back in that area *only* to correct the problem. Tr. 133.

warned both Urconis and Mitch Salmons that if unsupported hill seams continued to recur, he would put the mine on a “D sequence.”¹⁸ Tr. 72.

Wolford also considered the violation unwarrantable because of its extensiveness. As indicated on the exhibit on which he marked the deficient areas, S 12, he expressed that it covered “quite a bit of area across the section.”¹⁹ Tr. 68. It was the inspector’s estimation that the hill seams without the cross collars had been up for two days or longer. Tr. 70. That estimate was based on his view that it would have taken them at least two days to mine the coal to where they were. Tr. 70. Further, Wolford noted the condition immediately upon arriving at the section, and thus it was obvious. He described the lack of the corrective action in the presence of such hill seams as posing a “high risk” of danger because the miners are working in top that is not adequately supported. The rock could fall out at any time. Tr. 71.

In correcting the problem cited in Ex. S 2, the operator moved all eleven of the men out of the section and then used all of them to correct the deficiency. They proceeded to set up 80 timbers and they installed 16 cross collars up, using D 5 metal channels. Tr. 74. It took them from the time he issued his order until quitting time to fix the problems.²⁰ Tr. 74. The inspector

¹⁸Wolford stated that from approximately January through September 2009 he had issued four or five instances of failure to comply with the roof control plan where hill seams were present. Tr. 73. In contrast, government exhibit S1, a violation history of the mine’s roof control violations, was admitted, but the Court deemed it to be of low probative value because it dealt with such violations generally, not specifically to hill seam violations. Tr. 88. That being said, the uncontested testimony from Inspector Wolford that there had been four or five hill seam related violations from January through September of the same year establishes the chronicity of this violation.

¹⁹ Each blue line Wolford marked on the exhibit is about 20 feet, as the entries between the coal pillars are about 20 feet wide. Tr. 69.

²⁰ Respondent’s Counsel tried to diminish the large amount of time it took to install the corrective measures by asking questions relating to the length of time it would take for the supplies to arrive from the surface and thereby suggesting that was a mitigating consideration. Tr. 111-112. When asked if the time to get the supplies to the area should be considered, Wolford responded that when the miners first arrived on the section the problem was already there; it had not developed after their arrival. Tr. 100. Posing a hypothetical to the inspector, Respondent’s Counsel asked the inspector to assume that West was in the face area mining entries 4, 5, 6, 7 and 8 of an active working section and that, after making a couple of cuts, finds the adverse roof conditions and takes steps to control it. The Inspector agreed that, under such a hypothetical, that would be affirmative action to deal with the problem. However, the inspector did not feel that the need to have supplies brought down from the surface was a mitigating factor because they should have kept the supplies in the area, as they knew there were hill seams. The inspector’s point was that the supplies should have been handy, as they knew they would be needed since they were aware of the continuing hill seams issue. Tr. 103. Although part of the
(continued...)

counted the 80 timbers and 16 T-channels as they were installed. Tr. 106. He did not leave the section during that time.²¹ Tr. 107. Wolford reiterated that T-channel had to be installed in entries 2 and 3 and in 7 and 8. Tr. 109.

Noting again that Mr. Randall West, as the section foreman, is part of management, Wolford repeated that West was on that section the entire morning. Therefore, his knowledge is imputed to the mine operator. In addition, West admitted to Wolford that he knew about the problem. Wolford also expressed that he would have reached the same conclusion, even apart from West's statement and presence on the section, because the condition "was very obvious, extensive, and they knew about the one hill seam because they had put cross collars up but hadn't set the timbers under them." Tr. 77.

Wolford agreed that he met West inby the feeder in the face area at the time in issue. The inspector could not recall if the belts had been turned off prior to his arrival *on the section* that morning. Tr. 98. While he couldn't recall if coal was actually running when he arrived at the section, he did recall that it had been running as he saw "there was coal coming off the belts *when [he] arrived* at the mine." Tr. 99 (emphasis added). The inspector did not believe there were any mitigating factors. Tr. 99. When asked to assume that the belts had been turned off after a couple of cuts of coal had been made, whether that would be a mitigating factor, Wolford acknowledged it would be, *if* that had been done. Tr. 100. However, Wolford distinguished that what he would consider it to be mitigation would be if they "actually [had] start[ed] to correct the problem." Tr. 100. The Court agrees that, if the belts had been turned off, that would be a step preparatory to any true act of mitigation. Real mitigation, for example, would exist if the mine were in the process of setting some of the 80 timbers that were eventually needed.

Defenses Raised by the Respondent to the Order

In defense of the (d)(1) Order, the Respondent called John Urconis. At the time of the orders in issue here he was the mine's foreman and presently he is the mine superintendent at the Love Branch South Mine. Tr. 138. He described the mine as a "hilltop mine," with an inherently wet seam and he conceded that they do encounter "what some interpret to be a hill seam from time to time throughout the mine."²² Tr. 140

²⁰(...continued)

lengthy period it took to correct the problem was attributable to the time to have the supplies delivered from the surface to the section, the Court does not view this as diminishing the seriousness of the failures. Tr. 75. The extent of the problems, as depicted on S 12, and the number of timbers that had to be installed, show this by themselves.

²¹ Wolford's markings on the demonstrative exhibit, S 12, did not represent each collar, nor the exact number that were installed. Rather they showed, in a useful illustrative manner, the area where they were installed. Tr. 110.

²² Although the Court considers it immaterial to the issues here, Urconis added that the mine has never liberated methane and that the draw rock was rare. Tr. 140-141. Draw rock, he
(continued...)

Urconis did not disagree with the inspector's statement of the requirements under the roof control plan when hill seams are encountered.²³ Thus, he agreed that if that condition is encountered, one must install a four foot strap and if there are two seams, running parallel, one must first put up the primary support and then install 3 inch by 8 inch wooden cross collars or T 5 metal channel and these are to be installed on four foot centers.²⁴ Then, he further agreed, timbers must be installed under each end. Tr. 146.

Urconis concurred that he was with Inspector Wolford on September 16, 2009. When they arrived on the section, they started at the Number 1 entry and worked their way across into entry number 2 and 3 and so on until they reached the No. 8 entry. Tr. 151. Urconis stated that there were "some timbers installed" in entries 1, 2, and 3. He added that some had been knocked down but he could not recall where, stating only that they were "more on the left side of the section." Tr. 152. Urconis also stated that when the MSHA inspector issued the orders in issue here, he was underground with the inspector.

It was Urconis' testimony that he specifically recalled that when he and the Inspector arrived at the section, they were not producing coal and that the belts had been turned off. Tr. 155. However, he could not recall *when* those actions had stopped. It was Urconis' testimony that Randall West had "found hazards, and . . . he was fixing the hazards." Tr. 156. He continued, stating that "Randy and them was focusing (sic) on the right side," by which he was referring to the 5, 6, 7 and 8 entries. Tr. 156. As this was a split air section, MSHA classifies it as an 001 and an 002 section. Urconis stated that both were shut down, again, because West, according to Urconis, had identified some hazards and he shut down so that they could be fixed. Tr. 157.

Urconis could not remember all of the cracks, as the event was two years ago. Tr. 185-186. As a primary contention of the Respondent is that the cracks found by the Inspector were stress cracks and not hill seams, it is significant that Urconis also could not recall whether a particular area had stress cracks or hill seams. Tr. 208. In terms of timbers being installed in Entries 1, 2, and 3, Urconis recalled "some timbers being installed" and "some timbers that had been dislodged." Tr. 186. Urconis could not recall, but neither did he challenge, that the

²²(...continued)

informed, is found in roof with different thicknesses and the upper side of the strata, that is, the roof, is slick. That characteristic is important because, being slick, it won't adhere to the roof that's above it, and consequently it will drop out. Tr 141.

²³ Urconis reviewed the mining process: the continuous miner comes in, removes the coal, and then the roof bolting crew comes in to bolt the area where the coal was just removed. Tr. 147.

²⁴ Straps, which are different from collars, come in 48 inch lengths and have slotted holes on their ends, allowing one to anchor them to the roof. Tr. 149. They are required to be installed if hill seams are found. The plan provides, "[c]ross bars or metal channels will be secured to the roof using a roof bolt, metal straps, chains, or other effective means." Ex. S 7A.

inspector was present and watching the timbers being installed, nor could he speak to whether the inspector counted the number of timbers installed. Tr. 187-188. Urconis maintained that “to his knowledge” there were no miners in entries 1, 2 or 3. Tr. 189. As to entries 7 and 8, Urconis stated that they had cut coal there early that morning but that they “encountered some more conditions on the right side, and that’s when Randall West decided to shut the section down. Tr. 189.

As to a critical question, when Respondent’s Counsel asked if either he or West told the inspector that had he not shown up they would have kept running coal, Urconis answered, “I don’t remember saying that, no, I don’t. I really feel confident in saying I didn’t say that.” Urconis’ confidence in that regard was that to make such an admission to the MSHA inspector “would be the stupidest thing I could ever say in my entire life.” Tr. 190. Then, when asked if he told Inspector Wolford that he was in fear for his job if the violation were to be issued as an Order, Urconis stated: “I don’t recall.” Tr. 191. Later, he added, “I may have said it. I don’t know.”²⁵

When shown R1, the pre-shift and on-shift reports for the mine for September 14, 2009, it shows that timbers were needed for No. 1, 2, 3, 4, 5, 6, 7, and that they were all “dangered off” but none for 8 and 9. Tr. 158. Thus, Respondent contended that these problems were identified at least two days before Wolford issued his order. For the next day, the 15th, Mitch Salmons was the pre-shift examiner. His exam noted that the No. 5 entry needed timbers and was dangered off, the 6 left needed the same, and the 7 left needed straps. That infers that no violations were noted for Entries 2, 3, and 4. Turning to the pre-shift for the 16th, Salmons was also the pre-shift examiner. At that date he noted only the need for timbers in the No. 2 entry and that it needed to be dangered off. Tr. 162. Urconis stated that he countersigns the books to see if the corrective action was taken for the listed problems and that is part of his duties as a mine foreman.²⁶

Urconis agreed that the pre-shift report of September 16, 2009, for 5:00 to 5:45 a.m., reflects what Salmons recorded at that time. Tr. 169. Shown R 2 the mine’s production report

²⁵ Neither of these statements were helpful to the Respondent’s contentions. While Urconis’ remark that such an admission would be “the stupidest thing [he] could ever say in [his] entire life,” made it less likely that he said it, it was not an outright denial, nor did it reflect that safety was the paramount concern. As to his other response, that he could not recall if he expressed fear for his job and his alternative statement that he may have made the remark, the Court finds those responses to be conflicting. At once stating that he could not recall about the job security remark and then admitting he may have said that, fits with his alleged remark that he may have told the inspector that they would have continued to run coal. When paired with the question about continuing to run coal, the Court concludes that Urconis was not generally credible.

²⁶ Urconis, who has known Salmons from 2004 to 2009 as a pre-shift examiner, stated that he considered that Salmons “has always been pretty thorough.” Tr. 164. R’s Exhibit R1.

for September 15, 2009, Urconis stated that no hazards were listed on Salmon's report. At that time equipment was being serviced. Tr. 170. Urconis also stated that the section was shut down for some periods of time, putting up collars and timbers. Tr. 171. Urconis further commented that cable bolts were installed because the person believed he had encountered a situation requiring more support and that this action was beyond that required under the roof control plan's minimum requirements.

In what Urconis described as an "MSHA citation order rebuttal form,"²⁷ which form is used by the mine to explain "the situation that went on with the citation," that form indicated to him that the section had been shut down, and that shuttle cars had knocked down the timbers because the entries had been reduced to 18 feet in width. Tr. 173-174. Urconis also read from the same form that "[t]he cracks inspectors are finding are almost non-existing." Tr. 175.

Based on the production report, R 2, Urconis, did not agree with the claim that the condition had existed for two days. As he interpreted that report, they had finished mining in that area: "[t]hey had worked in that area and mined it." Tr. 179. However, when later directed to the same production report, R 2, and to the bottom right hand portion, where the pillars are marked, Urconis agreed that the area that had been mined on that shift is indicated by L3, and L 5 and all those numbers. Tr. 209. He also affirmed that the last open crosscut had been previously mined. Tr. 209. He then conceded that miners were going through the area where blue hash marks appear on Ex S 12 on Entry 1. Tr. 209-210. While his testimony was unclear at first, he then maintained that, for entry 1, there were collars and timbers installed. Tr. 210. Yet, when asked if that was his testimony, Urconis then stated that he "wasn't there, so [he couldn't] completely vouch for it." Tr. 211. Speaking still to Exhibit to R 2, and its statement that "No. 2 seams idled 8:30 to 12:40 putting up collars and timbers," Urconis admitted that the statement does not indicate *where* those collars and timbers were put up and that it could refer to anywhere on the right side, meaning entries 5, 6, 7 or 8. Similarly, he agreed that where it indicates that the continuous miner was idle from 12:10 to 12:40, setting timbers cleaning and dusting, there is no indication where that occurred and that it could have been anywhere on the left side. Tr. 212. He also concurred that Inspector Wolford did not write any violations for entries 5 or 6. Tr. 211-212. Thus, Urconis agreed that, based on that R's exhibit R 2, one could not determine where collars and timbers were placed. More critically, as noted, Urconis conceded that he wasn't there at that time, so he could not speak from personal knowledge. Tr. 212. Consequently, the Court finds that the production report is far less persuasive than Inspector Wolford's direct observations.

²⁷ This rebuttal form was filled out by Kenneth Hunt, who was the mine superintendent then. Mr. Hunt was not present when Urconis and the Inspector were looking at the problem that resulted in the Inspector's issuance of the Orders here, nor did he testify. Tr. 199. Beyond the assertions in the form proving nothing by themselves, further diminishing its reliability and contrary to the Court's prehearing exchange order, the document was not disclosed until the hearing. The Court, noting that it should have been disclosed, still admitted the document. Exhibit R 3, Tr. 176-178. However, admissibility and probative value are distinct considerations and in the latter regard, for the reasons just mentioned, the Court was not impressed with the rebuttal form.

As to the special findings, Urconis did not consider that the condition cited was “S & S” because he did not believe the cracks would have caused an injury, stating: “I mean, the cracks that we had was not open and weathered.” Tr. 180. By that he meant a crack that was open enough so that one could stick something in it. Tr. 180. However, he took no measurement of the cracks. Tr. 180. He maintained that the cracks were so small that they were “very difficult to find.” In terms of whether miners were in the affected area, Urconis did not think so, but he was not completely certain about that. He agreed that miners would have no need to be in Entries 1,2, and 3 if they were actively mining in Entries 5, 6, 7 and 8. Tr. 181. He stated that there had been no reportable injuries from hill seams and he added that there had been no draw rock. Tr. 184. Accordingly, Urconis’ opinion was based on his view that the problems identified by the MSHA Inspector were stress cracks. The Court finds otherwise. The Inspector found hill seams.

Urconis also did not believe the violation was unwarrantable, because for him that special finding applies only if the mine had done nothing. Here, he noted that the mine had installed collars and cable bolts. Tr. 185. Urconis did not feel that the mine had acted recklessly because they were identifying hazards and collars had been installed. Tr. 191. He also observed that, per Exhibit R 2, the 002, or right side of the section, had been idled for 270 minutes as they were putting up collars and timbers. Tr. 185. Urconis maintained that R 1 shows, via the preshift and onshift reports, all that the mine had been doing as to identifying hazards and correcting them. Tr. 185. The Court does not view it that way. All of the activity cited by Urconis demonstrates the wide scope of the problem, as identified by Inspector Wolford, was in fact as stated by the inspector during his testimony and even Urconis allowed that some of the conditions, that is to say, cracks cited by Inspector Wolford may have been obvious. Tr. 185.

Section foreman Randall West also testified and he was asked about the violation alleged in Order No. 7446458. He was working on the relevant date, September 16, 2009, and Mr. Urconis was his boss. Tr. 271. When West got underground he observed some timbers that had been knocked down but he couldn’t remember the crosscuts where he made that observation, nor could he recall which entries they were mining that morning. Tr. 250-252. When asked what he did when he saw that condition he stated: “Well, the miners - - we went on and went in places that had no hazards, and they started running [coal]; and I just kind of just started setting some timbers and my scoop man went to go get timbers and we started trying to fix it.”²⁸ Tr. 251. West stated that two continuous mining machines *were working* at that time but he asserted that no hill seams were present.²⁹ Tr. 252.

When asked if he encountered any roof control problems that morning, it was West’s testimony, as just noted, that no hill seams were present. Instead, he advised that: “[b]efore the

²⁸ The Court takes note that West shifted from stating there were timbers that had been knocked down to stating that his scoop man had to go get timbers. One would not need to go get timbers unless timbers were missing, not simply knocked down.

²⁹ Respondent’s Counsel stated: “So then they started running, correct?” West answered, “Yes.” Tr. 252.

inspector showed up, as my miners cut, they cut their first cut. They backed out. The guys bolted it and informed me that had hit some stress cracks is what I call them. So they proceeded to fix those and the miners went in two more places that were good, and they hit the same thing and I quit. I shut the section down.” Tr. 253. Thus, West implied by his testimony that the situation was getting out of hand. He expressed, “Because that’s too far ahead of me. You know, I can handle fixing one place at a time, but now you’re looking at four places; so I went and shut the belt off and we started working on the roof.” Tr. 253. They were working on four different cuts at the time he took that action. Fixing four places, he noted, “you’re going to fall behind big time.” Tr. 253. “You know,” he added, “I had a few timbers to set, and then those places were going to need the same work.” Tr. 253-254.

The Court finds that this testimony shows that the problems with the roof remained even as the mining continued. That West acknowledged this problem should not distract one from remembering that Wolford’s orders pertained to areas that had been previously mined.

West asserted that he did not know the inspector was coming to the area when he shut the section down and stopped the belts.³⁰ Tr. 254. In any event, the testimony was unclear as to how soon the inspector arrived at the section after West asserted that he had shut things down, but he admitted that the inspector “found some more cracks that we didn’t get.” Tr. 255. Despite having to fix the problems, West maintained that these problems were “stress cracks,” not “hill seams.”³¹ Tr. 256.

Critically, when asked if he told the inspector or if Mr. Urconis told the inspector that had the inspector not shown up, they would have continued to run coal that day, the best West could offer was “I can’t recall that statement.”³² Tr. 257. In an indirect fashion, West supported

³⁰ While it is not necessary to make a finding of fact, it does seem unlikely that the section foreman would not know that the MSHA inspector was coming to the area where he was. Typically, MSHA’s presence at a mine becomes known quickly.

³¹ Referring to Exhibit S 12 and upon being advised that the red lines signified where timbers were not present, West stated that for 3, 7 and 8, they would *not* have had timbers, pursuant to the informal agreement the mine had with MSHA. Tr. 266. As for 1, 2 and 3, West asserted that he didn’t think that one would see “that many collars up and not timbers. . . a few of them would but not near that many.” Tr. 266. Accordingly, while offering a reason for their absence, West conceded that at least some areas did not have timbers. The Court inquired about West’s recollection regarding another aspect of Exhibit S 12, asking if, in his view, everything listed on that exhibit were stress cracks and not hill seams. He maintained there were no hill seams present anywhere, thus placing his estimation in direct conflict with the Inspector’s observations. Tr. 269. As noted, where testimony conflicted, the Court has found Inspector Wolford’s account to be the more credible one.

³² And with that response, both Urconis and then West had memory lapses as to whether they told the inspector they would have continued to run coal. In both instances, the “can’t
(continued...)

Wolford's version, because he admitted that problems were addressed on a spot basis. That is, West admitted that without the inspector they *would've fixed a place and then continued running coal*, but with the inspector present they "fixed everything." Tr. 257. Consistent with his perspective that, until the inspector arrived, it was sufficient to fix things on a spot basis, West did not consider the violation to be unwarrantable because "we were repairing the problems." Tr. 262.

As with the view of his boss, Mr. Urconis, West also did not consider the problem to be "S & S" because they "weren't producing coal at the time. We were up there fixing things." Tr. 260. As best he could recall there was one area "needing some timbers under collars" in the Number 3 entry. Nor did West feel that there was a reasonable likelihood of a permanent injury occurring because they were dealing with "stress cracks," and he did not recall their being hill seams there. Tr. 261.

The Court does not adopt West's version of the situation. In addition, West's story conflicts with the claim that only stress cracks were present. If that were the case and, as the Respondent does not view them as a problem, West would not have needed to shut things down. Thus, the Respondent's own actions, addressing some of the roof control problems, refutes its claim that they were merely encountering what they characterized as the negligible condition of stress cracks.

The claims that compliance with the roof control plan was impossible and dangerous and that there was an agreement regarding knocked timbers.

In attempting to explain the mining difficulties experienced where hill seams are found, Urconis stated that the entries are narrowed down to 18 feet and with the T channel or cross collar that width is reduced to 16 feet. At that width, he stated that it becomes impossible for a shuttle car to operate without knocking down timbers. Thus, essentially, Urconis stated that knocking down the timbers is unavoidable. Tr. 153. Urconis contended "that's when we was (sic) told set the timber. Don't destroy the timber. Set it out of the way. Keep it out of the roadway to keep from destroying the timber. And then after you get done using that particular haul road before you advance to your next cut, stop and set the timber back to keep from destroying the timber." Tr. 154.

³²(...continued)

recall" formulation is found to be dubious. It is more likely that one would recall whether or not such a statement was made. When asked if he agreed with Inspector Wolford's assertion that the conditions had existed for at least two days, West responded, "It's been a long time. I'll have to look in your on-shift book and see as far as me just saying did it last two days." Tr. 263. Again, as noted earlier with his inability to recall, when it came to critical questions, Mr. West's memory failed him. As another example, when asked about the Inspector's finding in his order that the No. 2 entry one crosscut outby Survey station 519 had no collars installed, West answered, "I can't recall that." Tr. 262.

When asked if he ever received any violations for that practice, Urconis stated: “Not that I can recall. I mean, I don’t really recall.” Tr. 154. Given the problems of the narrow width and the associated issue of timbers being knocked down, one would think that Mr. Urconis would have recalled if the mine had or had not received violations for the practice of deferring the installation of timbers.

Somewhat modifying his initial remark, Urconis expressed that shuttle car operators have to be very careful, because the entries are so narrow, or they will knock down timbers, yet he then added that to turn the corner with a shuttle car, “it’s impossible.” Tr. 205. Counsel for the Respondent also elicited from Urconis his view that shuttle car operators were subject to potential injuries if they were to run over a timber. Tr. 154-155. Urconis stated that to deal with this problem, the mine offered to MSHA that it would not set timbers if only stress cracks were encountered but they would install timbers if a hill seam was encountered. Tr. 205. Further, the mine wanted to defer installing timbers until after the feeder had moved inby. Tr. 206. However MSHA rejected these proposals. Tr. 206.

West asserted that the agency and the mine had a “little agreement” that knocked timbers could be left that way for the last one from the face where the actual continuous miner will be sitting. Tr. 261. The inspector spoke to the issue as to whether there was any sort of informal agreement regarding setting timbers. He admitted that *now* there is such an informal agreement³³ but that there was not one present, at least between him and the mine at the time of the violations in this docket. Tr. 277-278.

As the Secretary correctly notes, at the critical time in this proceeding, that is, when the Orders were issued, the Inspector was not aware of any such informal agreement. Sec. Reply at 2. Further, the Secretary notes that there is no evidence in the record as to the identity of any MSHA official who made the claimed agreement and it observes that it is unusual that none of the three Road Fork witnesses could identify the source for the purported agreement, nor its details. *Id.* Also contradicting the claim of the informal agreement, MSHA rejected Road Fork’s attempt to allow a delay before setting timbers. *Id.* at 3.

In the Court’s view, the problem with this contention is that it is an indirect attack on the roof control plan’s requirements for these timbers to be installed when hill seams are encountered. However, if that was a genuine issue, it should have been addressed through modification of the plan. As noted, the Plan, the only official statement of the minimum roof control requirements, does not recognize such an exception. In fact, as noted, MSHA rejected the proposals. Last, attention to this issue is a distraction from the violation. Even if, for the sake of argument only, such an informal arrangement were considered, it would not impact the significant breadth of the shortcomings identified by the Inspector. Restated, the informal agreement would not allow the installation of 80 timbers to be deferred.

³³ Though, for the reasons stated, it does not impact this decision, the Court hopes that MSHA will avoid such informal agreements. Such arrangements do a disservice to the roof control plan provisions and invite enforcement problems.

The hill seams/stress cracks issue and Jenmar testing of the roof

As noted, much effort was expended by the Respondent in an attempt to distinguish “hill seams” from “stress cracks,” but at the end of the day, this effort collapsed. Associated with the seam versus crack distinction raised by the Respondent was the “scoping” of the mine roof by Jenmar. Neither were persuasive avenues.

Urconis distinguished hill seams as “something that is open and weathered . . . that would be broken from basically inside the mine to the surface.” Tr. 141. He agreed that most of the time one will know if there is a hill seam and thus they are not something that shows up a later time, nor would rock dusting disguise the presence of a hill seam. Tr. 142. Continuing with his distinction between the two, he added that one would see where water has come down from the surface and weathered the crack and there will be an orangish-colored tint in the crack. Tr. 144. A stress crack, he advised, is not even open and is so narrow one could not put a 4,000ths feeler gauge in such a crack and it is something “that mostly comes in after the coal is removed . . . it’s just [the] stress of the roof settling . . . stress cracks rarely go up.” Tr. 143, 145. In contrast, Urconis repeated that hill seams are “an open weathered crack that is broke (sic) from inside of the mine up to the surface.” Tr. 143. However, he admitted that the seam at this mine has *both* stress cracks and hill seams. *Id.*

Mitchell Salmons also weighed in on the issue of stress cracks and hill seams. Salmons too believed that there is a difference between hill seams and stress cracks. Tr. 223. He stated that while the mine had “several cracks,” most of them were very small, being hairline in nature. Like Urconis, a hill seam, according to Salmons, “would have separation with mud, the orange from the sulfur from the water; and it runs usually through the coal seam, not just the exterior or the top there. It’s usually through the whole seam.” Tr. 223. He could not recall any mud or colored water coming out of the cracks or conditions cited by Inspector Wolford in September 2009. Tr. 223.

Also, as noted, Section Foreman Randall West testified. His testimony included the hill seam and stress crack distinction and as with Urconis and Salmons, he expressed that there is a difference between a stress crack and hill seam. Unlike Urconis’ description, West identified a stress crack as a crack that has opened up. According to him, these can be large enough so that one could run one’s arm through it. Thus, not only would a feeler gauge fit, the crack would be so large as to make the gauge pointless. He acknowledged that a hill seam is a more serious problem than a stress crack. Tr. 269. Clouding his testimony that the two are distinguishable, he stated that “a hill seam or a stress crack is just a small crack that occurs in the mine itself as [one] mine[s].” Tr. 248. Responding to unobjected leading questions, he agreed that colored water can come out of a hill seam, that it is differentiated with mud and that one will see discoloration in the crack itself. Tr. 249. West maintained that the mine had more stress cracks than hill seams. Tr. 249. Perhaps most significant of all on the hill seam versus stress crack issue, West admitted that under the roof control plan when the mine encountered multiple hill seams, the requirement was “the *same thing* we do for stress cracks. . . . you install a T-channel or a wooden collar every four foot.” Tr. 267 (emphasis added). Upon questioning by the Court, West then backed away from that statement and tried to distinguish a “big hill seam” and how

that condition is treated. Ultimately, however, he agreed that the mine treats stress cracks and hill seams the same way. Tr. 268-269. Further, despite his position that the inspector was finding “stress cracks,” not hill seams, West admitted that he never made that assertion to Urconis. Tr. 272. West’s answer when asked if it would have been natural for him to bring such an issue to Urconis was unsatisfying. He admitted that he could have missed one (i.e. hill seam) and so he would not raise the issue to Urconis unless the inspector was present at that time too. Tr. 273. Later, West again confirmed that the mine treats both hill seams and stress cracks the same way.³⁴ Tr. 273.

Speaking to the asserted distinction between hill seams and stress cracks, Inspector Wolford stated that “[a]ccording to the roof control department a crack like that in the mine roof is a hill seam.” Tr. 92. Indeed, the Court finds that Wolford found hill seams, not merely stress cracks. As this Court has previously noted, the mine’s own actions show they were encountering hill seams. Collars, for the most part, had been installed and the mine would not have taken those measures absent its own recognition that the conditions they found required the supplemental support required under the roof control plan. The main problem, putting aside for the moment the instances where Wolford found neither straps nor timbers, was that the mine took only half the required measures as shown by the many instances where they installed the collars. This shows knowledge, that is, awareness of the problem, and therefore it speaks to unwarrantability and the fact that collars were installed in many, but not all areas, also informs about the significant and substantial element.

Turning to the issue of Jennmar’s “scoping” of the mine roof on September 14, 2009, Urconis stated that Jennmar told him that the cracks the mine was encountering were “stress cracks” and that those cracks “went up into the roof roughly a foot to foot and a half.” Tr. 194. He described the scoping process performed by Jennmar, a process that allows, after drilling a hole, to look into the roof and determine if it is layered. When asked if Jennmar’s testing in September 2009 helped in identifying whether the conditions were reasonably likely to cause serious injury, Urconis replied, “[a]ccording to his findings, no.” Tr. 196. West also maintained that Jennmar told them “everything was fine.” Tr. 259.

Upon questioning by the Court about Jennmar, Urconis stated that he spoke with Wallace Bolton with that company. He spoke with Bolton about stress cracks but that conversation only occurred the day before this hearing. Tr. 198. Instead, it was Kenneth Hunt, the mine superintendent, who took Bolton underground two days before the orders in this case were written. Tr. 198.

³⁴ West also seemed to backtrack in terms of his earlier assertion that he saw no hill seams in 1, 2, and 3 nor in 7 or 8, stating that he could not recall hill seams being present. Tr. 275. In an attempt to recover her witness, counsel asked if the mine treated hill seams and stress cracks the same “just out of concern for getting nailed with a D order.” The witness responded, “Yes, ma’am. Yes, ma’am.” Tr. 276. The Court does not adopt this attempted explanation.

The court took note that while the Respondent made frequent references to Jennmar, no report from that company was ever put into the record as an exhibit.³⁵ Tr. 280. Nor was their report part of the pre-hearing exchange. The rub was that Jennmar does not issue written reports. Tr. 281. When they come to a mine and do their ‘scoping’ no paper exists to record their findings. Instead, Respondent’s counsel used the mine employees’ testimony to relate what Jennmar ostensibly told them. As the Court noted in reaction to this arrangement, “Well that’s an odd way to do business I have to say. They are there to evaluate roof conditions, and they won’t put a word of it down in writing as to what their findings are?” Tr. 282. Accordingly, no stock can be placed in these Jenmar stories.

Despite these glaring deficiencies, the Respondent views the testimony concerning JennMar as “objective evidence” which “proved that this operator had met its duty of identifying hazards and properly controlling them.” R’s Br. at 12. According to the Respondent, JennMar found only cracks that “extended up for a foot to a foot and a half.” *Id.* Respondent believes this “objective evidence” speaks for itself and that no written findings were needed. *Id.* at 13. For the Respondent, Jennmar’s presence shows that “[t]he fact that the operator sought outside assistance with understanding the roof conditions proves that it was going above and beyond to keep their mine safe.” *Id.*

In sum, *the record* provides no reliable information about Jennmar’s evaluation of the roof conditions at the mine for the areas cited by Inspector Woldford. Against that, the Inspector’s testimony about his observations, finding hill seams, coupled with the Mine’s own actions, installing collars in a large part of the cited areas, are more reliable sources for determining the conditions which existed.

Conclusions regarding Order No. 7446458

In its post hearing brief, Respondent describes this issue as “whether Road Fork properly controlled its roof through the use of primary and supplemental roof support” and if not whether the failure was unwarrantable. R’s Br. at 1. Respondent believes that what Woldford observed were stress fractures, not hill seams, and it points to the collective experience of Urconis, Salmons and West in support of that assertion. R’s Br. at 4.³⁶ Respondent also points out that it had installed its primary roof support and that, from its view, the issue was whether the “secondary, or supplemental support systems” were adequate. R’s Br. at 5. Respondent then notes that when hill seams are encountered, and timbers installed because of that, the entry width is reduced to about 16 feet. R’s Br. at 6. At that width, shuttle cars knocking timbers down becomes impossible to avoid, and because of that there was an informal agreement between

³⁵ Respondent’s exhibits consisted of R1, 2 and 3. Tr. 280.

³⁶ Respondent’s Reply, for the most part, reargues the points made in its initial brief. As such there is no need to revisit the contentions.

MSHA and the mine that felled timbers could be moved to the side of the entry and not reinstalled until the entry was no longer used as a haul road.³⁷ R's Br. at 7. The Respondent then contended that non-compliance with the roof control plan made things safer because it eliminated the problem of shuttle cars striking timbers and running over fallen timbers.³⁸

The Respondent has also contended that before Wolford issued his orders it was "in the process of reinstalling the missing posts." R's Br. at 9-11. Respondent further asserts that, assuming 80 timbers were in fact needed, "only 160 feet of roof was temporarily affected"³⁹ and it challenges the contention that it took 11 men three hours⁴⁰ to install 80 timbers. R's Br. at 11-12.

In large part, the Respondent's contentions have already been addressed. The Court has found that Wolford observed hill seams in the areas he cited. Given that, the Respondent's obligations under the roof control plan were clear but not met. The Court therefore agrees with the Secretary's assertion that the Respondent's claim that the Inspector was finding stress cracks, not hill seams, is without merit, and with the Secretary's related observations that the mine treated both situations identically and that the testimony of both West and Urconis acknowledges that. Sec. Reply at 1-2. citing Tr. 195, and 266-269.

³⁷ Apart from whether the informal agreement existed or whether it is a defense or mitigation, the Respondent's characterization of it in its brief is broader than what the witness actually stated. Urconis statement was that the timbers were to be reset "*before* you advance to your next cut." Tr. 154 (emphasis added).

³⁸ Respondent suggested that these hazards, such as running over a timber, presented the risk of a miner being impaled, but there was no evidence that accidents associated with these kinds of posed problems had occurred at this mine. In the same spirit, Respondent suggests that waiting to install the timbers didn't pose any additional danger because the collars were attached to the roof with "grouted resin bolts." R's Br. at 8. This observation overlooks that Wolford found areas with *no* collars and that even where collars were present compliance with the roof control plan requires installing timbers where hill seams are encountered.

³⁹ This assertion is debatable in that Urconis, as quoted by the Respondent in its brief, stated "there's a total coverage area that is exposed, where the roof is exposed, anywhere from I'm going to say 17 to 1,800 feet. If we did set 80 timbers, that's two posts under each collar. That's just [a] 160 foot area." R's Br. at 11-12. It is unclear if the witness was referring to the area taken up by the 80 posts themselves, but what is not unclear is the area marked as being affected by Inspector Wolford on Exhibit S 12.

⁴⁰ The Court believes that it is more about the number of timbers, 80, that were needed than the precise amount of time it took to install them. It also rejects the assertion that the problem was merely a "few" timbers that had been knocked down, finding that Wolford correctly calculated the total number of timbers installed.

In addition, to the suggestion that West had no knowledge about the hill seams before the mine made the first two cuts, Wolford noted that the cross collars had been installed. Tr. 101. As for the suggestion that some mines might wait until all channels are installed before installing the timbers, Wolford had two ready answers. He acknowledged that some roof control allow this, but that as to this mine's plan, he stated, simply: "It don't." Tr. 114. As for the issue of timbers making it difficult for shuttle cars to move, Wolford agreed that the mine could've sought an amendment to its roof control plan, but that they had not done so. Tr. 136.

Although, also upon cross-examination, Wolford agreed that the primary means of support, that is roof bolts, had been installed in the area, the fact that the violations dealt with the lack of *supplemental* support, does not impress the Court because the shortcomings were still part of the minimum roof control plan where such hill seams are found. To note that the situation could have been worse does not render the deficiencies less serious.

The unwarrantable failure issue.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. An unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining*, 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of *1336 reasonable care." Id. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991); see also *Buck Creek Coal*, 52 F.3d at 135-36, approving the Commission's unwarrantable failure test.

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. See *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), rev'd on other grounds, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 43 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All relevant factors must be viewed in the context of the factual circumstances, and all material facts and circumstances must be examined to determine if a mine operator's negligence is mitigated. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

Respondent contends "there is no evidence that Road Fork is guilty of unwarrantable failure." R's Br. at 16. As mentioned, Urconis believed there was no unwarrantable failure on his part because it was not as if upon finding cracks they took no action. Tr. 196.

Acknowledging that “certain timbers were missing,” Respondent asserts that “Road Fork was actively working to correct the condition *prior* to the issuance of the either Order.” *Id.* (emphasis in brief). As it describes the situation, “Road Fork had unilaterally ceased producing coal, and shut down the belt-lines, all without any directive from Inspector Wolford to do so and prior to his arrival on the section.”⁴¹ *Id.* at 17. The testimony, both from the Inspector and from Respondent’s own witnesses, as previously discussed, does not support these claims.

On the same grounds, Respondent believes the negligence should be reduced. Road Fork further contends that the “informal gentleman’s agreement with MSHA” should be a mitigating factor. The problem with this argument is that it seeks to excuse a broader transgression from the roof control plan than the situation Inspector Wolford found. At best, the informal agreement, which *was not* in place at the time of the Inspector’s findings, applied to a short term abeyance from reinstalling fallen timbers. In another version of the informal agreement, West stated that MSHA would let them leave the last timbers out where the continuous miner would be sitting. This would be about five pieces and the last three might not have a timber. R’s Br. at 18. This is decidedly not the situation the Inspector found.

As Wolford’s statement and presence on the section attest, the condition “was very obvious, extensive, and they knew about the one hill seam because they had put cross collars up but hadn’t set the timbers under them.” Tr. 77. As noted, the fact that the Respondent had taken half measures supports the conclusion that it was aware of the problem but failed to fully comply with the Plan’s requirements.

In sum, the unwarrantable findings are clearly supported by the record and the Court’s findings of fact for that record. West, a member of the mine’s management, did tell the Inspector he was aware of the problem, the mine was running coal, at least at the start of that day, the conditions had been present long before the start of the shift when Wolford arrived, and the actions to correct the numerous roof control deficiencies were not in progress when the inspector observed them. Those remedial actions occurred *after* Wolford issued his Order. The record testimony, also as previously discussed, shows that the mine would likely have continued to run coal, but for the inspector’s presence and his identification of the roof control plan compliance failures. Further, the operator had been warned previously about inadequately supported hill seams. Wolford had so advised both Mr. Urconis and Mr. Salmons about this. Beyond these findings, the Court also concludes that the condition had existed for about two days, per Inspector Wolford’s testimony on that issue. So, too, the condition was obvious. As the Inspector testified, he noted the condition immediately upon arriving at the section.

⁴¹ The Court appreciates the nature of arguments and that leeway is expected when they are advanced but there are limits too. Here, the Respondent contends that Inspector Wolford agreed in his testimony that Road Fork’s “corrective actions should be considered as mitigating factors.” The problem with this claim is that the Inspector did not buy into the Respondent’s version of the actions it claimed to have taken, nor does this Court. As the Inspector put it, those actions would be mitigating factors “*if* [the operator had] done that.” R’s Br. at 17, quoting transcript at 99- 100. (emphasis added).

Accordingly, the inspector's finding of "high negligence" is supported and found to have been the case and the failure to comply with the roof control plan was unwarrantable.

The Significant and Substantial ("S & S") issue

With respect to the issue of S&S, as a general proposition, a violation is properly designated as S&S, if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained: In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove:

- (1) the underlying violation of a mandatory safety standard;
- (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation;
- (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and
- (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4; see also *Austin Power Inc., v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (August 1985); *U.S. Steel*, 7 FMSHRC at 1130.

The Respondent's assertion that the violation was not "significant and substantial," is a contention that relies upon the same arguments that no risk of injury was created and that it was not reasonably likely to occur. In this regard it adds that the mine has no history of roof falls, and that miners have no reason to travel in the affected areas. As the primary support was installed, it argues that "the only conceivable hazard is of the collars falling from the roof." R's Br. at 21. Of course, other hazards can be readily conceived.

The Court notes that the roof control plan is in place to deal with roof falls, not with collars which could fall. If the latter were the issue, that would be solved by not having collars in the first place. Instead, the collars *and* the timbers are required in tandem to deal with the risk of a roof fall where hill seams are encountered.

As to the “significant and substantial” determination, for both Orders, the Secretary has shown, and, as expressed previously, the Court finds, the underlying violations of the mandatory safety standards. Plainly, there was a discrete safety hazard contributed to by those violations.⁴² The lack of timbers, absent in significant numbers, by themselves establish this element. The missing collars, while fewer, only made the circumstances worse. Given that the hill seams present the acknowledged risk of a roof fall and that the timbers and collars are required parts of the roof control plan for addressing that risk, there was, clearly, a reasonable likelihood that the hazard contributed to by those violations will result in an injury. As discussed earlier in this decision, miners were working in the area of the hill seams and thus there was exposure. Notice can be taken, if a roof fall were to have occurred in these areas, it would more than meet the reasonably serious injury element.

The same analysis applies to the inadequate preshift violation, because the roof control violations go hand in hand with them. As with the plan violations, there was established a violation of the preshift examination by the absence of notations reflecting the presence of hill seams in the cited areas and the need for the collars and timbers there. Those absences made the preshift inadequate. The discrete safety hazard element, obviously, is that by not noting those matters, they were not timely attended to and miners, being unalerted of the situation by that inadequate preshift, were exposed to the problems as they traveled in the affected areas. While an inadequate preshift cannot literally produce a roof fall, the detection and the remedy are inextricably related, so that the reasonable likelihood of an injury element is met and the same logic applies to the reasonably serious injury element.

Accordingly, the Court finds that the violation was “significant and substantial” as that term applies under the Mine Act and case law.

Order No. 7446459, the inadequate preshift claim.

Speaking to the second Order in this matter, Order No. 7446459, Ex. 5, Wolford stated that he issued it because the roof control hazards he identified were not listed in the preshift. Therefore, the foreman did not do an adequate examination and as a consequence the crew was unaware of the hazards they were working under. Tr. 79. He considered it reasonably likely that one of the eleven miners would suffer injuries due to their lack of awareness of the hill seam problems. Tr. 80. He stated that the length of exposure was about five hours.⁴³ As Wolford had

⁴² The Court describes these in the plural as violations because, where hill seams are present, had Wolford found a single instance of a missing timber or the absence of one collar, that would have been a violation of the roof control plan. The significant and substantial and unwarrantability analyses, on the other hand, take into account other circumstances, such as the number of instances of such failures and knowledge of them.

⁴³ Regarding exposure, the inspector confirmed that miners were working on the section, with his best recollection being that they were “mining in the middle, maybe [in sections] 4 and 5.” Tr. 95. After consulting his notes and noting that they did not document *exactly* where the miners were working on that date, he conceded he could not recall exactly where they were
(continued...)

examined the preshift records prior to entering the mine and subsequently found the roof control hazards, he knew that the preshift exam had been inadequate. For the same reasons he expressed for the roof control violation, Wolford concluded that the preshift failures would be permanently disabling, that the violation was “S & S,” and that the negligence was “high,” because the problems were obvious. Similarly, he listed the same number of miners affected. Tr. 84.

Beyond the preshift exam, the operator is required to do an on-shift exam too, prior to the start of coal production. Tr. 82. As Wolford had stated that the hill seam problems had existed for two days, the operator therefore would have had six opportunities to examine the area and detect the problems, as there would have been three preshift and three onshift examinations to conduct. Tr. 82. To abate the violation, the operator was required to enter the hazardous conditions in the preshift book and the miners were also made aware of these problems. Tr. 82-83.

In the Respondent’s cross-examination dealing with the inadequate preshift exam, Wolford agreed that it had been conducted about five hours before the inspector arrived on the section. Tr. 121. However, he did not buy into the idea that hill seams could develop during such an interval. Hill seams, he explained, are present before mining commences and then encountered when one mines into them. The Court finds this to be the fact.

Wolford did not contend that no preshift was made; he agreed that Mr. Salmons went to the areas during his preshift. However, Wolford’s contention was that the conditions were obvious and should have been noted. Although the inspector did not suggest that there was any intentional or willful conduct on the preshift examiner’s part, he made it clear that, in his view, Salmon merely went through the motions during his preshift exam, that he was not really observing for hazards and that he failed to list any. As Wolford noted, Salmon merely listed for the hazards, “N/O” for “none observed.” Tr. 124-126.

Urconis agreed that he relied upon Mitchell Salmons to identify hazards in conducting his pre-shift and he admitted that a pre-shift examiner is to be looking for the presence of hill seams. Tr. 168, 194. Directed to Exhibit R 1, the pre-shift or on-shift exam, for September 16, 2009,⁴⁴ Salmons related what he did on that date. There, he noted, he called out that the No. 2 heading needed timbers under the collars and that it was dangered off. Salmons stated that if he

⁴³(...continued)

when he issued his orders. Tr. 96, 97. However, Wolford pointed out that when miners work in a section they don’t simply stay in one entry. Instead, they work “all over the section.” Tr. 97. The Court finds this to be the fact.

⁴⁴ Salmons also stated that he did a pre-shift on September 15, 2009. This included entries 1 through 9. He noted that in entry No. 1 mining had stopped, although he did not know the reason for that. Tr. 227. Continuing, he noted that the No. 5 needed timbers and that the six left needed timbers and the seven left needed straps. Tr. 228. Referring to the rough drawing, Exhibit S 12, Salmons stated that mining had advanced into the areas of 7 and 8. Continuing with his notes, Salmons added that 6 left needed timbers and 7 left needed straps and such straps were installed. Tr. 230.

found a condition that he did *not* consider to be a hill seam, he would not write that in his pre-shift. This is because he only writes down hazards. Explaining further, Salmons stated that if he finds “just a single crack,” one could use a thin metal strap, called a “bacon strap,” to make that condition safe.⁴⁵ Such bacon straps are four feet long and they go from bolt to bolt. Tr. 229. But this condition is not entered in the book.

Addressing the Inspector’s testimony that he found multiple hill seams and no timbers in the areas, marked in blue on Exhibit S 12, for the No. 1, 2, and 3 entries, Salmons asserted that “I’m going to say they had timbers in them or I would have called them out.” Tr. 231. Similarly, for the No. 3 heading, and the No. 7 heading, the inspector stated collars and timbers were needed but in neither instance did Salmons find anything that needed to be corrected. Tr.232-233.

On cross-examination, Salmons agreed that if a condition needing correction continues to exist, he will carry that problem forward. That is, it will be noted again. Tr. 233. However, Salmons’ testimony was not a model of clarity in that regard, as he was indirect in his answer. He stated that if he comes upon the problem the next time, then he will correct it. Yet, he added that he writes it down too. Tr. 236. On redirect, leading the witness grossly, but with no objection lodged by the Secretary, Salmons agreed that if he keeps listing “needs timbers and collars” that refers to *a different* (i.e. a new condition in need of timbers and collars) condition, as the earlier noted problem would have been corrected.⁴⁶ Tr. 244. Salmons agreed that the on-shift report for the 15th, and the No. 2 heading noted that collars and timbers were needed and that a purpose of the examination book is to show that the corrective action was taken. Tr. 241-242.

Respondent asserts that this Order should be vacated on the theory that the Secretary offered “no evidence” that the pre-shift was inadequate. R’s Br. at 21. It makes this argument on the assumption that the conditions existed at the time of the preshift exam because the inspector found them when he conducted his inspection. Against that, in the Respondent’s view, dubious deduction by the Inspector, it points to Mr. Salmons’ testimony and his “impeccable record of conducting [pre-shift] examinations. Accepting that Salmons did not observe any of the conditions means they did not exist at the time of his preshift exam. On that basis, Respondent contends that the Order should be vacated. R’s Br. at 22.

⁴⁵ As has been noted, there is conflict with this claim, at once admitting that something has to be done to make something “safe,” but claiming that it is not a hazard.

⁴⁶ Salmons was directed to the on-shift for the third shift for the 14th of September where the Secretary’s Counsel noted that the pages state either “pre-shift mine examiner’s report” or “daily end on-shift report.” Tr. 237. The witness noted that for Heading No. 2, it needed timbers under collars, dangered off. Tr. 237. He was then asked to turn to the next exam, the pre-shift for September 15th, from 5:00 to 5:45. The witness noted that for the No. 2 heading, it noted “None observed.” Tr. 238. Salmons maintained that notation reflected that the problem would have been corrected on the 14th. Tr. 238. Thus, he maintained that the problem had been corrected on the first shift, the day shift, of the 14th and therefore it would not be noted again on the 15th. Tr. 238.

Respondent also believes that the hearing testimony calls into question the length of time that the conditions existed. R's Br. at 13. It notes that Inspector Wolford expressed that it would have taken two days to mine the coal where he found the problem. Respondent's take is that the Inspector's premise was incorrect because he incorrectly believed the roof had hill seams but that in fact those were only stress cracks.⁴⁷ Shifting away from that contention, the Respondent then notes that most of the cited areas had collars installed.

The Secretary contends that, based on Inspector Wolford's testimony, the preshift exam conditions were easily seen and extensive. Sec. Reply at 3. It contends that, because miners were not alerted to the hazardous roof, they had no advance warning and therefore the risk to them was heightened. *Id.* at 4. Making the mine's culpability greater, management knew this to be a recurring problem at the mine. *Id.*

All of these matters have been previously discussed in this decision. Accordingly, the Order for the inadequate preshift examination is sustained along with the special findings made by the Inspector.

ORDER

For the reasons set forth above, **Order Nos . 74446458 and 7446459 are AFFIRMED, along with the special findings associated with them.**

Respondent is **ORDERED** to pay a civil penalty in the amount of \$9,774.00. Upon payment of the penalty, these proceedings are dismissed.

/s/ William B. Moran

William B. Moran

Administrative Law Judge

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⁴⁷ Respondent also relies upon Road Fork's production report which, it believes, evidences that the conditions did not exist the prior evening. R's Br. at 14. Respondent also contends that preshift examiner Salmon's testimony supports its perspective and that he diligently performed his responsibilities.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 2, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2009-898
Petitioner,	:	A.C. No. 05-04591-184581
	:	
v.	:	
	:	Bowie No. 2 Mine
BOWIE RESOURCES LLC,	:	
Respondent.	:	

DECISION

Appearances: Beau Ellis, Esq, Office of the Solicitor, U.S. Department of Labor
 Denver, Colorado, for Petitioner;
 R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania,
 for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Bowie Resources LLC, (“Bowie”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Grand Junction, Colorado, and filed post-hearing briefs.

Bowie operates a large underground coal mine in Delta County, Colorado. The case involves two section 104(a) citations alleging violations of 30 C.F.R. § 75.331(c). The Secretary proposed a penalty of \$1,412 for each citation.

I. BACKGROUND AND SUMMARY OF THE EVIDENCE

On March 24, 2009, MSHA Inspector Mark Brewer issued Citation No. 6687950 to Bowie Resources for an alleged violation of section 75.331(c) of the Secretary’s safety standards. The citation states that:

The auxiliary face fan unit # FF-21 is located in B8 HG in the #1 return entry outby of 41XC which is the last open crosscut in this section. When checked for methane passing through this fan by testing at the discharge end of the fan both my hand held multigas detector and the one used by the operator indicated methane over 1.0%. My hand Solaris detector and the one used by the operator indicated methane over 1.0%. My hand Solaris detector with SN

AS-18436 indicated 1.15% CH₄ and the operators hand held Scientific Industrial M-40 indicated 1.1% CH₄. The operator shut off this fan immediately. If a problem were to occur with the auxiliary fan and with methane passing through it is reasonable likely that a fire or explosion would occur.

(Ex. G-2).

On April 1, 2009, MSHA Inspector Bradley Serazio issued Citation No. 6688041 to Bowie Resources for an alleged violation of section 75.331(c) of the Secretary's safety standards. The citation states that:

While performing a E02 spot inspection in the B8 HG, MMU 005-0, in Entry 1 outby XC 46 fan, FF 21, was found with 1.25% CH₄ passing through it and fan FF 3528¹ had 1.3% CH₄ passing through it. The DT&I board had, 04/01/09 24:00 Terry Davis, section foreman, had inspected the fan area prior to our arrival. This section is bringing in .6% CH₄ in the belt entry and .4% CH₄ in the intake entry and they have had problems when they start cutting coal and going over the 1% CH₄.

(Ex. G-6).

In both citations, the inspectors concluded that an injury was reasonably likely to occur and if that injury were to occur it would result in lost workdays or restricted duty. Additionally, the inspectors determined that both the violations of 30 C.F.R. § 75.331(c) were S&S and moderate negligence.

Section 75.331(c) provides that “[i]f the air passing through an auxiliary fan or tubing contains 1.0 percent or more methane, power to electrical equipment in the working place and to the auxiliary fan shall be deenergized, and other mechanized equipment in the working place shall be shut off until the methane concentration is reduced to less than 1.0 percent.”

A. Inspector Brewer – Citation No. 6687950

Inspector Brewer testified that during his inspection on March 24, 2009, he measured a methane concentration of 1.15% at the discharge end of auxiliary face fan number FF21. (Tr. 23-24, Ex. G-1, p. 4). At this same time, Bowie's maintenance foreman, Ken Pitt, measured a methane concentration of 1.1%. (Tr. 24-25, Ex. G-1, p. 4). Inspector Brewer took two bottle samples at this location for analysis at MSHA's laboratory where levels of 1.48% and 1.55% methane were found. (Tr. 25, Ex. G-3). Inspector Brewer testified that he designated the citation as S&S based on the potential for the electrical fan to ignite the methane, causing fire and potentially injuring six people in the area by means of burns or smoke inhalation. (Tr. 25-

¹ The correct face fan number is 3520 according to the record. (Tr. 63).

26). Inspector Brewer assumed the high methane condition at the cited fan had existed for a short time. (Tr. 43).

Addressing the citation's negligence designation of moderate, Inspector Brewer testified that Bowie should have known that FF21 would exceed 1.0% methane because (1) Bowie's records showed 0.7% methane at the feeder breaker, (2) Bowie's foreman told Inspector Brewer that the face being ventilated by the fan had over 1% methane, and (3) the mine had a history of methane problems in that section. (Tr. 27-29). Because the ventilated face was experiencing over 1.0% methane, and because, upon inspection, he observed no damage to the tubing that might have allowed air leakage and methane dilution, Inspector Brewer concluded that it was likely that methane at the auxiliary fan would be over one percent. (Tr. 29-30). Factors mitigating the negligence designation included that, at the relevant face, (1) the roof bolters had identified that methane problem and had deenergized equipment, and (2) Bowie was hanging curtains at the face to reduce methane concentrations. (Tr. 31.) When Brewer notified Bowie foreman Ken Pitt of violation, Pitt immediately deenergized the fan. (Tr. 31-32).

On cross-examination, Inspector Brewer testified that on the day of his inspection Bowie was not mining coal, that he inspected Face 1, Face 2, and Face 3, and that the only ongoing work was at Face 1. (Tr. 34). At Face 1, Bowie had discovered methane over one percent, was deenergizing a roof bolter, and was hanging curtains when the inspector arrived. (Tr. 35). Inspector Brewer testified that these were proper actions upon discovery of one percent methane. (Tr. 35).

After observing the roof bolter at Face 1, Inspector Brewer went to the auxiliary fan discharge area where he monitored methane on three fans. (Tr. 37). Methane was below one percent at the fans ventilating faces 2 and 3. (Tr. 37). Inspector Brewer believed the presence of one percent methane passing through an auxiliary fan violated section 75.331(c). (Tr. 40). He also understood MSHA's Program Policy Manual ("PPM") to state that a violation of section 75.323 exists only when an operator fails to act upon discovery of excess methane. (Tr. 40).

Inspector Brewer testified that Bowie used three fans to provide face ventilation and that fans usually provide much better ventilation than do curtains. (Tr. 41). After Inspector Brewer issued the citation, methane concentrations at Face 1 and Face 2 were 1.3% and 1.05%, respectively. (Tr. 43-45, Ex. G-1, p. 3, 5). At the time of these measurements, Bowie was hanging curtains so methane levels would be expected to decrease. (Tr. 45). The fans ventilating Face 2 and Face 3, having methane under one percent, were not turned off after the citation was issued. (Tr. 37, 44). Inspector Brewer testified that should methane levels increase from 1.3% to 2% at the face, the detected level should be near 1.3% at the fan, a concentration considerably below methane's explosive level. (Tr. 45).

Inspector Brewer inspected the permissibility of the cited fan and found no problems. (Tr. 46). On redirect examination, he testified that permissible equipment, including fans, can sustain damage in the harsh conditions of underground mining, making the equipment nonpermissible. (Tr. 49-50).

Inspector Brewer testified that it was reasonable to believe the methane concentration at the face would be the same as that concentration pulled through the tubing and exhausted out of the fan. (Tr. 49). He testified that he had inspected the fan tubing and saw no areas where air leakage had occurred. (Tr. 49).

Inspector Brewer testified that section 75.331(c) does not require that methane exceed one percent for any length of time; rather, a violation exists the moment it exceeds this level. (Tr. 49). He knew of no interpretation of this section requiring operator knowledge of methane exceeding one percent. (Tr. 51). On re-cross examination, Inspector Brewer testified that a continuous miner would be more likely to be damaged than a fan and that he has observed equipment damaged to an extent rendering it nonpermissible. (Tr. 53-54).

B. Inspector Serazio – Citation No. 6688041

Inspector Serazio testified that on April 1, 2009, at 1:40 a.m., he inspected the B8 Head Gate at the Bowie mine, measured a methane concentration over one percent at the auxiliary fan discharge, and issued a citation for a violation of section 75.331(c). (Tr. 62). Inspector Serazio stated that it was his understanding that a violation occurs whenever one percent or more methane passes through an energized fan. (Tr. 62-63).

At fan FF 3520, Serazio measured 1.3% methane and collected a bottle sample (Tr. 63, Ex. G-5, p. 2-3). MSHA's lab detected 1.6% methane in this sample, substantiating the violation. (Tr. 64, Ex. G-7). At fan FF 21, Serazio measured 1.25% methane and collected a bottle sample in which MSHA laboratory analysis found 0.95% methane, a level less than the field reading. (Tr. 64, 76, Ex. G-5, p. 2-3, Ex. G-7).

Serazio designated the violation S&S, reasoning that the presence of fuel, oxygen and a heat source could result in a fire, potentially spreading to the face, and injuring workers to an extent resulting in lost workdays or greater harm through burns and smoke inhalation. (Tr. 65-66). Serazio determined that Bowie's negligence was moderate based on the mine's history of methane in the area as shown in the mine's books and on the citation issued two weeks earlier by Inspector Brewer. (Tr. 66). As a mitigating factor, Serazio considered that the continuous miner operator told him that his practice was to stop cutting activities and back out the miner in order to maintain methane below one percent. (Tr. 66). On cross-examination, Serazio testified that he had not seen any MSHA policy document or interpretation on section 75.331.

Serazio testified that foreman Terry Davis had found acceptable methane levels at the fans at 12:09 a.m., on the same day he issued the citation at 1:40 a.m. After Serazio's inspection of the fans, he went to the areas ventilated by these fans and observed that the continuous miner had ceased mining, had just exited the cut, and was still warm. (Tr. 71-72). Serazio spoke with a continuous miner operator who told him he backed the miner away from the face to allow the methane to decrease before reentering to continue operations. (Tr. 74). After the fans were shut down, Serazio measured methane at 1.2%, 1.7%, 1.4% in the areas being drawn into the auxiliary fans, respectively designated as Entry 2-Face 2, Crosscut 47 Entry, and Entry 3-Crosscut 47. (Tr. 72, Ex. G-5, p. 3).

In addition to fans FF3520 and FF21, fan FF17 was drawing air from the same area as the cited fan. Serazio measured 0.85% methane at the discharge of FF17 at the same time when methane at FF3520 and FF21 was over one percent. (Tr. 73, Ex. G-5, p. 2).

Serazio testified that Bowie's records showed instances where mining operations were shut down because of methane levels at either the face or at the fan; and the records showed Bowie would shut down the fans when it knew methane exceeded one percent. (Tr. 73). Serazio testified that, if the fans having over one percent methane had continued to run, the methane levels would probably not have increased. (Tr. 75).

Serazio did not inspect the fans for permissibility and agreed that, as far as he knew, they were in good condition. (Tr. 76). On redirect examination, Serazio testified that permissible auxiliary fans can sustain damage that could render the fan a potential ignition source and that this damage could happen suddenly. (Tr. 78-79).

C. Bowie Maintenance Manager Ken Lyman Pitt – Citation No. 6687950

Bowie employee Ken Pitt testified that he accompanied Inspector Brewer during his inspection on March 24, 2009 at the B8 Head Gate section. (Tr. 83). Pitt testified that a face fan will occasionally be used to ventilate more than one face and that during this inspection FF21 was ventilating Number 1 and Number 2 faces, causing the air from both faces to mix in the fan intake tubing. (Tr. 83-84). Pitt testified that when more than one percent methane is detected at a fan, he will shut down the fan, in accordance with Bowie's practices and procedures. (Tr. 84).

In order to prevent debris from being drawn into the fan where it can cause damage, a strainer and screen are located in front of the fan that catch the majority of debris. (Tr. 85). Debris smaller than one inch can pass through the screens. (Tr. 90). Pitt testified that typical fan damage includes cable damage, damage to the fan's structure and skids, corrosion on the fan's aluminum housing, and sticking buttons caused by humidity. (Tr. 85-86). During this inspection, Pitt observed no damage to the fan. (Tr. 86). He testified that roof bolters and continuous miners are more likely than fans to be damaged because that equipment is continually moving and vibrating and is more frequently hit by falling rocks. (Tr. 86).

Pitt testified that the fan inlet tubing is constructed of ten-foot sections connected with bell-shaped ends that slide onto the next section. (Tr. 88). Sections are joined to a length of 200 feet. (Tr. 89). Some air leaks into the tubing joints that they try to minimize by sealing the connections with tube wraps. (Tr. 88). The tubing inlet is supposed to be located within twenty feet outby the face. (Tr. 89). The face fan is usually located outby the last open crosscut in the return entry. (Tr. 89).

On cross-examination, Pitt testified that he has seen permissible equipment degraded to an extent rendering it nonpermissible, and that this is the reason for weekly permissibility checks. (Tr. 90). Pitt testified that Bowie's March 24, 2009, preshift documentation states section foreman Miles Roop checked the fans, as indicated by Roop putting the date and his initials on the document. (Tr. 91). Pitt confirmed that he measured 1.1% methane at fan FF21 during the MSHA inspection. *Id.*

On redirect examination, Pitt testified that weekly permissibility checks are conducted using a feeler gauge, a thin blade device used to measure the gaps between enclosures down to a thousandth of an inch. (Tr. 92). Pitt has seen citations for gaps being too large. (Tr. 92). Using a feeler gauge to assess permissibility is necessary because differences in the allowable gap of one or two thousandths of an inch are not discernable with the naked eye. (Tr. 92). Other permissibility conditions may also not be readily detected absent the weekly exam. (Tr. 92-93).

D. Bowie Shift Supervisor Rich B. Husted – Citation No. 6688041

Bowie employee Rich Husted testified that he accompanied Inspector Serazio during his inspection on April 1, 2009, and that he measured methane exceeding one percent at two fans. (Tr. 96). Husted testified that he would have shut down the fans upon detecting over one percent methane whether or not the inspector was present. (Tr. 96). He testified that methane levels were below one percent when Bowie foreman Terry Davis did a shift inspection as indicated by Davis's initials at the fan. (Tr. 96). Bowie's procedure upon detecting over one percent methane is to shut off the fans and to ventilate the faces using curtains. (Tr. 96-97).

A section foreman's responsibilities include maintaining the section, watering the roads for dust suppression, taking gas readings at the fans and at the faces, and examining the section continuously. (Tr. 98). When the fans are shut down, reducing ventilation at the face, the methane concentration at the face increases. (Tr. 99).

Husted testified that return air methane readings are taken near the fan discharge and that a different methane level is possible immediately next to the fan discharge. (Tr. 104). During the March 31, 2009 preshift examination, the methane level at the feeder was 0.7% (Tr. 104). The feeder air helps ventilate the faces and methane levels can be increased by additional methane from mining operations. (Tr. 104-105).

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Interpretation of 75.331(c)

The Secretary of Labor ("the Secretary") argues that 75.331(c) unambiguously states that a violation exists whenever one percent or more methane passes through an energized auxiliary fan; that is, the regulation contains no requirement that the operator knew or should have known of the condition. (S. Br. 13). Alternatively, if 75.331(c) is ambiguous, the Secretary argues that her interpretation is entitled to deference. (S. Br. 17-19).

To support the regulation's clarity, the Secretary argues that MSHA did not revise the language on auxiliary fans to address operator knowledge during either its 1992 or 1996 revisions. (S. Br. 14). As part of the 1996 revisions, MSHA did clarify in the Federal Register preamble that operator knowledge is part of 75.323 and incorporated this clarification into

MSHA's PPM.² (S. Br. 15). MSHA did not similarly clarify 75.331. 61 Fed. Reg. 9764, 9777-9778 (March 11, 1996). (S. Br. 15-16).

Bowie argues 75.331(c) means that a violation occurs only if an operator fails to deenergize a fan when he is aware that methane concentrations exceed one percent. (Bowie Br. 5-6). Bowie maintains that, because the language in sections 75.323 and 75.331(c) is similar, the safety standards should be interpreted in a similar manner. (Bowie Br. 6).

Both parties cite *Amax Coal Company* as illustrative of how section 75.323 and the PPM bear on other similar safety standards. *Amax Coal Co.*, 19 FMSHRC 470, 474-75 (March 1997). (Bowie Br. 8, S. Br. 15, note 4). In *Amax Coal*, the Commission held that the language of 77.201 was not analogous to 75.323. *Id.* at 475.

Next, the Secretary argues that she has never interpreted 75.331(c) to require operator knowledge, as evidenced by the fact that MSHA has not issued interpretive guidance that contains this requirement. (S. Br. 14-15). The Secretary argues that finding a knowledge requirement in 75.331(c) would provide an incentive for operators to reduce or cease monitoring for methane at auxiliary fans. (S. Br. 17). Alternatively, she maintains that the Commission must defer to her interpretation of 75.331 as set forth for the first time in this case. (S. Br. p. 19.). Because no case law or regulatory history has interpreted 75.331, Bowie argues that comparison to the language of 75.323 should guide the decision. (Bowie Br. 8).

Neither the Commission nor any administrative law judges have previously had occasion to construe section 75.331(c). Accordingly, the "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). 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 such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Exportal Ltda. v. United States*, 902 F.2d 45, 50

² MSHA Program Policy Manual, Vol. V, states:

75.323 Actions for Excessive Methane. Section 75.323 specifies actions to be performed for excessive methane. Neither the Act nor the regulations provide that a mere presence of methane gas in excess of 1.0 percent is *per se* a violation. A violation would exist if a mine operator, upon becoming aware of the presence of excessive methane, fails to perform the actions specified in Section 75.323. The presence of methane gas in excess of 1.0 percent is not a *per se* violation, rather, that the violation exists if the operator fails to take corrective action after becoming aware of the excessive methane.

(D.C. Cir. 1990) (“Deference . . . is not in order if the rule’s meaning is clear on its face.” (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984)).

As pertinent here, section 75.331(c) provides that if the air passing through an auxiliary fan “contains 1.0 percent or more methane, power to . . . the auxiliary fan shall be deenergized . . . until the methane is reduced to less than 1.0 percent.” The action required by the mine operator is clear; it must switch off the fan when the air passing through an auxiliary fan contains 1.0 percent or more methane. The Secretary argues that an operator commits a *per se* violation if an MSHA inspector detects 1.0 percent methane at the fan. I conclude that nothing in the safety standard provides that the mere presence of 1.0 percent or more methane is a *per se* violation. In contrast, section 77.201, at issue in *Amax Coal*, provides that the “methane content in the air of any structure . . . shall be less than 1.0 volume per centum.” (emphasis added). That safety standard requires an operator to maintain the level of methane in structures at less than 1.0 percent at all times. Section 75.331(c), on the other hand, recognizes that the methane level of the air exiting an auxiliary will exceed the 1.0 percent limit from time to time and it requires the operator to shut the fan off in such circumstances.

In *Amax Coal*, the administrative law judge vacated the citation at issue. 17 FMSHRC 48 (Jan. 1995) (ALJ). He stated that “any interpretation of 77.201 that makes a *per se* violation of a methane concentration of one percent or more to be an unreasonable one, to which I need not defer.” *Id.* at 51. He relied, in part, on the Secretary’s interpretation of section 75.323 in reaching this conclusion. The Commission reversed the judge’s decision and stated that 77.201 “stands in marked contrast to the regulation[] involving methane in underground . . . coal mines (30 C.F.R. § 75.323).” 19 FMSHRC 474. The Commission went on to hold that section 75.323 specifies “the corrective actions that are required when methane accumulations exceed 1 percent but do[es] not contain the same express prohibition regarding methane accumulations over 1 percent.” *Id.* at 474-75. In the present case, the language of section 75.331(c) likewise sets forth “the corrective actions that are required” without any express prohibition. I find that the language of section of 75.331(c) is clear on its face and must be interpreted in the same manner as the Secretary interprets section 75.323. My conclusion is consistent with the Commission’s decision in *Amax Coal*. Consequently, the mere presence of 1.0 percent methane or more in the air passing through an auxiliary fan is insufficient to establish a violation of the safety standard.³

³ The Secretary argues that the Commission owes deference to her interpretation of section 75.331(c) even though it is being set forth for the first time in this litigation. (Sec’y Br. 19). There are at least two preconditions that must be met in order to apply deference to an agency’s position first expressed in litigation. First, the language of the regulation in question must be ambiguous, lest a substantively new rule will be promulgated under the guise of interpretation. Second, the agency’s reading of its regulation must be fairly supported by the text of the regulation itself, so as to ensure that adequate notice of that interpretation is contained within the rule itself. *See Auer v. Robbins*, 519 U.S. 452, 46-623 (1997); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); and *Drake v. F.A.A.*, 291 F.3d 59, 67-68 (D.C. Cir. 2002). I find that the Secretary has not met either of these preconditions. The language of the safety standard is not ambiguous and, in addition, the text of the standard would not provide mine operators with adequate notice of the interpretation she posits for the first time in this case.

B. Constructive knowledge that methane concentrations exceeded 1.0 percent

If 75.331(c) does require operator knowledge, the Secretary argues that Bowie should have known that one percent or more methane was present at the auxiliary fans because of the known methane concentrations in the air being pulled into the fan. (S. Br. 19-20). For Citation No. 6687950, methane was 1.3% at the face near the fan intake and was 0.7% at the feeder breaker that supplied some air to the fan. (S. Br. 19). For Citation No. 6688041, methane at the face near the tubing intake was also greater than 1.0%. (S. Br. 19-20).

Bowie argues that a methane concentration exceeding one percent at the face will not necessarily correlate to this concentration at the fan. (Bowie Br. 11). Bowie argues that possible air leakage into the tubing joints will dilute the methane concentration. (Bowie Br. 11). For example, for Citation No. 6688041 Bowie points out that, though three fans were ventilating areas having methane over one percent, one of those fans had an outlet concentration below one percent. (Bowie Br. 11).

I conclude that constructive knowledge is “knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person.” *Black’s Law Dictionary* 284 (8th ed. 2004). The issue is whether Bowie management failed to use reasonable care by not deenergizing the fan before the MSHA inspectors took their methane readings. Was management put on notice by the conditions in the section that it should immediately check the methane levels at the fans?

With respect to Citation No. 6687950, the section was not producing coal and the roof bolting machine had just shut down because the methane monitor on the bolter registered one percent methane. (Tr. 31, 34-35). The inspector did not dispute that the methane level at the fan had been over one percent for a short period of time. (Tr. 43, Ex. G-1, p. 4). The record shows that, during the preshift examination, methane levels were measured at 0.7 or 0.8 percent at the three faces and at 0.7 at the feeder breaker. (Tr. 27; Ex. R-1, p. 1). Inspector Brewer testified that, because it would not take “a lot of activities” in the face area to be over one percent methane, the operator should have known that there could be over one percent methane at the fan. (Tr. 28). Although this statement has some superficial logic, the record makes clear that elevated methane levels at the face or at the feeder breaker do not necessarily translate to elevated levels at the fan. The air from the feeder breaker in the belt entry was diluted by intake air. (Tr. 105). The air traveling through the tubing to the fan is diluted through leakage. (Tr. 41, 88-89). I find that the evidence establishes that the high volume of air that is traveling through the fan will generally contain a lower percentage of methane than the air as measured at the face. (Tr. 100). Although the tubing directing air to a face fan starts near the face, the fan itself is typically located outby the last open crosscut in the return. (Tr. 89). There is no evidence that the section foreman was aware that the roof bolting machine had shut down due to high methane levels. (Tr. 36). I find that the Secretary did not establish that mine management failed to exercise reasonable care by not measuring for methane at the fan before the inspector arrived. It would be prudent for a mine operator to immediately measure the methane at the fan whenever methane over one percent is detected at the face but, in this instance, it appears that the overage occurred right before the inspector arrived at the face.

With respect to Citation No. 6688041, Terry Davis, a section foreman, measured the methane levels at the subject fans about 70 minutes prior to Inspector Serazio's inspection and the methane levels at these fans had been less than one percent. (Tr. 70, 96). The evidence demonstrates that the continuous mining crew backed the mining machine away from the face when the methane level at the face approached one percent. (Tr. 74). As with the previous citation, excessive methane developed at the face just prior to the arrival of the inspection party. (Tr. 71-72). I find that the Secretary did not establish that Bowie failed to exercise reasonable care.

In each instance, I find that the Secretary did not establish that Bowie had constructive knowledge that excessive methane was present at the cited fans or that Bowie failed to exercise reasonable care by not measuring for methane at these fans prior to the time that the MSHA inspectors took their methane readings. It is not disputed that employees of Bowie regularly test for methane at auxiliary face fans. (Tr. 97). Excessive methane levels at the face near a fan intake may be a sufficient basis for constructive knowledge and a violation of 75.331(c) should the operator fail to either monitor fan methane levels or shut down the auxiliary fans, given sufficient time. In this case, the record suggests that employees at the face only became aware of the excessive face methane levels at or near the time of MSHA's inspections.

III. SETTLED CITATIONS

Prior to the hearing, the parties settled the remaining citations in this docket. The parties agreed to reduce the penalty for Citation No. 6687699 from \$687 to \$584. Bowie Resources agreed to pay the Secretary's proposed penalty of \$1,445 for Citation Nos. 3584462 and 3584463. I have considered the representations and documentation submitted and I conclude that the proffered settlement of these citations is appropriate under the criteria set forth in section 110(i) of the Mine Act.

IV. ORDER

For the reasons set forth above, Citation Nos. 6687950 and 6688041 are **VACATED**. Bowie Resources LLC is **ORDERED TO PAY** the Secretary of Labor the sum of \$2,029 within 30 days of the date of this decision.⁴

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

⁴ 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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 8, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-1156
Petitioner	:	A.C. No. 35-00454-148808
	:	
v.	:	Docket No. WEST 2009-972
	:	A.C. 35-00454-183688
ALSEA QUARRIES,	:	
Respondent	:	Mine: Alsea Quarries
	:	

DECISION

Appearances: Mr. Evan L. Nordby, Esq., U.S. Department of Labor, Seattle, Washington on behalf of the Secretary

Ray Perin; Candy Hockema on behalf of Alsea Quarries

Before: Judge David F. Barbour

These cases arise from petitions for assessment of civil penalties filed by the Secretary of Labor (“Secretary”) on behalf of her Mine Safety and Health Administration (“MSHA”) against Alsea Quarries (the “company”). The Secretary alleges that in 16 instances the company violated various of the Secretary’s mandatory safety standards for surface metal and nonmetal mines (30 C.F.R. Part 56) at the company’s quarry in Benton County, Oregon. The Secretary further alleges that several of the violations are significant and substantial contributions to mine safety hazards (“S&S” violations) and that one violation also is the result of the company’s unwarrantable failure to comply. The company, through its president, denies the alleged violations and states that the proposed penalties are excessive. The two cases were assigned to the court and upon the motion of the Secretary they were consolidated for hearing and decision. The court further ordered the parties to confer to determine if they could settle any of their differences and upon being advised that they could not, the court scheduled a hearing which was conducted in Albany, Oregon. The Secretary was represented by her counsel. The company was represented by its president and office manager.

Prior to the hearing, the company agreed that the quarry came within the jurisdiction of the Mine Act and at the commencement of the hearing the parties stipulated to the admissibility of certain exhibits. Tr. 3-4.

THE MINE

At the quarry rock is drilled and shot. The shot material is moved to a mine-site hopper, fed onto a conveyor belt, conveyed along the belt to a feeder, and funneled into a series of crushers. The material is then crushed to size. Tr. 14-15. Although three different types of crushing are involved, the crushing unit is considered a single entity and is commonly referred to as the “crushing plant.” Tr. 15.

The company’s president, Raymond (“Ray”) Perin, testified that the company has operated the quarry since November 4, 1981, except for short periods of time when it was leased and that under the company’s management the facility never has experienced a lost time accident. Tr. 80. Indeed, the company has been awarded certificates of achievement by MSHA for its commendable safety record. Tr. 81; Resp. Exs. 18, 19.

DOCKET NO. WEST 2008-1156

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6438726	01/22/08	56.11002	\$2,000

Cory Michael Owens has more than four years of experience as an MSHA inspector. In addition, Owens has several years of experience in the sand and gravel industry working as a fabricator, a mechanic, a truck driver, and a crushing plant operator. Tr. 9-10. On January 22, 2008 Owens inspected the quarry. He began his inspection at the truck scales and he traveled to the crushing plant. The plant was not operating. In fact, it had not been operating for the last two or three days because of needed plant maintenance. Tr. 13-14, 37. Even though the plant was “down,” it was MSHA’s policy to check the plant’s equipment for compliance with all applicable safety regulations. Tr. 16.

Upon inspecting the plant, Owens noticed that the top half of the crusher had been removed and was sitting on the ground. Tr. 16. The top half “basically unscrew[ed]” from the rest of the crusher. Tr. 17, *see also* Tr. 22. It was sitting “right below the crusher itself.” Tr. 17. Owens climbed onto the crushing plant walkway. He followed the walkway to where it ended. At this point the walkway provided access to the crusher platform. The platform consisted primarily of planking that surrounded the top half of the crusher. Because the top half of the crusher had been separated from the bottom half and because most of the planking had been removed from the platform to perform the job, there was a void or an opening inside the platform. Tr. 20, 28. A handrail was not in place around the opening. *Id.*

Perin told Owens that before the top half of the crusher was removed it protruded up through the planking and that the planking fit snugly around the top of the crusher. Tr. 22-23. When the top and much of the planking was removed, the opening, which Owens estimated measured approximately 6 feet by 6 feet square, was created. Tr. 21.; Gov’t Ex. 1 at 4. The distance from the platform to the top of the bottom half of the crusher was approximately one to two feet. Tr. 23, 54. The platform was approximately 15 feet above the ground. Tr. 26. Also, below the opening, were numerous pieces of crushing plant equipment. Tr. 24; *See* Gov’t Ex. 1 at 5. Owens believed that the conditions violated 30 C.F.R. §56.11002, which requires handrails

on elevated work platforms. He thought the lack of handrails or other restraints created the hazard of falling into and through the unguarded opening onto the equipment below or all the way to the ground. Tr. 24, 30, 54. In Owens's opinion the result of such a fall would be "broken bone type injur[ies], sprains, strains . . . [and] if you hit your head [a fatality.]" Tr. 30; *See also* Tr. 32, 49.

Owens found that such serious injuries were "reasonably likely" because "there was very little avoidance of the hazard if for whatever reason a person were to walk out [on] that walkway." Tr. 30-31. He noted that the walkway "exited right towards the center of [the] opening." Tr. 31. Although the opening was "very" visible (Tr. 45), if a miner slipped or tripped or was not paying attention, the miner could "[step] right into [the] hole." *Id.* There were no steps or other structures to provide solid footing. Tr. 53. Making a fall into and through the opening more likely as mining continued was that fact that in January there could be rain, snow, and wind all of which could make for hazardous footing. *Id.*

To correct the condition the company installed a rope with magenta hanging strips around the opening. Tr. 26; Resp. Exh. 2. According to Owens, the rope and strips "warn[ed] people of the opening." Tr. 27. The company also placed a board across the entrance to the walkway. *Id.*

Owens found that the condition was caused by the company's "high" negligence and its "unwarrantable failure" to comply with section 56.11002. He stated that "anyone walking up that walkway . . . could see that something was amiss, that there should have been something blocking off that [opening]" Tr. 34. He added, "[I]t . . . [was] obvious." *Id.* Owens maintained that Perin lead him to believe the condition existed for two or three days before Owen arrived at the mine. *Id.* According to Owens Perin "was working on the crusher . . . and was aware that the condition existed." Tr. 38. Despite the fact the company was aware of the requirement to provide protection [¹], no effort was made to warn miners using the walkway of the open area. Tr. 44.

Owens testified that Perin told him that the company was putting a new hard surface on the rolls crusher. Tr. 34. Owens described the process as "long [and] drawn-out," one that would take a day or two. Tr. 36. Although Owens never had seen such work performed (Tr. 56), he believed that it was Perin who was actually doing this job and that Perin had to pass the opening to access the rolls crusher work area. Tr. 35. As a result, it was Perin whom the inspector believed was most endangered by the lack of handrails. However, he also thought that any miner who brought Perin supplies or simply came to check how the job was progressing likewise would be endangered. Tr. 36; *see also* Tr. 44-45.

In addition to miners involved in the rolls crusher project, there were others whom Owens believed were in danger. He noted that a miner had to be on the walkway to remove the planking around the top of the crusher before its top half could be lifted. Tr. 59. Moreover, when lifting the top half of the crusher, a tag line had to be attached to the equipment to guide the top

¹ Handrails were provided elsewhere at the facility. Tr. 38.

half during the lift. The miner manning the tag line would be standing on the walkway near the opening. Tr. 59-60; *see also* Tr. 60-61. Owens feared that the miner would focus on the part of the crusher being lifted and the hand signals being given to the hoist operator. Tr. 61. The miner would not pay sufficient attention to the unguarded opening and the hazard it posed. Tr. 61. Owens agreed, however, that no violation existed as long as the planking surrounded the top of the cone crusher. Tr. 65. The violation was created when the planking was removed and no hand rails were installed. *Id.*

Candy Hokema works in the company's office at the mine. She has numerous clerical and quasi-managerial duties. Tr. 67. Hokema identified and reviewed a copy of the company's time book for January 21, 2008, the day before Owens began his inspection. Resp. Ex. 16. According to Hokema it showed that January 21 was a short work day. Miners arrived around 7:00 a.m. and left at 10:00 a.m. "because of the weather." Tr. 67; Resp. Ex. 16. Hokema explained that it had been snowing, no customers came to pick up material, and Perin decided everyone should go home. Tr. 70-72. Hockema could not recall what kind of work was going on at the crusher on January 21 (Tr. 73), but she thought that it "probably . . . was a maintenance day." Tr. 74.

Perin testified that in fact Hockema was right and that on the morning of January 21 maintenance was done on the crusher. Tr. 75. He described what happened: "We . . . cut that deck loose, [got] up there with tag lines on that . . . crusher and [lifted the top half of the crusher] up out of there with the big crane and set it on the ground, and then we [went] home." Tr. 76. When the top half of the crusher was lifted, one miner was on the walkway handling a tag line and another miner was on the ground handling a tag line. Tr. 84. He stated that the miner on the walkway was not "anywhere near where that hole [was]." Tr. 83. He further stated that on January 22, the day of the inspection, maintenance work resumed and the miners disassemble the part of the crusher that was set on the ground the day before. *Id.* After the top half of the crusher was removed, no one had any reason to be on the walkway until the top half of the crusher was replaced.² Tr. 77.

Perin noted that the cited condition was abated by tying a rope between the sides of the walkway thereby blocking access from the walkway to the open area. Tr. 76, 90. The company also put a board across the walkway.³ Tr. 89. Further, the company provided fall protection (harnesses and lanyards) to its miners. Tr. 89-90. Perin maintained that Owens was wrong when he thought miners were working on the rolls crusher. Tr. 77-78. Rather, according to Perin the rolls crusher was "out of commission" and had been "for at least a couple of years." Tr. 77.

² The cone crusher was disassembled to replace an interior part. Tr. 78-79. After the repair, the top half had to be lifted and moved back over the bottom half. During the move a miner would return to the walkway to handle a tag line. Tr. 79-80

³ Although the citation states the cited condition was abated when "a handrail was . . . placed around the . . . opening" (Gov't Ex. 1), the alleged handrail was not referenced by any of the witnesses. *See* Tr. 90.

Perin was candid about the company's failure to block entry to the open area. He stated "We should have had a rope up there." Tr. 92.

THE PARTIES' POSITIONS

Counsel for the Secretary states that the company concedes that "there was a pretty big, [unguarded] hole in the upper platform around the . . . crusher" and that this establishes the violation. Tr. 94.

With regard to the S&S nature of the violation, counsel contends that because there was no handrail around the hole in the upper platform and because the walkway was no more than two to three feet away from the hole, there was a reasonable likelihood that a miner who fell off of the walkway into the hole would "strike obstructions on the way down to the base of the . . . crusher." Tr. 95. The result would likely be a head injury or other type of permanently disabling injury. *Id.* The hazard existed from the time the planking was removed around the cone crusher on January 21 until the inspector issued the citation on January 22 at 2:10 p.m. During this time "a miner could have been exposed to the hazard." Tr. 96.

Owens maintained that a miner might have had to go up on the walkway to retrieve a part or a tool. *Id.* The Secretary also noted that on January 21 during the time the top half of the crusher was removed a miner with a tag line was on the platform, and Owens surmised was likely the miner was paying attention to the suspended load and the tag line, not to the hole at the end of the walkway. Tr. 96-97.

With regard to the Secretary's allegation that the violation was the result of the company's unwarrantable failure to comply with section 56.11002, counsel stated that the government was not asserting that the company through Perin "intentionally put [its] miners in harm's way" or that it was reckless or indifferent. Tr. 98. However, "the obvious nature of the hazard, its duration for more than one shift, and the high degree of danger posed by the hazard" indicated a serious lack of reasonable care on Perin's and the company's part. Tr. 98.

Perin emphasized that the company had operated for twenty-eight years without an accident. Tr. 101-102. He further emphasized that the rolls crusher was not being worked on and had not been operating "for a couple of years." Tr. 103. As a result, no miners were exposed to the hazard due to work on the rolls crusher. Moreover, there was no work done after 10:00 a.m. on January 21, and no one was exposed to the hazard for the rest of that day. *Id.*

THE VIOLATION

Citation 6438726 states:

No handrail was provided around the cone crusher opening in the elevated platform accessing the cone and roll crusher. The platform is approximately 15 feet above ground level, the opening is approx. 6 by 6 feet square, approx. 5-6 feet above

the lower platform for the cone crusher with a walkway around the opening approximately 2-3 feet wide. The opening in the platform has existed for several days as the cone is dismantled for maintenance. This area is accessed daily for maintenance while the plant is down. This area is subject to adverse outside weather conditions such as rain and snow. If a person were to misstep and fall through the opening fatal injuries could result. This condition was obvious and has existed for several days. The owner[,] Ray Perin[,] has engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the condition and continued to direct employees to work in the area. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Ex. 1.

THE VIOLATION

Section 56.11002 requires in pertinent part: “[E]levated walkways . . . shall be provided with handrails and maintained in good condition.” There is no doubt that the standard was violated. Work around the top half of the cone crusher was accessed by the walkway. In addition, the walkway itself served as a place from which to work. In this respect, it was both a work platform and a walkway. The platform/walkway was “elevated.” The inspector testified without contradiction that it was 15 feet above ground level and that it was five to six feet above a lower crusher platform. Tr. 26; Gov't. Ex. 1. No handrails were provided around the platform/walkway. Tr. 20. Perin essentially agreed with the inspector that there was nothing for a miner to grab if the miner lost his balance. Tr. 92. Therefore, I find the violation existed as charged.

S&S and GRAVITY

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S, “if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (Jan. 1984); *accord Buck*

Creek Coal Co., Inc. 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec’y of Labor*, 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

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

The Secretary established the first of the S&S criteria. There was a violation of section 56. 20011. She also established the second criteria. The violation created a discrete safety hazards in that it subjected a miner on the platform/walkway to the possibility of slipping or tripping or otherwise losing his balance and falling into the opening at the edge of the platform/walkway.

The next question is whether in the context of continued normal mining it was reasonably likely a miner would fall into the opening. The question is a close one, but I conclude that in the particular circumstances of this case the answer is, “yes.” The inspector believed that a miner was reasonably likely to fall into the opening because “there was very little avoidance of the hazard if for whatever reasons a person were to walk out [on] that catwalk.”⁴ However, there was little reason for a miner to access the platform/walkway, and in fact, some of those whom Owens believed to be endangered by the violation were not. For example, Owens believed that the company was in the process of resurfacing the rolls crusher, a job requiring up to two work days during which a miner would pass the opening as he proceeding to and from the job. Tr. 35-36. Owens also believed that those bringing supplies to the miner would be exposed to the hazard of falling into the opening. Tr. 36; 44-45. Owens thought that Perin said this work was ongoing. Tr. 34. Owens was sincere in his testimony, but I conclude that his memory was faulty. Perin’s testimony that the rolls crusher had not operated for two years and that no work whatsoever was done on it was more persuasive than Owens’s recollection. Tr. 77-78. Perin testified that the belts were off of the rolls crusher and he pointed out that the rolls crusher’s pulley was rusty. Tr. 77. This testimony was not refuted, and Owens agreed that he had not seen anyone working on the rolls crusher during his inspection. Tr. 56. Given Perin’s more credible testimony, I find that no one was working on the rolls crusher when the violation occurred and

⁴ The inspector frequently used the word “catwalk” when he referred to the platform/walkway. *E.g.* Tr. 31.

that no one would be working on it as mining continued. This narrows the field of those reasonably likely to be exposed to the hazard.

Owens also feared that workers going to retrieve tools or other items left on the platform/walkway would be endangered (Tr. 44-45), but aside for those using the platform/walkway to remove the top half of the cone crusher and to replace it, the record does not support finding other miners used it. In fact, the record establishes that the only work requiring its use was removal and replacement of the top half of the crusher. Owens testified that a miner had to use it to remove the planking around the top half of the crusher. Tr. 59. In addition, a miner stood on the walkway to guide the lifted load with a tag line. Tr. 59-61.

Perin agreed that a miner used the platform/walkway to remove the planking from around the cone crusher. Tr. 83. Perin also agreed that a miner would have been on the platform/walkway tending a tag line during the lifting and replacement of the crusher's top half. But, Perin testified that given the length of the tag line, the miner would have been nowhere near the open area. Tr. 83. This testimony was not refuted and because Perin was very knowledgeable about the procedures used when removing and replacing the upper half of the cone crusher, I credit his testimony, and find that miners tending the tag line were not endangered by the violation.

I therefore find the record establishes that the only miners exposed to the hazard of falling into the open area were those who used the platform/walkway to remove and replace the planking around the crusher. (Obviously, the miners' exposure would not have commenced until enough of the planking was removed to create the opening and it would have ended once enough was replaced to close the opening.)

Although exposure to the hazard was very limited, I conclude those exposed were reasonably likely to be injured. The conclusion is premised on the fact that as Owens noted, during January the weather at the mine was subject to wind, rain and snow. Tr. 53. This obviously increased the likelihood of the exposed miner slipping, tripping or otherwise losing his balance, and with no handrail to grab to steady himself, the miner was reasonably likely to fall into the opening.

I have no doubt that the result of such a fall would have been reasonably serious in nature. I accept Owens's testimony that if a miner fell into the opening and hit the top of the remaining half of the crusher he would have suffered a fall of one to two feet. Tr. 50. Nonetheless, such a fall is enough to cause broken bones or a contusion. Further, if the miner continued falling he was likely to hit other pieces of metal equipment between the opening and the ground 15 feet below the platform. Tr. 24, 49. Broken bones, contusions and/or internal injuries were reasonably likely to result. For all of these reasons, I find that the violation was S&S.

The violation also was serious. As noted, if an injury occurred its result could be to remove a miner from the workplace for days, weeks, or months.

UNWARRANTABLE FAILURE AND NEGLIGENCE

In *Emery Mining Corp.*, 8 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 8 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” 8 FMSHRC at 2004-2004; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving the Commission’s unwarrantable failure test). The Commission has examined various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator’s efforts in abating the violative condition. *Mullines & Sons Coal Co.*, 16 FMSRHC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.* 14 FMSHRC 1232, 1243-1244(Aug. 1992); *Warren Steen Constr., Inc.* 14 FMSHRC 1125, 1129 (July 1992). The Commission also has examined the operator’s knowledge of the existence of the dangerous condition. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994). In order to establish unwarrantable failure there must be a showing of aggravated conduct, that is to say, a showing the operator exhibited significantly more than ordinary negligence. Ordinary negligence, or as the Secretary defines it, “moderate negligence” is when “[t]he operator knew or should have known of the violative condition . . . but there are mitigating circumstances.” 30 C.F.R. §100.3(d) (Table X).

The issue of whether the violation of section 56.20011 was the result of the company’s unwarrantable failure must be based on all of the circumstances. The existence of several of the traditional unwarrantable factors does not necessarily compel an unwarrantable failure finding.

I note that the government acknowledges that the violation was not the result of intentional conduct by the company or that the company, acting through Perin, “was necessarily reckless or indifferent.” Tr. 98. Rather, the government hinges its allegation of unwarrantable failure on the “obvious nature of the hazard, its duration of more than one shift, and the high degree of danger” posed by the violation. *Id.* But what the government does not reference is telling. The violation was not extensive. It only affected a six foot by six foot area around the top half of the crusher. Further, the violation exposed a very limited number of miners to a hazard in that, as I have found, when the violation came into existence and as it mining continued the only miners endangered were those who removed and replaced the planking around the top half of the crusher. Contrary to the inspector’s testimony, the record does not support finding that miners working on the rolls crusher and those manning tag lines were exposed. Moreover, as mining continued the time during which the hazard would have existed was not open ended. When the top half of the crusher was reconnected to the bottom half and the planking was replaced, the hazard was eliminated. According to Perin it would not have been very long before this work was done. Tr. 91. Further, everyone agreed that the company had not been placed on notice that it needed to place handrails around the opening. This was the first time that the company was cited for violating section 56.20011 with respect to an opening, although Perin recognized the company should have complied. Tr. 89. Finally, the company has

an enviable safety record and is not an habitual offender. Perin's statement that the mine had operated for 28 years without an accident was not refuted, and the government's records indicate the mine has no pertinent history of prior violations. Tr. 101-102, 107-108.

Although the company was indeed remiss in failing to provide a handrail around the opening, I find that its failure was not the result of such a heightened lack of care as to justify the inspector's unwarrantable finding. Rather, the company's lack of care in this instance squarely fits the definition of "moderate negligence," which is to say that the company "knew or should have know of the violative condition . . . but there were mitigating circumstances." 30 C.F.R. § 100.3(d) (Table X). Therefore, I hold that the company's negligence was moderate.

WEST 2009-972

The Secretary's petition in Docket No. WEST 2009-972 seeks the assessment of civil penalties for 15 alleged violations. However, at the hearing counsel for the Secretary stated his belief that two of the alleged violations were not at issue because the proposed civil penalties had been paid. The company confirmed that the check with which it paid the proposed penalties for the violations alleged in Citation No. 6479639 and Citation No. 6479644 was cashed. Tr. 104-105. Accordingly, at the close of this decision, I will dismiss all allegations regarding the violations alleged in Citation No. 6479639 and Citation No. 6479644.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479635	03/09/09	56.14132(a)	\$100

Citation No. 6479635 states:

The manually-operated horn provided as a safety feature/warning device on the . . . excavator . . . had not been maintained in a functional condition. The horn did not work unless the control joystick on which the horn control switch was mounted was moved back and forth, making it impossible to sound the horn when needed and without moving the excavator. The operator stated that this intermittent function was sometimes better than others. Miners working or traveling in the area risked receiving very serious injuries should the excavator operator be unable to warn them of movement or other hazards. This excavator was in operation in this condition, which had not been noted on the equipment preshift examination.

Gov't Ex. 2.

Brian Chaix is a federal mine inspector. He is employed in the agency's Vacaville, California office. Tr. 109. Chaix began working for MSHA in 2007. *Id.* Prior to working in the Vacaville office, Chaix worked in MSHA's Albany, Oregon office where he spent several hundred days a year inspecting sand and gravel facilities and quarries. Tr. 111. Before taking a job with MSHA Chaix also worked for a number of private mine operators at both small and large facilities. He held a number of positions with the companies. Tr. 110. Chaix received a B.A. degree from Southern Illinois University. Tr. 110-111.

On March 9, 2009 Chaix inspected the company's quarry. Tr. 112. Upon arriving at the mine Chaix noticed that the mine's conveyor was operating. Tr. 113. Once at the office he introduced himself to Perin and Ms. Hockema and explained that he had come to conduct a regular inspection. *Id.*

The first piece of equipment that Chaix inspected was an excavator. Chaix testified that he asked Perin, who was accompanying him, to sound its horn. Perin tried for 30 seconds and could not get the horn to work. Tr. 116. Chaix found that if the joystick on which the horn was mounted was jiggled, the horn would occasionally sound. It was the only way he could get the horn to function. *Id.* In his notes, Chaix wrote that Perin stated the horn "had worked sporadically . . . for some time." Tr. 116; Gov't Ex. 2 at 4. In other words, Perin agreed that the horn was defective. *See* Tr. 122.

Chaix believed that a non-functioning horn could contribute to an accident in the event the excavator operator tried to alert someone to the impending movement of the equipment. He stated that the horn also helped the excavator operator "communicate" with other equipment in the area. Tr. 118. However, traffic in the area was very limited. Tr. 117; Gov't Exh. 2 at 4. Although a miner could be badly hurt or even killed if he was struck by the excavator, given the limited traffic, Chaix thought it unlikely that the defective horn would cause an accident. Tr. 118-119. Therefore, he found that the company's negligence was moderate. Tr. 119. He stated, "[T]he degree of inattention was not extraordinarily disproportionate to the degree of the hazard based on likelihood." *Id.*

THE VIOLATION

Section 56.14132(a) requires "manually operated horns . . . provided on self-propelled mobile equipment" to "be maintained in functional condition." The excavator was mobile equipment. It was provided with a manually operated horn. The horn did not always work when activated. Tr. 116. The violation existed as charged.

GRAVITY

Chaix found that an injury was unlikely to result from the violation. Gov't Ex. 2; Tr. 117. His testimony that vehicular traffic near the excavator was limited was not disputed (Tr. 118-119), and the record contains no testimony of foot traffic in the vicinity of the loader. I therefore find that Cahix's assessment was correct. Although the violation created the potential for a very serious injury it was unlikely that any injury would occur.

NEGLIGENCE

Negligence is the failure to meet a duty of care required under all of the circumstances including those that mitigate the duty. Here, because of the unlikely prospect of an injury occurring due to the violation, the inspector found that the company exhibited a “moderate” degree of neglect. Tr. 119. I agree. The low level of gravity meant that the company’s duty of care was commensurate. At most the company was moderately negligent.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479636	03/09/09	56.14103(b)	\$100

Citation No. 6479636 states:

The front and rear windshields on the . . . front end loader were broken, which posed a cutting hazard to the operator as well as obscuring visibility. The front glass was broken in approximately 6 places within the field of view, and the rear glass was broken in more than 12 places within the field of view. A miner cleaning the glass risked receiving cut injuries from sharp glass edges. Visibility was also impaired by the multiple reflective lines within the operator’s field of view, which exposed miners working or traveling nearby to the risk of serious injury resulting from obscured visibility. This loader had been in operation in this condition, which was not noted on the preshift examination. This condition was obvious and had apparently existed for some time.

Gov’t Ex. 3.

There were two front end loaders at the mine, and Chaix inspected both. With regard to the first one, Chaix found that its front and rear windshields were cracked, conditions that posed a cutting and visibility hazard to the loader operator.⁵ Tr. 123; Gov. Ex. 3 at 4. Chaix testified that Perin told him the loader had been operated in this condition. Tr. 145. In Chaix’s view the

⁵ Chaix was sure that the cutting hazard existed because he moved a pen across the windows’ cracks and the pen caught on their jagged edges. Tr. 125.

most serious hazard was not that a miner would be cut⁶, but that the cracks in the front windshield impaired the loader operator's visibility. When sunlight hit the cracks the light could reflect in such a way as to cause a glare making it difficult for the loader operator to see miners on the ground and to maintain eye contact with the operators of other equipment. Tr. 125-126. The operator's restricted visibility could result in the loader hitting someone or colliding with other equipment, accidents that could cause very serious injuries to the loader operator and/or others. *Id.* However, Chaix believed that injuries were unlikely to occur because the the cracks did not completely obscure the loader operator's vision. Tr. 126. Moreover, anyone cleaning the window was likely to be aware of the cracks and take care not to be cut. Tr. 126. Chaix found that the company was moderately negligent. He asserted that the violation was "easily seen." Tr. 127. He testified that Perin told him that the windows had been in a defective condition for a number of years. Tr. 128.

THE VIOLATION

Section 56.14103(b) states in part: "If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced." Chaix's testimony that loader's front and rear windshield's were cracked obscuring the loader operator's visibility and creating the possibility of an accident was not refuted. Tr. 125-126. Nor was his testimony that an accident would endanger the loader operator and/or others. *Id.* Further, his testimony regarding the possibility of a miner cutting himself on the cracked glass was credible. Tr. 126. Therefore, I find that the damaged windows both "obscure[d] visibility necessary for safe operation" and "create[d] a hazard to the equipment operator" (section 56.14103(d)) and that the company violated the standard.

GRAVITY

Chaix found that the violation was unlikely to result in an injury producing accident, and I agree. As Chaix noted and as photographs of the windows make clear, despite the cracks, the loader operator's visibility was not totally obscured. Gov't. Ex. 3 at 4 & 5. In addition, the cracks in the windows were plainly visible to the loader operator and it is reasonable to assume, as Chaix testified, that the operator would take precautions against cutting his hand when cleaning the windows. Tr. 145-146.

NEGLIGENCE

Chaix seems to have based his finding of moderate negligence on the fact that the violation was unlikely to cause an injury. The fact that the violation was not serious means that

⁶ Chaix was asked if cleaning the window with a squeegee would eliminate the cut hazard. Tr. 129. In responding he implied that while a person using a squeegee might not be cut (Tr. 129; *see also* Tr. 130, 145), a photograph of the front windshield (Gov. Exh. 3 at 4) showed streaks that were inconsistent with those left by a squeegee, and that in any event using a squeegee did not relieve a mine operator of its duty to replace the cracked windows. Tr. 131, 145-146.

the company's lack of care was commensurately low. I therefore sustain Chaix's negligence finding.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479637	03/09/09	56.14100(d)	\$100

Citation No. 6479637 states:

Defects on self-propelled mobile equipment affecting safety have not been recorded as required . . . Multiple defects affecting safety on multiple pieces of equipment which were obvious had existed for some time and/or were known to mine management [but] had not been recorded as required by the standard, which exposed miners operating equipment or working and traveling near to the risk of receiving very serious injuries resulting from collision (from not knowing the [equipment] operator's intention to turn or stop, or from obscured visibility,) as well as other hazards.

Gov't Ex. 4.

Chaix testified that during the course of his inspection he observed "multiple defects on multiple pieces of equipment" that were not recorded in the required examination books. Tr. 132. When asked to be more specific about the unrecorded "multiple defects," Chaix testified that brake lights on the front end loader were not functioning.⁷ Tr. 135-136. In addition, Chaix stated that there were cracked windows on the front end loader (Citation No. 6479636) and on an excavator (Citation No. 6479640). Tr. 136-137; Gov. Ex. 4 at 2. Chaix testified that on March 9, 2009 during the course of his inspection he asked Perin for the book in which the results of pre-operational examinations of equipment were recorded. Tr. 134. Perin produced a book entitled "Daily Inspection Log," and when Chaix looked at it he found that the aforementioned defects were not noted. Tr. 132-133. Chaix took a photograph of the pertinent page in the book. Gov't Ex. 4 at 3. To abate the condition the company recorded the defects in the "comments" section of the records book, and Chaix took a photograph of the corrected page. Tr. 135; Gov. Ex. 4 at 4.

In the inspector's opinion the hazard created by failing to record the defects was that company would not "remember about the defects and stay on them and ensure that they were corrected." Tr. 133. However, he did not believe that an injury was likely to result from failing to record the defects. Tr. 137. He stated that none of the unrecorded defects created hazards that

⁷ The allegedly defective brake lights were not cited by the inspector as a separate violation. Tr. 136.

were “outrageous.” Tr. 137. Chaix also found that the company’s failure to record the defects was the result of its moderate negligence.. While Chaix maintained Perin, as the representative of the company, was responsible for ensuring compliance with the standard, MSHA’s records did not show the company had been previously cited for violating section 56.14100(d). For this reason, Chaix believed there was “some mitigation” of the company’s negligence. Tr. 138.

THE VIOLATION

Section 56.14100(d) requires defects on self-propelled mobile equipment that affect safety and that are not corrected immediately to “be reported to and recorded by the operator.” Chaix’s testimony that the brake lights on the front end loader were not working was not contradicted, nor was his testimony that the windows of the loader and the excavator were cracked. Tr. 135-136. The equipment was self-propelled. Brake lights that do not work and windows that are cracked are defects affecting safety. The defects were not recorded as required. Tr. 134. The violation existed as charged.

GRAVITY

Chaix found that the violation was unlikely to result in an injury producing accident, and he was right. Failure to record the defects made it less likely they would be corrected, but in and of itself the failure did not pose an immediate hazard to miners.

NEGLIGENCE

Chaix also found that the violation was due to the company’s moderate negligence, and . again, I agree. The defects were obvious. They should have been noted and recorded. However, the non-serious nature of the hazard carried with it a commensurately moderate duty of care.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479641	03/09/09	56.14103(b)	\$100

The left front window on the CAT 980B front end loader . . . was broken in approximately 6-8 places, posing a cut hazard to the operator as well as obscuring visibility. Miners risked receiving cut injuries from sharp glass edges, as well as from obscured visibility within the operator’s field of view. This loader had been in operation in this condition, which had not been noted on the preshift examination. This

condition was obvious and had apparently existed for some time.

Gov't Ex. 6.

Chaix testified that the second front end loader owned and operated by the company also had a cracked window. He cited the first front end loader in Citation No. 6479636. He cited the second in the subject citation. Tr. 141, Gov. Ex. 6 at 4. Chaix believed that the cracked window somewhat limited the loader operator's visibility and subjected a person cleaning the window to a cut hazard. Tr. 142. He recalled that the glass did not appear to be loose and did not completely obscure visibility. *Id.* As with the other loader, he thought it unlikely that the cracked window would cause an injury but that if it did, the result could be lost workdays or restricted duty to the affected miner. *Id.*

Although Chaix did not know how long the window was cracked, he testified that the cracks did not appear new. Tr. 143. He speculated that the window had been cracked "more than a day or two." Tr. 144. He also testified that he believed the continuing presence of the cracked window violated section 56.14103(b) and was the result of the company's moderate negligence. Tr. 143-144. The defect was easy to see. Tr. 144. He did not know however whether the condition had been brought to Perin's attention so he thought the company's lack of care might be mitigated. *Id.* None the less, he emphasized that the company was responsible for the condition and for maintaining the loader in good condition and that it did not live up to its responsibility. *Id.*

THE VIOLATION

As previously noted, section 56.14103(b) requires the replacement of damaged windows that obscure visibility necessary for safe operation or that create a hazard. Both Chaix's testimony and the government's photographic evidence establish the cracks in the loader's left front window somewhat obscured the loader operator's visibility. Tr. 142; Gov't Ex. 6 at 4. In addition, although he acknowledged the risk was slight, Chaix's belief that the cracks subjected a miner cleaning to the window to the chance of being cut was not challenged. *Id.* Therefore, I find that the damaged window both "obscure[d] visibility necessary for safe operation" and "create[d] a hazard to the equipment operator." 30 C.F.R. §56.14103(b). The company violated the standard.

GRAVITY

Chaix found that the violation was unlikely to result in an injury producing accident, and he was right. As Chaix noted and as a photograph of the window makes clear, despite the cracks, the loader operator's visibility was not totally obscured. Gov't. Ex. 6 at 4. In addition, the cracks in the window were plainly visible and it is reasonable to assume that any miner cleaning the window would take precautions against cutting his hand. I conclude that the violation was not serious.

NEGLIGENCE

As Chaix noted, the company had a duty to maintain the loader in good condition, and it should have replaced the cracked window. Tr. 144. However, the cracked window created a hazard that was unlikely to occur and the low level of the danger posed by the violation means that the company failed to meet a commensurately low standard of care. At most it was moderately negligent. Tr. 143-144.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479642	03/09/09	56.14132(b)(1)	\$100

The automatic reverse-activated alarm provided on the CAT 980B front end loader . . . had not been maintained in functional condition. The loader was observed in operation reversing with no audible alarm, and upon investigation was found to function only if the loader operator wiggled the controls. Miners working and traveling in the area risked receiving very serious or grave injuries resulting from not knowing this loader's intention to reverse. The loader was in operation in this condition, which was not noted in the preshift examination.

Gov't Ex. 7.

The front end loader in question is the same equipment cited in Citation No. 6479641 for a cracked window. When inspecting the loader Chaix saw it back up but did not hear its back up alarm. Tr. 147. Checking more closely, Chaix found that the back up alarm only worked if the alarm's controls were wiggled. *Id.* In his contemporaneous notes, Chaix wrote that the alarm "functioned intermittently at best" and that it "[o]nly worked when fiddled with." Gov. Exh. 7 at 3; Tr. 149. Chaix explained that the purpose of the alarm is to warn miners on the ground or in other equipment of the motion of the equipment when it is put in reverse. Tr. 149. In particular, it alerts those standing behind it when the loader begins to move toward them. Miners standing behind often cannot be seen by the loader operator. *Id.* When the alarm does not work, they are at risk of being struck. Tr. 149-150.

The inspector found that the improperly working alarm was unlikely to result in a miner being injured. Tr. 150. He did so because the alarm "may have worked occasionally" and the number of miners exposed to the hazard was limited. Tr. 151. None the less, if a miner was run over by the loader as a result of its alarm not working, Chaix believed that the miner was likely to be killed. *Id.*

Chaix found that the improperly working alarm was the result of the company's moderate negligence. He had no evidence that Perin knew about the condition, and he speculated that the fact the alarm functioned at times may have lead the company to believe the alarm was in

compliance. Tr. 152. In addition, Chax testified that because the loader was “pretty [loud]” it was possible the loader operator might not have noticed when the alarm did not sound. *Id.*

THE VIOLATION

Section 14132(b)(1) requires the installation of alarms or signals “when the operator of [self-propelled mobile equipment] has an obstructed view to the rear.” The cited front end loader is self-propelled and mobile. The record establishes the loader operator has an “obstructed view to the rear.” As Chaix put it, the loader is “a fair sized piece of equipment with a big blind spot. If I’m standing right at the rear of the equipment, the operator cannot see me.” Tr. 149. Section 14132(B)(1)(I) requires such equipment to have a reverse-activated signal alarm. A back up alarm does not fulfill this requirement unless it is fully operational. Here, Chaix’s undisputed testimony that the alarm only worked when its controls were jiggled means that the alarm was not fully operational and that the violation existed as charged. Tr. 147, 149; Gov. Ex. 7 at 3.

GRAVITY

Chaix found that the improperly functioning alarm was unlikely to result in an accident, and I agree. Tr. 150. As he noted, the alarm may have worked intermittently and few miners exposed to the hazard. Tr. 151. This was not a serious violation.

NEGLIGENCE

I also agree with Chaix that there were factors that mitigated the company’s negligence and that justified his belief the company was moderately culpable in failing to meet its required standard of care. The fact that the alarm may have worked occasionally meant that those responsible for detecting and correcting the malfunctioning nature of the alarm may have been misled as to its functional state. *See* Tr. 152. I affirm the inspector’s moderate negligence finding.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479643	03/09/09	56.14101(a)(1)	\$243

The service brake system provided on CAT 980B front end loader . . . was not capable of stopping the loader with its typical load on the maximum grade it travels. This loader was observed in operation at the time of inspection on grades measuring up to approximately 12%, but when tested on a grade measuring approximately 5-7% [the service brake were] insufficient to stop the loader. Miners operating this

loader or working and traveling nearby risked receiving very serious or grave injuries resulting from overtravel or run away.

Gov't Ex. 8.

After examining the back up alarm, Chaix watched as the loader operator, who was loading trucks with mine product, used the loader's gears to stop and hold the equipment. Tr. 154. Chaix concluded that the loader's service brakes were incapable of stopping the loader when it was carrying its typical load. Tr. 154. At the time Chaix observed the loader it was operating on a 5% -7% grade. Tr. 156. The maximum grade at the mine is approximately 12%.⁸ Tr. 160. The 12% grade is located on the mine's haulage road between the crushing plant and the pit, and miners and other equipment work and travel on the road. Tr. 159-160. Chaix decided not to test the loader's brakes on the 12% grade because it "was too dangerous." Tr. 155; *See* Tr. 156-157, 158; *See also* Gov't Exh. 8 at 3. If the service brakes did not work on a 5% - 7% grade, testing them on a 12% grade would be "professionally reckless." Tr. 158.

Chaix believed that the non-working service brakes were reasonably likely to result in a fatal injury. Tr. 160. He noted that there was "mixed traffic" (Tr. 160) – meaning vehicular and foot traffic – in the areas where the loader operated. Tr. 161-162. If the loader's gears failed while it was on a grade and the loader operator could not shift into reverse, the only way that the loader might be kept from running away was to drop its scoop, but this procedure was not an alternative to working service brakes, and the lack of adequate service brakes could "result in a very bad accident." Tr. 161. The loader operator was exposed to the hazard as were miners in other equipment and miners on foot. Tr. 162.

The inspector found that the violation was S&S. There was a "discrete safety hazard" in that the service brakes were not functional and the loader was sometimes operated on grades with mixed traffic. Tr. 163. Had the inspector not forced the issue by charging the company with a violation, Chaix believed that an accident due to the malfunctioning brakes would have been reasonably likely as mining continued. *Id.* Miners and others using the road where the loader was operated were exposed "to an unreasonable degree of hazard given that there was a loader that didn't have brakes." Tr. 164. Chaix also believed that injuries resulting from such an accident would be "at least permanently disabling, if not fatal." *Id.*

The inspector found the condition was the result of the company's moderate negligence. While the loader operator told Chaix that the service brakes needed to be adjusted, the inspector was unable to determine whether the company's management actually knew about the loader's condition. Although, he added, management should have known. Tr. 162-163.

⁸ Chaix measured the grade with a level. Tr. 160.

THE VIOLATION

The fact of violation is not subject to serious dispute. Section 56.14101(a)(1) requires that “self-propelled mobile equipment . . . be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.” The cited front end loader was self-propelled and mobile. The inspector’s testimony establishes that its service brakes did not work on a 5% to 7% grade where it was loading trucks with its typical load. Tr. 155, 159. The maximum grade at the mine is approximately 12%. Tr. 160. As Chaix noted, if the service brakes did not hold the truck with its typical load on the lesser grade, they would not hold it on the maximum grade. Tr. 158. The violation existed as charged.

S&S AND GRAVITY

I have found a violation of section 56.14101(a)(1). I also find that the violation created a discrete safety hazard. If the loader was operated on a grade of 5% to 7% or more at the mine and if the loader stopped, it was subject to rolling out of control because its service brakes were faulty. Tr. 155, 156-158. Chaix’s testimony establishes that the loader shared the areas where it operated with equipment operated by other miners as well as with miners on foot. Tr. 160-161. All of these miners were in danger of being struck by the loader as it rolled down a grade. Tr. 162-163.

I agree with Chaix that the hazard was reasonably likely to occur. The failure of the service brakes to hold the loader, the prevalence of other miners both in equipment and on foot on the grades where the loader operated, and the fact that as mining continued the loader would be stopping on the grades between 5% to 7% and 12% in the vicinity of other miners meant that a injury producing accident was reasonably likely to occur. *See* Tr. 164. Finally, as the inspector accurately noted, the kind of injury that was likely to result would be serious “if not fatal.” Tr. 164. For these reasons, I find that the violation was S&S.

It also was very serious. The inspector stated that the injury likely to result from the violation would at least be at that level, and he was right. Tr. 164.

NEGLIGENCE

Because Chaix could not determine whether mine management actually knew the service brakes were not working properly, he concluded the company’s negligence was moderate. Tr. 162-163; Gov’t Ex. 8. I will not gainsay the inspector’s finding except to state that he was correct when he observed that whatever the state of mine management’s actual knowledge, the company should have known about the brakes’ condition. Tr. 162-163. I affirm the inspector’s finding that the company was moderately negligent.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479640	03/09/09	56.14100(a)	\$100

The citation states:

Preshift examinations have not been performed on the Cat 908B front end loader . . . as evidenced by multiple defects affecting safety: several of which were unknown to the operator because they were not checked, whereas others were not noted despite being obvious (56.14100(d) cited separately.) The front left seat mount was cracked off, making the seat excessively loose and exposing miners operating this equipment or working nearby to the risk of injury from loss or inaccuracy of control. The brake lights did not work, which were not checked. The front left windshield was also broken, the backup alarm was not maintained in functional condition, and the service brakes were insufficient to stop the loader with a typical load on the maximum grade it traveled (56.14103(b), 56.14132(b), and 56.14101(a)(1) cited separately.) Failure to perform a preshift examination, then document and correct defects affecting safety exposed miners to the risk of very serious injury resulting from hazards of which miners were unaware.

Gov't Ex. 5.

The inspector testified that he cited the company for a violation of section 56.14100(a) because, "The standard requires that equipment to be used on a shift be examined prior to being placed in operation" and the cited front end loader had not "received a thorough preshift examination." Tr. 165; The inspector listed the deficiencies: "The front left seat mount was cracked . . . making the seat loose, the brake lights didn't work, the front and left windshield was broken, the backup alarm [did not function,] and the service brakes . . . didn't stop the loader." Tr. 165; *See* Gov. Exh. 5 at 5. Chaix testified that when he checked the company's pre-operational shift inspection log, no defects were listed. Tr. 168.

The defects that were not the basis for separate citations were the cracked seat mount and the non-functioning brake lights. In Chaix's view neither of these was likely to cause an accident. Tr. 166. Still, it was possible that the cracked seat mount could cause the loader operator's seat to wiggle, leading to a loss of control of the equipment and a resulting collision or to over-travel of the roadway. Tr. 167. In addition, the defective brake lights could cause a collision if an equipment operator approaching from behind was unaware that that loader stopped. *Id.* If such accidents occurred, Chaix believed the resulting injuries to the equipment operators and others nearby could be "pretty serious." Tr. 167.

Chaix found that the failure to conduct an adequate preshift examination was the result of the company's moderate negligence. The loader operator stated that he did not check the seat mount or the brake lights and although the conditions were obvious Chaix thought it possible that the company did not know about them. Tr. 167, 169.

THE VIOLATION

Section 56.14100(a) states: "Self-propelled mobile equipment to be used during the shift shall be inspected by the equipment operator before being placed on operation on that shift." The standard goes on to require any equipment defects to be corrected in a timely manner (30 C.F.R. § 56.14100(b)) and defects affecting safety that are not corrected to be reported to and recorded by the mine operator. 30 C.F.R. § 56.14100(d).

Here, the government charges the company with failing to conduct an adequate pre-operational examination of the front end loader. It asserts that the inadequacy of the examination is evidenced by specific defects found on the loader (*i.e.*, the loose seat, inoperable brake lights, cracked windows, a malfunctioning backup alarm, and ineffective service brakes). Tr. 168. Chaix's testimony about the loose seat and the inoperable brake lights was not challenged, and I find they existed and they affected safety just as Chaix maintained. Tr. 166, 168. I previously found the other specified defects existed and affected safety. Chaix testified without dispute that he looked at the company's records of its examination of the loader and found that no defects were recorded. Tr. 168. An examination conducted pursuant to the standard must be carried out adequately in order to meet the standard's requirements. Conversely, an examination conducted inadequately violates the standard. Five defects affecting safety existed and none were recorded. Tr. 168. Thus, the record supports finding that company's examination of the loader was inadequate and hence that the company violated the standard.

GRAVITY

The inspector found the violation was unlikely to cause an accident although if one occurred it would have "pretty serious" consequences for those involved. Tr. 167; Gov't Ex. 5. The hazard posed by the violation was that the undetected safety defects would not be corrected and the ongoing problems would result in a number of events that would endanger the loader operator and other miners. Tr. 167. The inspector's on-the-spot assessment that the record keeping violation was unlikely to result in an accident is not without support. I conclude that the violation was not serious.

NEGLIGENCE

The inspector found that the violation was the result of the company's moderate negligence. He thought it possible that mine management did not know the examinations were inadequately conducted. Tr. 167, 169. Still, management should have known, and it clearly failed to meet the standard of care required. Its failure was not of a heightened degree, and I affirm Chaix's negligence finding.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479645	03/09/09	56.9300(a)	\$108

The citation states in part:

Neither berms nor guardrails were provided in several areas of the mine access road, in lengths up to approximately 500 feet and over drop-offs of up to approximately 100 feet. The gated, single lane road, measure approximately 18 feet wide between turnouts, and approximately 12% in grade. All mine traffic uses this road, as it is the only access to the mine. The mine's gate and sign are at the bottom of the road where it meets a paved public roadway, the road is maintained by the mine operator, and was built by/for the mine. The mine operator had bermed some of this road in the past, but several significant areas remain unbermed. Miners and haul truck drivers using this road risked receiving very serious or grave injuries resulting from overturning or over traveling any of the several areas. This road was in service in this condition, which was not noted on any examination.

Gov. Ex. 9.

During the course of the inspection Chaix noticed that the mine's "gated, single-lane access road . . . lacked berms in several areas." Tr. 171. The road was the only way to get into and out of the mine and all mine traffic used it. Tr. 175. Perin told Chaix that he and his employees maintained the road. Tr. 176-177. According to Chaix, while there were indications the company provided berms along the road in the past, the berms had deteriorated. Tr. 177-178. Chaix identified a photograph (Gov't Ex. 9 at 7) that shows the access road when looking toward the gate where a public road passes the mine entrance. The photograph depicts a drop-off on the left side of the mine road. Tr. 172. It also shows how the roadbed goes "up to the edge of the drop-off without an intervening berm or guardrail." *Id.* Chaix also testified that further uphill there was another area of unbermed mine road with a drop-off on one side. Tr. 173-174; Gov't Ex. 9 at 10. Even further along there was an unbermed corner with a drop-off on one side of the corner. Tr. 174; Gov't Exh. 9 at 11. At the top of the hill there was still another unbermed area of the road with a drop-off. Tr. 174-175; Gov't Exh. 9 at 12. Chaix estimated that in total approximately 500 feet of the road lacked required berms. Tr. 175. He calculated one of the drop-offs had a slope of an approximately 45 degrees and a vertical height of approximately 129 to 140 feet. Tr. 179-180. There was, he testified, "plenty of distance for somebody to get hurt." Tr. 180.

Chaix found that the lack of berms was reasonably likely to contribute to a serious accident. He testified that “every vehicle coming to or from this mine would climb up [the inadequately bermed road] toward the mine empty and descent the grade full.” Tr. 180. Vehicles that overtraveled the road would fall in excess of 100 feet to the bottom of the drop-offs. Tr. 181. In Chaix’s opinion, such accidents “would be expected to result in extremely serious injuries” (Tr. 181) or in fatalities. Tr. 182. He noted that most haul trucks using the road did not have rollover protection. Tr. 181.

Chaix found the company was moderately negligent in failing to adequately berm the road. Tr. 183. Although the lack of berms was visually obvious, he believed the company’s failure to meet its duty of care was mitigated. He stated, “[T]here may have been a misunderstanding regarding the requirement to berm.” Tr. 183. Perin added more information about the “misunderstanding.” He stated that the company was advised by a previous inspector that it did not need to berm the cited parts of the road. Tr. 257. Given the possibility of conflicting advice from MSHA, Chaix acknowledged that the company might feel “a little bit like a moving target.” Tr. 185. He added, “maybe that’s why I was willing to allow that this could have been moderate . . . negligence.” *Id.*

Perin stated that the issue of whether or not to fully berm the road had caused the company “heartburn.” Tr.252. He maintained that in 2004 or 2005 in response to being cited elsewhere for failing to have a berm, he decided the company should berm all of the road. Tr. 253, 255. The work started but an MSHA inspector told Perin the road did not have to be bermed, so the work stopped. Tr. 253, 257. Perin remember the inspector saying that the company only was responsible for hazards that affected on-site miners, not hazards affecting those traveling to and from the active mining site. Tr. 256.

If there was a violation, Prein thought that it was not S&S because the company had been in the process of complying until the previous inspector orally advised the company that he did not think berming was necessary. Tr. 253, 270-271. Perin added that “99 percent” of his argument with MSHA was due to the lack of consistency among its inspectors. Tr. 186. Perin also observed that berming the road narrowed it and in his opinion made it more rather than less hazardous. He stated, “[W]e . . . probably created a bigger hazard then the one that we solved.” Tr. 254.

Finally, Perin testified that in November, 2008 and in January, 2009 the mine received a compliance assistance visit from an MSHA employee named Evan Church. Tr. 273–274, 279. Perin was not at the mine at the time, but Church left a written note on which he listed things he saw and approved of and things he saw and believed needed correction. Tr. 274. With regard to berms, Church wrote, that they “look[ed] good.” *Id.*; Resp. Ex. 7. After Perin’s testimony was received, the Secretary called Church as a witness. Church testified that when he wrote that the berms “look[ed] good” (Tr. 274) he was referring to berms “everywhere the miners worked or traveled during their shift,” not just to the mine road. Tr. 281. Church agreed that he and Perin discussed the part of the road that was later found by Chaix to lack berms. At the time of the compliance assistance visit Church did not consider the area to be a part of the mine because he did not think that the road belonged to the mine. Therefore, he did not think that berming that part of the road “[should] be the mine’s deal.” Tr. 281.

THE VIOLATION

Section 56.9300(a) states: “Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of such sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.” The Secretary easily established the violation. The cited road was part of the mine. It lead from the gate to the area where extraction and processing took place. Tr. 171, 180. As Chaix noted, every vehicle traveling to and from the site of the actual mining operations used the road. Tr. 180. Chaix’s testimony and the photographic exhibits he identified make it abundantly clear that the road either was not bermed or was inadequately bermed at points where precipitous drop-offs existed. Tr. 172, 173-175, 179-180, 182; Gov’t Exh. 9 at 10, 11, 12. In this regard, Chaix’s undisputed testimony as to the steepness and depth of the drop-offs was especially compelling. Tr. 179-181. The record supports finding that just as Chaix testified, a vehicle over traveling an unbermed portion of the road next to a drop-off would have fallen in “excess of 100 feet.” Tr. 181. That such an accident “would be expected to result in extremely serious injuries” is an understatement. Tr. 181.

S&S AND GRAVITY

I have found a violation of section 56.9300(a). I also find that the violation created a discrete safety hazard. The operators of all vehicles using the road were in danger of over traveling the road and falling in excess of 100 feet because parts of the road next to precipitous drop-offs were not bermed or were inadequately bermed. I also agreed with Chaix that such accidents were reasonably likely to happen as mining continued. The unbermed or inadequately bermed areas of the road were extensive, approximately 500 feet (Tr. 175), and every vehicle entering and leaving the mine used the road. Tr. 175, 180. It was only a matter of time before a vehicle operator’s misjudgement or a vehicle’s mechanical malfunction sent a vehicle perilously close to the road’s edge and with no berm or with an inadequate berm to restrain the vehicle, it was likely to go off the road and fall to the bottom of the drop-off. Chaix’s observation that such an accident “would be expected to result in extremely serious injuries” (Tr. 181) or in a fatality gives voice to the obvious. Tr. 182. For these reasons, I find that the violation was S&S.

It also was very serious. As the inspector stated, the likely result of the violation was at least an “extremely serious” injury. Tr. 181.

NEGLIGENCE

Chaix found that the company’s negligence was “moderate,” but I conclude that it was “low.” Perin credibly testified that it was not clear to the company if it was required to berm the subject parts of the road. Perin’s testimony that the company was advised by a representative of MSHA in 2004 or in 2005 that berms were not required in the cited areas and that it relied on the representative’s opinion and stopped efforts to berm the road was not refuted. Tr. 253-257. Further, despite what Church may have intended when he wrote the note that the mine’s “berming look[ed] good,” the statement can reasonably have been read by the company as an endorsement of the berming conditions as they were at the time of Church’s visit, and those conditions were essentially the same as those later cited by Chaix. While these factors do not

absolve the company of failing to meet the standard of care required, they mitigate its failure to a greater extent than Chaix believed.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479646	03/10/09	56.15004	\$108

The citation states:

A miner was observed not wearing any eye protection while using compressed air to actuate brake cylinders on a truck, which exposed his eyes to the risk of receiving very serious injuries from impact and/or contamination. The miner was laying on his back under . . . [a] haul truck, using a handheld air nozzle to actuate the brake cans. The air compressor was set to approximately 100 psi, and the air . . . was vented directly to atmosphere at the miner's hands every cycle. Mud, grit and rock on the floor of the shop and on the truck were exposed to the explosive release of air every cycle. Eye protection was provided to the miner, and it was available nearby.

Gov't Ex. 10.

Chaix left the mine after he issued the berm citation. He returned the following afternoon. When he arrived at the shop area he saw a miner repairing a haul truck. The miner was using a hand held compressed air nozzle to actuate the truck's brake cylinders. To gain access to the cylinders the miner crawled under the truck and lay on his back on the shop floor. Tr. 188-189. When Chaix saw the miner, his face was about one foot from the particular cylinder he was trying to activate. He was holding the air nozzle about one foot from his face, and he was not wearing safety glasses. Tr. 188-190.

Chaix believed that each time compressed air was released from the nozzle mud and grit on the cylinder and on the undercarriage of the truck was liberated. He noted that the air was compressed to a pressure of 100 pounds per square inch. Tr. 194. Chaix feared that because the miner was not wearing eye protection, dirt particles would fly into his eyes. Tr. 190. Chaix thought that the miner was reasonably likely to suffer an eye injury in the form of a scratched cornea with a possible accompanying eye infection. Tr. 194. Chaix described this outcome as a "multiple [week] . . . miserable experience." Tr. 191.

Chaix asked the miner if he had safety glasses. The miner said that he did. He stopped working on the truck, got the glasses and put them on. Tr. 197. Chaix testified that the miner

either forgot to use the glasses or chose not to. Tr. 192-193. Because the company was not directly responsible for the miner failing to use the available eye protection, Chaix found that the company was moderately negligent. Tr. 193-194.

Perin maintained that he had spoken with his miners about the need to wear eye protection and that he had seen the particular miner involved in the incident wearing safety glasses “a hundred times.” Tr. 264; *see also* Tr. 276. Perin did not know why the miner failed to wear the glasses. He speculated that the miner might have had a “memory lapse.” Tr. 264. The miner had been trained. The safety glasses were available. *Id.*

THE VIOLATION

Section 56.15004 states that “All persons shall wear safety glasses, goggles or face shields . . . when in or around an area of a mine . . . where a hazard exists which could cause injury to unprotected eyes.” The Secretary proved the violation. Chaix’s testimony that a miner was not wearing eye protection and that he was working in a situation where particles liberated by blasts of compressed air could fly into the miner’s unprotected eyes was not disputed. Tr. 190. Nor was his common sense testimony that such an accident could result in the miner suffering a scratched cornea and a possible eye infection. Tr. 191.

S&S AND GRAVITY

I have found a violation of section 56.15004. I also find that the violation created a discrete safety hazard. As Chaix testified, without safety glasses mud and dirt freed by blasts of compressed air could be propelled into the miner’s unprotected eyes. Chaix thought as mining continued it was reasonably likely the miner would experience an eye injury, and I agree. Tr. 191. The miner was engaged in ongoing work on the haul truck’s brake cylinders. The work involved repeated uses of the air nozzle, which in turn lead to repeated projections of mud and dirt particles in the immediate vicinity of the miner’s unprotected eyes. The likelihood a foreign particle lodging in one or both of the miner’s eyes increased with each blast of compressed air making an eye injury reasonably likely. Further, the resulting eye injury was likely to be of a reasonably serious nature. Chaix rightly described such an injury as likely to be a “miserable experience.” Tr. 191.

In addition to being S&S the violation was serious because a damaging eye injury was its most likely result.

NEGLIGENCE

Chaix found that the company was moderately negligent. Tr. 193-194; Gov’t Ex. 10. The record, however, shows that the company met the standard of care required. The company made eye protection available to its employees. Tr. 197. It advised miners about the requirements of section 56.15004. Tr. 264. Indeed, Perin specifically spoke with the miner in question about wearing safety glasses. Tr. 276. No one knows why the miner did not wear them. Both Chaix and Perin speculated that he possibly forgot. Tr. 192-193, 264. Chaix also thought it possible he

purposefully decided not to. Tr. 192-193. In either case there was no showing by the Secretary that the violation was due to any failing on the company's part, and I find that the company was not negligent.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479648	03/11/09	56.16006	\$100

The citation states:

The valves on 4 compressed gas cylinders stored or use in the shop area were not protected by covers as required by the [s]tandard. They were not in use at the time of inspection, and miners working and traveling in the area risked receiving very serious injuries from this missile/fire/explosion hazard.

Gov't Ex. 11.

After observing the miner who was not wearing eye protection, Chaix left the mine. He returned the next day and traveled again to the shop area. There he saw four compressed gas cylinders that were not equipped with protective valve covers. Tr. 200; Gov't Ex. 11 at 3 and 4. The cylinders, which usually fueled a cutting torch, were not in use. Tr. 200, 203. Their hoses were coiled and their valves were shut off. Tr. 203. Miners were working in the shop in the vicinity of the cylinders. *Id.*

Chaix believed that the cylinders contained gas and were available for use. He note that it was a "common practice" to remove empty cylinders "from the location of use and place [them] where the gas supplier can pick [them] up." Tr. 202. The cylinders Chaix saw were still located where they could be used. *Id.* He testified that the tanks contained acetylene and oxygen. Acetylene was stored at "several hundred psi [pounds per square inch]" and oxygen was stored at "several thousand psi." *Id.* Without a cover the cylinders' valves were exposed to the risk of being damaged. If a valve was damaged uncontrolled gas could be expelled from a cylinder, the cylinder could become a missel-like projectile. Tr. 204. Or, a cylinder's regulator and its valve could be dislodged and they too could be propelled with great force. Tr. 204. In addition, if a cylinder's valve was damaged but the tank or its parts were not put in motion, the valve could still leak and create a fire or explosion hazard. Tr. 205.

In Chaix's opinion if a cylinder or a part of a cylinder was projected and hit a miner, the miner's resulting injuries were likely to be permanently disabling. Tr. 206. Chaix "wouldn't want to be on the receiving end of the degree of force." *Id.* However, Chaix recognized that because the tanks were secured by chains, they were unlikely to tip or fall and suffer damage. Therefore, it was unlikely an injury would result from the violation. Tr. 205-206. Moreover, Chaix saw no moving equipment near the tanks. *Id.*

Chaix found the lack of valve covers was due to the company's moderate negligence. He believed that the company simply overlooked the requirement of keep the caps over the valves. Tr. 207. He noted that the covers were "nearby and available." Tr. 209. Perin agreed that during the compliance assistance visit two to three months before Chaix's inspection, Church indicated the company should cover the valves. Tr. 275; Resp. Ex. 7. Perin forthright stated, "[W]e didn't do that. We slid on that." Tr. 275.

THE VIOLATION

Section 56.16006 states in part: "Valves on compressed gas cylinders shall be protected on covers when being transported or stored." There is no dispute about the facts. They establish that four compressed gas cylinders stored in the shop area had valves that were not protected with valve covers. Tr. 200-203. The facts establish the violation.

GRAVITY

Chaix found that the hazards created by the violation were unlikely to occur although if they did they could result in serious injuries to the company's miners. Tr. 204-206. The facts confirm that Chaix's analysis of the gravity of the violation was in all respects correct. The subject cylinders were chained upright and unlikely to fall or tip in such a way that the cylinders or parts of the cylinders would become uncontrolled projectiles or leaked gas that would explode or catch fire. Tr. 205-206. Moreover, Chaix detected no evidence of equipment operating in the vicinity of the tanks that could hit them causing the same results. *Id.* For these reasons, I agree with Chaix that the violation was not serious.

NEGLIGENCE

I also agree with Chaix that the company was moderately negligent in allowing the violation. Tr. 207; Gov't Ex. 11. The company's duty of care was low. Perin candidly admitted that the company was on notice compliance was required. Tr. 275; Resp. Ex.7. While this might have otherwise increased the company's level of neglect, because the violation was very unlikely to result in an injury, the company's standard of care was commensurately low. Its prior notice to comply had the effect of raising what would have been its low negligence to the level of moderate.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479652	03/11/09	56.12030	\$100

The citation states in part:

A potentially dangerous electrical condition was not corrected prior to the energization of the system. Three open holes were left on the "Lighting Panel Main" disconnect box in the electrical shed. Two were on top, measuring approximately 2 inches in

diameter and 75 inches in height. One was on the bottom, measuring approximately 1 3/4 inches in diameter and 59 inches in height. Miners working or traveling in the area risked receiving very serious . . . injuries resulting from this shock/burn/fire hazard. The electrical system had been in operation in this condition which was not noted.

Gov't Ex. 12.

The inspector, whose testimony tracked the citation, testified that as he continued his inspection on March 11 he saw three open holes in the lighting panel main disconnect box. The box was located in the mine's electrical shed. Tr. 210-211. The top two holes were approximately 2 inches in diameter and located 6 feet 3 inches above the shed floor. The bottom hole was approximately 1 3/4 inches in diameter and was located approximately 4 feet 11 inches above the shed floor. Tr. 210; Gov't Ex. 12 at 4. Chaix could not recall if the electrical panel was energized and in use at the time of the inspection.⁹ Tr. 212.

The inspector was concerned that insects or mice might enter the box through the holes, make nests and cause a fire. Tr. 212-213. However, Chaix believed this was unlikely. *Id.* In addition to the fire hazard, Chaix thought that there was a chance that a miner could in some way contact energized parts inside the box and be shocked or even electrocuted. Tr. 213-214. However, Chaix recognized that a shock injury also was not "terribly likely." Tr. 214. He added that he thought that the area around the box was visited by a miner at least once or twice a shift. Tr. 215. Chaix found that the company was moderately negligent. Tr. 215; Gov't Ex. 12. He testified that the existence of the holes was "one of those ordinary types of circumstances where something was overlooked." Tr. 215.

Perin testified that the electrical box had been in place unchanged since 1981, that it had been inspected every year since 1981 and that no citations had been issued with regard to it. Tr. 267. Given the prior citation-free inspections he did not think that the company was negligent. Tr. 268. If there was a violation, the company was not responsible because of the "inconsistencies" of MSHA's enforcement actions. Tr. 269.

⁹ Chaix is not an electrician and he agreed that it was possible the box could have been out of service, although he added that he "was informed at the time of the inspection, that [the box] had been in operation in [the] condition [I cited]." Tr. 216-217. He also stated that he was told by miners that the box was used for lighting and that 120 volts of electricity passed through it. Tr. 217-218.

THE VIOLATION

Section 56.12030 states that when a “potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.” The standard is one that is “simple and brief in order to be broadly applicable to myriad circumstances.” *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981). In applying the standard the Commission has mandated an objective standard, *i.e.* the reasonably prudent person test. *BHP Minerals International, Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). The question is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSRHC 2490, 2416 (Nov. 1990). The Commission has stated that various factors that bear upon what a reasonable, prudent person would do, including accepted safety standards in the field, considerations unique to the mining industry, and the particular circumstances at the mine. *See U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983).

It is a close question whether the Secretary proved a violation of the standard, but on balance I conclude that she did. I credit Chaix’s testimony that he was told the box was used for lighting and that 120 volts of current passed through it. Tr. 120. I do so because it was not challenged and/or contradicted by Perin. I also find that Chaix’s uncontradicted belief the area around the box was visited by a miner at least once or twice a shift was factually correct. Tr. 215. Although Chaix did not know if the box was energized and in use at the time of inspection (Tr. 212-213), the evidence supports finding that the box had been used in the past with the holes present and that it would be used in the future. Tr. 216-218. With 120 volts passing though the box and with a miner in the immediate vicinity of the box, I conclude that a reasonably prudent mine operator would not have used the box in the condition that Chaix found.

Chaix forthrightly recognized that there was a very little chance that insects or animals nesting in the box would cause a fire. Tr. 213-215. He also acknowledged that there was very little chance that a miner would suffer a shock injury because of the holes in the box. Tr. 214. However, the fact that a fire or shock hazard was not “terribly likely” does not mean that a reasonably prudent operator would have ignored the hazard. Rather, Chaix’s testimony that these very hazards happened in the past at other mines is a persuasive indication that a reasonably prudent operator would have taken steps to prevent them. Tr. 215. In other words, a reasonably prudent operator would have covered the holes. The underlying purpose of the standard is to protect miners working around electrical equipment and electrical circuits. To fully effectuate this purpose, the company should have eliminated access to the box’s internal components. For these reasons I conclude the company violated section 56.12030.

GRAVITY

The inspector testified that fire and shock hazards were created by the violation, and the record supports finding that he was correct. Tr. 212-214. The record also supports finding that the hazards were not “terribly likely” to occur. Tr. 214. There was at best, one miner who visited the area on a regular basis. Tr. 215. Moreover, the Secretary did not quantify the chance of an insect or animal nesting in the box, and I suspect the reason she did not is because the chance is

so slight. The inspector found it unlikely the violation would cause an injury, and the record bears him out. This was not a serious violation.

NEGLIGENCE

While Chaix also found that the violation was caused by the company’s moderate negligence, I conclude its negligence was low. The company’s duty of care was as minimal as the violation’s gravity. Further, the company was not the only entity that failed to detect the violation. The record supports finding that the government too repeatedly failed to notice it. Perin’s testimony that the box had been the way Chaix found it for approximately 20 years was not challenged. Tr. 267. While this does not absolve the company of failing to meet the standard of care required, it confirms that company’s failure was of a minimal magnitude.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479653	03/11/09	56.14107(a)	\$100

The citation states in part:

Multiple moving machine parts on the “some main belts” were not guarded to protect miners performing inspection, maintenance and cleanup, or lubrication activities in these areas from contact, exposing them to the risk of receiving very serious injuries resulting from entanglement. The rapidly rotating v-belt drive on the conveyor, which was located immediately adjacent to the walkway at the left side of the head pulley, was unguarded on the bottom, the back, and the front, with the opening on the bottom measuring approximately 6 inches wide by 46 inches long and the secondary drive pulley protruding from the guard by approximately 3 inches on the bottom, all at a height of approximately 58-60 inches. . . . The pinch points at the left and the right sides of the head pulley were also open to contact at a height of approximately 72 inches above the walkway. Three return idlers on this conveyor were exposed to contact: the first, at a height of approximately 12 inches and distance of approximately 13 inches from the adjacent railed walkway; the second, at a height of approximately 60-64 inches on uneven ground and a distance

of approximately 4 feet from the adjacent railed stairway; and the third was partially guarded with exposure to contact on the front for approximately 3-4 inches, on the left side, at a distance of 12 inches from the existing side guard and a height of approximately 36 inches above ground, and on the right side at a distance of 9 inches from the existing side guard at a height of approximately 42 inches above ground, all adjacent to an established walkway. The tail pulley on this conveyor was also inadequately guarded to prevent contact, with open exposure on both sides and the bottom: on the right side, the self-cleaning pulley was approximately 7 inches from and flush with the bottom of the existing side guard at a height of approximately 32-34 inches above uneven ground; on the left side, at approximately 6 inches from the existing side guard and at a height of approximately 34 inches above ground; and across the bottom. These conditions were obvious and extensive, but apparently had not been raised to mine management's awareness as hazards.

Gov't Ex. 13.

The inspector testified that on March 11, 2009 he observed "multiple moving machine parts on the main belt which were not guarded to protect miners from injury resulting from contact." Tr. 219. The main belt transports extracted product from a hopper to the plant. Chaix described the length of the belt as "one hundred feet or so." Tr. 220. He recalled that the belt was operating when he arrived at the mine. *Id.*

Among the belt's unguarded moving parts were three return idlers. Tr. 220; Gov't Ex. 13 at 11. There were tracks throughout the area and there was a significant amount of belt spillage. Chaix testified that miners usually cleaned the spillage with hand shovels. Tr. 222-223. However, he saw a fire hose in the area and he agreed that the hose also could be used to clean spillage "depending on the circumstances at the time." Tr. 237. But even if the hose was used miners still had to go near unguarded parts to perform maintenance on the belt. Tr. 238. For these reasons Chaix believe that miners were exposed to a hazard because of the unguarded return idlers all of which could be easily contacted. Tr. 221. One of the idlers was approximately 12 inches above the floor of the mine. Another was approximately 5 feet to 5 feet 4 inches

above the floor and a third, which was partly guarded, was approximately 3 feet above ground level.

Tr. 221-222.

In addition to the return idlers, Chaix noticed that a self-cleaning tail pulley was inadequately guarded. Tr. 223; Gov't Ex. 13 at 12. The bottom side of the pulley was approximately 2 feet 10 inches about ground level, and the ground near the pulley was uneven. Tr. 223. Chaix testified that miners would be adjacent to the pulley when they were cleaning spillage. In addition, a mechanic would be checking on the pulley while it was operating, something that would bring the mechanic near to the unguarded pulley. Tr. 224. Chaix observed "extensive tracks and tool marks throughout the area." Tr. 226. He also noted that the pulley itself was not smooth but had fins (Tr. 223) which made the inadequately guarded tail pulley "really dangerous." Tr. 226. A miner "snagged" by the fins would be pulled into the pinch point between the belt and the pulley and would "not . . . live to tell the story." Tr. 227.

There was also an unguarded v-belt drive on the conveyor at the discharge end of the belt adjacent to the walkway on the left side of the head pulley. Tr. 227; Gov't Ex. 13 at 13. The head pulley had multiple pinch points. Tr. 228. Chaix explained that inadvertent contact with the v-belt drive could result in a miner being seriously injured when pulled into the pulley's pinch points. *Id.* In addition, the pulley's shaft turned at several hundred revolutions per minute. *Id.* If a miner came into contact with the rotating shaft the result would be like "being struck with a chunk of metal at high speed." Tr. 229. Chaix "wouldn't expect to get [the miner's] body parts back in the same way as they started." *Id.* The inspector testified that miners worked in the vicinity of the unguarded v-belt drive and pulley. There were tracks on the ground near the pulley and he noted that miners were expected to travel near the pulley to observe it, lubricate it, and if necessary to clean around it. Tr. 230.

Chaix found that given the multiple unguarded parts in areas where miners were expected to travel and work, it was reasonably likely that miners would contact the moving parts. Tr. 231; Gov't Ex. 13. Moreover, such contact would create a substantial hazard of dismemberment or death. Tr. 231-232. He described the main belt as the mine's "bread and butter . . . something you want to keep an eye on and make sure it keeps running," which meant that miners would be exposed to the hazards of contact with the unguarded parts on a repetitive basis. Tr. 231. Chaix also found that the company's negligence in failing to provide the guards was "low." Tr. 133; Gov't Ex. 13. He believed that the company was "really trying" to comply. Tr. 233.

Perin maintained that although the mine was previously cited twice for failing to properly guard moving parts of the conveyor belt, areas cited by Chaix were not involved in the prior citations.¹⁰ Tr. 260. Except for guards added due to the previous citations, the belt's structure was "exactly as it was in 1981," and it had been inspected at least once a year since 1981. Tr. 262. Perin maintained that in 2008 Chaix's predecessor issued only one citation at the mine. However, in 2009 when Chaix became the mine's regular inspector, Chaix issued 21 or 22

¹⁰ The mine was cited once in 1999 and once in 2000. At the time the mine was run by a lessee not by the company. Tr. 260.

citations to the company. Tr. 262. Perin attributed the increase to the “inconsistency” of MSHA’s enforcement efforts. Tr. 260, 262. Perin complained about MSHA changing the “ball game from one guy to the next.” Tr. 262. However, Perin also admitted that among the items noted for correction by Church as a result of his compliance assistance visit was “guarding on the main belt.” Tr. 274. In fact, Church specifically listed the “guarding around tail pulleys” as needing the company’s attention. Tr. 280; Resp. Ex. 7.

THE VIOLATION

Section 56.14107(a) states in part: “Moving machine parts shall be guarded to protect persons from contacting . . . drive, head, tail and takeup pulleys . . . and similar moving parts that can cause injury.” Chaix’s testimony echoed the citation and established that in fact three return idlers on the main belt were unguarded (Tr. 220), a self cleaning tail pulley was inadequately guarded (Tr. 223), and a pulley v-belt drive was unguarded. Tr. 227. In each of these instances his testimony also established that miners had worked and/or traveled in the vicinity of the unguarded and inadequately guarded moving parts. Tr. 222-223, 224, 226, 230, 238. There is no question but that any miner who contacted the moving machine part would be subject to a severe or fatal injury. Tr. 227-229. For these reasons I conclude that the violation existed as charged.

S&S AND GRAVITY

I have found a violation of section 56.14107(a). I also find that the violation created a discrete safety hazard. Miners who worked and/or traveled in the vicinity of the unguarded moving belt parts were in danger of being caught in the moving parts and of being dismembered or killed. I agreed with Chaix that accidents of this nature were reasonably likely to happen as mining continued. There were multiple opportunities for miners to come in contact with the unguarded moving parts. Miners not only cleaned belt spillage in the vicinity of the parts (Tr. 222-223, 223-224, 230), they also lubricated and maintained the parts (Tr. 230, 238) and observed the parts to make sure they operated properly (Tr. 224). These activities were carried out in close proximity to the parts, and I fully agree with Chaix that given the number of unguarded and inadequately guarded parts and the proximity of miners to them, it was reasonably likely as mining continued that an accident would happen. Tr. 231-232. The violation was S&S.

It also was very serious. The multiple nature of the infractions increased the likelihood of contact for miners who worked and/or traveled in the vicinity of the cited parts. The speed at which the belt and parts moved (Tr. 229) ensured that contact would almost certainly produce a very serious injury or a fatality. Tr. 231-232. Chaix stated that he would not expect the body parts of an entangled miner “to come back the same way,” and neither would I. Tr. 229.

NEGLIGENCE

The inspector found that the violation was caused by the company’s low negligence. Tr. 133; Gov’t Ex, 13. I do not agree. Although Chaix thought the company was “really trying”

to comply (Tr. 233), the record compels finding that whatever its intent, it significantly failed to meet its required standard of care. The guarding standard is clearly stated and well known in the industry. In addition, the hazards engendered when the standard is violated are equally well known. While it may be true as Perin testified that MSHA's inspectors previously failed to cite the same or similar conditions on the belt (Tr. 262), the company is deemed to be on notice as to what is required and to understand that it is obligated to meet the requirement.

Here, the company did not have a single isolated incident of inadequate guarding. Rather, it was responsible for multiple instances. Moreover, its failures came in the wake of having been placed on notice by Church that it needed to attend to guarding on the main belt. Tr. 274, 280. Despite this warning, the company was woefully out of compliance. Its lack of care arose in the context of few if any mitigating circumstances. Rather than low, the company's negligence was high.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479656	03/19/09	56.14130(g)	\$243

The citation states in part:

A miner was observed not wearing the seatbelt provided while operating [a] . . . front end loader[.] Grades at this mine measured up to in excess of 12%, the grade on which the loader was being operated measured approximately 10-12%, with multiple ramps, berms, obstacles, and drop-offs in the area. A miner not wearing the provided seat belt in this . . . loader risked receiving very serious . . . injuries from collision from within the cab, being ejected from the loader, or from not being protected by the ROPS provided around the operator's seat.

Gov't Ex. 14.

On March 19, 2009 Chaix went to the mine to monitor the abatement of several previously issued citations. Upon arriving he saw a miner operating a front end loader. The miner was not wearing a seat belt. Tr. 239; Gov't Ex. 14. The belt was draped over the loader operator's seat and he was sitting on part of it. Tr. 239-240; Gov't Ex. 14 at 3. Although the company instructed its miners that they were required to wear seat belts, Chaix believed it likely the loader operator ignored the instruction. Tr. 241, 246.

Chaix testified that an injury was reasonably likely to result from the miner's failure to wear the seat belt. Tr. 242. He noted that he saw the loader operated on grades of at least 12 % and in areas with multiple drop-offs. Tr. 242, 250. By failing to wear the provided seat belt, the loader operator gave up much of the safety otherwise afforded by the loader's roll over

protection system. Chaix thought that in the context of continued mining, it was likely an accident would occur, and he observed that when a loader operator who is not wearing a set belt is involved in an accident, the operator has “a tendency to die.” Tr. 243. Chaix also found that the company’s negligence was “moderate.” Tr. 244-145; Gov’t Exh. 14. The violation was the fault of the rank and file miner alone. Tr. 245.

Perin testified that the miners were trained to use seat belts, and obviously, the seat belt was available. Tr. 265; Resp. Ex. 21, Gov’t Ex. 14 at 3. Perin had no idea why the miner did not buckle it, but it was the loader operator who was negligent not the company. Tr. 266.

THE VIOLATION

Section 56.14130(g) states in pertinent part: “Seat belts shall be worn by the equipment operator[.]” Chaix not only testified without dispute that he saw a miner operator operating the equipment while not wearing a seatbelt, he identified a copy of a photograph that depicted what he saw. Tr. 239; Gov’t Exh. 14 at 3. I therefore find that just as Chaix testified and as the copy of the photograph shows, that the loader operator failed to wear the provided seat belt and the company violated section 56.14130(g).

S&S AND GRAVITY

I have found a violation of section 56.14130(g). I also find that the violation created a discrete safety hazard. If the loader was involved in an accident or otherwise overturned, the loader operator would be in serious danger of being thrown from the cab of the loader or of being thrown inside the cab. With nothing to restrain him, the operator could be seriously injured or killed. Chaix’s observation that operators involved in accidents when not wearing seat belts have “a tendency to die” makes the point. Tr. 245.

Chaix believed that the loader operator was reasonably likely to be seriously injured as mining continued, and I agree. Tr. 242, Gov’t Ex. 14. This is not a situation where the equipment in question was operated on flat ground and away from drop-offs. It was just the opposite. The grade was steep with multiple drop-offs. Tr. 242, 250. The terrain on which the loader was operated made it reasonably likely as mining continued that the equipment would experience an accident that would cause the loader operator to be severely jostled inside the cab or thrown from it. With nothing to hold the operator in his seat the least that could be expected is that the operator would be seriously injured. The violation was S&S.

The violation also was serious. Chaix’s observation that miners involved in accidents like the kind he feared usually are killed was not hyperbole. Tr. 243.

NEGLIGENCE

Although the inspector found that the violation was caused by the company’s moderate negligence (Tr. 244-245; Gov’t Ex. 14), I disagree and conclude that the company met the standard of care required. I note that a seat belt was provided, that it was in good condition and that it was readily available. Rather than “buckle up” the loader operator chose to sit on the belt.

Tr. 239; Gov't Ex. 14 at 3. I note as well that there is no evidence the miner was operating the equipment within sight of a supervisor or that the company's employees had a history of disregarding the seatbelt requirement. Moreover, both Chaix and Perin agree the company instructed its miners in the necessity of using provided seat belts. Tr. 241, 265. Perin had "no idea" why the equipment operator chose not to use the belt. Tr. 266. Neither did Chaix. Nor do I. The company was not negligent.

OTHER CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

The exhibits attached to the Secretary's petitions indicate the company has no applicable history of prior violations. Exhibits A.

SIZE AND ABILITY TO CONTINUE IN BUSINESS

The exhibits attached to the Secretary's petitions indicate the operator is small in size. Exhibits A.

GOOD FAITH ABATEMENT

The parties stipulated that the company showed good faith in abating the violations. Tr. 283-284.

CIVIL PENALTY ASSESSMENTS

DOCKET NO. WEST 2008-1156

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6438726	01/22/08	56.11002	\$2,000

I have found that the violation existed, that it was serious, that it was not the result of the company's unwarrantable failure and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$200.

DOCKET NO. WEST 2009-972

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479635	03/09/09	56.14132(a)	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$100.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479636	03/09/09	56.14103(b)	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$100.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479637	03/09/09	56.14100(d)	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$100.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479641	03/09/09	56.14103(b)	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$100.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479642	03/09/09	56.14132(b)(1)	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$100.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479643	03/09/09	56.14101(a)(1)	\$243

I have found that the violation existed, that it was very serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$300.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479640	03/09/09	56.1410(a)	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$100.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479645	03/09/09	56.9300(a)	\$108

I have found that the violation existed, that it was very serious and that the negligence of the company was low. Given these findings and the other civil penalty criteria I assess a civil penalty of \$225.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479646	03/10/09	56.15004	\$108

I have found that the violation existed, that it was very serious and that the company was not negligent. Given these findings and the other civil penalty criteria I assess a civil penalty of \$90.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479648	03/11/09	56.16006	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$100.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479652	03/11/09	56.12030	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was low. Given these findings and the other civil penalty criteria I assess a civil penalty of \$75.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479653	03/11/09	56.14107(a)	\$100

I have found that the violation existed, that it was very serious and that the negligence of the company was high. Given this and the other civil penalty criteria I assess a civil penalty of \$250.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479656	03/19/09	56.14130(g)	\$243

I have found that the violation existed, that it was serious and that the company was not negligent. Given these findings and the other civil penalty criteria I assess a civil penalty of \$125.

ORDER

In Docket No. WEST 2008-1156 Citation No. 6437826 **IS MODIFIED** to a citation issued pursuant to section 104(a) of the Act, 30 U.S.C. §814(a) and the inspector's negligence finding **IS MODIFIED** from "high" to "moderate."

In Docket No. WEST 2009-972 the inspector's negligence finding in Citation No. 6479645 **IS MODIFIED** from "moderate" to "low."

In Docket No. WEST 2009-972 the inspector's negligence finding in Citation No. 6479646 **IS MODIFIED** from "moderate" to "none."

In Docket No. WEST 2009-972 the inspector's negligence finding in Citation No. 6479652 **IS MODIFIED** from "moderate" to "low."

In Docket No. WEST 2009-972 the inspector's negligence finding in Citation No. 6479653 **IS MODIFIED** from "low" to "high."

In Docket No. WEST 2009-972 the inspector's negligence finding in Citation No. 6479656 **IS MODIFIED** from "moderate" to "none."

In Docket No. WEST 2009-972 the penalties proposed for the violations alleged in Citation No. 6479639 and Citation No. 6479644 have been paid and all allegations with regard to these two citations **ARE DISMISSED**.

Within 40 days of the date of this decision the company **SHALL** pay a total civil penalty of \$1965.00. Payment **SHALL** be sent to the: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63197-0390. The payment should reference Docket No. WEST 2008-1156-M and Docket No. WEST 2009-972-M.

These cases **ARE DISMISSED**.

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

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001

August 10, 2011

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. KENT 2009-383-M
v. : A.C. No. 15-04469-168455
CEMEX, INC., :
Respondent : Mine: Kosmos Cement Co.

DECISION

Appearances: Jonathan Hoffmeister, Esq., and Leslie Brody, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, on behalf of the Petitioner;
Gayle R. Harrison, Safety Manager, Cemex/Kosmos Cement, Louisville, Kentucky, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for a civil penalty filed by the Secretary of Labor (“Secretary”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.*, (“Act”) charging Cemex, Inc. (“Cemex”) with one violation of a mandatory standard and proposing civil penalties of \$7,578.00 for that violation. The general issue before me is whether Cemex violated the cited standard as charged and, if so, what is the appropriate civil penalty for that violation. Additional specific issues are addressed as noted.

Citation Number 7754461, issued on September 23, 2008, pursuant to section 104(a) of the Act, alleges a “significant and substantial” violation of the standard at 30 C.F.R. §56.14112(b) and charges as follows:

The snubber pulley guard, on the #149 conveyor belt located in the crusher building, was not securely in place. The guard had come [sic] loose, and was exposing the snubber pulley to contact. The entire side of the snubber pulley was unguarded. Employees working in and around the area were exposed to the possibility of a fatal injury if they were accidentally to contact the moving machine parts. Employees enter this area when equipment is running to perform maintenance and cleaning activities on a daily basis. The holder for the guard had either broken or been taken down for maintenance purposes. The conveyor was not running at the time of inspection, but had run at 0910 on this day. This area doesn’t have any emergency stop devices and this conveyor is not visible from the start/stop switch.

The cited standard requires that “[g]uards shall be securely in place while machinery is

being operated, except when testing or making adjustments which cannot be performed without removal of the guard.”

Thomas Galbreath, an experienced inspector for the Department of Labor’s, Mine Safety and Health Administration (MSHA), with 15 years additional experience in the mining industry, testified on behalf of the Secretary. On September 23, 2008, Galbreath was inspecting the conveyor belts in the Kosmos Cement stone crushing building. At approximately 9:45 a.m., Galbreath observed a two-and-one-half foot guard lying in the walkway next to the No. 149 conveyor belt. It is not disputed that, although the conveyor was not then running and had been locked and tagged out, the absent guard left a potential pinch point of the snubber pulley exposed. Galbreath opined at hearing that the guard was not intentionally removed, but rather had come loose from vibrations in the crusher building. He speculated that the vibrations caused the standard to break which attached the guard to the frame, and that the unanchored guard then fell to the floor.

Michael Mills, a “processor” at the cement plant, testified for the Respondent. The functions of a processor are equivalent in many ways to a preshift and onshift examiner. Processors check all the equipment “safeties” and only they can perform the “lock outs.” Mills testified that, when he examined the No. 149 beltline the previous day the guard was in place and that he was told nothing about the guard by the previous night shift crew (Tr. 88).

Between 6:00 and 6:30 a.m., on September 23, 2008 Mills was told to shut down the entire crusher system for maintenance work. Mills testified that the entire system was shut down by 8:50 or 9:00 a.m. (Tr. 84-86 and 109) and that he personally at 9: 10 a.m. locked and tagged out the electrical switches powering all parts of the system. Mills further testified that around 9:10 a.m. he viewed a work order requesting repair of the snubber pulley guard on the No. 149 conveyor. (Tr. 83). According to Mills, one of the maintenance men also told him that one of the reasons for shutting down the system was because the subject guard needed work. (Tr. 82-83).

Since there is no dispute that the system was not actually shut down until 8:50 or 9:00 a.m., it is apparent that the No. 149 conveyor continued to operate until that time. Moreover, since a work order to shut down the system had been prepared by 6:00 or 6:30 a.m., and Mills was told that one of the reasons for the shutdown was because the subject guard needed work, it is apparent that the No. 149 conveyor had been operating at least since 6:00 or 6:30 a.m. without the guard in place. I therefore find that there was a violation as charged and find that the violation was “significant and substantial” and of high gravity.

A violation is properly designated as "significant and substantial" if, based on 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained

In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation, (3) a reasonable

likelihood that the hazard contributed to will result in injury and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *See also Austin Power Co. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *see also Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).”

Since the credible evidence in this case shows that the subject conveyor was operating without the cited guard in place from as early as 6:00 or 6:30 a.m. on September 23, 2008 until 8:50 9:00 a.m. that day-- a period of nearly two and a half hours-- I find that there was a discrete safety hazard and that there was a reasonable likelihood that the hazard would result in injury of a reasonably serious nature. I find credible Inspector Galbreath’s testimony that the processors and maintenance personnel would be in the vicinity of the exposed pinch point at least once per shift and if pulled into the exposed pinch point would suffer fatal injuries. The violation was, accordingly, significant and substantial and of high gravity.

I further find that Michael Mills, as one of the operator’s “processors” responsible for checking all the equipment for safety and authorized to perform lockouts, was an agent of Cemex and, in light of the circumstances, should have known of the fallen guard as early as 6:00 or 6:30 a.m. when “maintenance” told him of the existence of the work order. Mills claims that he did not then know that the work order cited the fact that the guard was down. However, this claim is not accepted without serious skepticism. In any event, based on the fact that Cemex had been cited six times for violations of the standard at issue in the 15 months preceding the instant citation, I find this as additional evidence of operator negligence. I find that Cemex is, under the circumstances, chargeable with at least moderate negligence.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operators ability to continue in business.

The record shows that Cemex had a moderate history of violations but had six violations of the standard at bar over the previous fifteen months. It is of moderate size. The violative condition had actually been abated by shutting down and locking out the subject beltline even before the citation was issued. There is no evidence that the penalty imposed herein would affect the operator’s ability to remain in business. The gravity and negligence of the violation have previously been discussed.

ORDER

Citation No. 7754461 is hereby affirmed with “significant and substantial” findings. Cemex Inc., is hereby directed to pay a civil penalty of \$7,500.00 for the violation charged therein within 40 days of the date of this decision.

/s/ Gary Melick
Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (By Certified Mail)

Jonathan Hoffmeister, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, Suite 7T10, Atlanta, GA 30303

Gayle R. Harrison, Safety Manager, Cemex/Kosmos Cement, 15301 Dixie Hwy., Louisville, KY 40272

/to

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2500
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August 15, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2009-241
Petitioner,	:	A.C. No. 05-03836-166946-01
	:	
	:	Docket No. WEST 2009-580
	:	A.C. No. 05-03836-175445-02
	:	
v.	:	Docket No. WEST 2009-820
	:	A.C. No. 05-03836-180513-02
	:	
TWENTYMILE COAL COMPANY,	:	Docket No. WEST 2009-1322
Respondent.	:	A.C. No. 05-03836-192254-01
	:	
	:	
	:	Foidel Creek Mine

DECISION

Appearances: Jennifer A. Casey and Amanda K. Slater, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado; Larry W. Ramey, Mine Safety and Health Administration, U.S. Department of Labor, Denver, Colorado, for Petitioner.
R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, Pennsylvania; C.G. Peterson, Jackson Kelly PLLC, Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Twentymile Coal Company (“Twentymile”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Steamboat Springs, Colorado, and filed post-hearing briefs. Twentymile operates the Foidel Creek Mine, a large underground coal mine in Routt County, Colorado. The mine extracts coal in panels using a longwall system.

I. STIPULATIONS

At hearing, the parties offered the following stipulations into evidence:

8. The proposed penalties will not affect Twentymile's ability to remain in business.
9. Twentymile demonstrated good faith in abating the cited condition.
10. Twentymile is a large operator.
11. The certified copy of the MSHA Assessed Violations History reflects the history of the mine for the fifteen months prior to the date of the citations/orders and may be admitted into evidence without objection by Twentymile.
12. These cases involve ten Section 104(d)(2) orders. The 104(d)(1) order giving rise to Order No. 8460508 was issued on October 25, 2006 (Order No. 7286324) and has been resolved in settlement by the parties. The 104(d)(1) order giving rise to Order Nos. 8463325, 8463326, 8463327, and 8463330 (Order No. 7286321) was also issued on October 25, 2006 and has been resolved in settlement by the parties. In the period from October 25, 2006 to June 23, 2009, Twentymile was issued more than 30 orders (including those at issue here) pursuant to section 104(d) of the Act. Ten such orders are listed as being final orders. The rest are still in contest.
13. Order No. 8460508 refers to Citation Nos. 8460506 and 8460507. Copies of such citations are marked as Government Exhibit 8 and may be admitted into evidence without objection from Twentymile. Citation Nos. 8460506 and 8460507 were designated as significant and substantial violations. The citations and corresponding civil money penalties for such citations have been contested by Twentymile and are currently pending before the Commission in Docket No. WEST 2010-1323. The fact that Twentymile does not object to the admission of such exhibits does not in any way constitute an admission that such citations were validly issued or that any allegation therein is true.
14. Order No. 8463330 refers to Citation No. 8463328. A copy of this citation is marked as Government Exhibit 8 and may be admitted into evidence without objection from Twentymile. Citation No. 8463328 is designated as a non-significant and substantial violation. The citation and corresponding civil money penalty have been contested by Twentymile and are currently pending before the Commission in Docket No. WEST 2010-1323. The fact that Twentymile does not object to the admission of such exhibits does not in any way constitute an admission that such citations were validly issued or that any allegation therein is true.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. WEST 2009-1322, Order Nos. 8463325, 8463326, 8463327, 8463330

Inspector Mark Jay Albrecht has been employed by MSHA since 1998. During his time with MSHA he has worked as a metal/non-metal inspector and supervisor at surface and underground mines. Albrecht is currently a coal mine safety and health specialist in the Gillette, Wyoming, field office of MSHA District 9. As a health and safety specialist he is responsible for conducting health sampling and, occasionally, regular inspections. Prior to joining MSHA he worked for 10 years as a miner at above ground, non-coal mines. Inspector Albrecht has an associate's degree in electronic science and a second degree in assurance management.

On June 16, 2009, Inspector Mark Albrecht traveled to the Foidel Creek Mine to conduct health sampling and check the mine's Part 90 miners. The Part 90 miners he desired to check were not on shift at the time, so Albrecht selected an alternative inspection assignment to sample the seal lines in the North Main, which had been shut down and sealed. Albrecht was accompanied by Matt Winey, the shift foreman at the mine. Albrecht issued the orders discussed below while traveling the return entry of the North Mains section of the mine.

A. Order Nos. 8463325 and 8463326

On June 16, 2009, Inspector Albrecht issued Order Nos. 8463325 and 8463326 under section 104(d)(2) of the Mine Act for alleged violations of 30 C.F.R. § 75.333(h). Order No. 8463325 alleges the following:

The permanent stopping provided between the intake and the return air courses 3 left, north mains, across from the #1 seal, between #1 & #2 entry was not maintained to separate the air courses. There was a hole at the base of the stopping 4" wide by 2" high that allowed intake air to short circuit into the return air course. The area had been inspected on 6/15/09 by a company responsible person. The condition had not been identified on the examination report 6/15/09 and citation 8463330 was issued to the mine operator for the improper examination of this area. The condition was obvious to the most casual observer and this company has been cited 30 times in the past 15 months for the same standard. The persons examining this area engaged in aggravated conduct constituting more than ordinary negligence by failing to identify obvious conditions that affect miner's safety. This is an unwarrantable failure to comply with a mandatory safety standard.

(Ex. G-1). Albrecht determined that an injury was unlikely but, if an injury did occur, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not of a significant and substantial nature ("S&S"), that one person would be

affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty of \$4,000.00 for this violation.

The second order, Order No. 8463326, alleges the following:

The permanent stopping provided between the intake and the return air courses 3 left, north mains, across from the #2 seal, between #1 & #2 entry was not maintained to separate the air courses. There was a hole at the base of the stopping 6" wide by 2" high that allowed intake air to short circuit into the return air course. The area had been inspected on 6/15/09 by a company responsible person. The condition had not been identified on the examination report 6/15/09 and citation 8463330 was issued to the mine operator for the improper examination of this area. The condition was obvious to the most casual observer and this company has been cited 30 times in the past 15 months for the same standard. The persons examining this area engaged in aggravated conduct constituting more than ordinary negligence by failing to identify obvious conditions that affect miner's safety. This is an unwarrantable failure to comply with a mandatory safety standard.

(Ex. G-2). Albrecht determined that an injury was unlikely, but, if an injury did occur, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S, that one person would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty of \$4,000.00 for this violation.

Subsequently, the Secretary modified both of these orders to allege violations of section 75.333(b)(1) which requires that “[p]ermanent stoppings or other permanent ventilation control devices . . . , shall be built and maintained . . . [b]etween intake and return air courses” 30 C.F.R. § 75.333(b)(1).

i. *Summary of Testimony*

Inspector Albrecht testified that he began his inspection by traveling the Two Mains, which he noted as being in good shape and as having a good stopping line and plenty of rock dust. (Tr. 26). He then traveled to the Three Left North Mains which was quiet and clear. (Tr. 26). Albrecht stated that air was blowing in his face. (Tr. 26). Upon reaching the first seal, which was not a sampling point, Albrecht could hear air rushing through the stopping on the opposite side of the return entry. (Tr. 27, 28). After checking the integrity of the seal, he approached the stopping, which separated the return entry from the intake, and noticed a hole approximately four inches by two inches, slightly left of center, at the bottom of the stopping. (Tr. 27, 28, 30, 31, 86). Albrecht was unable to determine how the hole got there, or how long it had been there. (Tr. 31, 34). He stated that the air passing through the stopping was “whistling, noisy, loud” and very different from the sound of air that normally moves through the return.

(Tr. 27, 113-114). According to Albrecht, there was dirt and approximately three to four inches of rock dust in the cross cut in front of the stopping. (Tr. 86-87). He sprinkled rock dust in front of the hole and determined that air was flowing from the intake side to the return side of the stopping. (Tr. 29, 115). Albrecht agreed that there was a significant amount of air pressure and that he was not concerned that air would back up into the intake. (Tr. 115). He testified that he did not take an air sample at the hole because he did not think he needed to do so to determine that the stopping was not serving its intended purpose, i.e., separating the intake air from the return air. (Tr. 31-32, 40). Further, he did not travel to the intake side to measure the air so as to determine how much intake air was blowing through the hole. (Tr. 88, 111). Albrecht testified that the hole would continue to deteriorate due to the amount of air traveling through it, although he could not say whether this particular hole changed in appearance over time. (Tr. 90).

Albrecht explained that the stopping line between the intake and return must be checked weekly. (Tr. 20-21). Generally, the return is quiet, while the intake may be louder with equipment running. (Tr. 21). According to Albrecht, the weekly examiner of the return should be concerned mainly with the roof and rib conditions, but also with the seal line, permanent stoppings, ventilation control devices, and rock dust. (Tr. 35-36). On cross-examination Albrecht agreed that the primary focus of the weekly examination conducted pursuant to section 75.364 is to look for hazards related to air quantity, methane, and ventilation. (Tr. 93, 94, 96). Albrecht testified that he looked at the Date Time and Initial board (“DTI”) that was in the area and determined that someone had conducted a weekly exam of the area on the 15th. (Tr. 34). While he could not read the initials of the individual who conducted the exam on the June 15th, he later determined that the examiner was Tim Bertram. (Tr. 34-35).

According to Albrecht, this particular stopping was a Kennedy stopping¹ approximately 20 feet wide and 10 feet high. (Tr. 29, 88-89). Albrecht explained that the stoppings are designed to separate the air current in the return from the air current in the intake. (Tr. 29). He acknowledged that all stoppings have leaks which allow air to pass through, but they should not have holes. (Tr. 30, 95). The only time a hole would be acceptable would be to vent a power center to the return. (Tr. 30, 89). Albrecht did not know if there was an electrical installation on the other side of the stopping and he did not look at the other side, although he acknowledged that he could have. (Tr. 87-89). While Albrecht’s inspection notes indicated that the hole “appears to be a vent for a power center,” he testified that Winey told him that the hole was not a vent because the mine would not put a vent on the mine floor. (Tr. 112).

Based on his observations, Inspector Albrecht issued Order No. 8463325 for a violation of section 75.333(h), which he described as a “catchall” section of the Secretary’s regulations. (Tr. 32). Albrecht acknowledged that he mistakenly cited the wrong standard, and that the order was later modified to reflect a violation of section 75.333(b)(1), which specifically requires permanent stoppings or other ventilation controls between the intake and return air courses. (Tr. 32, 33, 84). According to Albrecht, the stopping was not being maintained as required by that

¹ Albrecht described a Kennedy stopping as a set of bars that go from wall to wall, with six foot panels that slide together and clip to form a metal wall. (Tr. 29-30). Foam is used to seal the cracks to stop airflow. (Tr. 29-30).

safety standard. (Tr. 33-34). The violation was terminated by using foam and other material to patch the hole. (Tr. 36).

Albrecht designated the order as an unwarrantable failure to comply with the mandatory standard because the noise created by the air passing through the hole was extremely obvious and could not have been easily ignored. (Tr. 36, 37). He did not have to get down on his hands and knees to see the condition. (Tr. 37). Further, the weekly examiner had been in the area the day before the inspection, yet the condition had not been noted in the examination books. (Tr. 36-38). Albrecht acknowledged that he could not determine how the hole got there or exactly how long it had been there. (Tr. 36). Albrecht agreed that the condition was not extensive. (Tr. 106). He testified that the mine had been cited for violations of section 75.333(h) about 30 times in the previous 15 months. (Tr. 40). However, while some of the past section 75.333(h) violations did involve holes in stoppings, he was not sure how many of those violations involved a condition similar to the one cited in this instance and he acknowledged that section 75.333(b)(1) is different from the one he based his unwarrantable failure finding on. (Tr. 41, 94, 95). Moreover, not all of the violations in the history he relied upon were final orders, and he did not run any comparison against other mines or national rates. (Tr. 101-102). Albrecht, in determining that the violation was the result of high negligence, relied on the past history of violations of the cited standard, the failure of the weekly examiner to discover the condition, and the fact that he issued a second order for the same condition at another seal. (Tr. 41-42). According to Albrecht, this was a continuous problem and it was not getting fixed. (Tr. 42).

Albrecht determined that the violation was not S&S based on his observation that the size of the hole was not going to affect airflow and that the condition did not amount to a hazard. (Tr. 39, 40, 93). However, while this individual hole was not a hazard, he noted that it is difficult to tell how big a hole can be, or how many holes would be needed, before it would become a hazard. (Tr. 39, 40, 114).

Following his inspection of the stopping across from the first seal, Albrecht traveled to the stopping across from the second seal. (Tr. 43). He agreed that the stopping across from the second seal was a block stopping and was covered with sealant. (Tr. 88). He discovered a hole, approximately six inches by two inches, at the bottom of the stopping on the mine floor. (Tr. 43, 86). There was dirt and other material on the mine floor in front of the stopping. (Tr. 87). He testified that, again, it was the sound of air passing through the stopping that brought his attention to the condition. (Tr. 43). Albrecht again sprinkled rock dust in front of the hole and determined that air was traveling from the intake to the return side of the stopping. (Tr. 44). He stated that he was concerned that, if the hole were not plugged up, it would continue to deteriorate and get bigger, and, in time, it would stop making noise and would not be easily identified. (Tr. 44-45). Nevertheless, he could not say whether this particular hole changed in appearance over time. (Tr. 90). According to Albrecht, this condition was virtually identical the one he cited at the stopping across from the first seal. (Tr. 46). On cross-examination Albrecht agreed that the condition did not present a hazard. (Tr. 93).

Based on his findings, Albrecht issued Order No. 8463326. He initially cited a violation of section 75.333(h), but, as with the first order, the cited standard was later modified to section 75.333(b)(1). (Tr. 46). He designated the order as non-S&S. (Tr. 46). Again, as with the first

order, he designated the condition as an unwarrantable failure after looking at the history, the extent of the condition, its obvious nature, and the fact that he issued another order for the same condition. (Tr. 46). He acknowledged that he could not determine if the hole was present at the time of the weekly examination, but he believed that the hole had been there for a while due to the rock dust. (Tr. 47). He again acknowledged that his unwarrantable failure determination was based on the history of violations of section 75.333(h) rather than on the standard now being litigated. (Tr. 94, 95).

Albrecht testified that, later that evening, he went back to the mine to attempt to sample some of the Part 90 miners who were not at the mine earlier that day. (Tr. 45). That night, Albrecht traveled with Jim Wells, one of the Part 90 miners who was an examiner and was conducting a preshift examination of a belt line. (Tr. 45, 95, 74). According to Albrecht, Wells said that “he did not have time to stop and look at these things” and the mine does not “want us to identify the stuff because we don’t have the people to correct it.” (Tr. 46). Albrecht testified that he had a difficult time keeping up with Wells. (Tr. 45).

Matt Winey, who has worked at Twentymile for 23 years, is certified to conduct preshift and weekly examinations. (Tr. 118-119). He testified that he was not sure what drew Albrecht’s attention to the stopping across from the 39 crosscut, although he does remember Albrecht saying that he could “hear air.” (Tr. 117, 120-121, 135). According to Winey, you could not see the hole from the area where they were walking in the entry and it was necessary to travel to the stopping to see the hole. (Tr. 121, 124). He opined that, while there was no water in the area at the time of the inspection, the hole was possibly created in the past to drain water that had accumulated near the high voltage electric switch on the opposite side of the stopping. (Tr. 126).

Winey testified that there is noise in the No. 1 entry from the movement of air. (Tr. 125). He acknowledged that there was a “pretty good quantity of air . . . rushing” through the two cited holes and described the sound as like wind whistling through an improperly sealed house door. (Tr. 125). He stated that there was a lot of pressure across the stoppings and there was no potential of an air reversal due to the hole. (Tr. 125-126). On cross-examination Winey agreed that the stoppings were installed quite a while ago and, when installed, they were one solid structure without holes in them. (Tr. 144). Further, he agreed that, with the exception of vents, stoppings should be constructed in solid form. (Tr. 145). However, on redirect, Winey agreed that it was also acceptable to put a hole in a stopping in order to drain water from around electrical equipment. (Tr. 145).

Winey testified that, generally, a weekly examiner would not travel up to each stopping but would just look at the stopping from the entry to see if it was providing a proper seal and if it was taking weight, damaged, or had large holes in it. (Tr. 124). On cross-examination Winey agreed that weekly examinations should include checking the structural integrity of stoppings, including whether there are any defects of those stoppings. (Tr. 136). Further, he agreed that the purpose of the stoppings was to separate the intake and return air courses. (Tr. 141). Winey acknowledged that Tim Bertram, the examiner who had checked the return the day before the inspection, has lost some of his sense of hearing over the course of his career as a miner and there is a possibility that his condition would have affected his ability to hear the air traveling through the hole. (Tr. 127, 135).

Winey testified that the day after the orders were issued he traveled with Tim Bertram and Dick Conkle to the subject area to investigate and follow up on the order. (Tr. 119). During their investigation they took a photograph of the intake side of the stopping at crosscut 39, i.e., the opposite side of the stopping that he and Albrecht looked at. (Tr. 121; TM Ex. 6a). Winey stated that the photo shows a concrete block stopping with a high voltage electrical switch in the foreground. (Tr. 121-122; TM Ex. 6a). He explained that this particular switch does not need to be vented to the return. (Tr. 122). Winey explained that venting is accomplished by putting a hole in the stopping. (Tr. 123). Further, while the subject stopping separates the return from the intake, there is also a Kennedy stopping in the same crosscut that separates the intake roadway from the switch. (Tr. 123).

Michael Ludlow is currently a project manager at the Sage Creek Mine. (Tr. 152). In June of 2009 he was mine manager at the Foidel Creek Mine. (Tr. 152). Ludlow testified that the holes in the stoppings were not a hazard, but would be violations based on the way the law is interpreted. (Tr. 157). He opined that weekly examiners are supposed to be looking for hazardous conditions. (Tr. 153). According to Ludlow, “a hazard is something that would cause immediate harm or danger to persons if they were exposed to it.” (Tr. 155). Based on his conversations with examiners, the examiners have enough time to complete their job. (Tr. 154). No examiner, including James Wells, has ever said they do not have enough time to complete their job. (Tr. 154). According to Ludlow, the mine has the resources to fix hazardous conditions as soon as they become aware of them and he has never told an examiner not to fix something because the mine did not have the resources to do so. (Tr. 155).

ii. *The Violation*

The Secretary argues that the Respondent twice violated the cited standard by failing to maintain permanent stoppings across from the No. 1 and No. 2 seals in the Three Left North Mains. (Sec’y Br. 11). The purpose of the stoppings is to separate the intake and return air courses. *Id.* at 12. When the stoppings were installed, they did not have holes. At the time of the inspection there were holes in both stoppings and air was traveling from the intake through the holes and into the return air course. *Id.* As a result, the stoppings were not fulfilling their purpose and, accordingly, were not being properly maintained. *Id.*

The Respondent argues that the holes in the two stoppings did not compromise the airflow in the return and, as a result, the stoppings had been maintained in a “functioning condition and were serving the purpose for which they were constructed.” (TM Br. 7). Further, the hole in the stopping across from the No. 1 seal served the purpose of allowing water to drain from around the electrical switch on the intake side of the stopping. *Id.* at 8.

It is undisputed that a hole existed at the bottom of both stoppings. The cited standard requires that permanent stoppings be built and maintained between the intake and return air courses. I credit Inspector Albrecht’s testimony that air was traveling from the intake, through the holes in the stoppings, and into the return. Further, I credit Albrecht’s testimony and find that, while leaks in a stopping may be unavoidable, holes in stoppings are indicative of improper maintenance of the stoppings. For that reason I find that Secretary has satisfied her burden and

she proved that the stoppings were not properly “maintained . . . [b]etween the intake and return air courses” as required by the plain language of section 75.333(b)(1).

Further, with regard to the Respondent’s argument that the hole across from the first stopping was intentionally created to serve a purpose, I find that, while the hole may have been created to drain water from around an electrical installation on the other side of the stopping, the reason for that hole no longer existed. I credit Winey’s testimony that the electrical switch on the other side of the stopping did not need to be vented. Further, it is undisputed that there was no water in the area at the time the order was issued. In light of these facts, there was no need for the hole in the stopping. Proper maintenance of the stopping would have included plugging holes once they were no longer needed for their intended purpose.

iii. *Gravity*

The testimony of both parties reveals that it is undisputed that neither of the cited conditions amounted to a hazard. Accordingly, the orders were properly designated as non-S&S. The condition would have affected, at most, the examiner who traveled this area on a weekly basis. An injury or illness related to these particular conditions was highly unlikely. For the foregoing reasons, I find the gravity of these violations to be very low.

iv. *Unwarrantable Failure and Negligence*

The Secretary argues that the holes in the stoppings were obvious to anyone who traveled in the area. (Sec’y Br. 12). In spite of their obvious nature, the conditions were not identified in the weekly exam that occurred the day before the orders were issued. *Id.* at 13. The fact that the examiner was unable to hear the air traveling through the holes is irrelevant. *Id.* The history of ventilation and weekly exam-related violations put the Respondent on notice that greater efforts were needed for compliance. *Id.* Respondent has engaged in high negligence and has exhibited an unwarrantable failure to comply with the mandatory standard. *Id.*

The Respondent argues that the Secretary has failed to establish that any aggravated conduct occurred. (TM Br. 10). The two holes in the stoppings were small and could not be seen from the return entry. *Id.* at 11. Examiners do not typically travel into each crosscut to examine stoppings individually. *Id.* The Inspector based his unwarrantable failure and high negligence finding on a history of violations which was, admittedly, a catchall standard. *Id.* The history of violations of the cited standard reveals no previous violations that could have put the Respondent on heightened notice of the need to increase efforts to comply with the cited standard. *Id.* at 12. No allegation has been made that the cited conditions constituted a hazard. *Id.* at 13.

I find that the Twentymile was moderately negligent and that the violation was not the result of its unwarrantable failure to comply with the mandatory standard. 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). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 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 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.

Inspector Albrecht testified that he was unsure how the holes were created and how long they had existed. While he believed that holes would continue to deteriorate over time, he did not indicate how long it would take for the holes to get significantly larger. I find that there is little to no evidence as to the length of time the cited conditions existed and that, for purposes of this analysis, this factor weighs in favor of the Respondent. Albrecht conceded that the conditions presented by both holes were not extensive and did not amount to a hazard. As a consequence, I find that these factors weigh in favor of Twentymile.

Inspector Albrecht testified that the whistling sound created by the holes rendered the condition obvious to any observer. However, as discussed above, Albrecht also conceded that the hole could have appeared after the weekly examination of the area. If the holes were present, they may not have been making the whistling sound that Inspector Albrecht heard at the time of the weekly examination. I find that, while the condition may have been obvious at the time of the MSHA inspection, it is unclear whether it was as obvious, or even present, at the time the weekly examination was conducted. As a result, I find that it is unclear how "obvious" this condition was, or whether the Respondent had any knowledge of the existence of the condition.

The Secretary asserts that the history of violations demonstrates that the Respondent was on notice that greater efforts were necessary for compliance. At hearing, Albrecht testified that he based his unwarrantable failure analysis on a history of violations related to a "catchall" standard, i.e., 75.333(h), and not the history of violations of the standard at issue. It is unclear how many of the catchall standard violations related to holes in stoppings. The history of violations entered into the record in these cases does not show any violations of 75.333(b)(1). (Ex. G-32). I find that the Respondent was not on notice that greater efforts were necessary for compliance.

I find the factors to weigh heavily in the Respondent's favor. There is no evidence of the Respondent engaging in aggravated conduct constituting more than ordinary negligence, nor is there any evidence of reckless disregard, intentional misconduct, indifference, or the serious lack of reasonable care. I find that the Twentymile was moderately negligent and that the violation was not the result of the Respondent's unwarrantable failure to comply with the mandatory standard. Accordingly, Order Nos. 8463325 and 8463326 are modified to section 104(a) citations with moderate negligence and low gravity. A penalty of \$200 is appropriate for each of the violations.

B. Order No. 8463327

On June 16, 2009, Inspector Albrecht issued Order No. 8463327 under section 104(d)(2) of the Mine Act for an alleged violation of 30 C.F.R. § 75.202(a). The order alleges the following:

Ground support was not maintained for the access to the north mains, 3 left, #4 seal. The last row of permanent roof bolts was about 13 feet from the rib and the last bolt was more than 5' from the seal. Three posts had been installed on the right side of the access to the seal and there was more than 2' of space from the top of the posts to the roof. The posts were not supporting the roof in this area. The pile of material on the ground from the rib failure supported the posts in the upright position. The area was inspected on 6/15/09 by the weekly examiner and the condition was not identified in the examination book. The condition was obvious to the most casual observer and order #8463330 was issued for the improper examination. The mine operator engaged in aggravated conduct, constituting more than ordinary negligence by failing to conduct a proper inspection of the area, identifying the unsafe condition and not correcting the condition that existed. This is an unwarrantable failure to comply with a mandatory safety standard.

(Ex. G-3). Albrecht determined that an injury was reasonably likely and such an injury could reasonably be expected to be permanently disabling. He determined that the violation was S&S, that one person would be affected, and that the violation was the result of reckless disregard on the part of the operator.

The standard cited by the Secretary requires that “[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” 30 C.F.R. § 75.202(a). The Secretary has proposed a civil penalty in the amount of \$30,288.00.

i. *Summary of Testimony*

After issuing the two orders discussed above, Albrecht, along with Winey, continued down the return entry. (Tr. 48). In front of the No. 4 Seal, Albrecht observed two posts intended for roof support that were missing their cap blocks. (Tr. 49). Posts were put in place to provide temporary roof support. (Tr. 49). In order to support the roof, the posts must be flush with the roof. (Tr. 49-50). Cap blocks are intended to sit on top of the posts and be wedged between the post and roof. (Tr. 49). Here, the two posts did not have cap blocks. (Tr. 50). Albrecht estimated that the space between the tops of the posts and the roof was approximately eighteen inches to two feet in height. (Tr. 52).

Albrecht agreed that TM Ex. 10 looked like the subject area. (Tr. 55-56). Albrecht described the area on the left side of the seal as having a can, with a deteriorating wall, and a

post without a cap block. (Tr. 50). Most of the roof bolts to the left side of the seal were intact, and, according to Albrecht, that area was “pretty well supported.” (Tr. 50). There was a crib slightly left of center in the front of the seal, which was wedged into the area to provide secondary roof support. (Tr. 50, 97). Three other cribs were also present. (Tr. 97). Albrecht assumed that the crib in the middle of the seal was there because of the condition of the ribs. (Tr. 97). When Albrecht turned his attention to the right side of the seal and the right rib, he saw two posts without cap blocks, as well as a lack of good bolts from the right rib line out about twelve feet to the last row of good bolts. (Tr. 51). The good bolts were supporting the roof. (Tr. 97-98). Albrecht testified that a good bolt is one that is grounded to the roof, and has not had material fall away from the plates such that there is a space between the plate and the roof. (Tr. 51-52). The bolts beyond the last good row, heading towards the right rib, were not good. (Tr. 51-52). Albrecht explained that the posts had been set up to act as supplemental roof support in the area but, because the cap blocks were missing, no support was being provided. (Tr. 51-52). He estimated that the posts were six feet from the rib, while the last row of good bolts was approximately twelve to thirteen feet from the rib. (Tr. 54, 61). Based on that information, Albrecht determined that there was no roof support from the last permanent support, i.e., the good bolts, all the way to the rib. (Tr. 52). There were bolts in the unsupported area, but they were not good bolts, as material had fallen from behind the plates. (Tr. 54). On cross-examination, Albrecht agreed that the number of bolts in the area was probably in excess of what was required by the roof plan, and that the seal would have provided some support. (Tr. 99).

Albrecht testified that both ribs had sloughed, and it appeared that some of the fallen material was actually holding up the posts. (Tr. 53). When estimating the amount of material that was on the ground, Albrecht stated that he “guess[ed] two and a half, three foot, from the angle of repose. Probably a foot or foot and a half of material around the base of the post. Some of it had fallen out of the roof.” (Tr. 53). He determined that the condition had existed for some time based on the fact that there was approximately $\frac{1}{4}$ to $\frac{1}{2}$ inch of rock dust on the material that had fallen. (Tr. 52-53, 99). While he was not sure how long the posts had been in place, he is sure that it was for more than a day due to the amount of rock dust that had settled on the cap blocks. (Tr. 60). Albrecht acknowledged that he was familiar with MSHA’s policy that rib sloughage in the return should not be cleaned up because the sloughage helps support the rib. (Tr. 98). Albrecht saw no cracks in the roof at this seal. (Tr. 103).

Albrecht testified that, generally, an examiner at the seal should take a methane reading, check the condition of the seal, roof, and ribs, and then mark the DTI board. (Tr, 103). It takes two to five minutes to gather a sample at a seal. (Tr. 22). Albrecht testified that there was a DTI board on the seal between the last row of good bolts and the uncapped timbers, i.e., in an area of unsupported roof. (Tr. 59). According to Albrecht, an examiner would have to get close to the seal to examine it and would have had to walk in the unsupported area to sign the DTI board. (Tr. 59, 62). Albrecht noted that this particular seal was not a methane sampling point. (Tr. 62).

Albrecht testified that he noticed footprints in the rock dust in front of the seal which showed a path that led down the timber line, i.e., to the left side of the uncapped posts, to the DTI board. (Tr. 59, 100). He explained that, in many areas of the return, the rock dust is up to a foot deep. (Tr. 60). He is not sure how old the footprints in the rock dust were, but they were

identifiable enough that he determined they were not very old. (Tr. 60). Albrecht agreed that there was a possibility an examiner traveling to the DTI board could walk through the left side of the area and then come up from the back to sign the board, but even if they avoided the unsupported area on the way to the board, once they reached the board, they would be under unsupported roof. (Tr. 59-60). If the examiner stayed to the left of the middle crib, then he could safely walk all the way to the seal. (Tr. 98). Albrecht testified that, while neither he nor Winey went all the way to the DTI board or the face of the seal, they were able to see from the pillar line that Tim Bertram had conducted the examination of the area one day prior. (Tr. 53, 61, 66, 100). Albrecht did not get an opportunity to talk to Bertram. (Tr. 63).

Albrecht noted that the weekly examination book did not mention any problems with the roof in the area. (Tr. 63). The condition should have been listed since it was hazardous. (Tr. 63). According to Albrecht, roof falls cause the largest number of fatalities in the mining industry. (Tr. 63-64). Examiners are the first line of defense and are responsible for examining these areas and making sure that things get fixed. (Tr. 64).

Based on his observations, Albrecht issued Order No. 8463327 for a violation of section 75.202(a). Albrecht agreed that section 75.202(a) is a catchall provision. (Tr. 100). He determined that the violation was S&S. (Tr. 64). Albrecht testified that a roof fall is a serious hazard. (Tr. 64). Here, the roof was not adequately supported, there was sloughage from the ribs, and the entry was wide. (Tr. 64). Material had fallen away from a number of bolts, and although there were no significant cracks in the roof, that fact does not establish that the roof cannot fall. (Tr. 64). Any injury sustained as a result of a roof fall would, at a minimum, cause spinal damage from material falling on the head of the miner. (Tr. 65). Most of the time, the injuries are permanent, but not always. (Tr. 65). On cross-examination, Albrecht agreed that most roof fall fatalities happen on working sections rather than in outby areas. (Tr. 101).

Albrecht designated the violation as an unwarrantable failure to comply with the safety standard. (Tr. 65). The examiner signed the DTI board, which was in the area of inadequately supported roof. (Tr. 65). It is the examiner's job to identify the hazards so that they can be fixed or the area cordoned off. (Tr. 65). The examination was conducted less than 24 hours before Albrecht arrived in the area. (Tr. 65). While, generally, there is not much traffic in this area, examiners, inspectors, supervisors, rock dusters, and miners conducting repairs would all need to be in the general area. (Tr. 66, 102). The condition of the timbers was obvious. (Tr. 66) A casual observer would have known that the roof was not adequately supported. (Tr. 66-67). According to Albrecht, there had been 28 violations of the cited standard in the previous 15 months. (Tr. 67). However, not all of the violations in the history he relied upon were final orders and he did not run any comparisons against other mines or national rates. (Tr. 101-102). The approximate ½ inch of rock dust on sloughage indicated that the condition had existed for some time. (Tr. 68). However, on cross-examination, Albrecht stated that he "had no idea how long it existed." (Tr. 99). Albrecht was not sure what the area looked like at the time the previous MSHA inspection party came through and agreed that it could have looked the same as it did when he traveled through the area. (Tr. 90, 99).

Albrecht designated the violation as being the result of "reckless disregard" on the part of the Respondent. (Tr. 68). He explained that he understood "reckless disregard" to mean

“without reasonable care for the miner, aggravated conduct, intentional violation of the law.” (Tr. 105). According to Albrecht, the examiner is an agent of the operator and is certified to inspect these areas. (Tr. 68-69). Further, the examiner, who is certified and should know the law, is required by law to identify the hazard and then report the condition in the books. (Tr. 68-69). Here, the examiner did not do that. (Tr. 69).

Winey testified that a miner could safely travel on either side of the crib in the middle of the entry to get to the face of the seal, where he could then safely examine the seal. (Tr. 130). He explained that an examiner could get to the face of the seal without walking under the hanging roof bolts. (Tr. 131). Moreover, an examiner would not be able to walk through the area where material had sloughed off. (Tr. 132). According to Winey, the cribs in the area provided extra roof support. (Tr. 131). Winey could not remember where the date board was at the time of the inspection. (Tr. 130). He explained that the material on the right side of the crib was sloughage from the rib and the roof. (Tr. 131). The timbers were not touching the roof because of the roof sloughage. (Tr. 133). Winey could not remember any cracking in the roof in the subject area. (Tr. 131). He testified that there were a number of good bolts in the area, and that the area had more bolts than the mine would normally install. (Tr. 132). This particular seal had been in place for approximately 10 years. (Tr. 132). Winey testified that the condition of the area must have existed for some time. (Tr. 133, 137). Winey believed that it was possible that an MSHA inspector or a company examiner could have missed this condition. (Tr. 133-134, 137-138). He agreed that it is the mine’s responsibility to examine the area. (Tr. 138). Because this particular seal was not a sampling location, an examiner would only be in the area to look at the face of the seal, sign the DTI board, and walk away. (Tr. 134). On cross-examination, Winey acknowledged that, even if there were no need to sample the seal, the examiner would still need to get pretty close to the seal to check and make sure there were no leaks or other problems. (Tr. 136). An examiner would need to go to the DTI board to write on it. (Tr. 146)

Winey testified that during the inspection he and Albrecht walked to the face of the seal to see the DTI board. (Tr. 138, 144). Winey could not “remember exactly” how they got to the face of the seal, but he thinks they traveled to the left side of the crib so they could walk under the good roof bolts. (Tr. 138-139, 143). Winey testified that there was a portion on the right side that was not safe to walk under. (Tr. 139). He agreed that the last row of bolts was more than five feet from the rib, and that the timbers were not good. (Tr. 139). Winey was “pretty sure” that there was rock dust on the floor, but he does not remember footprints between the last set of good bolts and the timbers. (Tr. 140).

Dianna Ponikvar, the compliance manager at the mine, testified on behalf of the Respondent. (Tr. 147). Ponikvar testified that, on the day of the hearing, she called the mine to find out where the DTI board was located. (Tr. 148-149). Based on her conversation with another individual, she marked a “B” on TM Ex. 10 to reflect the current location of the DTI board. (Tr. 148-149, 150-151). Ponikvar could not say whether the board was at that location at the time of the inspection, but she does not know of any reason why it would be moved. (Tr. 149). Ponikvar stated that almost every seal has a crib set in the middle of the entry to provide additional support so that, in the event of sloughage, one can still access the seal. (Tr. 149). Ponikvar testified that there have been no previous citations for roof control, or other violations, at this seal. (Tr. 150). She agreed that this seal did not have a sample point. (Tr. 151).

Mine Manager Ludlow testified that weekly examiners are supposed to be looking for hazardous conditions. (Tr. 153). According to Ludlow, “a hazard is something that would cause immediate harm or danger to persons if they were exposed to it.” (Tr. 155). Whether an inadequately supported roof creates a hazard depends on “where it located, on where it is endangered off, and whose opinion it is.” (Tr. 155-156). If he saw a violation of the roof control plan that was not a hazard, he would note it on the preshift exam in the remarks section and then find the resources to abate it. (Tr. 156). He reviewed the orders issued by Albrecht and disagreed with Albrecht’s findings. (Tr. 156).

ii. *The Violation*

The Secretary argues that Respondent failed to adequately support the roof at the No. 4 seal. (Sec’y Br. 13). A roof falls is one of the most serious hazards in underground coal mining. *Id.* Here, the roof between the last row of good roof bolts and the rib was unsupported. *Id.* at 14. The Respondent’s examiner signed the DTI board the day prior to the issuance of the order. *Id.* On the day the order was issued, the DTI board was located underneath the unsupported roof. *Id.* at 14-15. Moreover, footprints in the rock dust led to the face of the seal and were below unsupported roof. *Id.* Accordingly, the roof in an area where persons worked at the mine was inadequately supported. *Id.* at 15.

The Respondent argues that the adequacy of a particular roof support must be measured against what a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have provided to meet the protection intended. (TM Br. 14). The cited area had roof support in the form of bolts, cribs, a can, and timbers. *Id.* at 15. The area had more bolts than the plan required, there were no cracks in the roof, the roof to the left side of the seal was in good condition, and the seal itself provided support such that the area could be adequately examined. *Id.* A person would not normally travel in the area where there was sloughage. *Id.* A person could safely travel to the seal on either side of the crib in the middle of the entry. *Id.* Moreover, the alleged footprints in the rock dust do not establish that anyone walked under unsupported roof. *Id.* Rather, the footprints, if anything, were directly under a row of roof bolts that were spaced closely together. *Id.* For those reasons, the Respondent argues that no person traveled in an area with inadequate roof support. *Id.*

The Secretary’s roof-control standard at 30 C.F.R. § 75.202(a) is broadly worded. Consequently, the Commission has 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 purposes of the standard, would have provided in order to meet the protection intended by the standard.” *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987) (*cited in Harlan Cumberland Coal Co.* 20 FMSHRC 1275, 1277 (Dec. 1998)).

I credit Inspector Albrecht’s testimony as to the fact of violation and find that adequate roof support to protect against hazards did not exist in an area where persons worked or traveled. The last row of good bolts heading from the center of the seal toward the right rib was twelve to thirteen feet from the rib. While bolts did exist in the twelve to thirteen foot gap, they had potted out and were not providing complete support. The mine clearly had recognized the danger

presented by this condition, as it had, at some undetermined point, placed supplementary support, in the form of the timbers, in the area between the last row of good bolts and the rib. However, those timbers were no longer providing support at the time of the inspection, as their cap blocks were missing and nothing was in contact with the roof. The mine asserts that the seal itself provided some support. However, while the seal may have provided some support, it is not a structure designed for roof control but, rather, is designed primarily to achieve a purpose related to the ventilation plan. Further, while the evidence establishes that there were no cracks in the roof of the subject area at the time of the citation, it is well established that roof falls are unpredictable. I find that adequate support did not exist over the twelve to thirteen foot distance between the last row of good bolts and the rib.

Albrecht testified that the DTI board was on the face of the seal between the last row of good bolts and the uncapped timbers. Consistent with my earlier findings, the area of inadequately supported roof existed from the last set of good bolts to the rib. I credit Albrecht's testimony that the DTI board was located in the area of unsupported roof. I further credit his testimony that, in order to sign the DTI board, a miner would need to be standing in the area of inadequately supported roof. It is not entirely clear where the footprints that Albrecht described were located. I credit Albrecht's testimony that $\frac{1}{4}$ to $\frac{1}{2}$ inch of rock dust was on the material that had sloughed and fallen from the roof and ribs. Moreover, Albrecht stated that the cap blocks, which should have been against the roof, had rock dust on them such that he was convinced that the sloughed material, which presumably was at one point supported by the timbers and cap blocks, had been there for more than a day. It is undisputed that Tim Bertram initialed the DTI board the day prior to the issuance of this order. I find that it would have taken longer than one day for the amount of rock dust observed by Albrecht to accumulate on top of the sloughed material and cap blocks. I further find that Tim Bertram, the examiner, did travel into the inadequately-supported area when he signed the DTI board the day prior to inspection.

I find that a reasonably prudent person, familiar with the mining industry and protective purposes of the standard, would have provided additional roof support in the area where the DTI board was located. Timbers were not touching the roof and potted out bolts were in the area. An examiner is required by law to travel to this area on a weekly basis. A reasonably prudent person would not fail to provide roof support in an area that is traveled on a regular basis. Based on the foregoing analysis, a violation of the cited standard has been established.

iii. *Significant and Substantial and Gravity*

The Secretary argues that the violation contributed to the discrete safety hazard of a roof fall. (Sec'y Br. 15). Roof falls are one of the most serious and dangerous hazards in the coal mining industry. *Id.* The roof in this area was obviously deteriorating, and the support that was in place was not being maintained. *Id.* at 16. It was at least reasonably likely that the continued failure to support the roof in the area would lead to a serious injury. *Id.* at 16-17.

The Respondent argues that there was no reasonable likelihood that the violative condition would result in an injury causing event. (TM Br. 17). The roof was adequately supported, and there were no cracks at the seal. *Id.* Further, there was limited exposure of miners to the condition, as only the weekly examiner would visit this area, and his stay would be

limited to the amount of time it took to look at the seal and mark the DTI board. *Id.* at 18. Moreover, the inspector did not credibly testify as to the location of the DTI board, or the footprints he allegedly saw in the coal dust. *Id.* Finally, this area is in an outby area, away from the face, and is unlikely to experience any sudden change that will result in a roof fall. *Id.* at 19.

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

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

As discussed above, I have already found a violation of the cited mandatory standard. Further, I find that there was a discrete safety hazard, i.e., that the lack of adequate support

created a source of danger in the form of a roof fall in an area where persons travel. Furthermore, I find that the third element of the *Mathies* test has been satisfied.

There are many factors that could be used to support a conclusion that it was not reasonably likely that the hazard contributed to by the violation would result in an injury. Albrecht testified that there were no cracks in the roof in the unsupported area. Further, he acknowledged that one could safely travel to the face of the seal under good roof. I credit Winey's testimony that an examiner would not travel where the material had already sloughed off, but could travel to the face on either side of the crib and under the good roof bolts. Based on TM Ex. 10, and Albrecht's and Winey's testimony, the DTI board, while located under inadequately supported roof, was very close to the area of roof that was properly supported by the last row of good bolts and was immediately adjacent to the seal. An examiner would only need to enter the area of inadequately supported roof to write the date, time, and his initials on the DTI board. This would take less than a minute. This seal was not a sampling point and the only reason anyone would go to the face of the seal was to inspect it. Examiners are only in this area once a week and would only need to be under the unsupported section of roof for a matter of seconds. Moreover, as conceded by Albrecht, the seal itself provided some support. Further, Albrecht agreed that, while a roof fall could occur at this location, most roof fall fatalities happen in working sections, within 40 feet of the face and, typically, do not occur in outby areas like the one found here.

Nevertheless, considering continued normal mining operations and the fact that the DTI board was under unsupported roof, I find that the evidence establishes that an injury was reasonably likely. Roof falls are unpredictable. The condition had existed for a considerable period of time and there is no indication that Twentymile planned to install additional roof support in the area or take other steps to make the area safe for the weekly examiner. *See Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005). I find that the violation contributed to the cause and effect of a hazard that was significant and substantial. The Secretary is not required to establish that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co., Inc.*, 18 FMSHRC 862, 865 (June 1996). The Secretary also established the fourth element of the *Mathies* analysis and I find that, if an injury were suffered as a result of this hazard, it would be of a serious nature.

iv. *Unwarrantable Failure and Negligence*

The Secretary argues that the subject violation was a result of the Respondent's reckless disregard and unwarrantable failure to comply with the cited standard. (Sec'y Br. 17). Specifically, she argues that the condition presented a high degree of danger, and was extremely obvious, yet had been ignored by the weekly examiner the day prior to the inspection. *Id.* This operator has a history of roof control and weekly examination violations and was on notice of the need to conduct more thorough weekly exams. *Id.* at 18. By failing to identify and correct this obvious condition, the Respondent has "exhibited the absence of the slightest degree of care and an unwarrantable failure to comply with the mandatory safety standard." *Id.*

The Respondent argues that the condition did not pose a high degree of danger and was limited to a small area in front of one seal. (TM Br. 19). Further, there are numerous seals in the

area with no roof control issues. *Id.* The duration of this condition is not a significant factor, given that the inspector testified that the condition could have existed during previous MSHA inspections, yet had not been cited. *Id.* at 19-20. Moreover, the history of violations is based on a catchall standard that can address a variety of conditions, and the Inspector did not make his determination based on final orders. *Id.* at 20. The Secretary has not shown that there is a similarity of prior violations to the condition at issue in this case. *Id.*

I find that Twentymile was highly negligent, and that the violation was the result of the Respondent's unwarrantable failure to comply with the mandatory standard. I again credit Albrecht's testimony that this condition had existed for longer than one day and did exist at the time the examiner conducted his weekly examination the day prior to the issuance of this order, yet was not noted or corrected. The condition was obvious. Timbers which had been set at some point were not in contact with the roof, and were not providing the necessary support. The fact that these timbers were no longer touching the roof should have immediately alerted the examiner of the condition. The parties agree that the bolts in the subject area were potted out and not providing support. In addition to being obvious, the condition also presented a high degree of danger. While the likelihood of an injury was not particularly high, it is well established that if any injury occurs due to a roof fall, it will be a serious injury and could potentially be fatal. I credit Albrecht's testimony in that respect. I agree with the Respondent that a violation history that is not based on final orders, for an admittedly catchall standard, is not very helpful when considering whether the Respondent was on notice that greater efforts were necessary for compliance.

The Respondent had obviously attempted to address the roof support issue by installing the timbers at some time in the past; however, no attempt had been made to provide roof support after the roof had sloughed and the timbers were no longer providing support. I find that the aggravating factors, when looked at together, reflect aggravated conduct that constituted more than ordinary negligence. I give great weight to the obviousness of this condition and the fact that the examiner had been in the area one day prior, yet had failed to note the condition or correct it. The examiner, who is charged with identifying hazards, exhibited a serious lack of reasonable care when he did not identify the subject condition. An examiner acts as the agent of a mine operator during his examination and his conduct is imputable to a mine operator. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 197 (Feb. 1991). I find that the Respondent's conduct, while it did not reach the level of reckless disregard, did amount to high negligence. Accordingly, I affirm the Secretary's unwarrantable failure finding, but modify the level of negligence from reckless disregard to high. I assess a penalty of \$25,000.

C. Order No. 8463330

On June 16, 2009, Inspector Albrecht issued Order No. 8463330 under section 104(d)(2) of the Mine Act for an alleged violation of 30 C.F.R. § 75.364(d). The order alleges the following:

The weekly examination conducted in the north mains, 2 left to the 7 left section of the mine did not identify conditions that adversely affect the safety and health of miners required to travel this area.

104-d-2 order 8463325 and order 8463326 were issued for failure to identify opening in the permanent stopping's between the intake and return air courses. 104-d-2 order 8463327 was issued for failure to identify, report and correct roof control in the 3 left #4 seal access. Citation 8463328 was issued for failure to clearly mark the escape way from the return air course to the intake air escape way. The conditions were obvious to the most casual observer and adversely affect the safety and health of miners. The examiners engaged in aggravated conduct constituting more than ordinary negligence by failing to identify, record and correct conditions that adversely affect miner's safety and health. This is an unwarrantable failure to comply with a mandatory safety standard.

(Ex. G-4). Albrecht determined that the cited condition was reasonably likely to result in a fatal injury. He determined that the violation was S&S, that one person would be affected, and that the violation was the result of reckless disregard on the part of the operator.

The standard cited by the Secretary requires that “[h]azardous conditions shall be corrected immediately. If the condition creates an imminent danger, everyone except those persons referred to in §104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected.” 30 C.F.R. § 75.364(d). The Secretary has proposed a civil penalty in the amount of \$41,574.00.

i. *Summary of Testimony*

After exiting the mine on June 16th, Albrecht reviewed the information related to the citations and orders he had issued and determined that the weekly examination conducted of the return air course on June 15th did not appropriately address the hazards present. (Tr. 70). As a result, Albrecht issued Order No. 8463330 for a violation of section 75.364(d). (Tr. 70). Albrecht based this order on the two 104(d)(2) orders that he issued for holes in the stoppings, i.e., Order Nos. 8463325 and 8463326 discussed above, the 104(d)(2) order for the lack of adequate roof support at the seal, i.e., Order No. 8463325 discussed above, and a citation issued for failure to clearly mark the escapeway from the return air course to the intake air escapeway. (Tr. 70-71). The cited section requires the operator to conduct a weekly examination and record any hazardous conditions that would affect the safety and health of a miner. (Tr. 72). Once the conditions are identified, they must be recorded and then corrective action must be taken. (Tr. 72). Albrecht acknowledged that not all of the conditions observed on the 16th were hazardous, and none of the conditions rose to the level of imminent danger. (Tr. 73).

According to Albrecht, none of the conditions related to these alleged violations were recorded in the weekly exam book. (Tr. 25). Albrecht acknowledged that the stoppings violations were non-S&S, but he identified them in the body of the order because no one identified the conditions and they contributed to a hazard. (Tr. 71). He is not sure how many holes in stoppings would be necessary before it becomes a hazard, but the condition at least

needs to be identified. (Tr. 71). The biggest hazard he saw was the cited roof condition near the seal. (Tr. 71, 72).

The fourth alleged violation referenced by the subject order was for a lifeline sign that was pointing in the direction of a rib and was not conspicuously marked. (Tr. 72-73). Albrecht testified that this area was a marked escapeway on the map, although he acknowledged that this was not on a working section, and that the escapeway requirements apply to active sections or sections where the mine is tearing down or installing equipment. (Tr. 73, 92). He was not sure if they were tearing down or installing equipment in this section and he agreed that it was several miles to the nearest coal-producing section. (Tr. 92). He stated that the sign could have misdirected a miner, although on cross-examination, he acknowledged that the sign was pointing into the rib. (Tr. 91). Further, the lifeline present in the escapeway had directional markers. (Tr. 91). Moreover, he acknowledged that the sign is not required to have an arrow, but that it must be conspicuously marked. (Tr. 91). Even though he found the violation to be non-S&S, not extensive, and not a hazard, he referenced it in the order since the condition was not identified in the examination book. (Tr. 73, 93, 106). According to Albrecht, a condition like the sign being out of place is what the examiner should be looking for since it may affect the safety and health of the miners. (Tr. 73). The sign citation could have been easily corrected by moving the sign to show the correct direction of travel. (Tr. 73). The condition was fixed by flipping the sign around. (Tr. 103). He acknowledged that there were air currents in the area, but since the sign was connected on both sides, he had no idea how it got flipped around. (Tr. 104).

Albrecht testified that it took about four hours to complete his entire inspection of the return entry on June 16th. (Tr. 74). As stated earlier in this decision, Albrecht traveled with mine examiner Jim Wells while he was conducting a preshift examination of a belt line. (Tr. 45, 95, 74, 76). According to Albrecht, Wells said that “he did not have time to stop and look at these things” and the mine does not “want us to identify the stuff because we don’t have the people to correct it.” (Tr. 46, 74-75). Albrecht noted that this conversation took place while Wells was examining a belt entry, which, according to Albrecht, has a lot more items to check than a return entry. (Tr. 74). Albrecht recorded notes about this conversation, which he wrote contemporaneously with the inspection. (Tr. 77). Albrecht opined that the examiners are moving too quickly and are not taking time to stop and look at the conditions in the mine. (Tr. 75-76).

Albrecht designated this order as S&S based on the nature of the roof condition he observed. (Tr. 77). He stated that it is the examiner’s job to identify these conditions, and, by not doing so, they are contributing to more extensive hazards. (Tr. 77). The examination is the first line of defense for miners. (Tr. 77). Albrecht explained that faulty examinations expose miners to numerous hazards, including roof and rib conditions, air currents, insufficient rock dust, explosions, and fire, all of which are things that an examiner must check for. (Tr. 78).

Albrecht designated this order as an unwarrantable failure to comply with the mandatory standard. He noted that there had been a number of citations issued for alleged examination violations during the previous 15 months. (Tr. 77-78). On the day of the inspection, after exiting the mine, Albrecht had a discussion with Dick Conkle, Mike Ludlow, and Walt Shilling. (Tr. 79). During that discussion, management expressed its opinion that the conditions of the

stoppings did not amount to hazards. (Tr. 79). Albrecht explained to them that, if the conditions are not noted in the book, then they will not be corrected. (Tr. 79). Albrecht testified that the unwarrantable failure and reckless disregard designations were based on the number of violations issued and the conditions at the mine. (Tr. 81; Ex. G-5, p. 9). According to Albrecht, obvious conditions were not identified or corrected and the mine had been issued in excess of 50 citations. (Tr. 81). Albrecht explained that at some point the negligence has to be elevated, and that is how he arrived at his unwarrantable failure designation. (Tr. 81). Albrecht testified that he arrived at his reckless disregard designation for the same reasons as he stated with the roof control order. (Tr. 82). Further, according to Albrecht, the escapeway sign violation “stuck out like a sore thumb.” (Tr. 82).

Winey testified that the escapeway sign referenced in the order was hung from both ends, such that the two wires came together to form an upside-down “V”. (Tr. 128). The condition was fixed by flipping the sign over. (Tr. 128). He did not know how the sign got pointed in the wrong direction and he did not believe that the escapeway was active at the time. (Tr. 128-129). He does not believe anyone would have been confused by the sign because the lifeline was still there, as were the reflectors. (Tr. 129).

ii. *The Violation*

The Secretary argues that the roof control violation created a possible source of danger, as described above. (Sec’y Br. 18). Respondent argues that the Inspector incorrectly based his finding of violation on two stoppings violations that were not hazardous, a roof control violation that was not hazardous, and a non-S&S violation for an escapeway sign that had flipped around. (TM Br. 22). Weekly examiners are required only to identify hazards. *Id.* There is no evidence that the weekly examiner hurried through his examination and recklessly disregarded obvious hazards. *Id.* at 23. Moreover, the only condition that the inspector identified as a hazard was the roof control condition at the No. 4 seal, but the condition did not prevent safe travel to, or inspection of, the seal, and therefore was not a hazard. *Id.*

I agree with the Respondent that the inspector improperly relied upon the two stoppings violations and the escapeway sign violation in his finding of a violation in this instance. The inspector testified that each of these three violations did not involve a hazard. I agree. The cited standard contemplates that “[h]azardous conditions shall be corrected immediately.” 30 C.F.R. § 75.364(d). Because these violations were, admittedly, not hazardous, the inspector incorrectly relied upon them when assessing whether a violation of the cited standard occurred. However, I find the inspector’s reliance upon the roof control violation to be valid. Further, for the reasons set forth in my discussion of the roof control violation, I find that the violation created a hazardous condition. While it may not have been more likely than not that the roof would fall on an examiner, a roof fall was reasonably likely assuming continued normal mining operations, and therefore a hazard condition existed. Further, I also rely upon my earlier finding that this condition existed at the time of the weekly examination, yet was not immediately corrected or recorded in the examination book. As a consequence, I find a violation of the cited standard.

iii. *Significant and Substantial*

I have already found that the underlying roof control violation was the only hazardous condition that violated the safety standard. Further, the findings set forth above describe the reasons why the roof control violation was S&S. Given that I have already found that the underlying hazardous condition was reasonably likely to result in an injury-causing event, I conclude that Respondent's failure to record the roof condition was likely to lead to an injury-causing event. I find that this violation was S&S and the gravity was high.

iv. *Unwarrantable Failure and Negligence*

I have already found the roof control violation discussed above to be an unwarrantable failure to comply with the mandatory standard. Further, I have also found that this condition was present during the weekly examination conducted the day prior to the roof control violation. My unwarrantable failure and negligence analysis related to the underlying roof control violation is equally applicable here. The examiner, who was charged with identifying hazards, exhibited a serious lack of reasonable care when he did not identify the subject condition. I find that the Respondent's conduct, while it did not reach the level of reckless disregard, did amount to high negligence. Accordingly, I affirm the Secretary's unwarrantable failure finding, but modify the level of negligence from reckless disregard to high. I assess a penalty of \$25,000.

2. WEST 2009-1322, Order No. 8460508

Inspector Richard Boyle has been employed by MSHA for approximately seven years as a coal mine inspector and diesel specialist. As a diesel specialist, Boyle is responsible for checking diesel equipment in underground mines to determine whether it is in compliance with federal regulations. Prior to joining MSHA, Boyle worked in the mining industry for a number of years and held positions including general laborer, diesel mechanic, and diesel maintenance supervisor. Boyle holds certifying papers for mine foreman, fire boss, federal electrical underground, electrical instructor, and diesel qualification.

On June 23, 2009, Inspector Boyle traveled to the Foidel Creek Mine to assist in the E01 quarterly inspection. During that inspection Boyle issued Order No. 8460508 under 104(d)(2) of the Mine Act for an alleged violation of 30 C.F.R. § 75.363(a). The order alleges the following:

Hazardous conditions were found and noted in the preshift examination record for the inspections done in the travelways book. These conditions were listed as "Remarks" and not in hazardous conditions. The inspections referred to were done on 06-22-09 on the 02:00 PM - 05:00 PM examination, and on the 06-22-09 10:00 PM - 01:00 AM examination. These conditions were cited in citations 8460506 and 8460507. There was no action taken to correct or post with a conspicuous danger sign by either the examiner or the mine operator. This constitutes more than ordinary negligence and a serious lack of reasonable care to prevent and correct known violative conditions. These conditions

even after being reported did not get corrected until after being cited.

(Ex. G-6). Boyle determined that an injury was reasonably likely, and that such an injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was S&S, that 14 persons would be affected, and that the violation was the result of high negligence on the part of the operator. Further, he designated the violation as an unwarrantable failure to comply with the mandatory standard. The cited standard requires that:

[a]ny hazardous condition found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons designated by the operator for the purposes of conducting examinations under this subpart D, shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected.

30 C.F.R. § 75.363(a). The Secretary has proposed a civil penalty of \$14,743.00 for this violation.

A. Summary of Testimony

Inspector Boyle stated that, before going underground on June 23, 2009, he inspected the mine's preshift examination books and looked for hazardous conditions. (Tr. 163). Boyle explained that the pages of the mine's preshift books are divided into two areas: one area to record hazardous conditions and one area to record remarks. (Tr. 164). Boyle testified that he noticed a number of entries in the books that "believed to be hazardous conditions written in the remarks section of the preshift books." (Tr. 164). After reviewing the books, Boyle spoke with Matt Winey, the shift supervisor that day, and discussed his concern that the books did not reflect that any corrective action had been taken to address the hazardous conditions recorded in the remarks section. (Tr. 164, 165). According to Boyle, Winey told him the conditions were not hazardous and were just remarks. (Tr. 164). Boyle explained to Winey that, even if recorded in the remarks section, if the conditions are hazardous, then some sort of action must be taken. (Tr. 165). On cross-examination, he agreed that, ultimately, it does not make a difference where on the page the conditions are recorded, as long as they are recorded. (Tr. 193). Boyle agreed that it is not always clear whether a condition is a hazard. (Tr. 191-192). According to Boyle, a hazardous condition is one where there is a "foreseeable potential that someone is going to be injured or exposed to a danger, either injury or illness." (Tr. 168).

Boyle testified that, after reviewing the books and taking a few notes, he entered the mine and immediately proceeded to the areas described in the preshift book. (Tr. 166). Boyle traveled to crosscut 8+63 on the 24 right section and found that the crosscut leading to the man door, which provided access from the return entry into the primary escapeway, was blocked by a number of items. (Tr. 168). Specifically, he noted the presence of a five foot diameter roll of 71- inch belt, an oil storage tool box that had been pushed into the walkway approaching the man

door, a bucket, an old man door, and a length of tubing. (Tr. 169; Sec'y Ex. 7 p. 2). At this mine, the intake is the primary escapeway, which is the only escapeway from the 24 Right Section. (Tr. 207). Boyle agreed that, while the 24 Right (8+63) is not an escapeway, it does lead to the escapeway from the return entry. (Tr. 207). According to Boyle, the materials restricted access near the door to 44 inches, and he agreed that the path leading to the door was as wide as 26 inches at most points, but as narrow as 22 inches at one point. (Tr. 169-170, 195). There was no walkway to the door, but rather only a path between debris that was obstructing access to the man door. (Tr. 211).

Boyle believed that this crosscut should not have been used as a storage area. (Tr. 170). In addition, Boyle testified that there were other crosscuts in the area that did not have man doors and could have been used to store the materials. (Tr. 171). Boyle acknowledged that this particular mine installs more man doors than are required; however, by choosing to do so the mine must then maintain the walkways to all man doors so that safe passage is possible. (Tr. 171). Boyle testified that the man door was not dangered off or designated as not available for use. (Tr. 171, 172). He determined that, in an emergency situation, the condition of the crosscut would hinder rapid escape. (Tr. 171). Boyle explained that, even with good visibility, it would be difficult to navigate in between the materials to get to the man door. (Tr. 171).

Boyle testified that this condition was noted in the "remarks" section of the preshift examination book, although, in his opinion, the condition was worse than what was described in the book. (Tr. 170, 172). Further, according to Boyle, no corrective action had been taken by the time he arrived, and it was only after he arrived that he saw anyone working to correct the condition. (Tr. 169, 172). Moreover, there were personnel mining coal inby this area. (Tr. 172). It is Boyle's opinion that a hazard was created because a miner wanting to travel from the return to the escapeway via the man door would be hindered by the various objects in the crosscut. (Tr. 168-169). Escapeways must be available for use by disabled and injured miners. (Tr. 171). Based upon his observations, Boyle issued Citation No. 8460506 for an alleged violation of 75.380(d)(1) for the failure to maintain safe access from the return entry into the primary escapeway. (Tr. 168). The citation was terminated by bringing in machinery to take everything out of the crosscut and clean the area. (Tr. 173). It took approximately one hour to clean the area. (Tr. 173).

Boyle then traveled to another area of the mine to inspect the condition of a refuge chamber that, according to a note in the "remarks" section of the preshift exam book, was "impounded with mud and water." (Tr. 174, 178; Sec'y Ex. 9 p. 1). According to Boyle, "impounded with mud and water" are not casual words and, instead, paint a picture of a serious problem. (Tr. 194). The preshift exam was signed by the examiner and countersigned by Winey and the assistant foreman. (Tr. 179; Sec'y Ex. 9 p. 1). Boyle testified that, when he arrived at the area, the chamber was sitting in a down dip at the back of the crosscut and there was lots of mud in the area. (Tr. 177). There was a four-inch high water mark that indicated that the water was four inches lower than it had been prior to his arrival. (Tr. 189, 203, 209). There were also tripping and stumbling hazards in the mud and the mud was deeper toward the back of the chamber, which is an area where the examiner is required to travel to check the chamber controls. (Tr. 176-177). Boyle noted that the pieces of wood and straps in the mud were

“terrible obstacles” that would catch miners’ feet, trip them, and cause them to fall in the mud or go face first into the steel rescue chamber. (Tr. 177).

Boyle was concerned about safe access to the chamber. (Tr. 199). He does not know why the chamber was placed in that location. He acknowledged that the chamber was still deployable. (Tr. 207). Boyle testified that the condition was obvious, extensive and, while he could not tell how long the condition had existed, he believed that it had existed for some time. (Tr. 177). Further, when he arrived in the area there were no danger signs or postings and no one was attempting the clean up the area or relocate the chamber. (Tr. 180). Boyle did note that someone had attempted to push water out before he arrived, but as far as he was concerned, that did not abate the condition. (Tr. 189). Boyle testified that the chamber had been noted by the examiner, and that other people had countersigned the exam book, including Winey. (Tr. 181).

Boyle explained that, in the event escape from the mine is blocked, the refuge chamber, which has an oxygen supply, provides a safe location where miners can isolate themselves from the poisonous mine atmosphere as a last resort. (Tr. 174, 199, 207). Miners can remain in the chamber until rescued. (Tr. 175). According to Boyle, rescue chambers are important tools that must be maintained at all times, and anything that presents a hazard to the chamber must be addressed. (Tr. 176). Moreover, what might present a small obstacle to an uninjured individual trying to access or deploy the chamber, might be an insurmountable obstacle to someone who is injured. (Tr. 176-177).

Boyle testified that, at some point after he inspected the exam books, an entry was made saying that water had been pushed out of the area around the chamber. (Tr. 200). This notation was not there at the beginning of the shift. (Tr. 201). Had the notation been there, he might not have traveled to that area. (Tr. 201). Nevertheless, the condition was still hazardous when he arrived. (Tr. 202). Based upon his observations, Boyle issued Citation No. 8460507 for a violation of 30 C.F.R. § 75.380(d)(1). (Tr. 173). The citation was terminated by using a large piece of equipment to move the chamber from the low side of the entry, across the entry, to the high side where the ground was dry. (Tr. 180).

Boyle testified that both of the 75.380(d)(1) citations involved hazardous conditions that were noted in the preshift examination book but were not dangered off or corrected. He did not issue those citations until he went underground and observed the conditions. (Tr. 194, 210). Based on his inspection, he issued Order No. 8460508 for a violation of section 75.363(a). (Tr. 167). According to Boyle, section 75.363(a) requires that, prior to the commencement of work, a certified individual must examine all areas where people are scheduled to work. (Tr. 167). If hazardous conditions are discovered then they must be corrected, or dangered off and posted, so that miners are not exposed to them. (Tr. 167, 174, 192).

Boyle determined that an injury or illness was reasonably likely to occur based upon what he believed was a “foreseeable potential” that anyone attempting to gain access to the escapeway via the cited man door crosscut would encounter “numerous tripping, slipping, [and] stumbling hazards.” (Tr. 182-183). Further, if a miner were not able to access the escapeway, it would necessitate the use of the rescue chamber, which was located such that an injured miner would have accessibility issues. (Tr. 183). Boyle found that any injury could be reasonably

expected to result in lost workdays or restricted duty based on the slipping and tripping hazards in the crosscut with the man door and under the mud near the rescue chamber. (Tr. 183). If a miner falls, it is reasonably likely that he will be injured or cut. (Tr. 183-184). Boyle testified that he had difficulty navigating the subject areas under normal conditions. (Tr. 184).

Boyle testified that he determined that the violation was the result of high negligence based on his knowledge that management had been informed of the condition by the exam books, which they are required to review and sign. (Tr. 184-185). He issued the order as an unwarrantable failure because management had not taken care of a hazardous condition that they knew about from the preshift examination books. (Tr. 185). The certified person must make sure that there are no hazardous conditions that the men working in the section would be exposed to. (Tr. 185). When the certified person finds a hazardous condition, the law requires that he correct it, or post it and danger it off. (Tr. 186). Boyle stated that the mine's history of 40 violations of section 75.380 should have put Twentymile on notice of escapeway issues. (Tr. 203). Boyle observed that a miner arrived at subject crosscut and began to clean up while he was there. However, Boyle believed that the miner was cleaning the area only because the operator knew that a citation was going to be issued for the condition. (Tr. 198, 207, 209). The order was terminated by retraining the examiners and supervisors as to the requirements of section 75.363 including their responsibilities are when a hazardous condition is found. (Tr. 187).

Winey testified that he was the shift foreman on the date the subject order was issued. (Tr. 213). His job was to communicate with the crew from the previous shift and look at the books when he arrived at the mine to see what needed to get done. He would then assign miners to work on any matters listed in the preshift book. Finally, he would communicate with miners on the next shift regarding what needed to be accomplished on that shift. (Tr. 213-214, 217-218). When he looked through the books, he looked to see what had been turned in as hazards. (Tr. 214). According to Winey, a hazard is something that requires immediate attention, as opposed to that which is just a violation and needs to be worked on. (Tr. 214). If something is marked as a hazard, then the mine will take care of it right away. (Tr. 214).

Winey then testified that he relies on the preshift examiner, who sees the conditions first hand, to determine if the conditions are hazards or just violations, and then he will countersign the books. (Tr. 216). Winey has no reason to believe that the examiner inaccurately assesses whether a condition is a hazard. (Tr. 217). On cross-examination, Winey agreed that, if a mine examiner tells him that a rescue chamber is impounded with mud and water, the condition "could" be a hazard, but it also could just be something that needs to be taken care of. (Tr. 223). The examiners received training on hazard recognition. (Tr. 217). He agreed that the examiner was concerned enough with the condition that he wrote it down. (Tr. 223).

Winey does not remember any specific conversations with Boyle, but he has had discussions with other inspectors regarding a difference of opinion as to what should be identified as a hazardous condition. (Tr. 218, 219). Winey, after refreshing his recollection with the shift report, stated that the rescue chamber was in the cited location because it had just been moved there in order to have it within the required proximity of the face. (Tr. 222). The chamber should be properly maintained in a ready, usable condition. (Tr. 224).

Ken Wolgram, an 18-year veteran of the mine, was a fire boss at the time of the alleged violation. (Tr. 226). His primary responsibility is examining for hazardous conditions and looking for violations. (Tr. 226). When looking for hazards he looks for something that is going to “injure a miner immediately or cause harm to them.” (Tr. 226). He is bound by law to address those conditions immediately. (Tr. 226, 232-233). Wolgram conducted the travelway preshift exam from 1:00 a.m. to 4:00 a.m. on June 22nd. (Tr. 227-228; TM Ex. 11 p. 6). He noted in the remarks section that the rescue chamber was impounded with mud and water. (Tr. 228). He made these notes after observing mud and water in front of the chamber and on the right side. (Tr. 228).

Wolgram did not believe the condition was a hazard, but he knew it was a violation, so he recorded his observation in the “remarks” section of the exam book. (Tr. 228). He did not think it was a hazard because a fire or explosion would have to occur before miners would even consider using the chamber. (Tr. 229). He also did not think people would be kept from using the chamber by the mud and water. (Tr. 229). To access the chamber, you would have to approach it from the right-hand side, turn on the valves, and then open the front. (Tr. 229). In his opinion, the chamber was still deployable with the water and mud. (Tr. 229). He has no idea where the “pushed water out from in front of chamber” language on the exam sheet came from, but it is a note from the miner who corrected the condition. (Tr. 230; TM Ex. 11 p. 6). It is typical procedure for the party making the correction to write a note saying he has corrected it. (Tr. 230). Here, the individual who corrected the condition had the initials “JF.” (Tr. 230-231).

Scott Reid, a CM downshift foreman/bull gang foreman at the mine, is responsible for moving belts, power equipment, and making sure that everything is set up when the production shifts come in. (Tr. 236). He remembers removing debris, mud, and water from in front of the subject chamber on the morning of June 23rd. (Tr. 237). He undertook the task because it was in the travelways exam book that he countersigns and Matt Winey told him to get it done. (Tr. 237, 241; TM Ex. 11 p. 6). The travelways book said that the chamber was impounded with mud and water. (Tr. 238). When he saw that language, he knew it was something that needed to be taken care of during the shift. (Tr. 238). As a result, he had a crew member use a skidsteer to move as much mud and water as he could, and then rock dust the area. (Tr. 238). He does not recall what time this occurred on the morning of the 23rd, but it would have been toward the beginning of the shift. (Tr. 238-239). The preshift that identified the chamber condition was conducted from 10:00 p.m. on the 22nd, until 1:00 a.m. on the 23rd. (Tr. 242). He came on shift at 6:00 a.m. on the 23rd. (Tr. 242). He is also a preshift examiner and preshifted the area that morning. (Tr. 243, 244). He identified his signature on the exam report. (Tr. 243).

Once the condition was fixed, Reed called out to Jim Forquer to take the condition out of the books. (Tr. 240). The action was not taken in response to a citation being issued. (Tr. 240). Once the area was cleaned, the chamber could be accessed and deployed. (Tr. 240). The chamber was in the subject location because it was the longest crosscut, which would keep it from being deployed into a travelway. (Tr. 241). He was not there when the chamber was moved to terminate the citation and he is not sure that it was moved to a better location since now it would deploy into a travelway. (Tr. 241, 246).

Jim Forquer, a continuous miner coordinator at the mine, testified that he was working at the mine on 22nd and 23rd of June in 2009. (Tr. 248). On the 23rd, he worked the day shift, which he believes was from 7:00 to 3:00, during which he wrote the entry into the preshift exam book that water had been pushed out from in front of the chamber. (Tr. 248, 251; TM Ex. 11 p. 6). He put the entry into the book because it either was called out to him or he otherwise knew that it had been done. (Tr. 249, 251). As a result, he highlighted the original entry and made the corrective note. (Tr. 249). According to Forquer, the general mine foreman usually makes sure that all tasks listed in the remarks section are taken care of. (Tr. 250).

Kenneth Ferrier, a longwall utility lead man at the time of the alleged violations, vaguely remembers working at the mine on the 22nd and 23rd. (Tr. 252). Ferrier examined TM Ex. 11 p. 4 and identified it as the standard preshift for the travelways. (Tr. 253). He testified that he initialed and dated the form on the 22nd, which indicated that, to the best of his knowledge, he either corrected the problems identified on the preshift book concerning access to the man door or he sent someone to correct it. (Tr. 253; TM Ex. 11 p. 4). If something in the books needs to be corrected, then it is possibly a hazard or a violation. (Tr. 253). If it is written in the remarks section of the book, then it is not necessarily a hazard, but the potential is there. (Tr. 253-254). Typically, if problems are listed anywhere in the preshift book, they are taken care of. (Tr. 254). Whether he or someone else makes the correction is dependent on how busy he is. (Tr. 254). He does not recall whether it was he or someone else who corrected this condition, but he would not have initialed the book without looking at the condition and making sure there was a 24 inch walkway. (Tr. 254, 256). Ferrier was not aware that a citation had been issued for the condition when he corrected it. (Tr. 256). On cross-examination, Ferrier agreed that, once a hazardous condition is identified, it needs to be corrected immediately or posted or reported. (Tr. 256-257). Ferrier believed that, as long as a clear 24 inch travelway was provided, the condition was safe and not a hazard. (Tr. 257). Further, the path does not need to be straight. (Tr. 257). Ferrier could not recall what was done to correct the condition. (Tr. 258).

Dianna Ponikvar testified that you do not want to deploy a rescue chamber into a travelway because an explosion will “take it out.” (Tr. 260). The main path of an explosion would be through the main entry. (Tr. 261). She has never been in an explosion, so she does not know if they go into the crosscuts and adjacent entries although, she acknowledged that it could go in all directions and blow out stoppings. (Tr. 261). The subject chamber was in the 18 left because it was a longer crosscut. (Tr. 260).

B. The Violation

The Secretary argues that Twentymile violated section 75.363(a) by failing to correct or post hazardous conditions. (Sec’y Br. 23). A hazardous condition is one that is “a possible source of peril, danger, duress, or difficulty, or a condition that tends to create or increase the possibility of loss.” *Id.* at 24. (*quoting Lodestar Energy*, 22 FMSHRC 238, 241 (Feb. 2000) (ALJ)). In order for a condition to be considered “hazardous” it need not be something that will immediately injure a miner. *Id.* It is undisputed that the two conditions, i.e., the debris blocking the man door in the crosscut and the impounded rescue chamber, were identified in the preshift examination book but were not posted with conspicuous danger signs. *Id.* The Commission and the courts have determined that an experienced MSHA inspector’s conclusion that a violation is

hazardous is entitled to substantial weight. *Id.* Here, the inspector, after observing the conditions noted in the preshift book, determined that both were hazardous and should have been immediately corrected rather than corrected sometime during the shift. *Id.*

The Respondent argues that because the conditions were not hazards, they were not required to be recorded as such. (TM Br. 32). Only hazardous conditions noted in the preshift book can serve as a basis for a section 75.363(a) violation. *Id.* at 33. Here, the conditions were noted in the “remarks” section and, as a consequence, these remarks cannot serve as a basis for this violation. *Id.* The pre-shift reporting requirement sets a regulatory floor and operators are free to exceed the standards by reporting more than what is required. *Id.* at 35. Moreover, the subject conditions listed in the preshift examination record were in the process of being addressed when Inspector Boyle arrived at the mine. *Id.* at 36.

The cited standard, as relevant to this analysis, requires hazardous conditions discovered by the preshift examiner to be corrected, or posted and dangered off until corrected. The Commission has held that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 175, 178-79 (Dec. 1998); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). The second element of the *Mathies* S&S test is that the “Secretary of Labor must prove . . . a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). Accordingly, an experienced inspector’s determination of what is a hazardous condition is also entitled to weight. However, when viewed in the context of the cited standard, the inspector, and in turn the Secretary, must necessarily be able to establish that the conditions were “hazardous” conditions at the time the preshift examination was conducted. I find that the Secretary established that hazardous conditions existed at the time of the subject preshift examination.

Twentymile argues that because the conditions were recorded in the remarks section of the preshift book rather than in the hazardous conditions section, they were not hazardous and the cited safety standard does not apply. I reject this argument because that would leave the determination to the sole discretion of the preshift examiner. Under this interpretation, if the preshift examiner determines that a condition is not hazardous, then it is not a hazard and the considered opinion of an MSHA inspector is irrelevant. As stated above, the opinion of an experienced MSHA inspector that a condition creates a hazard is entitled to substantial weight. An objective test should be used looking at whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the subject conditions as presenting a hazard to miners. *See Utah Power & Light*, 12 FMSHRC 965,968 (May 1990).

In the present case, the two subject conditions were “found” by the preshift examiner, so the issue is whether the conditions were hazardous as that term is used in section 75.363(a). To put it another way, the evidence establishes that Twentymile conducted an adequate preshift examination that met all the requirements of section 75.360, but the issue in this case is whether

two of the conditions found by the examiner presented a sufficient hazard to invoke the requirements set forth in section 75.363(a).²

In *Enlow Fork Mining Co.*, the Commission defined the term “hazardous conditions” as used in section 75.360(b). 19 FMSHRC 5, 14 (Jan. 1997). It defined “hazard” as a “possible source of peril, danger, duress, or difficulty” or a “condition that tends to create or increase the possibility of loss.” *Id.* (citation omitted). That definition is equally applicable here. The issue in the present case is whether the two subject conditions were hazardous at the time of the preshift examination taking into consideration the opinion of the inspector and the reasonably prudent person test.

Boyle testified that he did not make a final determination that the two subject conditions were hazardous until he observed them while underground. However, early in his testimony, when discussing what he saw when examining the preshift books before going underground, he stated that he “found several issues that [he] believed to be hazardous conditions written in the remarks section of the preshift books.” (Tr. 164). Boyle’s testimony makes clear that, while the conditions cited in the preshift examination book were “potentially hazardous” based on the language in the book, his determination of what was actually a hazard was based on what he observed when he went underground. I credit his testimony in this respect. In both instances, Boyle could not say how long the conditions had existed.

With regard to the rescue chamber citation Boyle could only opine that “[t]he condition had existed for some time. Lots of mud.” (Tr. 177). Moreover, Boyle acknowledged that the four inch water mark was evidence that some work had been done to address the condition. The citation for mud and water impounding the rescue chamber was issued at 12:50 p.m. on June 23rd, while the preshift examination that noted the condition was conducted from 10:00 p.m. on the 22nd until 1:00 a.m. on the 23rd. Thus, at least 12 hours had elapsed since the preshift examination. The entry in the preshift examination book stated: “Rescue chamber in 18LT is impounded with mud and water.” (Ex. G-9). The inspector was, of course, not present when the preshift examination was conducted. He based his determination on what he observed and the words written in the preshift examination book. As he put it, the choice of words in the book brought him “into focus on it” because it “is not casual language.” (Tr. 194). I find that the

² The parties spent considerable energy arguing about the format of the form used by Twentymile for recording the results of preshift examinations. The form contains three sections entitled “Hazardous Conditions Observed and Reported,” “Air Measurements,” and “Remarks.” (footnote continued) The Secretary contends that Twentymile’s preshift examiners routinely record hazards in the remarks section rather than in the hazardous conditions section so that the hazards do not have to be corrected immediately. Twentymile argues that it properly lists all hazardous conditions in the hazardous conditions section and that the remarks section is, in effect, a “To Do” list for use by the shift foreman and these items are not required to be included on the form. I find these arguments to be irrelevant. An MSHA inspector can look at the preshift exam book and then go to those areas that are listed as having problems in the hazards or remarks section, but there would be no violation of section 75.363(a) if the condition did not present a hazard at the time of the preshift examination.

evidence establishes that the conditions at the rescue chamber presented a hazard, as that term is used in the safety standard, and that these conditions were the same or even worse at the time of the preshift examination. I credit the testimony of Inspector Boyle on the conditions he found. A reasonably prudent person would have recognized that the conditions presented a hazard to miners who might need to use the chamber. In the context of section 75.363(a), I hold that one should not consider the likelihood of a fire or explosion necessitating the use of the rescue chamber when considering whether a hazardous condition existed.

With regard to the citation issued for debris in the crosscut with the man door, Inspector Boyle noted that the entry in the preshift book states: “access to man door is blocked @ XC 8-63 2 to 1 entry.” (Ex. G-9 p.). The citation for debris in the crosscut at the man door was issued at 10:30 a.m. on June 23rd, while the preshift examination report that noted the condition was conducted from 2:00 p.m. to 5:00 p.m. on June 22nd. Thus, at least 17 hours had elapsed since the preshift examination. As with the rescue chamber notation, Inspector Boyle was not present during the preshift exam. Based on the notation in the examination book and the conditions he personally observed, Boyle surmised that a hazardous condition existed when the preshift exam was made. I find that the evidence establishes that the conditions in the crosscut presented a hazard, as that term is used in the safety standard. I credit the testimony of Inspector Boyle on the conditions he found and the language used in the preshift book make it clear that the conditions were similar if not exactly the same 17 hours earlier. A reasonably prudent person would have recognized that the conditions presented a hazard to miners who might need to exit the mine through the man door in the crosscut, especially injured miners. In the context of section 75.363(a), I hold that one should not consider the likelihood of a fire, or other event necessitating the use of the man door as an escape route during an emergency, when considering whether a hazardous condition existed.

Because Twentymile did not either immediately post the two areas with a conspicuous danger sign or immediately correct the conditions, I find that the Secretary established a violation. When hazardous conditions are found or conditions that a reasonably prudent person would consider to be hazardous, such conditions must be immediately corrected or dangered off. The fact that the preshift examiner did not personally consider the conditions to be hazardous is not a defense if the objective evidence establishes the hazardous nature of the conditions.

C. Significant & Substantial and Gravity

I find that the Secretary did not establish that this violation was S&S. Although she established the first two elements of the *Mathies* S&S test, she did not establish that it was reasonably likely that the hazard contributed to by the violation would result in an injury. The likelihood of an injury was remote. There was a walkway to the man door, but it was a little too narrow in some places and it was not a straight line. The refuge chamber could be deployed, but it was not as easily accessible as it should be. Conditions in the mine made it unlikely that either the man door or the chamber would need to be used in an emergency. Both conditions were noted in the preshift examination book. As discussed in more detail below, Twentymile was in the process of correcting both of the hazardous conditions at issue in the subject order. The gravity of the violation was serious, however.

D. Unwarrantable Failure and Negligence

I find that Twentymile was moderately negligent with respect to this violation and that the violation was not the result of Twentymile's unwarrantable failure to comply with the standard. I credit Reid's testimony and find that, on the morning of June 23rd, in response to a discussion with Matt Winey and after noting the entry in the travelway preshift book, he instructed one of his crew members to use the skidsteer to remove debris, mud, and water from in front of the subject rescue chamber. While he does not remember the time that he completed the task, it was near the beginning of his shift, which would have started at 6:00 a.m. on the 23rd. Once the mud and water were removed, he called out to Jim Forquer to have it noted in the preshift book that the condition had been corrected. I credit his testimony that the action he took was not in response to the MSHA inspection being conducted by Inspector Boyle.

I credit Forquer's, Wolgram's, and Ferrier's testimony that when conditions noted in the exam books are corrected, it is typical practice at the mine for the correcting party, or someone who has knowledge that the correction has been made, to make a notation in the exam book. Here, it appears that, either before Boyle went underground, or between the time he went underground and the time he arrived at the rescue chamber, Twentymile had remedied the hazard to a certain extent.

I credit Ferrier's testimony that, based upon his initials on the preshift exam, he, or someone he instructed, took steps to correct the condition. He would not have initialed the examination book without traveling to the area and making sure that there was a 24-inch walkway in front of the man door. He was not aware that Inspector Boyle was issuing a citation when he took steps to correct the condition.

The refuge chamber had not been in the cited location for very long and there is no evidence that the route to the man door had been partially blocked for a lengthy period of time. Although the conditions were obvious, they were noted in the preshift book. As stated above the conditions did not pose a high degree of danger. I find that Twentymile had not been put on notice that it needed to do a better job maintaining its preshift examination books or correcting hazardous conditions. Management knew that the conditions existed, as evidenced by the fact that the examiners marked the conditions in the preshift book. A penalty of \$1,000 is appropriate for this violation.

3. WEST 2009-241, Citation No. 7622553; and WEST 2009-580, Citation No. 8456110

Inspector Carol Miller has been employed by MSHA for four years as a coal mine inspector. Miller's responsibilities include performing quarterly inspections of underground coal mines. Prior to joining MSHA, Miller worked 18 years as an underground coal miner. During that time she worked as a general laborer, a longwall crew member, downshift longwall crew member, shuttle car operator, haul truck operator, wash plant operator, and fire boss. Miller holds certification papers for mine foreman, shop fire, and methane and oxygen deficiency.

A. Citation No. 7622553

On September 21, 2009, Inspector Miller traveled to the Foidel Creek Mine to conduct an E02 spot inspection. During that inspection Miller issued Citation No. 7622553 under 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.325(c)(2). The citation alleges the following:

The 22 Right Longwall was mining coal with only 317 cubic feet per minute air velocity at shield No. 15. When the longwall foreman measured the velocity with his anemometer he read only 370 cubic feet per minute. The ventilation plan requires 400 cubic feet per minute air velocity at shield No. 15. The longwall is currently mining through a stress zone.

(Ex. G-10). Miller determined that an injury was reasonably likely, and that such an injury could reasonably be expected to result in lost workdays or restricted duty. She determined that the violation was S&S, that seven persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. Prior to hearing, the cited standard was modified from section 75.325(c)(2) to section 75.370(a)(1).³ The cited standard requires that:

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

³ On October 22, 2010, the Secretary filed a Motion to Amend (the “motion”) this citation to allege a violation of section 75.370(a)(1), as opposed to section 75.325(c)(2). In support of her motion the Secretary stated that “[a]fter further review of Citation No. 7622553 . . . Petitioner has determined that the alleged violation was not issued under the appropriate standard.” (Sec’y Mot. Amend 1). After oral argument on the issue, I granted the Secretary’s motion. In her post-hearing brief the Secretary alleged that the conference and litigation representative who presented the evidence on this citation mistakenly “presented evidence under the originally cited standard.” (Sec’y Br. 28. n. 3). Further, she states that the CLR was not aware that the Secretary had moved to change the safety standard cited. She requested that I evaluate the evidence presented at hearing under the originally proposed standard, but stated that “both standards basically require operators to comply with their ventilation plan, so the Court is free to consider the violation under either standard.” *Id.* Twentymile alleges in its Reply Brief that the Secretary is moving to amend a cited standard after the hearing in an effort to bolster her case by waiting to see what standard the evidence best supports. (TM Reply Br. 6). Finally, in her own reply, the Secretary reiterates that she is not moving to amend the cited standard, and is simply “acknowledging her oversight . . . and leav[ing] it to the Court to decide which standard to apply.” (Sec’y Reply 1). In her initial motion the Secretary stated that the first amendment was necessary because the violation was “not issued under the appropriate standard.” I find that the appropriate standard was litigated and **DENY** the Secretary’s request to amend the citation a second time. I have not considered section 75.325(c)(2) in this decision.

30 C.F.R. § 75.370(a)(1). The Secretary has proposed a civil penalty of \$2,473.00 for this violation.

i. *Summary of Testimony*

Inspector Miller testified that she was accompanied by Frank Pennington, the shift foreman, during her inspection. (Tr. 268). She explained that, at the time of her inspection, the mine was liberating more than 500,000 cubic feet of methane per 24 hours and, as a result, was on a 10-day E02 spot inspection schedule. (Tr. 269). According to Miller, an inspector on an E02 inspection is responsible for checking the ventilation controls, checking to see that the actual ventilation is correct, and checking for certain gases and air readings. (Tr. 269).

Miller testified that coal was not being mined when she arrived. (Tr. 269, 292). Before going underground, Miller checked the preshift books and found air readings in the subject area to be in compliance, with no recorded hazards. (Tr. 273, 286). She then traveled to the 22 Right section via the main roadways, and then walked the return entry to the longwall face. (Tr. 269-270). She checked the ventilation and air along the face as she traveled from the tailgate to the headgate. (Tr. 270, 284). Miller testified that, after passing the shearer as she neared the headgate, production began and the shearer started to run up the face. (Tr. 276, 293). Miller took an air velocity reading at Shield No. 15 with her anemometer and found that the air velocity was below the mine ventilation plan's requirement for that area. (Tr. 271-272). Specifically, the air velocity was 317 cfm, which is below the 400 cubic feet per minute required at Shield No. 15 by the mine's ventilation plan. (Tr. 272, 291). Miller noticed no abnormal roof conditions at Shield No. 15. (Tr. 289). She estimated that the air along "probably about 50 feet" of the longwall was not being maintained at 400 feet per minute. (Tr. 272). Miller testified that she continued to the headgate and got the attention of the longwall foreman to inform him that there was not enough air velocity at Shield No. 15 to begin mining, and that the longwall had to shut down until the air could be restored. (Tr. 271, 288-289). The longwall foreman then took a reading with his anemometer and measured a velocity of 370 cfm. (Tr. 271, 273, 291). She believed that the velocity at the tailgate was sufficient at that time. (Tr. 272, 284, 291). According to Miller, the tailgate generally has enough air velocity because the material behind the shields in the tailgate stays tightly caved in because there is no entry to keep the roof behind the shields bolted up. (Tr. 284-284). The smaller area results in increased air speed at the tailgate end of the longwall. (Tr. 285).

While in the headgate, Miller observed that a ventilation curtain was not completely in place at the No. 1 shield. (Tr. 270). She explained that the Nos. 1, 2, and 3 shields are typically in the entry. (Tr. 270). The roof in this particular entry had been previously bolted. (Tr. 270). As a result of the bolting, a void is often present when the roof hangs up and does not cave right away. (Tr. 270, 287). Although the curtain is not required by the ventilation plan or by any standard, there usually is a curtain present to push air up on the face and prevent air from traveling into the void. (Tr. 270, 288).

Miller discussed the condition with Pennington and the longwall foreman. (Tr. 273). No mitigating information was provided as to why the velocity was not being maintained, and no

efforts were underway to correct the condition when she arrived on the scene. (Tr. 273-274). Miller testified that she issued the citation for a violation of section 75.325(c)(2) due to the failure to follow the ventilation plan that had been submitted and approved by MSHA. (Tr. 271).

Miller determined that an injury or illness was reasonably likely to result in lost workdays or restricted duty based upon her determination that, without enough air velocity on the face, falling roof in the void behind the shields can push noxious gases and low oxygen across the face where miners are working. (Tr. 274). Based on her longwall experience, the headgate does not cave immediately due to the entry having been bolted and, as a result, it is necessary to hang a curtain in the headgate to direct air onto the face and prevent it from being lost in the void behind the shields. (Tr. 274-275, 287, 288). Miller explained that miners can become disoriented or lose consciousness as a result of low oxygen. (Tr. 275). She explained that miners in a low oxygen atmosphere on the longwall face are likely to break bones or suffer lacerations if they stumble or fall. (Tr. 276). Miller testified that she did not attempt to detect whether low oxygen existed behind the shields. (Tr. 275). While she was using a gas monitor to check the air in the area, she acknowledged that she did not detect high levels of methane and did not see any problems with coal dust. (Tr. 275-276, 285-286, 292).

Miller testified that she determined that the violation was S&S. (Tr. 276). The required velocity is necessary to pressurize the gob and keep the noxious gases, methane, and low oxygen away from the face during mining. (Tr. 277, 285). Miller explained that, at the time of the citation, this particular longwall was on the uphill side of a bowl-shaped stress zone. (Tr. 279). According to Miller, the uphill side is where more methane will gather, as methane liberates more uphill than downhill. (Tr. 279). Miller determined that seven persons would be affected based upon the number of persons that were at the face at the time she issued the citation. (Tr. 277).

Miller found that the violation was the result of moderate negligence. (Tr. 277). She explained that checking the air is one of the first things you do before cutting coal. (Tr. 277). Even if a reading is taken during the preshift examination, other conditions in the mine may change and it is necessary to make sure that the required air velocity is present when the cutting of the coal is performed. (Tr. 277-278). The longwall foreman should go through a parameter check, which includes checking the air velocity, right before mining begins. (Tr. 286-287). After adjusting the curtain that was present in the No. 2 entry, the air velocity was still not adequate. As a consequence, Twentymile installed an additional curtain and hung it from Shield No. 1 to Shield No. 15. (Tr. 280-282). This second curtain brought the air velocity at Shield No. 15 back up to the required level. (Tr. 280, 288).

Scott Simpson testified on behalf of the Respondent. Simpson has been at Twentymile for approximately 16 years and was the longwall production supervisor, or foreman, at the time in question. (Tr. 295, 310). Simpson testified that, on the day in question he would have conducted his parameter check prior to the commencement of mining. (Tr. 300). During the parameter check he would have made sure that the required air velocities, quantities, and water pressures were present before mining began. (Tr. 300). He explained that the parameter check is different than the preshift exam because the check is less concerned with hazards, and more concerned with looking for specific air quantities and velocities. (Tr. 300). According to

Simpson, he conducted his parameter check from approximately 6:20 a.m. to 6:25 a.m. (Tr. 300, 313). Once the parameter check was completed, the shearer was started and mining commenced. (Tr. 300).

Simpson stated that between 6:35 a.m. and 7:20 a.m., following the parameter check and after production had begun, he conducted a preshift examination of the subject area and made an entry in the exam book. (Tr. 296; TM Ex. 12). The shearer was operating and coal was being produced during the preshift examination. (Tr. 300, 301). According to Simpson, at the time of his examination, the area was safe, as he detected no methane or other dangerous gases in the area, and the air velocity at shield No. 15 was 548 cfm. (Tr. 296-297, 301). Simpson opined that the shearer was probably on the tailgate side when he took his reading at Shield No. 15. (Tr. 301). Further, the curtain in the No. 2 entry was properly hung and not knocked down. (Tr. 297, 303). Simpson explained that he took the reading at Shield No. 15 by standing on the relay bar and reaching out over the pan toward the face with his anemometer. (Tr. 298, 318). During his examination he also took a second air velocity reading, as required by the plan, at Shield No. 135 near the tailgate. (Tr. 299). At Shield No. 135 the reading was 636 cfm, which was also in compliance with the ventilation plan's 400 cfm requirement. (Tr. 299). Following his preshift, he phoned out the results to the surface. (Tr. 296, 299).

According to Simpson, approximately 1½ hours after commencing mining, the roof extending from Shield No. 13 to Shield No. 16 fell in. (Tr. 301). Simpson estimated that 2½ feet of roof over the four shield area had fallen out, thereby creating a void and increasing the roof height from nine feet to twelve feet. (Tr. 302, 310, 311). The shield was then raised to reach the higher roof. (Tr. 310). The roof material fell in front of the shields in the pan area. (Tr. 310). At the time, Simpson did not make any velocity adjustments because “[e]verything seemed normal.” (Tr. 302). “There was no indication that there was a decrease in the velocity on the face.” *Id.* At hearing, Simpson explained that the roof fall increased the size of the area at Shield No. 15, thereby decreasing the velocity of the air traveling through that specific area. (Tr. 302, 304). At some point after the roof fall, Inspector Miller arrived in the area and took an air velocity reading at Shield No. 15. (Tr. 302). Her reading showed that the mine was not getting enough air to the area. (Tr. 303). As a result, Simpson then shut down the longwall and went to take another reading and check the curtains. (Tr. 303). Simpson's reading was not as low as Miller's, which he attributed to his having a longer reach and ability to get further out over the pan and closer to the face where the higher velocities are. (Tr. 308).

Simpson testified that, when he went to check the curtains, there was a curtain hung from the rib to the wall. (Tr. 306). The curtain was designed to direct air onto the face and prevent air from going back into the gob. (Tr. 306). He does not recall any curtains being down. (Tr. 316). At around 9:00 a.m. or 9:30 a.m., after checking the curtains that were already in place, Simpson took an additional set of air velocity readings in various areas along the longwall between Shield Nos. 10 and 20. (*See* TM Ex. 13; Tr. 304). Based on those readings, Simpson determined that he was getting the required air velocity everywhere but at Shield No. 15. (Tr. 304, 305).

Simpson testified that he discussed his readings with Miller. (Tr. 305). At some point he had an additional curtain brought in, which was eventually hung from Shield No. 1 to Shield No. 20. (Tr. 303, 305). Simpson testified that, even after hanging the second curtain, the air

velocity, while improved, was still a little low and, as a result, he had to drop Shield No. 15 off of the roof down to the level of the other shields in order to decrease the area. (Tr. 306-307, 310, 312, 313). Simpson stated that Miller was present and aware of what he was doing when he dropped the shield, but she did not say anything. (Tr. 319). The installation of this second curtain, combined with dropping Shield No. 15 off of the roof, resolved the air velocity issue. (Tr. 306, 307, 317). During this entire time, the methane, low oxygen, and methane sensors were all reading zero and were in compliance. (Tr. 307).

Simpson does not believe that low oxygen coming out of the gob was a potential hazard because, even without the second curtain, there were still proper velocities across the face everywhere except at Shield No. 15. (Tr. 309). He based this opinion on the group of readings that he took between Shield Nos. 10 and 20 after the shut down. (Tr. 309). In his opinion, there was still enough air on the face to flush out the methane and respirable dust. (Tr. 309).

ii. *The Violation*

The Secretary argues that the Respondent violated its ventilation plan when it failed to provide the required velocity of air at Shield No. 15. (Sec’y Br. 28-29). According to the Secretary, “[i]t is undisputed that this is one of the locations that requires a specified velocity under Respondent’s ventilation plan[,]” and the “Respondent admits that they were in violation of their ventilation plan and Citation No. 7622553 was properly issued.” *Id.* at 29. The Respondent does not address the fact of violation in its post-hearing brief.

The undisputed facts show that the Respondent’s ventilation plan required that 400 cfm be maintained at Shield No. 15. Both Miller and Simpson recorded air velocities below 400 cfm at Shield No. 15. I find that a violation of section 75.370(a)(1) has been established.

iii. *Significant and Substantial*

The Secretary argues that the violation was S&S. (Sec’y Br. 29). If there is not enough air velocity on the face, “miners can be exposed to noxious gases and low levels of oxygen.” *Id.* As the void behind the shields collapses, bad air is forced onto the face. If there is not sufficient air velocity at the face, then there is a “possibility that miners will be exposed to bad air and suffer disorientation or loss of consciousness.” *Id.* The Respondent’s witnesses acknowledged that there may have been a void behind the shield, and that the decreased air velocity may have been caused by air traveling into that void. As a result, when the roof of the void collapsed, there would be insufficient air on the longwall face to dilute the gases that would be pushed onto the face where miners were. *Id.* at 29-30.

Twentymile argues that there was no “reasonable likelihood” that an injury would occur and, therefore, the S&S designation was inappropriate. (TM Br. 45). The inspector’s testimony that injuries “could” occur is not sufficient to satisfy the “reasonably likely” aspects of the *Mathies* test. *Id.* Further, the lower velocity was limited to a very small area. *Id.* at 46. Twentymile argues that the cause of the low air was the increased area that resulted from the roof fall. *Id.* at 46. In addition, the Inspector did not provide any basis for her assertion that the velocity of the air would be insufficient to dilute methane or low oxygen from the gob, and her

own readings did not detect low oxygen or the presence of high levels of methane. *Id.* Moreover, the air that was allegedly not traveling along the face was being diverted into the gob and would likely have lowered the methane levels and raised the oxygen levels in the gob, thereby reducing the potential for a hazard where bad air is forced out onto the face by a cave-in of the void. Finally, the air along the face was sufficient both inby and outby Shield No. 15. *Id.* at 47.

I have already found that there was a violation of the mandatory safety standard. Second, I credit Inspector Miller's testimony and find that a discrete safety hazard existed as a result of the violation. However, with regard to the third factor, I find that there was no reasonable likelihood that the hazard contributed to would result in an injury. I credit Simpson's testimony that the air readings he took both inby and outby of Shield No. 15 indicated that the low air velocity was limited to Shield No. 15. Further, I find that the roof fall in the vicinity of Shield No. 15 increased the area and decreased the air velocity at that location. In addition, the presence of a void behind the shields also contributed to lost air velocity at Shield No. 15. As soon as the second curtain was hung from the shields, much of the lost velocity returned. Simpson and Miller offer conflicting testimony about whether the second curtain hung from the shields fully terminated the citation; however, both acknowledged that it helped restore air velocity at Shield No. 15. I agree with Twentymile's argument and find that the hanging of the second curtain and subsequent restoration of velocity to the face, combined with the prior readings taken both inby and outby Shield No. 15, is evidence that some of the air was traveling into the gob at that particular area. It is important to recognize that Inspector Miller did not detect low oxygen, high levels of methane, or the presence of noxious gases during her inspection. Any air traveling in the void would necessarily have helped dilute methane and noxious gases in the void, as well as raised the oxygen level. In the event of a cave-in of the void, the air pushed out onto the face would already have received some level of ventilation. Further, any collapse would seemingly fill the void and immediately return much of the air velocity to the face. I find that an injury or illness is unlikely to occur as a result of this violation. The affected area was not very large and it was unlikely that anyone would become disoriented as a result of a low level of oxygen in that area. I find that the violation is not S&S. The violation was moderately serious.

iv. *Negligence*

Miller's testimony regarding her knowledge of whether the longwall foreman took an air velocity reading is confusing. On one hand, she states that nothing led her to believe that the required parameter check was not conducted before coal was cut, and she assumed that it was conducted. On the other hand, she wrote in her inspection notes that the foreman did not check the air velocity before mining.

I credit Simpson's testimony that he checked the air velocity and obtained satisfactory readings during both his preshift examination and parameter checks. However, Simpson's testimony reflects, and I find, that no check was completed after the alleged roof fall. In his testimony Simpson stated that he did not check the velocity because "[e]verything seemed normal [after the fall]." (Tr. 302). "There was no indication that there was a decrease in the velocity on the face." *Id.* However, the evidence is clear that air velocity was lacking on the

face in the vicinity of the alleged roof fall. It is clear that Simpson, based on his testimony, is aware that a roof fall, or any other increase in area, can result in a decrease in air velocity as the air travels through the larger area. In light of the foregoing, I find that the violation was appropriately designated as moderate negligence. A penalty of \$200 is appropriate.

B. Citation No. 8456110

On December 9, 2008, Inspector Miller traveled to the Foidel Creek Mine to conduct an E02 spot inspection. During that inspection Miller issued Citation No. 8456110 under 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.380(d)(7)(iii). The citation alleges that “[t]he lifeline located in the primary escapeway of 23 Right, No. 2 entry from 7 Main North to the last open crosscut was not marked with reflective material every 25 feet.” (Ex. G-13).

Miller determined that an injury was unlikely but that, if an injury occurred, it could reasonably be expected to result in lost workdays or restricted duty. She determined that the violation was not S&S, that eight persons would be affected, and that the violation was the result of moderate negligence on the part of the operator.

The cited standard requires that “[e]ach escapeway shall be . . . [p]rovided with a continuous, durable directional lifeline or equivalent device that shall be . . . [m]arked with a reflective material every 25 feet[.]” 30 C.F.R. § 75.380(d)(7)(iii). The Secretary has proposed a civil penalty of \$585.00 for this violation.

i. *Summary of Testimony*

Inspector Miller testified that she was accompanied by Dick Conkle while conducting her E02 inspection on December 9, 2008. (Tr. 321). While traveling the primary escapeway on the 23 Right section, Miller noted that there was no reflective material on the nylon rope lifeline. (Tr. 322, 323, 328). As a result, Miller issued the subject citation for a violation of section 75.380(d)(7)(iii), which requires that the lifeline be marked with reflective material every 25 feet. (Tr. 322). The citation was terminated on December 12th after reflective material was attached to the lifeline. (Tr. 326).

Miller testified that the reflective material should be able to be seen with a miner’s cap light. (Tr. 322) She was unable to provide an exact distance over which the condition existed, but she did state that it was from the “loading point out to the main roadway that turns off into the section.” (Tr. 323). She estimated that the section had been “developed in at least one thousand feet at a minimum, in order to come from Seven Main North all the way to the Number 2 Entry, all the way to the 23 Right’s last open.” (Tr. 323). On cross-examination, Miller acknowledged that it is possible that the reflective tape was present, but was obscured by rock dust. (Tr. 328).

Miller testified that “reflective” means that the material will reflect back whatever color is on it when light hits the material. (Tr. 329). Miller was unsure if reflective tape had been installed by the manufacturer of this lifeline, or if it had come without reflective tape, however, she did state that most lifelines include pieces of reflective material. (Tr. 324). While the

lifeline did not have reflective material on it, it did have directional cones every 100 feet, as required by the standard, but she was unsure if the cones had reflective material on them. (Tr. 324, 329). According to Miller, lifelines are to be used when an entry becomes so smoke filled that one cannot see to walk straight out the escapeway. (Tr. 329). The hazard presented by an unmarked lifeline is that miners will be unable to find the lifeline in the event of an emergency where the atmosphere is filled with smoke or unsettled rock dust. (Tr. 327). The visibility of the reflective material on the lifeline is dependant upon how dense the smoke is. (Tr. 329). She explained that the reflective markings make it easier for a miner to find the lifeline or pick out the lifeline from other cables that may be present in the area. (Tr. 327).

Miller explained that she marked the likelihood of an injury or illness as “unlikely” based upon her knowledge that the mine trains its miners on both the use of the primary and secondary escapeways, and also puts reflectors, which she believes were present and visible at the time of the issuance, in the entries to show direction of travel. (Tr. 325, 328, 329). Miller explained that any injury could reasonably be expected to result in “lost workdays or restricted duty” because a miner who cannot find a lifeline will be unable to exit the mine and gain access to fresh air as quickly as possible. (Tr. 325). Miller testified that eight miners on the section were subject to being affected by this condition. (Tr. 325-326). Finally, she determined that the mine’s negligence was “moderate” based upon the timely notice of the lifeline requirements that was provided through hearings and publication in the Federal Register. (Tr. 326).

Dianna Ponikvar testified on behalf of the Respondent. Ponikvar was the Senior Safety Representative at the mine at the time the subject citation was issued. (Tr. 330). Ponikvar believes that the term “reflective” means “that it reflects back at you, and you might be able to see it.” (Tr. 331). According to Ponikvar, all of the lifelines installed at the mine were purchased with 2-3 inches of reflective material attached to the lifeline at 25 foot intervals. (Tr. 330). Ponikvar testified that, when a miner is in smoke he cannot see anything, including the reflective material on the lifeline, and his way out of the mine is through the use of the directional cones on the lifeline. (Tr. 331). Each year the mine conducts training where it fills an area of the mine with smoke and then has the miners locate the lifeline and find their way out of the smoke-filled area. (Tr. 331). According to Ponikvar, you cannot see the reflective materials, the man door signs, or anything else through the smoke. (Tr. 331).

ii. *The Violation*

The Secretary argues that the Respondent violated section 75.380(d)(7)(iii) by failing to have reflective material every 25 feet along a lifeline in an escapeway at the mine. (Sec’y Br. 30). According to the Secretary, the only evidence offered by the Respondent was that “all lifelines installed in the Mine were purchased with factory provided reflective material” and the “reflective material may have just been obscured by rock dust.” (Sec’y Br. 30-31). Nevertheless, the reflective material was not visible to the inspector. *Id.* at 31. “The citation was abated by marking the lifeline with [new] reflective material.” *Id.* If, as the Respondent suggests, the reflective material was simply covered by rock dust, it would follow that the citation would have been abated by cleaning the lifeline rather than installing new reflective material.” *Id.* at 31.

Twentymile argues that the citation should be vacated. The fact that the inspector could not recall whether the reflective markings were obscured by rock dust is evidence that the inspector did not have a good recollection of the condition and, therefore, the Secretary has failed to meet her burden of proof. (TM Br. 49). All lifelines purchased by Twentymile have reflective markings. *Id.* The plain language of the standard is satisfied if the reflective markings are present, even if they are obscured. *Id.* at 50.

The Commission has recognized that, although sections of the Act may not literally set forth a requirement that an object function effectively, such a requirement may be implicit in the standard's language and consistent with the underlying statutory purpose. *Cumberland Coal Resources*, 28 FMSHRC 545, 552 (Aug. 2006). Congress has recognized the importance of lifelines:

Providing underground personnel with assistance in locating and following escape routes, particularly in circumstances of diminished visibility, is an important feature in any emergency plan. Flame-resistant directional lifelines are likely the most common method for achieving this end, and are the most reasonably calculated to remain usable in a post-accident setting.

S. Rep. No. 109-365 (2006).

I credit Inspector Miller's testimony that she did not observe any reflective material on the subject portion of the lifeline. I also credit her testimony that it is possible that reflective tape was present but was obscured by rock dust. While not expressly required by the cited standard, I find that the standard's use of "marked with reflective material," combined with Congress' acknowledgment of the importance of lifelines in locating and following escape routes, amounts to an implicit requirement that reflective tape on the lifeline function effectively. Miller testified, and I agree, that reflective material should be able to be seen with a miner's cap light. Here, Miller saw no reflective material while traveling the escapeway in an atmosphere with good visibility. Even if I accept, as suggested by the Respondent, that the reflective material was obscured by rock dust, I still find a violation of the cited standard and what I deem to be its implicit requirement that reflective material be able fulfill its intended purpose. I find that the Secretary has established a violation of the cited standard.

iii. *Gravity*

I credit Miller's testimony regarding the gravity of the violation. The escapeway training of the miners at this mine, as well as the presence of a separate set of reflectors marking the escapeway, make it unlikely that an injury or illness will be sustained as a result of the violative condition. Further, I agree with her assessment that, in the event a miner is unable to locate this lifeline due to the lack of reflective markings, that miner would be momentarily prevented from exiting the mine as quickly as he would have been able to had the reflective markings been present and functional. Any delay in locating the lifeline would be minimal, but it is reasonable to assume that injuries related to smoke inhalation, or lack of fresh breathable air, would result in lost work days or restricted duty. Finally, I agree that the eight miners on the working section

would have been affected by this condition. Given the presence of other reflectors along the escape route that were clearly visible, the gravity of this violation is very low.

iv. *Negligence*

The lifeline requirements have existed for some time. The testimony provided by Respondent's witness regarding the Mine's purchase of lifelines with reflective material attached by the manufacturer, while encouraging, does not account for the fact that the reflective material on the lifeline may not have stood up to the continuous rigors of the underground mining environment. Further, it is important to recognize that Ponikvar's testimony did not address the specific lifeline at issue. In fact, all of the Respondent's testimony is in terms of generalities and mine practices. Inspector Miller's testimony specifically addresses the condition observed. I affirm Inspector Miller's moderate negligence determination and assess a penalty of \$200.

4. WEST 2009-580; Citation Nos. 7622362, 7622365, 7622372

Inspector James Preece has been with MSHA since 2000. Preece has been a coal mine inspector for the last six years. Before joining MSHA, he worked for the Ohio Valley Coal Company. He has one degree in mining engineering, as well as a second degree in occupational development. Preece is a certified mine foreman in Ohio and West Virginia, and also has certification as a shop fireman, electrician, and trainer.

A. Citation Nos. 7622362 and 7622365

On December 4, 2008, Inspector Preece traveled to the Foidel Creek Mine to conduct an E01 inspection. During that inspection, Preece issued Citation No. 7622362 under 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.370(a)(1). The citation alleges the following:

The approved ventilation plan, page 11 was not being complied with in front of the operations center parking area. Two versi-foam packs were brought to the surface and were being stored under the staircase of the managers office.

(Ex. 15). The following day, Inspector Preece issued a second 104(a) citation for a violation of the same standard. Citation No. 7622365 alleges the following:

The approved ventilation plan, page 11 was not being complied with in front of the entrance to the warehouse. One versi-foam pack was brought to the surface and was being stored by the entrance to the warehouse in front of the No. 995 load center.

Ex. G-20). With regard to both citations, Preece determined that an injury was unlikely, but that, if an injury was sustained, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the violations were not S&S, that one person would be affected, and

that the violations were the result of moderate negligence on the part of the operator. The standard cited in both citations requires that:

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

30 C.F.R. § 75.370(a)(1). The Secretary has proposed a civil penalty of \$285.00 for each of these violations.

i. *Summary of Testimony*

Inspector Preece testified that, while conducting an E01 inspection on December 4, 2008, he came upon two versi-foam packs that were sitting outside the operations center building, underneath a stairway. (Tr. 333-334, 344). Preece had seen the foam packs in this location the day prior, but did not issue a citation at that time and, instead, had a discussion with management. (Tr. 345-346). Preece identified Sec'y Ex. 16 as an accurate representation of what he saw that day. (Tr. 344). He identified two versi-foam pack boxes, some trash, and possibly a PLM plug for a high voltage cable in the picture. (Tr. 356-357; Sec'y Ex. 16). He could not say whether the material was being thrown away. (Tr. 357). According to Preece, the surface under the foam packs was wet, possibly from snow melt, and the boxes supporting the chemical containers were deteriorating. (Tr. 344). From the photograph, Preece could not tell if the foam pack boxes themselves were wet, but he knows that they were sitting in water. (Tr. 364). There was no fire protection for the area. (Tr. 358). Further, the valve on one of the tanks was left in the open position, "which is part of the manufacturer requirements."⁴ (Tr. 344). Preece did not know if the dispenser handle was also open, and he did not see any of the chemical product from the containers in the area. (Tr. 363). Preece stated that this location is where miners board the man trip to travel underground. (Tr. 343-344, 355). He testified that, at the time of this inspection, the outside temperature was below freezing at times overnight and in the morning, but would warm to 40s and 50s during the day. (Tr. 343). Preece remembered that, while there were times in December of 2008 when there was a substantial amount of snow on the mine property, there were other times when there was not much snow. (Tr. 343). Preece determined that the location of the packs under the stairway outside the operations center, amounted to a violation of the mine's ventilation plan and issued Citation No. 7622362 to Dianna Scott Ponikvar. (Tr. 337).

The following day, Preece returned to the mine and observed a versi-foam pack that had been brought to the surface and was sitting outside a warehouse. (Tr. 348). Again, Preece determined that the location of the pack was a violation of the mine's ventilation plan and, accordingly, issued Citation No. 7622365. (Tr. 348-349). Preece determined that the canisters

⁴ Preece deduced that the valve was open because the yellow knob, visible in Sec'y Ex. 16 p. 2, was not screwed down flush with the top of the tank. (Tr. 345, 362)

had been at this location for some time based on his observation that they were covered with dust and snow. (Tr. 349)

According to Preece, by placing the versi-foam packs in the locations where he observed them, the mine had failed to comply with the manufacturer's guidelines for the poly foam and, in turn, had violated its ventilation plan. In the past he had talked Dianna Ponikvar, Dick Conkle, and mine management about the storage and handling procedures for the foam packs both underground and on the surface. (Tr. 345-346, 360). With regard to the packs on the surface of the mine, Preece told them that the packs could not be "haphazardly" thrown around given that the materials were compressed in the containers. (Tr. 360). Preece testified that Ponikvar, Conkle, and management told him that they would handle the packs according to the ventilation plan and the manufacturer's guidelines for storage procedure underground. (Tr. 360-361).

Preece explained that the versi-packs are a polyurethane foam ("poly foam") system used by Twentymile. (Tr. 338, 339). The system is made up of two chemical components stored under low pressure, i.e., 25 p.s.i., in separate containers that come in a cardboard box. (Tr. 338, 339, 357, 360). The containers look like tanks for a gas cooking grill. (Tr. 338). The cardboard box provides a protective cover for the system, and also holds the guidelines, which should be followed when operating the system, and the Material Safety Data Sheet ("MSDS") for the chemicals used by the system. (Tr. 339). Foam is created when the two components are mixed at the nozzle dispenser attached to a hose. (Tr. 338, 363). This foam is used on ventilation controls across the country, including on Kennedy stoppings, and to repair cracks and leakage in the sealant on concrete block walls. (Tr. 338).

According to Preece, the cited standard requires the mine to comply with the approved ventilation plan. (Tr. 337, 353). Preece explained that, in addition to controlling respirable dust, the ventilation plan addresses control of methane, the installation of fans, and other matters such as the handling of versi-foam packs on the surface and underground. (Tr. 353, 355). He agreed that the mine's ventilation plan has specific storage locations and that, while underground, the packs should be stored in those areas. (Tr. 354). Once the packs are empty, or are unused, they should be removed from the mine within 24 hours. (Tr. 354). If there is still product in the container, then the foam pack is considered to be available for use. (Tr. 358). Twentymile's ventilation plan requires that polyurethane foam be handled, stored, and applied according to the manufacturer's guidelines. (Tr. 339, 355; Sec'y Ex. 17). Preece explained that the manufacturer's guidelines specify that the poly foam system be stored in a controlled environment no warmer than 100 degrees Fahrenheit, no cooler than 30 degrees Fahrenheit, and away from direct sunlight, hot pipes, chimneys, and heat ducts. (Tr. 340; Sec'y Ex. 18 p. 4). In addition to the operating instructions, the mine must also look at the MSDS for the chemicals involved in the system. (Tr. 340; Sec'y Ex. 19). Preece initially testified that the MSDS sheet said that the product would "react[] violently" with water. On cross-examination, Preece agreed that the reaction occurs when the actual product itself comes into contact with water. (Tr. 358).

According to Preece, he marked the likelihood of an injury or illness as "unlikely," but if the packs are left out in the cold, and exposed to water, there is a risk that there could be a premature rupture of the tanks, or that they could be run over by mobile equipment. (Tr. 365). In the right conditions, the tanks could explode. (Tr. 365).

Preece stated that the manufacturer's guidelines regarding handling, storage, and application of the foam packs apply not only when the packs are underground but also when they are on the surface. (Tr. 346). Preece testified that he covered this issue with mine management the day before he issued the first citation, yet, when he left and then came back, the containers under the stairs were still there. (Tr. 346). As a result, he determined that the packs had been at that location for more than 24 hours. (Tr. 347, 356, 358). Both citations were abated by moving the foam packs into a warehouse with a controlled environment. (Tr. 359, 365).

Preece acknowledge that, at the time he issued the citations, the packs were not a hazard but the packs could create a hazard over time. (Tr. 347). The risk of leaving the tanks out in the cold, and exposed to water, was that they could rupture. (Tr. 347). Given that the canisters were compressed gas, there was a risk that, if they ruptured, a miner would become inundated with the chemical inside the tank. (Tr. 347). Preece testified that he was aware of a situation where a miner was inundated with foam and ended up suffering respiratory problems. (Tr. 348).

Preece testified that he designated both citations as "moderate negligence" because he had multiple meetings with the mine where they had discussed the handling procedures for the foam. (Tr. 350). The containers in both citations were located in areas that mine management and miners would have passed by regularly. (Tr. 350).

Preece testified that Inspector Art Gore issued a section 104(d)(2) order to Twentymile on December 6, 2008, for a violation of the ventilation plan because a pack was thrown into a dumpster at the mine. (Tr. 351, 361). Preece believes that mine management was not listening to MSHA's warnings. (Tr. 351-352).

Dianna Ponikvar testified that she has accompanied Inspector Preece on a number of inspections, but she was not sure that she accompanied him on this particular one. (Tr. 367). According to Ponikvar, during the approval process of the mine's ventilation plan, the mine was able to work through certain terms with the District Manager. (Tr. 367). Among those terms were the specific locations underground for the storage of foam packs. (Tr. 367-368).

Ponikvar explained that the mine uses versi-foam as a sealant around the edge of stoppings. (Tr. 368). The foam pack consists of a box with two metal containers that look like propane tanks. (Tr. 368). Each container holds a chemical that, when mixed with the other, turns into foam that expands and dries quickly. (Tr. 368) The foam is used on the stoppings and seals, as well as for other purposes. (Tr. 368). Ponikvar agreed that the ventilation plan requires the mine to comply with the manufacturer's guidelines. (Tr. 375). The miners are trained in proper storage, use, handing and disposal procedures for the foam packs. (Tr. 368-370). Empty canisters are sent to the landfill but reusable canisters are taken to the surface to be stored in the warehouse. (Tr. 369). Canisters for reuse must be brought to the surface within 48 hours. (Tr. 370). The canisters are transported to the surface on man trips are dropped by the stairs because that is where things are dropped that are to be taken to the warehouse. (Tr. 370-71). She explained that this area is a staging area for things taken out of the mine. (Tr. 372). According to Ponikvar, there is only one warehouse for material storage and all materials are stored there or thrown away. (Tr. 372).

Ponikvar remembers discussing with Preece the issue of the foam being outside. (Tr. 373). Preece told her that he did not want the packs outside. (Tr. 373). However, she testified that the ventilation plan covers the underground mine and has nothing to do with outside air. (Tr. 373). The subject citations are for violations of Part 75, which address underground ventilation, and not for Part 77, which addressed surface issues. (Tr. 374-375). According to Ponikvar, the subject packs were stored and not thrown away. (Tr. 373).

ii. *The Violation*

The Secretary argues that the mine's ventilation plan requires that the manufacturer's guidelines for the storage and handling of polyurethane foam be followed. (Sec'y Br. 33). The manufacturer's guidelines require that foam not be left or stored in locations where the temperature drops below freezing, nor should the foam be left or stored in locations where it can be exposed to water. *Id.* at 34. On two separate occasions the mine left foam in locations that exposed the foam packs to water, snow, and freezing temperatures. *Id.* Section 75.370(a)(1) requires the mine to develop and follow a ventilation plan and is not limited in scope to only underground operations. *Id.* at 35-36.

The Respondent argues that the mine's ventilation plan does not apply to surface storage of the foam packs. (TM Br. 52). Rather, the plan addresses underground mine ventilation and dust control. *Id.* Further, the language of the plan which addresses "storage" of the foam packs applies only to underground storage. *Id.* at 53. Moreover, it is not clear that "storage" was occurring. *Id.* Even if the guidelines did apply, the Secretary did not prove that the temperature guidelines were exceeded. *Id.* at 55. Moreover, the "product" never came in contact with water and, rather, it was only the cardboard box for the metal canisters that might have been in contact with damp ground. *Id.* The Secretary did not prove that it was clearly understood that the plan provision applied to the surface. *Id.* at 55. As a result, the plan provision was ambiguous. *Id.* at 56. When a plan provision is ambiguous, the Secretary must "dispel the ambiguity" by establishing the intent of the parties on the issue through credible evidence as to the history and purpose of the provision and evidence of consistent enforcement." *Id.* (citing *Jim Walters Resources*, 9 FMSHRC 903, 907 (May 1987)). The Secretary has failed to dispel the ambiguity, and, therefore, has not satisfied her burden of proving that the plan applied to foam packs on the surface. *Id.* at 55-57.

At the outset, it is necessary to address whether the cited standard and, in turn, the mine's ventilation plan and the incorporated manufacturer's guidelines can apply to the handling, storage and application of polyurethane foam on the surface. Section 75.1 of the Secretary's regulations states that "[s]ome standards [within part 75] also are applicable to surface operations." 30 C.F.R. § 75.1. The Secretary does not "specify which of the standards are so applicable, how this is to be determined and, finally, whether the specific standard here involved is one that is intended to be applicable to surface areas of underground mines." *Jim Walters Resources*, 1 FMSHRC 1317, 1324 (Sept. 1979) (ALJ). In *Jim Walters*, the Judge was presented with the question as to whether section 75.1403 and its subparts were applicable to surface areas of underground mines. *Id.* at 1325. The judge noted that some standards, by way of their

language, are made specifically applicable to surface areas at underground mines, while others standards mention activity which is to be conducted on the surface. *Id.* In an effort to determine whether section 75.1403 was applicable to the surface, the judge asked if “the standard itself expressly states that it is applicable to surface areas” or “is it clear from the language that [the standard] is applicable to both underground and aboveground.” *Id.* While limiting his decision to the facts of the case, the judge found that the particular standard, which addressed safeguards, was sufficiently broad enough to cover certain surface conditions. *Id.* at 1325-1326. While I am not bound by the decisions of other judges, I find the judge’s methodology in the Jim Walter’s decision instructive.

Here, the cited standard states, in pertinent part that “[t]he operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine.” 30 C.F.R. § 75.370(a)(1). This provision is unique in the context of this analysis since it incorporates by way of reference the provisions set forth in the mine’s approved ventilation plan, which then incorporates by way of reference the manufacturer’s guidelines. As a result, a three-step analysis is necessary. First, on its face, it is clear that the cited standard does not expressly reference that it is applicable to surface areas, nor does it mention activity which is to be conducted at the surface. Rather, the text is silent on the issue. Second, the mine’s ventilation plan, in a section entitled “Use of Polyurethane Foam,” states that “Manufacturer Guidelines for safe handling, storage and application will be followed.” (Sec’y Ex. 17). Again, nothing from this text expressly references that the provision is applicable to surface areas, nor does the provision mention activity which is to be conducted at the surface. Instead, the provision incorporates by reference the manufacturer’s guidelines. The third and final step of the analysis requires an examination of the manufacturer’s guidelines as they relate to “safe handling, storage, and application.” The guidelines state that “at no time should the kits be stored in temperatures above 100 F (38 C) or lower than 30 F (-1 C).” (Sec’y Ex. 18 pp. 3 & 4). “Nor should they be stored in direct sun or near hot water pipes, furnaces, chimneys or heat ducts.” *Id.* at p. 4.

The Material Safety Data Sheet (“MSDS”) that accompanies the guidelines, and is incorporated by reference, states that one of the component chemicals “reacts slowly with water, releasing carbon dioxide, which can cause pressure buildup and rupture of closed containers.” Sec’y Ex. 19 p. 1. It advises to “[a]void contact of this product with water at all times during handling and storage,” *Id.* at p.2. On its face, the manufacturer’s guidelines do not expressly reference that it is applicable to surface areas; however, I find that it does mention activity that could potentially be done on the surface, namely, storage of the packs outside of the temperature parameters, and exposure to water. Nothing in the guidelines or the MSDS suggests that the foam packs are for underground use only. As a consequence, I conclude that these guidelines and the MSDS apply to the handling, storage and application of polyurethane foam both underground and on the surface. The guidelines have been incorporated by reference into Twentymile’s ventilation plan and the MSDS is part of the guidelines. (Ex. G-17). On this basis, I conclude that the provisions of the ventilation plan at issue here apply to the surface and underground portions of the mine.

I credit Inspector Preece's testimony that the two cited conditions involved foam packs that were located in areas that were not a controlled environment. While I do not disagree with Respondent that the two locations were not formally designated storage areas, I find that the duration of the time that the packs were in these areas they were exposed to impermissible temperatures in violation of the manufacturer's guidelines and, in turn, the cited standard. First, Preece credibly testified that the packs that are the subject of the first citation were in the same location the day before he issued the citation. The packs were left out overnight under the stairs. They may have been intended for permanent storage somewhere else, but the length of time they existed at that location does not square with the Respondent's argument that this was a staging area. I find that the packs were stored under the stairs. Further, I credit Preece's testimony that the outside air temperature at the time of his inspection was below freezing at night. In light of the above analysis, I find the Secretary has proven that the foam packs that are the subject of Citation No. 7622362 were not properly handled pursuant to the manufacturer's guidelines and were, therefore, in violation of the mine's ventilation plan. The Secretary has established a violation.

With regard to the second citation, I credit Preece's testimony that the foam pack was covered in snow and dust. While the dust may not have been indicative of the time the pack spent outside, I agree with Preece's assessment that the snow on the canister is evidence that the pack had been outside for an extended period of time. Further, the accumulated snow on the canister is evidence of the canister's presence in temperatures below freezing. I find that the Secretary has proven that the foam pack that is the subject of Citation No. 7622365 was not properly handled pursuant to the subject manufacturer's guidelines and was, therefore, in violation of the mine's ventilation plan. The Secretary has established a violation.

Twentymile argues that, consistent with the Commission's decision in *Jim Walters Resources*, 9 FMSHRC 903 (May 1987), the Secretary has not "dispelled the ambiguity" of the cited provision. Here, however, there is no ambiguity. The provision of the mine's ventilation plan is clear on its face. "Manufacturer Guidelines [related to polyurethane foam] for safe handling, storage and application will be followed." Twentymile seeks to insert ambiguity where there is none. It asserts that the provision is ambiguous due to the lack of an express statement that the provision applies to the handling, storage and application of the foam on the surface. I disagree that such an express statement is necessary and rely upon my above analysis as to why the cited standard, the incorporated ventilation plan provision, and the manufacturer's guidelines apply to the surface. It is more than reasonable to assume that the manufacturer did not develop its guidelines to only be applicable in certain situations and locations. If this product is mishandled at any point, the safety of the product may be compromised. According to Ponikvar, these canisters had already been in the mine and had been removed and were in staging areas before they were to be stored in the materials warehouse. Storage in the materials warehouse, versus disposal, indicates that the canisters were to be used again in the future, meaning that they would return underground at some point. As such, the packs should be stored, placed, or staged in an area that would comply with the manufacturer's guidelines so that, when the packs are taken back underground, they have not deteriorated or been compromised.

iii. *Gravity*

Preece determined that an injury was unlikely but that, if an injury were sustained, it could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violations were not S&S and that one person would be affected. I agree with Preece's assessment of the likelihood of an injury. The canisters' pressure was low. A rupture was unlikely, even after the canisters were exposed to low temperatures. It is unlikely that more than one person would use these containers at one time. Preece acknowledged that when he issued the citations there was no hazard but that a hazard could develop. I find that the gravity was low.

iv. *Negligence*

Preece designated both citations as moderate negligence. He based his determination on the fact that he had conducted multiple meetings with the mine where they had discussed the handling procedures for the foam, and the fact that both cited locations were areas that miners and management would have passed by. At hearing, Preece stated that he could have possibly designated the citations as high negligence. In her brief, the Secretary also advocates that I modify the negligence of both citations to "high."

I credit Preece's testimony that, the day before the December 4th citation was issued, he specifically identified the foam packs under the stairs and indicated his concern that they be properly stored. In spite of such, the Respondent took no action. As a result, he issued Citation No. 7622362 the following day for the same foam packs. The next day, Preece again noted foam packs that were improperly stored outside, this time with snow having accumulated on them. I agree with Preece's assessment that management was not taking this issue very seriously. Although I understand the reasoning behind the Secretary's request that the citations be modified to charge Twentymile with high negligence, I am affirming the inspector's moderate negligence determination. Twentymile genuinely believed that the ventilation plan did not apply to its surface operations. I assess a penalty of \$150 for each of these citations.

B. Citation No. 7622372

On December 10, 2008, Inspector Preece traveled to the Foidel Creek Mine to conduct an inspection of the mine. During that inspection Preece issued Citation No. 7622372 under 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.1100-3. The citation alleges the following:

The firefighting water sprinkler system located on the 3 Main North belt drive and head roller was not being maintained in a usable and operative condition. The sprinkler heads were covered were impacted (sic) with a heavy layer of rock dust. The sprinklers are heat activated.

(Ex. G-21). Preece determined that an injury was unlikely, but that, if an injury were sustained, it could reasonably be expected to result in lost workdays or restricted duty. He determined that

the violation was not S&S, that one person would be affected, and that the violation was the result of moderate negligence on the part of the operator. Prior to hearing, the Secretary moved to have the citation amended to reflect a violation of section 75.1107-16(b). The motion was granted. The cited standard requires, in pertinent part, that:

(b) Each fire suppression device shall be tested and maintained in accordance with the requirements specified in the appropriate National Fire Code listed as follows for the type and kind of device used: . . . National Fire Code No. 13A "Care and Maintenance of Sprinkler Systems" (NFPA No. 13A--1971).

30 C.F.R. § 75.1107-16(b). The Secretary has proposed a civil penalty of \$285.00 for this violation.

i. *Summary of Testimony*

Inspector Preece testified that, while conducting an inspection on December 10, 2008, he noticed that the sprinkler heads for the fire suppression system along the Three Main North Belt were "impacted with rock dust" and were not clean. (Tr. 379, 398). Preece later testified that the material on the heads was both rock and coal dust. (Tr. 392). As a result, he issued the subject citation. (Tr. 379).

At hearing, Preece testified that section 75.1107-16(b) of the secretary's regulations requires the mine to maintain the fire suppression system in accordance with the National Fire Protection Association. (Tr. 380). Preece agreed that the National Fire Protection Association No. 13A, Care and Maintenance of Sprinkler Systems, 1971, is the National Fire Code that section 75.1107-16(b) is referring to. (Tr. 380). Preece testified that the fire code states that "sprinklers should be checked regularly to make sure they are in good condition, free from corrosion, loading, white wash, bent, or damaged." (Tr. 380-381 (paraphrasing the fire code at Sec'y Ex. 23 p. 3)). Preece explained that this provision means that you "can't have any buildup on the sprinkler head itself." (Tr. 381).

Preece testified that the MSHA Program Policy Manual ("PPM") states that sprinklers should be free of dirt, and all damaged sprinklers should be replaced. (Tr. 386; *see* Sec'y Ex. 24). On cross-examination he agreed that rock dust is not what is commonly referred to as "dirt," and that the PPM does not address rock dust on sprinkler heads. (Tr. 393).

According to Preece, this particular type of sprinkler has a glass tube that is filled with liquid and an air bubble. (Tr. 381). When the temperature rises, the liquid inside the tube expands until it ruptures. (Tr. 381). The rupturing of the tube allows water to flow. (Tr. 381). Preece believes that the standard temperature at which a head should activate is 250 degrees, but he could not say what was the activation temperature of this particular head. (Tr. 392). On cross-examination Preece agreed that the sprinkler shown in Sec'y Ex. 22 p. 2 is a dual sprinkler head, with one head directed toward the belt, while the other is directed at the rib. (Tr. 391). In response to a question as to whether the rock dust on the sprinklers would have prevented the liquid from expanding, Preece responded by saying, "I think that eventually this would rupture

and become a functional system.” (Tr. 382). He believes that the rock dust would potentially delay the reaction time for the sprinkler system to come on. He explained that there is a difference between being “impacted” and having a light layering. (Tr. 398). While he did not measure the thickness of the dust on the heads, it was not a thin layering like a sheet of paper. (Tr. 398). Preece testified that reaction time is crucial. (Tr. 383). His concern was the dust on the glass piece. (Tr. 397).

Any delay in the reaction time reduces the effectiveness of the sprinkler. (Tr. 383). Further, it is possible that a fire will spread more quickly if there is a delay in the sprinkler being activated. (Tr. 383). Preece agreed that he did not know how long the reaction time would be delayed but, according to a conversation with MSHA technical support about the effect of rock dust on sprinklers, there would be a difference in the reaction time. (Tr. 383, 394).

On cross-examination Preece agreed that the subject type of sprinkler system is used in many different environments. (Tr. 396). Preece testified that he was aware of a 1994 NIOSH report that tested sprinkler systems that were impacted with rock dust and their activation times. (Tr. 382). The report concerned testing of temperatures ranging from 212 degrees down to 83 degrees, and with high and low velocities of air. (Tr. 382). The report concluded that the reaction times were delayed, but he thinks all of them eventually went off. (Tr. 382). Preece did not have a copy of this report at the time he issued the citation. (Tr. 387).

Preece acknowledged that rock dust is good to have in a mine, depending on where it is placed. (Tr. 392). He opined that, in spite of the fact that there is a whole standard addressing the sufficiency of rock dust in entries, you do not want rock or coal dust on the sprinkler heads. (Tr. 392-393). Preece did not know the history violations at this mine for rock dust on sprinkler heads, but he agreed that there are no Commission cases that address the issue. (Tr. 394).

Preece determined that the alleged violation was the result of “moderate negligence.” (Tr. 384). Preece testified that, at some point before the issuance of the subject citation, he traveled with Dianna Ponikvar, Dick Conkle, and the mine representative to a different belt drive where the suppression system was in the same condition as the cited one. (Tr. 384-385). There, they used a pump spray bottle to wash off the sprinkler heads. (Tr. 384-385). No citation was issued on that drive, but it did bring to light the issue of rock dust on the sprinkler heads. (Tr. 385). Later, either during or following the subject inspection, Preece had a discussion with the same individuals and explained to them that there cannot be a buildup of rock dust on the sprinkler heads. (Tr. 384).

Edwin Brady is currently the maintenance manager at the mine and was previously the mine’s conveyance manager for 20 years. (Tr. 399). As conveyance manager he was responsible for, among other things, the initial design and installation of the sprinkler system along the belt. (Tr. 399-400). Brady is a member of the SME Bulk Material Handling Committee, which has put out several papers that address fire suppression on conveyor systems. (Tr. 400-401).

Brady examined the photographs of the subject sprinklers and testified that this is a two-diffuser system. (Tr. 402). One diffuser on the sprinkler head directs water over the conveyor

belt, while the other directs water at the ribs. (Tr. 402). The mine utilizes the double diffuser because, while conveyor belts are dangerous, the mine believes that the bigger danger is the ribs catching fire. (Tr. 402). MSHA does not require the ribs to be protected with water. (Tr. 402-403). Further, Twentymile spaces its sprinkler heads closer together than MSHA requires. (Tr. 403). These particular sprinkler heads are activated by a fusible link, i.e, a metal alloy that melts at a low temperature, attached to a spring. (Tr. 403). When the fusible link melts, the sprinkler is triggered. (Tr. 407). These heads would melt around 150 degrees. (Tr. 403). Brady disputed earlier testimony and stated that these heads are not activated by a bubble with water in it. (Tr. 403-404). According to Brady, the sprinklers are inspected weekly to see that the water supply is on and that the system is not damaged and is given an annual functional test to see that the fire flow switch detects fire and automatically shuts down the conveyor. (Tr. 410). Brady testified that, when the citation was issued, he believed that the mine offered to test the sprinklers to show that they would operate, but the Inspector did not want to do that. (Tr. 405).

According to Brady, the photographs do show rock dust on the sprinkler heads. (Tr. 404; Ex G-22). Rock dust is required by law and is put in the belt entry deliberately. (Tr. 409-410). Brady explained that, given the regularity of rock dusting in belt entries, it would be common to have rock dust on sprinkler heads. (Tr. 404). In fact, prior to Preece's inspection, no inspector, including those with the MSHA belt initiative after the Aracoma belt fire, had ever told the mine that it was a violation to have rock dust impacted on sprinkler heads. (Tr. 404, 405). On cross-examination Brady stated that he would not classify rock dust as "dirt." (Tr. 404). He defines "clean" as "free of debris" and it is possible that rock dust could be considered "debris." (Tr. 408). He agreed that if something is "impacted," it is not "clean." (Tr. 408).

Brady explained that he did not believe that rock dust would affect the temperature at which the heads would activate. (Tr. 405). Further, he does not believe that rock dust impacting the heads should be a citation. (Tr. 407). He checked with Matt Bujewski, Peabody's risk analysis consultant for the company's insurance carrier, who told Brady that rock dust on the sprinklers was not even an issue, and that the sprinklers are routinely "put inside dust collectors, where it is more than likely dust will be found on sprinklers in those environments." (Tr. 406). Bujewski is apparently the chair of the NFPA mining division. (Tr. 406).

Brady explained that, in order to remove the rock dust, the sprinkler heads would need to be washed off with a high pressure hose rather than a squirt bottle. (Tr. 411). Given the delicate nature of the sprinklers, washing with a high pressure hose could potentially damage the heads. (Tr. 411). According to Brady, there are several thousand sprinkler heads along the belt line. (Tr. 412).

ii. *The Violation*

I find that the Secretary has not alleged a violation of a mandatory standard for which I can find a violation. The Secretary argues that the Respondent violated section 75.1107-16(b) of her regulations by failing to maintain the fire suppression system in accordance with the requirements of the National Fire Code. (Sec'y Br. 38).

The Respondent argues that the National Fire Protection Code, while appropriately incorporated by the Secretary's regulations, does not create an enforceable requirement. (TM Br. 59). Specifically, the referenced code offers only "recommended practices," which are not requirements and, according to the code, are only "advice and suggestions relative to the care and maintenance of sprinkler equipment." *Id.* Moreover, the provisions of the National Fire Code cited by the Secretary use the word "should," which indicates the non-mandatory nature of the provision. *Id.* at 60.

The standard cited by the Secretary is clear: the fire suppression device shall be tested and maintained in accordance with the requirements specified in the appropriate National Fire Code. The language is clear and unambiguous. Only those "requirements" set forth in the appropriate National Fire Code are mandatory standards.

This mandatory standard incorporates by reference a provision of the National Fire Code. Certain pages of the subject National Fire Code were offered and accepted into evidence at the hearing as Sec'y Ex. 23. (Tr. 413). In her brief, the Secretary relies on two particular provisions of the Code. The first provision states that "[s]prinklers should be checked regularly to make sure that they are in good condition, clean, free from corrosion or loading, not painted or whitewashed, and not bent or damaged." (Sec'y Ex. 23 p. 3). The second provision relied upon by the Secretary states that "[i]t is of prime importance to keep sprinklers in good condition. If they are subject to loading with dust or foreign material, the authority having jurisdiction should be consulted." *Id.*

As pointed out by Respondent, the Commission has spoken to the use of the word "should" in the context regulatory language. In *Utah Power & Light Co.* the Commission stated the following:

The Secretary's argument is undercut also by the use of the term "should" in the wording of the criteria, a term that normally signals the non-mandatory nature of a regulation. *See generally, Jim Walter Resources, Inc.*, 3 FMSHRC 2488 (November 1981). The Commission has emphasized that when assessing the nature of a regulation the essential question is whether the standard as written imposes a mandatory duty upon operators. For instance, the Commission has found that even the inadvertent use of the word "should" instead of "shall" could be overcome as an indicia of a regulation's non-mandatory nature where the regulatory history of the standard made clear that the standard imposes a mandatory duty on mine operators. *See Kennecott Minerals Co., Utah Copper Division*, 7 FMSHRC 1328, 1332 (September 1985). The standard at issue, however, was neither proposed as mandatory nor promulgated with a mandatory designation. *Compare Kennecott Minerals Co., supra.*

11 FMSHRC at 1931-1932. Each of the National Fire Code provisions relied upon by the Secretary incorporates the word "should" in its directive language. As noted by the

Commissioners, the use of “should” signals the non-mandatory nature of a regulation. Obviously, the National Fire Code was not promulgated as an MSHA standard and, instead, it was simply incorporated by reference into the Secretary’s regulations. *See* 30 C.F.R. §§ 75.1107-16 and -17. However, the language of the incorporated National Fire Code is clear; the subject provisions only state that certain things “should” be done or what should be considered by local authorities. Further, the foreword to the National Fire Code states that its provisions “offer to property owners and managers advice and suggestions relative to the care and maintenance of sprinkler equipments upon which the safety of their property may depend.” (Sec’y Ex. 23 p. 2). The National Fire Code was not written to be mandatory standards. As a consequence, I cannot see how the referenced provisions of the subject National Fire Code can be considered “requirements” as contemplated by section 75.1107-16.

In *Jim Walters Resources* the Commission stated that, “[a]lthough safety and health standards are to be construed liberally, any resultant interpretation must be reasonable in order to be upheld.” 3 FMSHRC 2488, 2490. Here, the Secretary’s interpretation, which is not backed by any policy statements, or regulatory or legislative history, would have the Respondent comply with advisory National Fire Code provisions, despite the fact that the Secretary’s own regulation incorporating the National Fire Code clearly states that fire suppression devices shall be tested and maintained in accordance with the “requirements” of the Code.

I find that, while the standard cited by the Secretary may be mandatory in nature, only those provisions of the National Fire Codes that are “requirements” are incorporated by reference into the standard. The National Fire Code provisions referenced by the Secretary as having been violated are not “requirements.” As such, the Secretary has failed to allege a violation of a mandatory standard for which I could find a violation. Accordingly, the citation is vacated.⁵

5. WEST 2009-820, Citation Nos. 8456301 and 8456311

Inspector Phillip Ray Gibson is a MSHA coal mine inspector based out of the Craig, Colorado field office. He inspects both underground and above ground coal mines and estimates that he has been to the Foidel Creek mine over one thousand times.

⁵ Even if the subject National Fire Code provisions could be considered as mandatory safety standards, I find that the Secretary failed to establish a violation. I credit the testimony of Brady that the sprinklers are activated by fusible links rather than by glass bubbles filled with liquid and an air bubble. Inspector Preece’s knowledge of Twentymile’s sprinkler system, how it activates, (footnote continued) and whether the presence of rock dust would delay the activation was vague and not very convincing. I do not give this testimony much weight. Twentymile’s request to admit into evidence a U.S. Bureau of Mines (NIOSH) report entitled “The Effects of Underground Mining Conditions on the Activation of Automatic Sprinklers” is DENIED. This report was briefly mentioned for the first time in this case by Inspector Preece. (Tr. 382, 455). It is a technical report and, because no testimony was provided to explain the relevance of the report to the facts at issue, it was not admitted. A copy is included with the exhibits.

On February 19, 2009, Gibson issued Citation No. 8456301 under section 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.516-2(c). The citation alleges the following:

Additional insulation was not provided for two communication circuits where they passed underneath energized power conductors and an energized fluorescent lighting fixture. The two mine phones were located on the left rib of no. 4 entry (conveyor belt entry) at crosscut 7+78 in 7 Main North. The communication circuits were 4 inches to 14 inches below the energized power conductors and lighting fixture. It did not appear that there were any attempts to correct the condition before the inspector cited it. This condition was obvious and had existed for at least one week. These mine phones are used by miners during the course of their work in the conveyor belt entry. This condition contributes to an electrical shock hazard.

(Ex. G-26). Gibson determined that an injury was unlikely but that, if an injury did occur, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S, that one person would be affected, and that the violation was the result of high negligence on the part of the operator.

On February 26, 2009, Gibson returned to the Foidel Creek mine and used Citation No. 8456311 under section 104(a) of Mine Act for an alleged violation of 30 C.F.R. § 75.516-2(c). The citation alleges the following:

Additional insulation was not applied to two communication circuits (mine phones) at crosscut no. 8 between no. 3 entry (conveyor belt) and no. 2 entry (intake air course) of 2 Main North. The communication circuits touched, passed over and under two energized power cables for CSTs (electrical equipment) at this location. Miners use the phones for communication purposes on a regular basis. This condition contributes to an electrical shock hazard.

(Ex. G-29). Gibson determined that an injury was unlikely but that, if an injury did occur, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S, that one person would be affected, and that the violation was the result of high negligence on the part of the operator.

The standard cited by the Secretary requires, in pertinent part, that “[a]dditional insulation shall be provided for communication circuits at points where they pass over or under any power conductor.” 30 C.F.R. § 75.516-2(c). The Secretary has proposed a civil penalty of \$687.00 for each of these violations.

A. Summary of Testimony

On February 19th, Gibson was accompanied by Bob Owens while conducting an inspection at the mine. (Tr. 418). They traveled the No. 4 Entry, a conveyor entry, in Seven Main North. (Tr. 418). While walking on the walkway side of the conveyor, Gibson looked across the entry and saw two communication telephones and a 110-volt fluorescent light fixture. (Tr. 418, 431). However, Gibson did not believe that the subject power cord was any different from a cord that would be used on a home lamp. (Tr. 432). The light was on and the cable for the fixture was hanging from J hooks that were attached the rib. (Tr. 418-419). The power cable was not damaged. (Tr. 438, 440). Underneath the fixture and its cable were two telephones and their respective communication cables. (Tr. 418-419). Gibson explained that the two communication circuits were for a pager phone and a touch-tone phone. (Tr. 419). Both phones could be used to communicate anywhere in the mine. (Tr. 419). According to Gibson, the power cable was not touching either communication cable and, instead, ranged from four to fourteen inches away from the communication cables over a ten-foot distance. (Tr. 420-421).

Gibson noticed that no additional insulation had been provided around the communication circuits. (Tr. 421). According to Gibson, additional insulation would be something in addition to the outer jacket of the communication cables. (Tr. 421). Gibson testified that, while in this instance the communication circuits were cables with outer jackets, if the circuit had been just a twisted pair of wires, "additional insulation" would have required the only layer of insulation over the twisted wires. (Tr. 421). All that is needed for communication purposes is two conductors with insulation. (Tr. 435). An extra jacket is not needed for communication purposes, but here there was an extra jacket. (Tr. 435). He explained that the purpose of additional insulation is to provide an extra measure of safety. (Tr. 426). When additional insulation is not provided, it exposes miners to injury. (Tr. 426). The most likely thing that would happen is that the a damaged power cable, which has a higher voltage than the communication circuit, would touch a bare wire of the communication cable, thereby elevating the power and transmitting that elevated voltage over the communication cable to a handset being used by a miner. (Tr. 426). The miner would suffer an electric shock. (Tr. 426).

According to Gibson, this particular communication circuit had insulated wires inside of an outer jacket. (Tr. 421). A circuit is not a cable unless it has an outer jacket over the two insulated twisted wires. (Tr. 421, 442). Each communication circuit has two conductors surrounded by insulation. Electricity is used to carry the communication through the conductors. (Tr. 432, 433). The communication cable was pretty standard, not extra thick, and looked like the same type of cable that is used for communication circuits at other mines. (Tr. 421-422). He has observed communication circuits at other mines that are just two insulated conductors that are twisted and do not have an outer jacket. (Tr. 422).

Based on his observations, Gibson issued Citation No. 8456301 at 2:08 p.m. for the lack of additional insulation on either the communication or power cables where the communication circuit passed under the power cable. (Tr. 417-418). Gibson spoke with a pumper about the condition while he was still underground. (Tr. 423). According to Gibson, the pumper had reported this condition to management. (Tr. 423). Gibson discussed the violation with the shift foreman once he left the mine. (Tr. 422). When he spoke with the shift foreman he reiterated

that the standard required additional insulation for the communication circuits where they pass over or under power conductors or cables. (Tr. 422). According to Gibson, the foreman agreed that additional insulation was required. (Tr. 422). Gibson believed that this particular condition had existed at least longer than the beginning of the shift, which began at noon. (Tr. 426). The citation was terminated by moving the fluorescent light and its cable out by the area so that the power cable did not pass over or under communication circuit. (Tr. 426-427).

On cross-examination, Inspector Gibson agreed that there is no particular amount or quality of additional insulation that is required by the cited standard. (Tr. 434). Further, he acknowledged that the cited standard had been around since the time when mines used bare power conductors and bare communication wires, and that trolley wires are still bare and range between 3 to 600 volts. (Tr. 436). He stated that the conductors are rated to carry 24 volts, but he did not know at what voltage they would be damaged. (Tr. 441). The foil shield provides electrical insulation. (Tr. 434). The cable has polypropylene insulation, which provides an abrasion resistant protective cover for the insulated wires. (Tr. 424). The polypropylene insulation is standard in communication wire. (Tr. 424). This cable also has a PVC outer jacket, which is also typical. (Tr. 424). PVC is abrasion resistant and has some insulating qualities. (Tr. 424-425, 434). He agreed that the insulation of the cable was appropriate for the amount of current in the conductors. (Tr. 433). He has never taken a meter and tested the insulating qualities of the cable. (Tr. 434). Gibson also contacted a representative from Belden, the cable manufacturer. (Tr. 454). The representative, Teresa Bonnikur, informed him that the subject cable is "ordinary run-of-the-mill communication cable," but that the company did manufacture a different cable that had a heavy duty outer jacket with an MSHA approval stamp number on it. (Tr. 425-426). Gibson was not sure what Bonnikur's position with Belden was or what her qualifications were. (Tr. 439). According to Gibson, there was no stamp on the subject cable. (Tr. 425).

On February 26th Gibson returned to the mine and issued Citation No. 8456311 for a violation of the same section, just in a different location, i.e., the Two Main North conveyor belt entry. (Tr. 427). Like Citation No. 8456301, this one also involved the lack of additional insulation on the outer jacket of a communication circuit. (Tr. 427). Gibson identified Sec'y Ex. 30 as an accurate representation of what he saw when he issued the citation. (Tr. 427). In this instance, there were a number of communication circuits and power cables. (Tr. 428). There was a black touch-tone phone like the one he described in the earlier citation, and a control box immediately to the left of the phone. (Tr. 428). Gibson testified that there was no additional insulation on the communication circuits or the four power cables that were in the area. (Tr. 428). He explained that the additional insulation can be on either the communication or power cables. (Tr. 428). Gibson testified that the communication cables were touching the power cables, and circled the area on the exhibit. (Tr. 428-429; Sec'y Ex. 30). According to Gibson this citation involved the same type of communication cable that was involved in the earlier citation. (Tr. 429). The corrugated tube, i.e., Camflex, in Sec'y Ex. 30 is the kind of additional insulation and mechanical protection that you might see on a properly insulated cable. (Tr. 428). On cross-examination he stated that he was not sure of the insulating properties of Camflex. (Tr. 440). He had not heard of using brattice cloth as additional insulation. (Tr. 435). On cross-examination Gibson agreed that the power cables have insulated conductors, an outer jacket, and ground monitors, but he was not sure if they had shielding. (Tr. 437-438). He

further agreed that the power cables had ground monitors so that they would go to ground if there was a problem with the cable. (Tr. 438). Gibson agreed that none of the cables in Sec'y Ex. 30 were damaged. (Tr. 438, 440).

Based on the dust, Gibson believed that the condition had existed for longer than a day. (Tr. 429). According to Gibson, the condition was obvious because a mine examiner or belt man would walk right past the installation. (Tr. 429). Further, the mine examiner, who is considered a member of management, would walk right past the area three times a day during the preshift examination. (Tr. 430). The second citation was abated by wrapping electrical tape around the cable. (Tr. 434-435). He found both citations to be non-S&S.

Gibson designated both citations as high negligence. (Tr. 430, 442). He based the first citation's designation on the conversation he had with the pumper. (Tr. 430). Gibson explained that he had no reason to doubt the pumper. (Tr. 430). Gibson designated the second citation as high negligence based upon his observation that the condition was so obvious that an examiner had to see it. (Tr. 430). Gibson has issued other citations to the Respondent under the same standard, including three other citations for the same standard in the same quarter. (Tr. 430, 443). He testified that, since May 1995 the mine had been cited 39 times under this standard. (Tr. 431). On cross-examination Gibson acknowledged that the cables involved were stable, and were not dragged around like equipment cables. (Tr. 438). Further, he agreed that, in order for electricity to be conveyed to the communication cables, first the power cable would need to be damaged such that all of the protections in the cable were short circuited so that the grounding would not work, then second, the electricity would have to go through the outer jacket, shielding, and insulation of the communication cable before it got to the conductor. (Tr. 440-441).

Rick Stillion has worked at the mine for thirteen years. (Tr. 444). He is currently the electrical department manager and, prior to that, was an electrical supervisor. (Tr. 445). Stillion has a federal and state electrical certification for low, medium, and high voltage in both underground and surface mines. (Tr. 446). According to Stillion, the electrical department works on many things, including communication and power systems. (Tr. 445).

Stillion explained that a communication cable consists of two or more small gauge copper conductors, covered by insulation, then foil shielding, and finally a PVC jacket. (Tr. 446-447). If there are multiple pairs of conductors then each pair will have a foil shield, and there will be a drain wire and a PVC jacket. (Tr. 446). The foil shield is designed to keep electrical noise off of the communications circuit. (Tr. 447). Each of the conductors is covered with insulation that is intended to keep stray voltage from getting to the conductor and prevent shorting with another conductor. (Tr. 447). The insulation is also abrasion resistant. (Tr. 447). PVC is a very good abrasion-resistant coating and has an insulation rating that goes up to 300 volts. (Tr. 447). Stillion has tested the outer jacket of these cables with a voltmeter and has determined that they do not conduct. (Tr. 447-448). He explained that, while two or more conductors connected to two telephones are a communication circuit, they are not necessarily a communication cable. (Tr. 452).

Stillion was familiar with the power cable at issue in the first citation. (Tr. 448). The cable for the light fixture did not have a PVC coating, but rather a rubber coating on each

conductor. (Tr. 448). The cable had three conductors: one for power, one for return, and a ground wire. (Tr. 448). Generally, all three conductors are insulated with a rubber coating and then there is a jacket over the insulation. (Tr. 448). This cable, which has three conductors, is a little better protected than the standard cable for a 110-volt lamp in a house, which would only have two conductors. (Tr. 448-449).

Stillion examined Sec'y Ex. 30 and determined that the power cable was a 480 volt three phase cable that was powering the belt controller. (Tr. 449). This power cable is constructed in a similar manner to that of the light fixture cable in the first citation, although the jackets are heavier and are usually rated to 2,000 volts. (Tr. 449). Each of the phase conductors is covered in a rubber compound with insulating properties, then all three phase conductors are insulated, and finally the over jacket, which is abrasion resistant and provides some insulation. (Tr. 449). There would be two grounds, which are sometimes insulated, and a pilot. (Tr. 449).

Stillion explained that he is familiar with how communication cables and their closeness to power cables have been an issue at the mine. (Tr. 449). He has been told by MSHA that electrical tape, brattice, Camflex, and rubber hose conduit on the power cables will all satisfy the additional insulation standard. (Tr. 450). The electrical tape and rubber hose conduit have insulating qualities, but the brattice and Camflex are not rated for insulation even though they may have some insulating qualities. (Tr. 449-451).

Stillion testified that, at one time, communication lines and power conductors were uninsulated in underground mines. (Tr. 452). By 1970, mines were required to have a plan to insulate or replace conductors in the mine. (Tr. 452). Given the communication and power cables that are in use at the mine, he does not see that there is a potential for a transfer of electricity to the communication cables. (Tr. 453). Additional insulation beyond that which is already there is unnecessary. (Tr. 453). Many telephone lines do not have outer jackets, and are only two insulated conductors, twisted together, and they are approved for mining. (Tr. 453). All of the telephone lines at Twentymile have abrasive resistant jackets that have multiple mills of insulation. (Tr. 453). Stillion stated that one mill of tape will not decrease the potential, although, on cross-examination he agreed that it will add some extra measure of safety. (Tr. 453)

B. The Violation, Gravity, and Negligence

The Secretary argues that, in two different instances, the Respondent failed to provide additional insulation for communication circuits at points where they crossed over or under power cables. (Sec'y Br. 44). "Communication circuits," as contemplated by the cited standard, is a broad term that is not defined but, necessarily, includes "any conductor between telephones whether the conductor is a wire, a cable, or some other type of line." *Id.* at 45-45. "Additional insulation" is insulation beyond that which is already provided. *Id.* at 46. The Secretary relies upon a factually similar case in which I found that a mine had violated the cited standard. *Western Fuels Utah*, 17 FMSHRC 756 (May 1995) (ALJ), *aff'd by Western Fuels Utah*, 18 FMSHRC 1912 (Nov. 1996). Further, the Secretary argues that she is entitled to deference as to the definitions of "communication circuit" and "additional insulation." (Sec'y Br. 48).

The Respondent argues that no violation of the cited standard occurred. (TM Br. 66). Specifically, the Respondent argues that the communication cables, as they existed at the time of citation, did in fact provide the “additional insulation” required by the standard. *Id.* Further, the Secretary’s interpretation of “additional insulation” is unreasonable and not entitled to deference. *Id.* at 70.

The cited standard requires, in pertinent part, that “[a]dditional insulation shall be provided for communication circuits at points where they pass over or under any power conductor.” 30 C.F.R. § 75.516-2(c). I find that the language of this safety standard to be quite clear. This is a safety standard that served an important purpose when it was first promulgated because much of the electrical wiring in mines was either uninsulated or poorly insulated. Adding extra insulation where power conductors passed near communication circuits was designed to protect those using the communication system from receiving an electrical shock. I credit the testimony of Stillion concerning modern insulated power conductors and communication circuits as well as the substantial outer jackets on power conductors. These improved, well-insulated and well-protected power conductors have rendered the safety standard obsolete. The risk of electric shock is nonexistent as long as the operator frequently checks the conductors for abrasion or other damage. The Secretary accepts a single wrapping of electrical tape on the power conductor to abate these types of violations. Nevertheless, I do not have the authority to modify or vacate the safety standard. Mine operators are required to add “additional insulation” where communication circuits pass over or under any power conductor no matter how well-insulated the conductor is.⁶

There is no dispute that “additional” insulation was not provided at the cited locations. As a consequence, I find that violations were established. I also find that the violations were the result of Twentymile’s moderate to high negligence. Mine management was well aware of the requirement of the safety standard and was also aware that the standard was not being complied with at the cited locations. The violations did not pose a hazard to miners. A penalty of \$10.00 is assessed for each citation.

⁶ In *Emerald Coal Resources, LP*, Judge Gary Melick vacated a similar citation on the basis that the insulated circuit far exceeded the required dielectric strength required. 29 FMSHRC 660 (July 2007). I appreciate Judge Melick’s frustration with the pointless requirement that additional insulation must be provided in all circumstances, even where the insulation provided by the manufacturer more than meets the requirement to protect the communication circuit from becoming energized. I do not agree with his conclusion that the phrase “additional insulation” can be interpreted to refer to the insulation that was provided by the manufacturer for the entire length of the power conductor. The Secretary should seriously consider eliminating or modifying section 75.516-2(c).

III. SETTLED CITATIONS AND ORDERS

At the hearing, the parties proposed to settle the remaining citations in these cases. The terms of the settlement are set forth below.

Citation/Order No.	Originally Proposed Penalty	Settlement Amount	Modifications
WEST 2009-241			
7291718	\$3,689.00	\$2,250.00	Reduction in gravity to 2 persons affected.
7622548	\$3,996.00	\$1,000.00	Reduction in gravity to Unlikely, Non-S&S, and 1 person affected.
Docket Total	\$7,685.00	\$3,250.00	

WEST 2009-580			
7291777	\$308.00	\$308.00	
7291781	\$308.00	\$308.00	
7291782	\$308.00	\$308.00	
7291783	\$207.00	\$207.00	
7291785	\$308.00	\$308.00	
7291786	\$807.00	\$555.00	Reduction in gravity to 7 persons affected.
7291788	\$308.00	\$308.00	
7622363	\$392.00	\$392.00	
8456002	\$392.00	\$392.00	
8456007	\$392.00	\$392.00	
7622374	\$392.00	\$392.00	
7622375	\$392.00	\$392.00	
8456010	\$392.00	\$392.00	
8456016	\$207.00	\$207.00	
7622380	\$207.00		Vacated.
8456018	\$392.00	\$392.00	
8456113	\$21,442.00	\$8,000.00	Reduction gravity to Unlikely and Non-S&S.
7622382	\$138.00		Vacated.
7622383	\$138.00		Vacated.
7622387	\$3,405.00		Vacated.
7622388	\$3,689.00	\$2,500.00	
8456025	\$362.00	\$362.00	
8456117	\$108.00	\$108.00	
Docket Total	\$34,994.00	\$16,223.00	

WEST 2009-820			
8456302	\$687.00	\$687.00	Reduction in negligence to Moderate.
8456304	\$2,678.00	\$1,337.00	Reduction in gravity to 5 persons affected.
Docket Total	\$3,365.00	\$2,024.00	
WEST 2009-1322			
8456919	\$47,716.00	\$4,400.00	Modify to 104(a) High Negligence Citation. Reduction gravity to Unlikely and Non-S&S.
8460325	\$5,645.00	\$5,645.00	
Docket Total	\$53,361.00	\$10,045.00	
Settlement Total	\$99,405.00	\$31,542.00	

I have considered the representations and documentation presented and I conclude that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The motion to approve settlement is **GRANTED**.

IV. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have reviewed the Assessed Violation History Reports, which are not disputed by Twentymile. (Sec'y Ex. 32). Twentymile is a large mine operator, as is Twentymile's parent company, Peabody Energy. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Twentymile's ability to continue in business. The gravity and negligence findings are discussed above.

V. ORDER

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

<u>WEST 2009-1322</u>	<u>30 C.F.R. §</u>	<u>Penalty Amount</u>
8463325	75.333(b)(1)	\$200.00
8463326	75.333(b)(1)	200.00
8463327	75.202(a)	25,000.00
8463330	75.364(d)	25,000.00
8460508	75.363(a)	1,000.00

WEST 2009-241

7622553	75.370(a)(1)	\$200.00
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WEST 2009-580

8456110	75.380(d)(7)(iii)	200.00
7622362	75.370(a)(1)	150.00
7622365	75.370(a)(1)	150.00
7622372	75.1107-16(b)	Vacated

WEST 2009-820

8456301	75.516-2(c)	10.00
8456311	75.516-2(c)	10.00

Total penalty for adjudicated citations/orders: \$52,120.00

GRANT TOTAL DUE: \$83,662.00

For the reasons set forth above, Citation No. 7622372 is **VACATED** and the other citations and orders are **AFFIRMED** or **MODIFIED** as set forth in this decision. Twentymile Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$83,662.00 within 40 days of the date of this decision.⁷

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

⁷ 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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August 18, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2009-318
Petitioner	:	A.C. No. 36-06475-173653
	:	
v.	:	
	:	
HOMER CITY COAL PROCESSING	:	
CORPORATION,	:	Mine: Homer City Coal Cleaning
Respondent	:	Plant

DECISION

Appearances: Joseph L. Gordon, Esq., and Michele Dean, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA for the Secretary of Labor

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

STATEMENT OF THE CASE

This civil penalty proceeding was held pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §802 et seq. (2000), (the “Act”). This matter concerns an alleged violation of the mandatory safety standards 30 C.F.R. §77.204 and 30 C.F.R. §77.1713. Citation No.7049778, a 104(d)(2) violation, and Order No. 7049779 were served on Respondent on November 12, 2008. These alleged violations were both found to be significant and substantial in nature, as well as unwarrantable failures to comply with mandatory safety standards. A hearing was held in Pittsburgh, Pennsylvania on June 2, 2011, and the parties participated fully therein. They later submitted post-hearing briefs.

STIPULATIONS AT HEARING

The parties stipulated to the following facts at hearing:

1. Homer City is an “operator” as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter “the Mine Act”), 30 U.S.C. § 803(d), at the coal preparation plant at which the Citation and Order at issue in this proceeding was issued.

2. Operation of Homer City at the plant at which the Citation and Order were issued in this proceeding are subject to the jurisdiction of the Act.
3. 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 Act.
4. The individual whose signature appears in Block 22 of the Citation and Order at issue in this proceeding was acting in the official capacity and as an authorized representative of the Secretary of Labor when the Citation and Order were issued.
5. True copies of the Citation and Order that are at issue in this proceeding were served on Homer City as required by the Act.
6. Homer City demonstrated good faith in the abatement of the Citation and Order.
7. There was work performed by a contractor to Homer City, Rizzo & Sons Construction, on the 5 ½ floor of the plant that involved beams under the floor and some floor grating near the feeder boxes that are referenced in the Citation and Order. This work was performed between July 26 and August 11, 2008.
8. Payment of the proposed penalties will not affect Homer City's ability to continue in business.

SUMMARY OF THE TESTIMONY

Respondent is a wash plant¹ that cleans and processes coal prior to its burning to produce electricity. Tr. 32-34. In its progression consisting of eight (8) full floors and two (2) half floors, the raw coal enters the plant on the eighth floor and goes through various processes as it travels down to the lower floors. Tr. 32, 33-35, 79. The end result is coal that has had most impurities removed and is uniform in size. Tr. 33-35.

The issue at hearing concerns the 5 ½ Floor, which contains twelve (12) bin sieve feeder boxes that are arranged in two rows of six. Tr. 37. The 5 ½ Floor is not accessible by elevator; rather, it must be accessed by stairways from either the fifth or sixth floor. Tr. 80. Because of this and the low head clearance described below, the 5 ½ Floor receives much more limited traffic than the others. Tr. 38, 79, 161-162. Further, these boxes are the only equipment located on this particular floor. Tr. 164.

The placement of the bin sieve feeder boxes is a checkerboard pattern, proving access to the boxes all the way around. Tr. 38-39, Ex. G1-G6. Due to pipes connected to the distributors

¹ This facility is considered a "wet" plant because it uses large amounts of water during the cleaning process and the facility is hosed down to prevent coal from accumulating in dangerous quantities. Tr. 33.

on the floor above the boxes, head clearance is very low. Tr. 38. Although the boxes themselves are covered and jut up from the floor as much as fifteen (15) inches, railings were also installed around each of them. Tr. 84, 130, 170-171, Ex. R-1B, G1-6. Eight (8) of the twelve (12) railings were found to be unsecured by the inspector. Tr. 37, 45.

Upon finding the unsecured railings, the inspector, Robert Swope (“Swope”) issued a Section 104(d)(1) citation to Respondent alleging a violation of 30 C.F.R. §77.204(a) because, in his opinion, the inadequately secured railings would not protect miners from falling into the open feeder boxes. Ex. G-7. In issuing this citation, he expressed his concern that the loose guardrails created a false sense of security, as reasonable people would assume that they were secured to the floor. Tr. 43. He testified at hearing that a person who grabs the guardrail, believing that it will hold weight, could fall and suffer injuries serious in nature, such as head lacerations or broken bones from falling into the feeder box. Tr. 56-58.

Swope simultaneously issued a Section 104(d)(1) order to Respondent alleging a violation of 30 C.F.R. §77.1713 for conducting an inadequate daily examination. Ex. G-8. During his conversation with then Safety Director Robert Dominick (“Dominick”), Swope learned that the steel flooring had been replaced with steel grating by a third-party contractor and all of the guardrails had been removed in order to accomplish this task. Tr. 63, 198. Ex. J1 - 7. From his conversation with Dominick, Swope also learned that this work had been completed months earlier. Tr. 63, Ex. J1 - 7.

LAW AND REGULATIONS

Thirty C.F.R. §77.204 states that “[o]penings in surface installations through which men or material may fall shall be protected by railings, barriers, covers or other protective devices.”

Likewise, 30 C.F.R. §77.1713 provides:

- (a) At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.
- (b) If any hazardous condition noted during an examination conducted in accordance with paragraph (a) of this section creates an imminent danger, the person conducting such examination shall notify the operator and the operator shall withdraw all persons from the area affected, except those persons referred to in section 104(d) of the Act, until the danger is abated.
- (c) After each examination conducted in accordance with the provisions of paragraph (a) of this section, each certified person who conducted all or any part of the examination required shall enter with ink or indelible pencil in a book approved by the Secretary the date and a report of the condition of the mine or any location of any hazardous condition found to be present at the mine. The book

in which such entries are made shall be kept in an area at the mine designated by the operator to minimize the danger of destruction by fire or other hazard.

(d) All examination reports recorded in accordance with the provisions of paragraph (c) of this section shall include a report of the action taken to abate hazardous conditions and shall be signed or countersigned each day by at least one of the following persons:

- (1) The surface mine foreman;
- (2) The assistant superintendent of the mine;
- (3) The superintendent of the mine; or,
- (4) The person designated by the operator as responsible for health and safety at the mine.

ISSUES

The critical questions at hearing were whether the alleged violations were, first, significant and substantial in nature and, second unwarrantable failures to comply with mandatory safety standards.

DISCUSSION AND CONCLUSION

A violation is significant and substantial “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 Division, National Gypsum Co.*, 3 FMSHRC 822,825 (Apr. 1981). The Commission later clarified that, in order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must show: (1) an underlying violation of a mandatory safety standard; (2) a discrete safety hazard contributed by the violation; (3) a reasonable likelihood that the hazard contributed to will result in injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature (the “Mathies” Test). *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

“Unwarranted failure” suggests more than ordinary negligence. *Emery Mining Corporation*, 9 FMSHRC 1997, 2000 (1987). It is aggravated conduct that is “characterized by such reckless disregard, intentional misconduct, indifference or serious lack of reasonable care.” *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001). Some aggravating factors include: the length of time the violation existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, the obviousness of the violation, involvement of a supervisor in the conduct and the operator’s knowledge of the violation. *Consolidation Coal Co.* 22 FMSHRC 340, 353 (Mar. 2000). All of the relevant facts and circumstances must be considered when determining whether the actor’s conduct is aggravated, or whether the level of negligence should be mitigated. *Id.*

After a careful review of the total record, the Undersigned finds that Respondent’s conduct was not so aggravating in nature so as to constitute an unwarrantable failure. Moreover,

while the record supports a finding of ordinary negligence associated with Respondent's failure to maintain secure railings around the eight (8) feeder boxes in question, the Court does not find that Respondent's violative conduct rises to a significant and substantial level. Indeed, the Undersigned is compelled to note that the Secretary barely carried its burden of proving that violations of 30 C.F.R. §77.204 and 30 C.F.R. §77.1713 had actually occurred.

At hearing, the Secretary maintained that Respondent had violated §77.204 based upon two alternative theories of liability: first, miners might "slip and fall" on the steel grated flooring surrounding the bin feeder boxes or, second, miners might lose their balance grabbing onto unsecured railings and fall through "openings."

As to the "slip and fall" hazard, the Secretary essentially argued that the flooring could become wet or have debris lodged in its openings, causing miners to slip or stumble, further losing their balance upon grabbing onto the loose railings. Within this same theory, the Secretary also argues that a miner could grab hold of the railings, assuming that they would bear weight, and lose his/her balance when the railings could not. This would then cause the miner to slip and fall, possibly causing lacerations or broken bones in the process. Under this theory, the Secretary claims, and Swope testified, that the railings are a danger because they provide a false sense of security to the unwary that approach them. Tr. 43.

Later, however, at hearing the Secretary essentially abandoned this theory of violative conduct, conceding that the unprotected "openings," which were the subjects of the violations/citations at issue were not the walkway grated floor openings but, rather, were the bin feeder boxes themselves and the open spaces along the sides of such.

In any case, this Court finds that the Secretary's slippery walkway theory of liability viz-a-viz §77.204 would be unsupported by applicable law and the facts of this case. The clear and unambiguous language of §77.204 provides that the safety standard is violated when there exist unprotected "openings in surface installations through which a man [...] may fall." The evidence patently establishes that miners could not fall through the grated flooring openings in question. At hearing, shift foreman John Anthony Maggio ("Maggio") testified that an I-beam runs just below the floor grating. Tr. 168. Either I-beams or angle-iron also run below the sluice boxes, enclosing much of the area that is considered "open" around the feeder boxes. Tr. 168-170. Further, considering the actual plant processes taking place on Floor 5 ½ and the actual physical structure of the facility and the bin feeder boxes, no materials falling through the grated floor openings would pose an actual hazard to miners.

Whether using a "Chevron I or II" analysis, it appears improper to interpret §77.204 as applying to slippery floor gratings, and, further given the actual language in the citation, violative of due process to have raised such a theory of liability for the first time at hearing. Even assuming *arguendo*, however, that such a statutory interpretation would pass appellate muster, there was insufficient evidence to establish a hazardous condition based upon the foregoing. At hearing, there was no convincing evidence presented that the floor gratings in question were wet or slippery or had debris lodged within. In fact, Swope testified that he did not recall seeing any accumulations of material on the floor while inspecting the plant. Tr. 91. Respondent's witnesses indicated that, although the facility was a "wet plant," the 5 ½ floor was

dry. Tr. 201-202. Any liquids or debris fell unimpeded through the floor gratings and this material would be small in nature. Tr. 178, 201 There had been no problems with liquids pooling on the walkways or debris accumulating on such. Tr. 90. Nor had there ever been a “slip and fall” accident reported on the 5 ½ floor. Tr. 202.

The Undersigned, however, does accept that the open feeder boxes themselves and the spaces on the sides of such could reasonably be interpreted as “openings [...] through which men or material may fall” so as to invoke §77.204 protections. Although the feeder boxes were at least partially covered, there was a risk, albeit remote, that a miner could fall into an unprotected bin feeder box or catch his foot in the spaces along the sides of the boxes. Tr. 84, 130, 170-171, Ex. R-1B, G1-6.

In light of the foregoing and, *inter alia*, given that Respondent conceded that the railings in question were, in fact, not secured, the Undersigned finds that the first two prongs of *National Gypsum* have been met. However, the Undersigned finds that the Secretary has failed to prove that there was a reasonable likelihood such that the hazard contributed to would result in an injury or a reasonable likelihood that the injury in question would be of a reasonably serious nature.

At hearing, Respondent presented credible testimony that the 5 ½ floor was rarely frequented by miners. Tr. 38, 79, 161-162. There were stairwells and elevators that employees could use to bypass the floor altogether. Tr. 80. Those traveling through 5 ½ could also avoid the center walkway - where the loose railings were actually located - by using perimeter walkways which were more spacious. Tr. 182. Workers only went to the floor to perform occasional maintenance, usually involving leaking pipes. Tr. 175, 185-186.

Debris or liquids falling into the bin feeder boxes and/or spaces along such would not pose a danger to miners. Given the height of the bin feeder boxes, the covers and over-hanging structures as described at hearing, it appears unlikely that a miner could actually fall into a box. Tr. 84, 130, 170-171, Ex. R-1B, G1-6. Even if he did so, he would not fall through such to the next floor. Tr. 134, 173, 201. If he caught his boot in an opening along side the box, any injury sustained would likely be minor in nature.

The undersigned concludes that neither the §77.204 violation in this case nor the §77.1713(a) violation were significance and substantial in nature. It was unlikely that an injury would occur due to the violations. The negligence associated with such was “low” in nature.

In reaching the foregoing conclusions, the undersigned also carefully considered the past written statements and hearing testimony of Robert Dominick. At the time the above citation and order were issued, Dominick was Safety Director of Respondent’s Processing Plant. In a letter to the Commission, dated November 22, 2010, Dominick stated the following:

Dear Sirs:

Homer City Coal Processing Corporation is contesting the high negligence assigned to Citation/Order Nos. 7049778 and 7049779. It is our opinion that the

railing being loose in this location was not the result of any type of high negligence, and that the daily examination of this location was adequately performed.

The railings in question do not serve as a protective barrier around any openings in the floor - they are placed around a steel box that protrudes up through the floor. There is no way any person nor any part of a person's body could go through the flooring or get caught between the steel box and the flooring. If these railings not being secured are a violation of 77.204, they are not the result of high negligence on our part.

The railings are located in an area that is seldom traveled and not a normal walkway due to the amount of low hanging overhead pipes or related feed boxes, which is not a regular occurrence. These railings have been around these boxes in this configuration since the early 1990's. During that time period, the floor was changed from concrete to grating in order to ventilate moisture from the floor below. The railing was replaced by Rizzo & Sons Industrial Services (MSHA Contractor ID #FPL) in July and August 2008. Rizzo employees that worked on this project stated that if the railing had been attached to the grating, they would have reattached them after replacing the floor grating.

It is also the opinion of Homer City Coal Processing that the Foreman on duty that shift did complete an adequate daily examination of the jobsite. He properly inspected the normally used walkway and work area on the 5 ½ floor of the Coal Cleaning Plant, and was satisfied that the non-traveled area with the sliding railings was safe. Between the time Rizzo & Sons Industrial Services replaced the floor grating and the day the citations/orders were written, three Management/Employee Safety Walkdowns were completed (9/5/08, 9/11/08, and 11/5/08) with no mention of any problems in this area.

At hearing, however, Dominick appeared as a witness for the Secretary, indicating that he had left Respondent's employment and was an inspector-trainee for MSHA. Tr. 106. Dominick essentially recanted his assertions in his November 22, 2010 letter to the Commission. He opined that Respondent should not have contested the citations at issue. *Inter alia*, Dominick testified that, if an individual stumbled and fell into one of the feed boxes, he could hit a shin or knee or fall and hit his head. Tr. 124.

Dominick further testified that there was a hazard that existed which should have been "recognized, caught, taken care of and eliminated." Tr. 127. He also opined that the negligence was high because "this hazard was in the plant and we didn't discover it, we didn't know it was there, and we didn't do anything about it." Tr. 128. Finally, Dominick maintained that Respondent had not acted "appropriately" in conducting its workplace examinations "because the condition wasn't found and it wasn't corrected." Tr. 128.

The undersigned found that Respondent essentially impeached² Dominick regarding his past contradictory statements to the Commission. Dominick's explanations for writing and signing a statement he believed not to be true were unpersuasive, compelling the undersigned to give little credence and minimal weight to his testimony. See Tr. 137-140.

The Commission outlined its authority assessing civil penalties in *Douglas R. Rushford Trucking*, stating that "the principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established." 22 FMSHRC 598, 600 (May 2000). While the Secretary's system for points in part 100 of 30 C.F.R. provides a recommended penalty, the ultimate assessment of the penalty is solely within the purview of the Commission. *Id.* Thus, a commission judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). The *de novo* assessment of civil penalties does not require each of the penalty assessment criteria to be given equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

After reviewing all the relevant facts and weighing the §110(c) factors applicable to such and considering the above findings as to gravity and level of negligence associated with the citation and order, the Undersigned concludes that a penalty of \$225.00 for each is warranted.

²Contrary to the Secretary's position, the Undersigned found that said 11/22/2008 letter was clearly a past inconsistent statement which Dominick could be cross-examined about. The record further belies the Secretary's argument that said letter constituted an inadmissible settlement proposal as, *inter alia*, it was sent directly to the Commission and date-stamped. See Tr. 149, Ex. R-3.

ORDER

Having found that the violations were not significant and substantial in nature and that the negligence attributable to the operator was “low,” it is **ORDERED** that Citation No. 7049778 be modified to reflect these changes and Order No. 7049779 be modified to a 104(a) citation that also reflects the same levels of gravity and negligence. It is further **ORDERED** that Respondent pay the Secretary of Labor the sum of \$450.00 within 30 days of the date of this decision.³ Upon receipt of payment, this case is **DISMISSED**.

/s/ John Kent Lewis

John Kent Lewis
Administrative Law Judge

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/kmb

³Payment 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

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

August 22, 2011
CONTEST PROCEEDINGS

LONG BRANCH ENERGY, : Docket No. WEVA 2009-1492-R
Contestant : Citation No. 8086845; 05/04/2009

v. : Docket No. WEVA 2009-1493-R
: Citation No. 8086846; 05/06/2009

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

CIVIL PENALTY PROCEEDINGS

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

Docket No. WEVA 2010-467
A.C. No. 46-08637-204735

Mine: No. 23

v. : Docket No. WEVA 2009-1788
: A.C. No. 46-01537-189869

LONG BRANCH ENERGY, :
Respondent :

Docket No. WEVA 2010-652
A.C. No. 46-01537-207468

Mine: No. 27

Docket No. WEVA 2010-466
A.C. No. 46-01537-204725

Docket No. WEVA 2010-653
A.C. No. 46-04955-207470

Mine: No. 25

Docket No. WEVA 2010-63
A.C. No. 46-08305-195555

Docket No. WEVA 2010-654
A.C. No. 46-08305-207472
Mine: No. 18 Tunnel Mine

ORDER OF DISMISSAL

Appearances: Michele L. P. Dean, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Respondent/Petitioner;

Melissa M. Robinson, Esq., Charleston, West Virginia, for Contestant/Respondent

Before: Judge McCarthy

I. Factual and Procedural Background

The above-captioned dockets are before me on Petitions for Assessment of Civil Penalties filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Long Branch Energy (Long Branch) filed motions to dismiss the civil penalty proceedings based on MSHA's alleged "inexcusable delay" in filing the petitions.

Long Branch timely contested the proposed penalties in the above-captioned dockets pursuant to Commission Rule 26. The Secretary was then required to file petitions for assessment of civil penalties within forty-five days of the receipt of the timely contests under Commission Rule 28. In three dockets, the Secretary filed the petition about 7 ½ months late. In two dockets, the Secretary filed the petition about 8 ½ months late, and in one docket, the Secretary filed the petition about eleven months late. In all seven dockets at issue, the Secretary filed the late petition with a concurrent motion for leave to file out of time.¹ No request for an extension of time was made under Commission Rule 9.

Upon receipt of the Secretary's late-filed petitions, Long Branch timely filed oppositions and motions to dismiss for failure to establish adequate cause. The Secretary opposed the motions to dismiss, claiming adequate cause based on "excusable negligence" due to the large volume of work being handled in MSHA's District 4 office in Mount Hope, West Virginia.²

On June 1, 2011, the parties participated in a conference call to discuss, inter alia, Long Branch's motions to dismiss. The Secretary's counsel, who drafted the Secretary's oppositions in most of the dockets, indicated that he was leaving the Agency the next day and was not prepared to discuss the threshold procedural issue. Accordingly, rather than dismiss these matters outright, as I indicated that I was inclined to do based on the apparent insufficiency of the Secretary's showing of adequate cause in her filings, I noticed this matter for oral argument.

¹ For each docket, the belated filing is summarized in a table attached to this decision.

² Under Commission Rule 10(d), in response to a motion to dismiss, the Secretary is afforded an opportunity to provide a statement in opposition to the motion within eight days of service. 29 C.F.R. § 2700.10(d). Essentially, this statement gives the Secretary a chance to show adequate cause for the delay without the necessity of oral argument on the issue, unless otherwise ordered. Given these procedural protections, there is no further need to order the Secretary to show cause for the untimely filings.

The Notice of Oral Argument limited the issues to whether the Secretary has established adequate cause for the late filings, and if so, whether Long Branch has established actual prejudice from the delay. Limited testimony was permitted on these issues, if necessary.

II. Oral Argument

On June 14, 2011, I presided over oral argument at Commission headquarters. During oral argument, the Secretary's counsel argued that Supreme Court precedent in *Brock v. Pierce County*, 476 U.S. 253 (1986) and *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003), preclude divesting a government agency of jurisdiction for failing to follow a procedural rule. Tr. of Oral Arg. at 10. The Secretary further argued that a procedural deadline can be enforced against a government agency only when Congress has expressly provided a sanction for failure to act in a timely manner. *Id.* at 11. Alternatively, the Secretary proposed that the Commission's balancing test in *Salt Lake Co. Rd. Dep't*, 3 FMSHRC 1714 (July 1981) be abolished. *Id.* at 12. Instead, the Secretary argued that the Commission should require a showing of prejudice by the operator before the Secretary must establish adequate cause for an untimely filing. *Id.* at 15.

On the issue of adequate cause, the Secretary argued that the backlog of contested penalties and lack of clerical personnel to process said backlog should be adequate cause for the delay in filing penalty petitions in a timely manner. *Id.* at 17. Until the backlog is under control, the Secretary would have the Commission ignore the 45-day deadline for filing penalty petitions. *Id.* at 32. The Secretary emphasized that all the cases at bar originated from MSHA District 4, which had a large increase in contested penalties in recent years and lacked the personnel or resources to address the problem. *Id.* at 19-20. The Secretary maintained that 94% of the contested civil penalty cases in District 4 are handled by three Conference Litigation Representatives (CLRs) and one clerical assistant, who have had to deal with a increasing number of contested penalty cases that has grown larger each year. *Id.* at 24 (referencing the affidavit of District 4 CLR Richard Hosch). When asked why the Secretary did not file for an extension of time, the Secretary's counsel argued, without evidentiary support, that the CLRs lacked the time to file such a request. *Id.* at 34. The Secretary further argued that the failure to request an extension of time does not prejudice the operator, who should have known that the citations would be litigated once it contested the violations. *Id.* at 35.

The Secretary conceded, however, that if roles were reversed, and the operator had insufficient personnel or resources to file an answer in a timely manner, the Secretary would insist that the operator to be held to the Commission's filing deadlines. *Id.* at 40. The Secretary further acknowledged that having cases linger for an extended period of time, reduces the efficacy of enforcement efforts because final Commission orders within limited time periods are often necessary to trigger increased penalties and enforcement measures. *Id.* at 28. On the other hand, the Secretary argued that dismissing the instant cases would have a greater detrimental effect on the efficacy of the enforcement efforts since the citations would lose any deterrent effect. *Id.* at 29. Furthermore, the Secretary argued that dismissal would not "spur the Secretary to action" because the tardy filings were not due to any abuse of discretion by the Secretary. *Id.* at 30.

In response to my questions, the Secretary was unable to identify a process in which District 4 could identify cases that had reached the 45-day deadline for filing a petition. *Id.* at 37. The Secretary noted in her rebuttal, however, that MSHA, as a whole, had taken several modest steps to address the backlog of contested penalties. *Id.* at 99. For example, in 2007, MSHA hired additional CLRs and revised the procedures for handling conferences with the operators. *Id.* at 99, 100. The Secretary also noted that MSHA recently (post argument) divided District 4, the largest district for coal operations, into two separate districts, which presumably will allow more resources to be allocated where needed. *Id.* at 99.

In addition to the oral argument presented, the Secretary proffered Secretary Exhibit 1, a Memorandum in Support of Secretary's Motions for Leave to File Petitions Out of Time. The Memorandum attached three declarations from MSHA representatives and supporting Government exhibits. Exhibit 1 is the Declaration of Linda C. Weitershausen, the Deputy Director of the Office of Assessments since 2007. Attached to her Declaration are three Exhibits, A-C. Exhibit A is a spreadsheet listing the assessed and contested violations by district during 2010. Exhibit B contains charts and tables listing the assessed penalties and percentage of contested penalty cases by district between January 2007 and December 2010. Exhibit C is a printout from the Commission's website listing the dockets before the Commission as of April 16, 2011. Exhibit 2 is the Declaration of Richard D. Hosch, a CLR who has served District 4 since 1997. Attached to Hosch's Declaration is Exhibit A, a spreadsheet listing the assessed and contested violations between May 2009 and April 2010. Exhibit 3 is the Declaration of Noah AnStraus, a former backlog attorney for the Office of the Regional Solicitor in the Philadelphia Regional Office.

Upon receipt of Secretary Exhibit 1, I granted Long Branch the opportunity to depose the declarants. On June 30, 2011, the operator deposed CLR Hosch. On July 7, 2011, the operator submitted Respondent's Response to the Petitioner's Memorandum in Support of Motions to Permit Late Filing. Attached to Long Branch's Response were three exhibits. Exhibit A is the transcript of the deposition testimony of Hosch. Exhibit B is a position letter from Bruce Watzman, Senior Vice President, Regulatory Affairs of the National Mining Association (NMA) to Roslyn Fontaine, Acting Director of MSHA's Office of Standards.³ Exhibit C is a copy of Chapter 7 of the Supplemental Appropriations Act of 2010 concerning salaries, expenses and transfer of funds.

During oral argument, counsel for Long Branch argued that the Commission's *Salt Lake* test is binding precedent in this matter and requires that the Secretary first show adequate cause before the operator must show prejudice. *Tr. of Oral Arg.* at 57. The operator argued that it is

³ On July 14, 2011, my office received an e-mail from the Secretary's counsel objecting to the inclusion of Exhibit B because the statements of Mr. Watzman were not under oath or in any way verified. The Secretary asked that I include this objection as part of the record. I consider the Secretary's objection a motion to strike and deny the motion on the grounds that the Exhibit is admissible hearsay under Commission Rule 63 and a matter of public record that can be found on MSHA's website. *See generally MSHA v. Daanen & Janssen, Inc.*, 19 FMSHRC 665, 667 (Apr. 1997).

inane to place the burden on the operator to show prejudice when the Secretary is at fault for the untimely filing. *Id.* at 68.

On the threshold issue of adequate cause, Long Branch argued that the Secretary's excuse for the untimely filings was not adequate cause for the long delays at issue here. *Id.* at 44. At some point, the Secretary must do more than simply state "we're too busy." *Id.* In addition, Long Branch argued that the federal government should be held to the same filing requirements as operators, since unlike most mining operations or law firms, the government often has a larger pool of attorneys, clerks, and other personnel to assist in meeting filing deadlines. *Id.* at 43. Furthermore, Long Branch argued that MSHA should have known that increased enforcement and penalties in recent years would result in higher rates of contested penalties, and MSHA did little to address the backlog, particularly in District 4, where it should have seen the obvious trend in contested penalties. *Id.* at 48, 49.⁴

On the issue of prejudice, the Respondent called its president, Gregory D. Patterson, who gave limited testimony. Patterson testified that he has but one personal assistant to help him quickly resolve a growing number of MSHA citations. *Id.* at 72, 78. Patterson cited the general difficulties with contesting penalties long after the time the citation initially was issued. *Id.* at 88. He testified that mines change dynamically over the course of a year and the initial condition cited has long been remedied by the time a contested penalty comes before the Commission. *Id.* at 85, 88. Additionally, Patterson testified generally that annual miner turnover is about 20% and that miners with relevant knowledge about the cited condition may have left the mine or may no longer be available to testify. *Id.* at 77. Patterson, however, could give no specifics about miners with relevant knowledge of the instant citations until discovery was completed. *Id.* at 90.

III. Disposition & Analysis

The *Salt Lake* Standard

At issue is the belated filing of the Secretary's Petitions for Assessment of Civil Penalty. In the Secretary's Opposition to Respondent's Motion to Dismiss, the Secretary erroneously cites Section 105(a) of the Mine Act and relies on cases such as *Steele Branch Mining*, where the "reasonable time" test was applied to the notification of penalty, not the filing of the petition. *MSHA v. Steele Branch Mining*, 18 FMSHRC 6, 13 (Jan. 1996).⁵

⁴ Counsel for the operator stated that her practice has been flooded with untimely penalty petitions that pay lip service to the backlog as justification for the delayed filings, and that these cases are just the tip of the iceberg in District 4. *Id.* at 46, 50.

⁵ The standards pertaining to a proposed penalty under section 105(a) of the Act and a penalty petition under section 105(d) starkly differ as to their purpose and implementation. A proposed penalty under section 105(a) is submitted to the operator once the process of inspecting or investigating the alleged violation is completed under section 104 and the assessment of monetary penalty is completed under section 110(a). See 30 U.S.C. § 815(a). Such a process
(continued...)

The correct standard for determining the time period for filing a petition for assessment of civil penalty can be found in Section 105(d) of the Mine Act. Section 105(d) states in pertinent part:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of penalty issued under subsection (a) or (b) of this section . . . , *the Secretary shall immediately* advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing.

30 U.S.C. § 815(d) (emphasis added). Further, Commission Rule 28(a) provides that “within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary *shall* file with the Commission a petition for assessment of penalty.” 29 C.F.R. § 2700.28(a) (emphasis added).

The seminal Commission case that sets forth controlling principles that address the statutory language and the Commission’s 45-day rule is *Salt Lake Co. Rd. Dep’t*, 3 FMSHRC 1714 (July 1981), which is binding precedent and guides my decision today. In that case, the Secretary filed its civil penalty proposal – a simple two-page pleading consisting mainly of five short paragraphs – a mere two months late. The late penalty proposal was accompanied by an “instanter motion” to accept the late filing because of lack of clerical personnel and a high volume of cases. The respondent, *Salt Lake County*, filed an answer and motion for summary dismissal because the proposal for penalty was filed late.

In *Salt Lake*, the Commission stated that “Rule [28] implements the meaning of ‘immediately’ in section 105(d)” and that the deadline was an integral part of the Mine Act’s penalty structure. *Id.* at 1715. The Commission further observed that the purpose of section 105(d) is to provide for prompt and efficient enforcement. Additionally, the Commission noted that the requirement of a prompt penalty proposal puts teeth into the Mine Act’s penalty structure and incidentally promotes “fair play” by protecting operators from stale claims. The Commission observed that this focus on effective enforcement rather than on creating a period of limitations is reflected in relevant legislative history cited by the judge. *Id.*

In addition, the Commission stated that while “effectuation of the Mine Act’s substantive scheme, in furtherance of the public interest, is more crucial,” insuring procedural fairness is an

⁵(...continued)

potentially can take an extended period of time and thus Section 105(a) affords a more generous allowance for the Secretary to submit the proposed penalty within a “reasonable time.” *Id. See generally Sec’y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261-62 (D.C. Cir. 2005) (examining the “reasonable time” standard as it applies to the untimeliness of the Secretary to submit the proposed penalty). As explained herein, the penalty petition, by contrast, is a relatively simple boilerplate document to be “immediately” filed, i.e., within 45 days under Commission Rule 9, after the difficult tasks of investigating the mine and assessing the penalties are completed.

important concern under the Mine Act. *Id.* at 1716. Thus, the Commission in *Salt Lake* established the “adequate cause” test to strike a proper balance between procedural fairness to the operators and the “severe impact of dismissal of the penalty proposed upon the substantive scheme of the statute and, hence, the public interest itself.” *Id.* (citing *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380, 1384 (8th Cir 1980)). By requiring the Secretary to show adequate cause for the untimely filing of a petition without prior permission to file late, the Commission sought to guard against cases of abuse and create a workable standard that was analogous to the one to which operators were held. *Id.* The Commission held as follows:

In order to help strike a proper balance and to insure that the Secretary does not ignore section 105(d)’s injunction to act “immediately,” we hold that if the Secretary does seek permission to file late, [s]he must predicate his request on adequate cause. *Cf. Valley Camp Coal Co.*, 1 FMSHRC 791, 792 (1979) (excusing late filing of an operator’s answer for “adequate cause”). Such a requirement will guard against cases of abuse and also comports with analogous leeway extended to private litigants before the Commission. *Valley Camp Coal Co.*, *supra*. Nevertheless, cases may arise where procedural justice dictates dismissal.

3 FMSHRC at 1716.

Although the Commission in *Salt Lake* ultimately denied the operator’s motion to dismiss, the Commission recognized that a high case load and a lack of clerical personnel only minimally met the requirement for establishing adequate cause where the petition was filed two months late and warned that “an extraordinarily high caseload and lack of clerical personnel, might be deemed improper excuse for filing a simple, two page pleading *two months late*.” *Id.* at 1717 (emphasis added). *See also MSHA v. Phelps Dodge Morenci, Inc.*, 1993 WL 395589 FMSHRC (June 1993) (Chief ALJ Merlin). Furthermore, the Commission made clear that it would not tolerate the continued disregard for filing deadlines by admonishing the Secretary to file a request for an extension of time in future cases. More specifically, the Commission observed that “[t]he use of an instant motion could become temptation to abuse and, absent extraordinary circumstances, the Secretary is also admonished to proceed by timely extension motion when extra time is legitimately needed.” *Salt Lake*, *supra*, 3 FMSHRC at 1717.

Brock and Progeny and 28 U.S.C. § 2462 are Inapposite

First, I will briefly address why *Brock* and progeny are inapposite to the cases at bar. Then, I will address why 28 U.S.C. § 2462 is inapplicable. Based on this discussion, I conclude that *Brock* and progeny do not overturn Commission precedent and, therefore, *Salt Lake* provides the appropriate balancing test for disposition of this matter.

As noted above, the Secretary argues that the Supreme Court’s decisions in *Brock* and progeny preclude the Commission from imposing any procedural deadline on the Secretary where Congress did not provide an explicit sanction of dismissal for untimely action by the Secretary. Mem. in Support of Secretary’s Mot. at 1-3. In *Brock*, a civil case, the Court found

that when the Secretary of Labor missed a deadline for making a final determination as to misuse of federal grant funds, the Secretary was not precluded from action to recover the funds after the statutorily imposed 120-day deadline. *Brock, supra*, 476 U.S. at 253. The Secretary argues that *Brock* is analogous to the present cases and, as a result, the Commission is powerless to sanction the Secretary for untimeliness.

Since *Brock*, the Supreme Court has issued several other decisions expanding *Brock*'s interpretation of time-related directives. In the criminal context, *United States v. Montalvo-Murillo* involved the application of a deadline in the Bail Reform Act of 1984, which required that a detention hearing be held "immediately" upon the first court appearance of a criminal detainee. 495 U.S. 711, 714 (1990). Despite a small delay of but a few days in excess of what the Bail Reform Act allowed, the Supreme Court held that the failure to comply with the Act's prompt hearing provision did not require the release of a person who should otherwise be detained where failure to meet the deadline did not subvert the Act's procedural scheme and the brief delay did not appear to be caused by either party. *Id.* at 711, 712, 721.

The Secretary also relies on *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003). In *Barnhart*, the Court held the Coal Industry Retiree Health Benefit Act of 1992's requirement that the Commissioner of Social Security "shall" assign coal industry retirees to companies responsible for funding their benefits before a designated date did not preclude the Commissioner from acting after the prescribed date. *Id.* at 159-63.⁶

The Supreme Court's more recent effort to determine the consequences of a missed deadline where the statute does not provide for one is *Dolan v. United States*, ___ U.S. ___, 130 S. Ct. 2533, 2539-40 (2010). *Dolan* was a criminal case in which the 5-4 majority held that a sentencing court, which missed the 90-day deadline to order restitution, retained the power to do so, at least where the court made clear prior to the deadline's expiration, that it would do so, thus leaving only the amount of restitution at issue. *Dolan* expanded upon *Brock* by dividing procedural deadlines into three categories.

The first category is a jurisdictional deadline, an absolute and unalterable prohibition that prevents a court from permitting or taking action after the deadline is passed by stripping the court of its subject-matter jurisdiction. *See Dolan, supra*, 130 S. Ct. at 2538 (citing, *inter alia*, *John R. Sand & Gravel Co., v. U.S.*, 552 U.S. 130-133-34 (2008)). Jurisdictional deadlines must be founded upon clear legislative intent to deprive a tribunal of adjudicatory authority upon the expiration of the deadline. *Id.*

The second category is a claims processing rule that does "not limit a court's jurisdiction but rather regulate[s] the timing of motions or claims brought before the court." *See Dolan, supra*, 130 S. Ct. at 2538. Unlike a jurisdictional deadline, the protection of a claims processing

⁶ Concededly, a statute's use of the mandatory "shall" has not always led the Supreme Court to interpret the statute to bar judges of other public officials from taking the action contemplated by the missed statutory deadline. *See Dolan v. United States*, ___ U.S. ___ (2010), 130 S. Ct. 2533, 2539-40 (2010); *Brock v. Pierce County*, 476 U.S. 253, 266 (1986). *But see Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 184-85 (2003) (Justice Thomas dissenting).

deadline may be forfeited where a party fails to object to the tardy party's untimeliness. *Id.*, citing *Kontrick v. Ryan*, 540 U.S. 443, 454-56 (2004) (60-day bankruptcy rule deadline for creditor's objection to debtor's discharge); *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (*per curiam*) (7-day criminal rule deadline for filing motion for a new trial)..

The third category, under which *Brock*, *Montalvo-Murillo*, and *Barnett* fall, "seeks speed by creating a time-related directive that is *legally enforceable* but does not deprive a judge or public official of the power to take the action to which the deadline applies if the deadline is missed." *Dolan*, *supra*, 130 S. Ct. at 2538 (emphasis added) (citing *United States v. Montalvo-Murillo*, *supra*, 495 U.S. at 722 (missed deadline for holding bail detention hearing does not require judge to release defendant)); *Brock*, *supra*, 476 U.S. at 266 (missed deadline for making final determination as to misuse of federal grant funds does not prevent later recovery of funds); *Barnhart*, *supra*, 537 U.S. at 171-72 (missed deadline for assigning industry retiree benefits does not prevent later award of benefits). Time-related directive deadlines are primarily used to spur a court or other public official to action by a certain time, but do not normally divest the public official of the power to act if the deadline is not met. *Brock*, *supra*, 476 U.S. at 265.

In determining which category a deadline falls, the Supreme Court has looked to the language, context, and purpose of the statute and the public interest that the statute seeks to uphold. *Dolan*, *supra*, 130 S. Ct. at 2539, 2540. In *Salt Lake*, the Commission did just that. The Commission considered Congressional intent and the public interests at stake. The Commission recognized that the "Secretary is not free to ignore the time constraints in Rule [28] for any mere caprice, as that would frustrate the enforcement purposes of section 105(d) and, in some cases, deny fair play to operators." 3 FMSHRC at 1716. Rather, Rule 28 is a "procedural rule designed to give specific and concrete form to section 105(d)'s injunction for 'immediate' action in order to effectuate the Mine Act's penalty system." *Id.* at 1717.

The Commission's rules and MSHA's own regulations are frustrated when petitions are not timely filed. For example, when determining the existence of a pattern of violations under 30 CFR §104.3, MSHA only examines repeated violations that have become final orders of the Commission during the last twelve months. MINE SAFETY & HEALTH ADMIN., PATTERN OF VIOLATIONS SCREENING CRITERIA - 2010, <http://www.msha.gov/POV/POVScreeningCriteria2010.pdf>. Similarly, the way MSHA assesses penalties is disrupted when cases are not resolved promptly. In determining penalties, MSHA only considers violations that have "been paid or finally adjudicated, or have become final orders" during the preceding fifteen months. 30 C.F.R. § 100.3(c). Thus, if the Secretary were given numerous months beyond the 45-day deadline or up to five years to file a petition as suggested by the Secretary, the final order of the Commission could be so removed from the date the citation was issued, that it would become meaningless in establishing a pattern of violations.

The public interest at issue further distinguishes the present cases from *Brock* and progeny. Unlike preventing the Secretary of Labor from retrieving misused government funds as in *Brock*, requiring that a dangerous arrestee for drug trafficking offense be set free as in *United States v. Montalvo-Murillo*, depriving miners of benefits as in *Barnhart*, or depriving an assault victim of restitution in *Dolan*, the harm to the public interest if the cases at bar were dismissed for having been untimely filed, while important, appears to be less severe because the cited

conditions must and have already been abated within a reasonable time after the citation was issued. 30 U.S.C. § 814(a). Put differently, miners are no longer at risk by the time the citations are contested. Rather, the enforcement of the penalties primarily promotes the welfare of the miners by serving as a deterrent against future violations and this deterrent effect must be balanced against the recognized public interest in expeditiously resolving contested penalties before the Commission. Both Congress and the Commission have made it abundantly clear that the “expeditious resolution of penalty cases” also serves an important public interest. *MSHA v. Buck Creek Coal*, 17 FMSHRC 500, 503 (April 1995); *MSHA v. Scotia Coal Mining Co.*, 2 FMSHRC 633, 635 (March 1980) (stating that “Congress has forcefully expressed its desire for the expeditious determination of whether penalties are warranted.”)

It is clear from a reading of the text of the Mine Act, that Congress did not intend the term “immediately” in section 105(d) to be a jurisdictional rule nor did Congress expressly provide that a federal rule could restrict the Commission’s subject matter jurisdiction. Such a view is consistent with Commission precedent holding that the deadline for petition filing is not to be construed as jurisdictional, a statute of limitations, or a “procedural strait jacket” requiring strict compliance. *See Salt Lake, supra*, 3 FMSHRC at 1716. Additionally, as detailed above, the deadline exists in a substantially different context than does *Brock* and its progeny. The deadlines in *Brock*, *Montalvo-Murillo*, *Barnhart*, and *Dolan* are time-related directives intended to give guidance to an official or a court to perform a task by a certain time. They are not intended, like the deadline in the present cases, to serve as a procedural limitation for parties in an adjudicatory process. Given this fact, and Rule 28’s importance to the overall legislative and regulatory scheme and the mitigated impact on the public interests involved, I find *Brock* and its progeny inapposite to the cases at bar. Thus, in my view, Rule 28’s deadline for the Secretary to file her penalty petition is most accurately classified as a claims processing rule, adopted by the Commission to aid in the orderly transaction of its business.⁷ As such, the decision to relax the deadline appears to lie within the Commission’s discretion. *See, e.g., Bowles v. Russell*, 551 U.S. 205, 212 (2007) (citing *Schacht v. United States*, 398 U.S. 58, 64 (1970)).

Finally, I conclude that the statute of limitations set forth in 28 U.S.C. § 2462 is not applicable to the current proceedings.⁸ The express language of 28 U.S.C. § 2462 provides a

⁷ Even if the 45-day rule is more appropriately classified as a time-related directive like the rule in *Brock*, the Commission still retains the right to review the untimely filing taking into consideration equitable considerations such as the reasons for the delay, the parties responsible for the delay, and the potential harm to the operator’s case. *Dolan, supra*, 130 S.Ct. 2533, 2542. As the Supreme Court has not yet spoken on how such factors apply, I follow the Commission’s *Salt Lake* balancing approach, which is not necessarily inconsistent with *Dolan*.

⁸ TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE, PART VI – PARTICULAR PROCEEDINGS, CHAPTER 163 – FINES, PENALTIES AND FORFEITURES, Sec. 2462, provides as follows:

Time for commencing proceedings – Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture,
(continued...)

five-year time limit for commencing an action, suit or proceeding for the enforcement of a civil penalty, but contains an exception when Congress has provided otherwise. That exception is applicable here. The deadline for the Secretary to file a petition for assessment of civil penalty was provided by Congress in Section 105(d) of the Mine Act, which is implemented by the Commission's 45-day deadline in Rule 28(a). *See Salt Lake, supra*, 3 FMSHRC at 1715. Certainly, "immediately" cannot mean five years later.

Although the D.C. Circuit has found 28 U.S.C. § 2462 to be applicable to administrative proceedings that review an assessed penalty, it did so only after finding no controlling act of Congress that created a deadline to act. *3M Co. v. Browner*, 17 F.3d 1453, 1455 (D.C. Cir.1994). Thus, in *Browner*, the EPA attempted to initiate an administrative proceeding seeking the enforcement of a civil penalty over two years after the civil penalty was issued. *Id.* Since the controlling legislation, the Toxic Substances Control Act (TSCA) contained "no provision limiting the time within which the EPA Administrator must initiate the administrative action," the D. C. Circuit found that the 5-year statute of limitations in 28 U.S.C. § 2462 should be applied. *Id.* at 1455, 1462. In other words, when Congress is silent on the imposition of a time restraint for commencement of a proceeding for enforcement of a civil penalty, the 5-year statute of limitations may be invoked. *Id.* at 1459, n.10 (citing *Mullikin v. United States*, 952 F.2d 920 (1991)). By contrast, 28 U.S.C. § 2462 has no applicability to this matter because the deadline for the Secretary to file her petition is provided in Section 105(d) of the Mine Act, which is implemented by the 45-day requirement in Rule 28(a). *See Salt Lake, supra*, 3 FMSHRC at 1715. Accordingly, I conclude that the general catchall provision in Section 2462 is not intended to supercede Section 105(d) of the Mine Act or Commission Rule 28.

For the foregoing reasons, I reject the Secretary's arguments and apply the long standing "adequate cause" test set forth in *Salt Lake* and progeny to the instant matter.

Application of the Commission's Adequate Cause Test

The Commission has held that in order to survive a motion to dismiss an untimely petition, the Secretary must first establish adequate cause for the late filing. If adequate cause is not established, the case may be dismissed and the issue of prejudice need not be decided. Only after adequate cause is established does the Commission then examine whether the delay has been prejudicial to the operator. *MSHA v. Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089, 2093 (Oct. 13, 1993), *aff'd* 57 F. 3rd 982 (10 Cir. 1995), citing *Salt Lake County*, 3 FMSHRC 1714 (July 28, 1981) and *MSHA v. Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 26, 1982).

⁸(...continued)

pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

(June 25, 1948, ch. 646, 62 Stat. 974.)

Concededly, the Commission has permitted the filing of untimely petitions in a number of cases based on factors such as the Secretary's extraordinarily high caseload during particular periods of time, lack of clerical personnel, or confusion over filing deadlines because of amended standards. *See, e.g., Salt Lake*, 3 FMSHRC at 1714; *MSHA v. Lone Mountain Processing Inc.*, 17 FMSHRC 839 (May 31, 1995). In recent years, some Commission judges have been accommodating when parties have filed out of time due to the Secretary's extraordinarily high caseload. *See MSHA v. Harvest-Time Coal, Inc.*, Docket No. WEVA 2009-293 (Sept. 24, 2010); *MSHA v. Harvest-Time Coal, Inc.*, Docket No. WEVA 2009-1522 (Apr. 4, 2010); *MSHA v. Long Branch Energy*, Docket No. 2009-841 (Nov. 9, 2010). However, a rule of leniency is not without bounds and an increase in the Secretary's workload is not always adequate cause when the delay is significant. *MSHA v. Phelps Dodge Morenci, Inc.*, 1993 WL 395589, *3 (June 1993); *MSHA v. Hecla Mining Co.*, 1993 WL 395630, *2 (June 1993). For example, in *Phelps Dodge Morenci*, then Chief Judge Merlin dismissed a case where the Secretary filed the penalty petition five months late. *Id.* Judge Merlin noted that the Secretary's caseload would continue to grow as a result of changes to the penalty structure and regulations and that excusing a petition filed so late would undermine the deadline as long as the trend continued. *Id.*

Furthermore, it is often overlooked, but particularly noteworthy, that the Congressional drafters of the Mine Act, while recognizing the need to accept untimely filings in some circumstances, stated that such actions should be "rare." S. Rep. 95-181, 95th Cong., 1st Sess., 14 (1977) Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978) (addressing the late filing of proposed assessments). In recent years, the Secretary's untimely filings have become commonplace, not rare, and I am not inclined to assume good cause based on a generic increase in workload or the Secretary's inability to provide adequate personnel, particularly where MSHA should have been aware of a particular problem and did little to correct it.

In the present case, the Secretary contends that the increase in contested penalty assessments and a lack of clerical personnel to process them is adequate cause for an average delay of about 267 days in filing the petitions for assessment of civil penalties. In my view, these general excuses fall short of what is required to show adequate cause. The Commission has required that for long delays in filing, "the reasons [for the delay] need to be more unique and special to the particular case, e.g., distraction from investigation of a major mine accident or loss of staff to national emergency." *Cactus Canyon of Texas, Inc.*, 25 FMSHRC 164, 169 (Mar. 3, 2003) (ALJ Schroeder).⁹ The Secretary's responses contain only general statements about the nature of the backlog, high caseload, and lack of personnel, which allegedly caused the untimeliness of the petitions. The specific circumstances affecting the present cases are not addressed. If such a vague and general explanation was allowed to establish adequate cause then the Commission would be forced to accept nearly every late petition. The Commission's

⁹ Judge Schroeder continued by stating that "press of other work, inadequate clerical assistance and personal hardships" would only provide adequate cause for short delays assuming "good faith on the part of government agency management to reallocate people to cover the pending work load as quickly as possible." *Cactus Canyon*, 25 FMSHRC at 169.

properly promulgated filing deadlines and the Congressional desire for expeditious determination of civil penalty petitions would be rendered meaningless.

While the Secretary suggests that the delay in filing the penalty petitions was due to “excusable neglect,” the facts indicate that this legal standard, assuming it is applicable, has not been met here.¹⁰ As more fully discussed below, Hosch’s deposition strongly suggests that the repeated late petition filings in District 4 resulted from continued inattention to filing deadlines and the absence of any pro-active steps toward solution. Indeed, in my view, the record indicates that the delay in filing petitions in these dockets was more akin to “inexcusable neglect.”¹¹

In *Pioneer Investment Services Company v. Brunswick Associates Limited*, 507 U.S. 380, 395 (1993), the Supreme Court resolved a conflict in the circuits over the meaning of “excusable neglect” under various federal rules and held that an attorney’s inadvertent failure to file a proof of claim by the bar date can constitute “excusable neglect” with the meaning of Bankruptcy Rule 9006(b)(1). In the absence of Congressional guidance, the Court concluded that the determination of whether a party’s neglect is excusable is an equitable one, taking account of all relevant circumstances surrounding the party’s omission. *Id.* at 395. These include the danger of prejudice to the other party, the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the tardy party, and whether the tardy party acted in good faith. *Id.*

Even were I to apply these factors here, instead of the *Salt Lake* balancing test, I would reach the same result dismissing the late-filed petitions. First, Long Branch has raised a “danger of prejudice” due to the Secretary’s untimely filings.¹² Second, the length of delay extends

¹⁰ Excusable neglect is defined as “[a] failure – which the law will excuse – to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) not because of the party’s own carelessness, inattention, or willful disregard of the court’s process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care or vigilance of the party’s counsel or on a promise made by an adverse party.” BLACK’S LAW DICTIONARY 1133 (9th ed. 2004).

¹¹ Inexcusable neglect is defined as “[u]njustifiable neglect; neglect that implies more than unintentional inadvertence. A finding of inexcusable neglect in, for example, failing to file an answer to a complaint will prevent the setting aside of a default judgment.” BLACK’S LAW DICTIONARY 1133 (9th ed. 2004).

¹² Long Branch contends that the changing mine environment and high turnover of employees will make collecting evidence difficult when the litigation is far removed from the time the citation is issued. Additionally, Long Branch argues that the delay often necessitates the litigation of multiple dockets at the same time. *Id.* Long Branch claims that if the petitions were filed on time, the cases likely would be litigated separately instead of grouped together with other late filed petitions involving the same operator. *Id.* at 17. In Long Branch’s view, a large grouping of dockets tends to increase the legal costs to operators and requires more personnel to
(continued...)

significantly beyond the 45-day deadline and, as explained above, has a potential deleterious effect on prompt and expeditious resolution of civil penalty petitions, which hampers the deterrent value of heightened enforcement efforts and imposition of more severe penalties. Moreover, until the petition is filed, the adjudicatory process languishes and the potential for the backlog to grow increases at each level of review. Third, the reason for the delay was within the reasonable control of MSHA District 4 and results from a failure to recognize and deal with an obvious and growing problem and to effectively allocate resources to resolve that problem. In these circumstances, any good faith of the Secretary is discounted.

It is important to keep in mind that the untimely petitions filed by the Secretary were relatively simple boilerplate documents. By the time the operator contested the penalties, MSHA had already completed the more difficult tasks of investigating the mine and assessing the penalties. Essentially, all the Secretary needed to do to comply with Rule 28(a) was to fill in a few blanks on a template and file the petition with the Commission, a task that could easily be automated or done by any one of the number of secretarial staff or CLRs in the District 4 office. Instead, CLR Hosch stated that the task of drafting penalty petitions for the entire district primarily fell on the shoulders of one secretary. Respt's Ex. A at 31-32. There appears to have been little oversight of the Secretary's filings and no procedures that would alert CLRs of neglected dockets. District 4 does not keep detailed time sheets or work logs that would show the time taken to prepare each petition. *Id.* at 5-6. Additionally, there was no tickler system in place to remind the CLRs in District 4 of impending deadlines, nor did CLRs receive weekly or even monthly reports of upcoming deadlines. *Id.* at 7. When CLR Hosch appealed to District managers for additional assistance, his appeals were ignored despite the influx of funds in the Supplemental Appropriation and the existence of other qualified secretarial staff in the District 4 office. *Id.* at 20, 32.

Moreover, if the Secretary was not able to file certain petitions on time, Commission Procedural Rule 9 provides that a motion for extension of time may be granted for good cause shown. 29 C.F.R. § 2700.9(a). I take administrative notice of the fact that back in March 2009, well over a year before the instant petitions were due or received, CLRs were instructed by MSHA administrators always to file a 90-day extension of time request once a timely penalty contest was received. Mine operators, miners, and independent contractors also were made aware that requests for extension of time would occur as a matter of course. See Kevin Stricklin & Neal Merrifield, MSHA, Program Information Bulletin No. P09-05 (March 27, 2009), available at <http://www.msha.gov/regs/complian/PIB/2009/pib09-05.asp>. In the dockets before me, however, the Secretary has routinely failed to avail herself of Commission Rule 9 or the Commission's admonition in *Salt Lake* "to proceed by timely extension motion when additional time is legitimately needed" (3 FMSHRC at 1717), instead opting to simply attach a motion to accept late filing with the untimely petitions.

Furthermore, the cases relied on by the Secretary to establish adequate cause can be distinguished from the current case, or involve relatively insignificant, short delays. For

¹²(...continued)

be absent from work during discovery and litigation, thus impinging on mine operations. *Id.*

example, in *Salt Lake*, the delay was less than two months. 3 FMSHRC at 1714. In *Rhone-Poulenc of Wyoming Co.*, the delay was only eleven days. 15 FMSHRC at 2094, *aff'd* 57 F. 3rd 982 (10 Cir. 1995). In *Medical Bow*, the delay was fifteen days. 4 FMSHRC at 883. While the Commission allowed delays based on the Secretary's high caseload in *Salt Lake* and *Rhone-Poulenc*, the caseload was "unusually high" over a fixed period of time. 3 FMSHRC at 1714; 15 FMSHRC at 2094, *aff'd* 57 F. 3rd 982 (10 Cir. 1995). As the Secretary acknowledged, the current high caseload is neither unusual nor an outlier. Rather, it is part of a growing trend in contested cases that has been observed over the course of several years beginning way back in 2007 in District 4. *See* Secretary's Ex. A.

The Secretary would have the Commission believe that MSHA has been caught off guard by a sudden and unpredictable influx of contested citations, and therefore MSHA has been unable to file penalty petitions within 45 days of the operator's contest. However, according to the Secretary's own figures, the increase in contested penalties is a long-established trend that began in 2007, years before the instant citations were issued. To suggest that the District 4 office did not see or expect an increase in contested penalties is simply beyond reasonable belief. It has been long known and common sense dictates that heightened enforcement and increases in the penalty structure would cause operators to contest more citations. As noted, as early as 1993, then Chief Judge Merlin warned the Secretary of this inevitable result. *Phelps Dodge Morenci, Inc.*, 1993 WL 395589, *3. When the total penalties nearly doubled in late 2007, there was a natural increase in the percentage of contested citations.¹³

The Secretary attempts to obscure this obvious trend by citing certain statistics and placing the blame on operators for filing increased contests.¹⁴ Absent evidence of a bad-faith effort by operators to overwhelm MSHA with frivolously contested citations, however, the higher rate of contested penalties has little practical import on the adequate cause analysis. Operators have the statutory right to contest penalties they believe were issued in error and may have reason to think that they are justified in contesting a significant percentage of cases at the current rate.¹⁵

¹³ In 2007, the percent of contested penalties was 15% and the total penalties assessed were equal to \$74,457,111. In 2008, the percent of contested penalties jumped to 23.7% and the total penalties assessed had almost doubled to \$134,501,287. Since 2008, the percentage of contested penalties and total penalties assessed has increased further and remained at elevated levels. *See* Secretary's Ex. 1-B.

¹⁴ CLR Hosch cites a sudden influx of 1,857 contested cases from May through June 2009, and 4,750 contested cases from August 2009 through February 2010, the months during which the instant petitions were eventually filed. While the contrast in numbers would initially indicate that the aggregate number of contested cases greatly increased, upon closer review, the two-month (May through June 2009) versus seventh-month (August 2009 through February 2010) comparisons are not comparable, and the increase in contested cases was less than 10% per month during these periods. Secretary's Ex. 2.

¹⁵ Long Branch provides evidence that of the "significant and substantial" (S&S)
(continued...)

Finally, even after the change in the penalty structure went into effect in 2006, the Secretary has failed to show that any significant effort was made in District 4 to ensure that petitions were filed timely with the Commission. The Secretary cannot continue to assert that the increase in workload justifies her failure to process petitions when MSHA did not make timely changes to personnel or administrative policy in an effort to alleviate the obvious problem. According to CLR Hosch's deposition, District 4 has only one secretary processing penalty petitions. Respt's Ex. A at 17. District 4 has three CLRs and more than fifteen additional secretarial staff, who arguably could have done more to contribute to the timely filing of penalty petitions, and MSHA declined to grant Hosch's unspecified requests for additional help. *Id.* at 32. The day before oral argument in this matter MSHA formally announced that it was taking significant action to address the apparent inefficiency by splitting District 4 in two districts and allocating additional personnel and resources. *See*, Press Release, MSHA, MSHA's Newly Formed Coal District 12 Begins Operations (June 14, 2011) (available at <http://www.msha.gov/media/press/2011/nr110614.asp>). While the creation of a new district is a step in the right direction, the recognition of the petition backlog in District 4 comes far too late.

The Commission has routinely denied motions to reopen when the operator fails to give adequate reason for its failure to timely contest citations. *See, e.g., MSHA v. XMV, Inc.*, 31 FMSHRC 523 (May 11, 2009), *MSHA v. Premier Chemical, LLC*, 31 FMSHRC 516 (May 6, 2009); *MSHA v. Fisher Sand & Gravel Co.*, 31 FMSHRC 513 (May 6, 2009). Despite the fact that *Salt Lake's* adequate cause test was an attempt by the Commission to comport with the analogous leeway extended to private litigants (see *Salt Lake*, 3 FMSHRC at 1716), the Secretary made clear in her oral argument that when an operator fails to contest citations in a timely manner because it is overwhelmed by the workload, the Secretary would not accept the operator's excuse as adequate cause. Tr. of Oral Arg. at 40. Operators too are constrained by budgetary and personnel issues and it is disingenuous to suggest that these problems are unique to government. In the interest of procedural fairness, I see no reason why the same adequate cause standard should be inapplicable to the Secretary where she fails to show specific cause for failing to timely file a petition.

The Secretary also relies on a series of unpublished cases where Commission ALJs have accepted petitions filed very late. *See MSHA v. Long Branch Energy*, Docket No. 2009-841 (Nov. 9, 2010) (accepting petition filed 427 days late); *MSHA v. Harvest-Time Coal, Inc.*, Docket No. WEVA 2009-293 (Sept. 24, 2010) (accepting petition filed 323 days late); *MSHA v. Harvest-Time Coal, Inc.*, Docket No. WEVA 2009-1522 (Apr. 4, 2010) (accepting petition filed 151 days late); *MSHA v. Brody Mining*, Docket No. 2009-1445 (June 3, 2009) (accepting petition filed 141 days late). These cases rely on similar rationale to permit the late filing, but provide little guidance as to the facts that justify the adequate cause analysis under the *Salt Lake* framework.

¹⁵(...continued)

violations contested during the fiscal years 2009 and 2010, almost 20% were later vacated or had the S&S designation removed. Similarly, of the 104(d) citations and orders litigated during this same period, almost 33% were vacated or modified to a 104(a) citation. Operator's Ex. B at 3.

While the decisions of other judges are not binding, I am inclined to agree with the primary rationale that these cases rely upon. For example, I recognize that the 45-day filing requirement may be unrealistic given the increased number of contested citations and the large backlog. *See, e.g., MSHA v. Solar Sources, Inc.*, 31 FMSHRC 729, 730 (June 30, 2009). Similarly, I agree that neither the term “immediately” contained in Section 105(d) nor the 45-day procedural rule should be construed as a “procedural strait jacket,” particularly where adequate cause is shown based on the specific facts at issue. *Salt Lake*, 3 FMSHRC at 1716.

On the other hand, allowing petitions to be filed between 7 ½ and 11 ½ months late where specific adequate cause has not been shown is less akin to a procedural strait jacket and more akin to allowing the Secretary *carte blanche* to ignore the prescribed filing deadlines. As noted, based on the facts disclosed in the current record, the excuses offered by District 4 in this case are more akin to inexcusable neglect than adequate cause.¹⁶ And, while the 45-day time limit may be unrealistic, the Secretary has not asked the Commission to change its rule. Nor has the Secretary shown specific facts establishing that District 4’s overall heavy workload as a result of increased contests is adequate cause for failing to timely file the instant petitions, particularly where MSHA has had ample time since 2007 and 2008 to make changes in personnel and policy to adapt to the obvious increase in workload.

In sum, under extant Commission precedent, the Secretary must establish adequate cause for the delay in filing, apart from any consideration of whether the operator was prejudiced by the delay. *Salt Lake*, 3 FMSHRC at 1716; *Rhone-Poulenc*, 15 FMSHRC at 2093, *aff’d* 57 F. 3rd 982 (10 Cir. 1995).¹⁷ In these cases, the Secretary has done nothing more than file a form *instanter* motion concurrently with the untimely petitions, which fails to address the specific basis justifying the delay in each individual docket. The Secretary’s approach apparently presumes that the Commission will not scrutinize the reasons for and the extent of the delay, but will instead summarily grant the Secretary’s motion based on the generic backlog, increase in contest rates, and failure to allocate resources. In my view, which may not be the popular view,

¹⁶ I make no finding on the numerous other dockets from District 4, which are not pending before me and which may or may not be subject to the same infirmities. *See supra* note 4.

¹⁷ Although I need not reach the issue of actual prejudice under the *Salt Lake* and *Rhone-Poulenc* analysis, I have noted above that Long Branch has raised a “danger of prejudice” due to the Secretary’s untimely filings, and those filings are prejudicial to the interests of efficient adjudicatory administration. *Cf. Pioneer Investment Services, supra* 507 U.S. at 395, 398; *see supra* note 12.

Salt Lake provides otherwise.¹⁸ Since the Secretary has failed to demonstrate adequate cause for the untimely petitions under the *Salt Lake* balancing test, these cases are dismissed.

In light of the foregoing, the Respondent's Motions to Dismiss are hereby GRANTED and the Petitions for Assessment of Civil Penalties are DISMISSED.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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/tjr

¹⁸ While dismissal is a harsh outcome and a decision that I do not come to lightly, extant procedural rules and Commission precedent provide little room to forge a middle road. Over thirty years ago, the Commission in *Salt Lake* attempted to curb the Secretary's untimeliness with strongly written admonishments. Apparently, those warnings fell on deaf ears as the problem of untimely petitions has only grown worse over the years, and has reached a crescendo. In light of this history, it is unclear how to spur the Secretary to more timely action. In my view, procedural justice dictates dismissal here. *Salt Lake, supra*, 3 FMSHRC at 1716.

Appendix

Docket No.	Citations Issued	Proposed Assessment Received	Contested by Operator	Petition Due	Petition Received
WEVA 2010-467	Oct-09	December 12, 2009	January 5, 2010	February 19, 2010	November 5, 2010
WEVA 2009-1788	Mar-09 & Apr-09	July 9, 2009	August 11, 2009	September 25, 2009	July 6, 2010
WEVA 2010-63	Jul-09	September 10, 2009	October 9, 2009	November 23, 2009	November 8, 2010
WEVA 2010-652	Nov-09	January 7, 2010	February 4, 2010	March 21, 2010	November 5, 2010
WEVA 2010-653	Nov-09	January 7, 2010	February 4, 2010	March 21, 2010	November 5, 2010
WEVA 2010-466	Sep-09	December 8, 2009	January 5, 2010	February 19, 2010	November 5, 2010
WEVA 2010-654	Nov-09	January 7, 2010	February 4, 2010	March 21, 2010	November 5, 2010

Docket No.	Days Late	Months Late	Motion to Dismiss Filed	Answer to Motion to Dismiss Filed	Number of Contested Citations	Penalty
WEVA 2010-467	259	8.5	November 30, 2010	December 14, 2010	7	\$3,024.00
WEVA 2009-1788	284	9.5	July 22, 2010	August 31, 2010	8	\$4,187.00

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WEVA 2010-63	350	11.5	November 30, 2010	None	23	\$21,131.00
WEVA 2010-652	229	7.5	November 30, 2010	December 14, 2010	4	\$4,513.00
WEVA 2010-653	229	7.5	November 30, 2010	December 14, 2010	6	\$11,516.00
WEVA 2010-466	286	8.5	November 30, 2010	December 14, 2010	6	\$7,318.00
WEVA 2010-654	229	7.5	November 30, 2010	December 14, 2010	21	\$24,073.00
Average	267	8.6		Total	75	\$75,762.00

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001

August 29, 2011

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2010-280-D
on behalf of LIGE WILLIAMSON,	:	PIKE CD 2009-06
Complainant	:	
	:	
v.	:	
	:	
CAM MINING, LLC,	:	Mine ID: 15-18911
Respondent	:	No. 28 Mine

DECISION

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor, Nashville, Tennessee, on behalf of the Complainant;
Mark E. Heath, Esq., Spilman Thomas & Battle, PLLC, Charleston, West Virginia, on behalf of the Respondent.

Before: Judge Paez

This case is before me upon a complaint of discrimination filed by the Secretary of Labor (“Secretary”), on behalf of Lige Williamson against CAM Mining (“CAM”), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the “Act” or “Mine Act”), 30 U.S.C. § 815(c).

I. Statement of the Case

On May 29, 2009, Williamson filed a complaint alleging discrimination under section 105(c) of the Mine Act. After an investigation, the Secretary chose to pursue the case on behalf of Williamson.

The Secretary filed an application for temporary reinstatement pursuant to section 105(c)(2) of the Mine Act.¹ A hearing on the temporary reinstatement was held before

¹ Section 105(c)(2) of the Mine Act states, in relevant part:

Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as [s]he deems

(continued...)

Administrative Law Judge Jerold Feldman. Judge Feldman determined that the Secretary had not satisfied her burden by failing to demonstrate that the application was not frivolously brought, and he dismissed the case. *CAM Mining, LLC*, 31 FMSHRC 1187 (Sept. 2009) (ALJ). Upon review, the Federal Mine Safety and Health Review Commission (“Commission”) reversed and ordered the retroactive reinstatement of Williamson. *CAM Mining, LLC*, 31 FMSHRC 1085 (Oct. 2009). Judge Feldman subsequently ordered Williamson’s retroactive reinstatement. *CAM Mining, LLC*, 31 FMSHRC 1270 (Oct. 2009) (ALJ). Thereafter, the discrimination case was assigned to me for hearing and adjudication.

The Secretary subsequently filed an amended complaint requesting civil monetary penalties in the amount of \$15,000, which was accepted by order dated March 16, 2010. By order dated April 26, 2010, the originally scheduled hearing was postponed by request of the Secretary due to MSHA personnel being called upon to assist in the Upper Big Branch Mine investigation. Thereafter, a hearing in the discrimination case was held on the merits of the case in Pikeville, Kentucky, pursuant to section 105 of the Act. At the conclusion of the hearing, the parties submitted written post-hearing briefs.²

Williamson alleges he was harassed and terminated from employment at CAM because of a ventilation complaint he made to his foreman and also for telling the mine superintendent that he wished to speak to MSHA. CAM denies that Williamson engaged in protected activity or that Williamson was harassed. CAM also denies that Williamson’s termination was motivated in any part by protected activity and argues that he was terminated for assaulting and swearing at a mine foreman. Considering these arguments, the issues before me are (1) whether Williamson engaged in protected activity; and (2) whether the adverse action was motivated, at least in part, by protected activity.

For the reasons stated below, Complainant’s discrimination claim is dismissed.

(...continued)

appropriate . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, [s]he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, . . . alleging such discrimination or interference and propose an order granting appropriate relief.

30 U.S.C. § 815(c)(2).

² At hearing, the Secretary submitted Government Exhibit 4 into evidence but failed to provide a copy to the court. (Vol II: Tr. 293–94.) After several attempts by my office to secure the exhibit dating back to October 2010, I issued an Order to Submit Exhibit or Strike Exhibit From Record on February 16, 2011, ordering counsel for the Secretary to submit Government Exhibit 4 to the Commission by February 24, 2011, or the exhibit would be stricken from the record. Counsel for Respondent submitted Government Exhibit 4 to the Commission, and it was received on February 16, 2011.

II. Findings of Fact

CAM operates the No. 28 underground coal mine near Pikeville, Kentucky, where Williamson worked. The No. 28 mine has multiple sections. During the relevant period in this matter, April and May 2009, Section 1 was being operated as a “walking super section.” (Vol. I: Tr. 204–05, 214–15.) As a walking super section, Section 1 was ventilated by a single split of air which swept the working faces. (Vol. I: Tr. 188.) Sometime prior to April 2009, Section 1 was being operated as a “super section,” and was therefore ventilated by two splits of air. (Vol. I: Tr. 22.) Section 1 contained two continuous miners, machines that cut coal from the working faces, while being operated as both a walking super section and a super section. (Vol. I: Tr. 22.) When ventilated by two splits of air, both continuous miners were legally allowed to operate at the same time. (Vol. I: Tr. 214–15.) However, the continuous miners were not legally allowed to operate at the same time if the section was ventilated by only a single split of air. (*Id.*) Both continuous miners were prohibited from operating at the same time due to the danger of dust and noxious fumes, such as methane, drifting from the right continuous miner to the left miner. (*Id.*)

Section 1 had seven entries leading to the face, where active mining of coal occurred. (Vol. I: Tr. 26.) Each entry was numbered one through seven. (*Id.*) The left-hand continuous miner operated in entries one through four, and the right-hand continuous miner operated in entries four through seven. (Vol. I: Tr. 49.) Three shuttle cars loaded coal extracted by the two miners. The left shuttle car carried loads from the left continuous miner, the right shuttle car carried loads from the right continuous miner, and the center shuttle car received coal from both the right and left continuous miners. (Vol. I: Tr. 215–17.) The center shuttle car would inform one continuous miner that it could start operating when the other miner was done cutting coal. (Vol. I: Tr. 217-18.)

Williamson worked for CAM for approximately 21 months before the events that led to his termination. Williamson was originally employed as a utility man, or “floater,” constructing and maintaining ventilation controls in Section 2 of No. 28 mine. (Vol. I: Tr. 21.) Prior to April 2009, Williamson had made two safety-related complaints to CAM management. First, Williamson had told Frank Smith, the mine superintendent, that supervisors were smoking on the surface in areas where smoking was prohibited. (Vol. I: Tr. 47, 105.) The issue of not smoking on CAM property was subsequently discussed in a safety meeting. (Vol. I: Tr. 105.) Second, Williamson complained that no one answered phone calls from miners needing to be transported out of the mine after their shift ended. (Vol. I: Tr. 47.) Williamson made this complaint to the mine manager, the superintendent and foremen from Sections 1 and 2. (Vol. I: Tr. 106.) Williamson testified that he never encountered this problem again but that he did not think anything was done about his complaint. (Vol. I: Tr. 106–07.)

A. The April Safety Complaint

In mid-April 2009, Williamson was transferred to Section 1 and began to work under McArthur Swiney, who was the foreman of Section 1. (Vol. I: Tr. 33.) On April 20 or 21, 2009,

Williamson observed the left-side and right-side shuttle cars exiting from two different entries at the same time. (Vol. I: Tr. 36.) Both cars were loaded with coal. (*Id.*) Williamson also testified that he heard the power box make a “surge,” which he believed occurred when the second miner started running while the first miner was still being operated. (*Id.*) Williamson believed that both continuous miners were being operated simultaneously. (Vol. I: Tr. 35.) Williamson was concerned about dust and gases created by the right miner traveling into the intake airway of the left miner (Vol. I: Tr. 38–39), and, according to Williamson, he informed Swiney that he thought both miners were running simultaneously (Vol. I: Tr. 35). According to Williamson, Swiney did not give Williamson a verbal response but simply stared at him. (*Id.*) Swiney denies that Williamson ever complained to him about ventilation or the simultaneous operation of two continuous miners in Section 1. (Vol. II: Tr. 119.)

The parties presented contradictory evidence regarding whether both continuous miners were actually being operated simultaneously. Phillip Gray, a mine foreman and electrician who started at CAM after Williamson was terminated, testified that both continuous miners sometimes operated at the same time in Section 1. He stated that he could tell both miners were being operated simultaneously because of the dust that accumulated in the mine. (Vol. I: Tr. 187–88.) William Gillespie, a former shuttle car driver at CAM, testified that he would leave one continuous miner that was cutting coal and drive to the other continuous miner, which was also cutting coal. (Vol. I: Tr. 218–19.) The drive between the two continuous miners took roughly two and one half minutes. (Vol. I: Tr. 236–37.) However, Anthony Moore, a continuous miner operator on the section, testified that he did not know of any time that both miners were running simultaneously. (Vol. I: Tr. 255.) Perry Norman, the operator of the other continuous miner in April of 2009, told MSHA officials that the two miners never operated simultaneously. (Vol. II: Tr. 214–15; Resp’t Ex. 11.) Alex Blankenship, the left-side shuttle car operator for Section 1, testified he never saw evidence that both miners were cutting coal at the same time. (Vol. II: Tr. 231.) Additionally, Benny Hopkins, CAM’s Chief Electrician, and Jerry Taylor, the electrician for Section 1, both testified that the power supply in Section 1 was insufficient to allow both miners to operate at the same time. (Vol. I: Tr. 268; Vol. II: Tr. 241.) Specifically, they testified that if both miners were to operate simultaneously, the power box would heat up, create a strong smell, and potentially explode. (Vol. I: Tr. 268; Vol. II: Tr. 241.) Quentin Dean Blair, coal mine inspector and electrical specialist for the Department of Labor, MSHA, testified that if a power box is overloaded, it will overheat and eventually damage itself. (Vol. II: Tr. 275.)

After Williamson made his alleged complaint on April 20 or 21, he testified that Swiney displayed a “Jekyll/Hyde reverse on the attitude” towards him. (Vol. I: Tr. 161.) Williamson believes Swiney began criticizing him more and acted in a more hateful way towards him. (Vol. I: Tr. 42–43.) According to Williamson, Swiney began referring to Williamson exclusively as “asshole.” (Vol. I: Tr. 50; 222.) Nevertheless, evidence at the hearing demonstrates that Swiney acted similarly towards other miners. Specifically, Anthony Moore, a continuous miner operator who worked with Swiney and Williamson, believed Swiney was a tough foreman and a “tough man to work for.” (Vol. I: Tr. 256.)

On April 22, not long after transferring to Swiney’s section, Williamson was taken out of the mine because he thought he was experiencing a heart attack. (Vol. I: Tr. 41.) Williamson

sought medical treatment for chest pains and was advised by his doctor to take some days off from work. (Vol. I: Tr. 45.) Williamson returned from medical leave on April 27, and he was transferred from working as a floater to operating the right-side shuttle car. (Vol. I: Tr. 48.) While Williamson was working as a shuttle car driver, Swiney assigned him various tasks that required physical labor, such as shoveling ribs, shoveling the tail piece area, and building brattices. (Vol. I: Tr. 52.) Williamson admits that these additional jobs he was asked to do were included in his job description as shuttle car driver. (Vol. I: Tr. 130.) Yet Williamson does not believe other shuttle car drivers were made to perform these tasks in the manner and to the extent he was required to perform them. (Vol. I: Tr. 50–54.) Nevertheless, other shuttle car drivers were asked to do the tasks Williamson was asked to complete. (Vol. I: Tr. 232; Vol. II: Tr. 202, 219, 228.) Indeed, these other employees also built brattices, hung curtains, and shoveled coal while working as shuttle car drivers. (Vol. I: Tr. 232; Vol. II: Tr. 219.)

B. The May 13 Incident

Williamson worked as a shuttle car driver under Swiney without event until May 13, 2009. On that day, Williamson was using the shuttle car to load coal from the right-side continuous miner, which was operating in the No. 4 entry. (Vol. I: Tr. 59.) Williamson testified that he had loaded the shuttle car and was making a right turn into the No. 5 entry when the shuttle car hit a dip in the mine floor. (Vol. I: Tr. 59.) According to Williamson, the car slid through the intersection and severed a water line, causing water to stream into the air. (Vol. I: Tr. 66; Gov't Ex. 4.) The car also pinched the cable providing power to the continuous miner. (Vol. I: Tr. 66.) Swiney testified that the car had already turned into the No. 5 entry and had crossed two intersections when it ran into the rib and severed the water and power lines. (Vol. II: Tr. 135–37; Gov't Ex. 4.)³ Both Swiney and Williamson agree that Swiney approached the shuttle car and told Williamson he would have avoided contact with the water line and cable if he had raised the car's boom. (Vol. I: Tr. 73; Vol. II: Tr. 112.) According to Williamson, Swiney shoved his finger in Williamson's face and swore at him. (Vol. I: Tr. 73.) Swiney states he did not put his finger in Williamson's face, but was standing at the front of the shuttle car. (Vol. II: Tr. 111.) Swiney also denies swearing at Williamson. (Vol. II: Tr. 121.) Williamson maintains that he exited the shuttle car and that Swiney retreated. (Vol. I: Tr. 76.) According to Swiney, Williamson jumped out of the shuttle car and pushed Swiney six or seven feet into the rib. (Vol. II: Tr. 134.) Both agree that Williamson loudly told Swiney that he had been "dogging" Williamson for two weeks, and then swore at Swiney. (Vol. I: Tr. 73.) More specifically, Williamson told Swiney "that he [Swiney] was going to quit his goddamn dogging

³ The testimony regarding the placement of the shuttle car during the events of May 13 is less than clear. Both Swiney and Williamson illustrated the movements of the shuttle car on a mine map, entered into evidence as Government Exhibit 4. Swiney was told to illustrate the events of May 13 on the map without being given any instruction as to which way the map was oriented. (Vol. II: Tr. 135.) Further, the differences between Swiney's illustrations and Williamson's illustrations are slight. Considering that the events the parties testified about occurred over one year before the hearing, the fact that Swiney believed the shuttle car ran into the rib two intersections away from the spot where Williamson believed the shuttle car ran into the rib does not discredit either witness's testimony. Considering these facts, I do not give the hand-drawn illustrations made on Government Exhibit 4 much weight.

on me. That he'd been dogging me for two fucking weeks and I was tired of it and it's going to stop now." (Resp't Ex. 8 at 75.)

After the confrontation between Swiney and Williamson, Swiney called the shift foreman, Danny Conn. (Vol. I: Tr. 78–79.) Swiney and Williamson traveled to meet Conn in a mantrip, a vehicle used to transport people within the mine. (Vol. I: Tr. 81.) Swiney told Conn he wanted Williamson off of his section. (Vol. I: Tr. 85; Vol. II: Tr. 152.) Swiney then told Conn that Williamson had pushed him against a rib. (Vol. I: Tr. 85.) Williamson responded that Swiney was "a G.D. Liar." (Vol. I: Tr. 85.) According to Conn, Williamson said, "Mac, I never pushed you." (Vol. II: Tr. 178). Conn then escorted Williamson out of the mine. (Vol. I: Tr. 85.) Williamson asked Conn if he was being terminated, and Conn told him to return to the mine the next day to speak to Smith, the mine superintendent. (Vol. I: Tr. 86.) Conn called Smith that night to inform him of the incident. (Vol. II: Tr. 188.)

Sometime after the incident, Swiney dictated a note to Perry Norman, a continuous miner operator on Section 1. (Vol. II: Tr. 8.) This note described Swiney's allegations against Williamson, specifically that Williamson had "jumped out of his car and started pushing me around." (Resp't Ex. 3 at 3.) On the morning of May 14, after Swiney completed his shift at 4:30 a.m., Swiney gave Smith his dictated note describing the incident with Williamson. (Vol. II: Tr. 8.) Swiney told Smith that Williamson had cut the cable, got out of the shuttle car, and pushed Swiney. (Vol. II: Tr. 9.) Swiney and Smith completed a disciplinary report. (Vol. II: Tr. 16.) Smith wrote, "Lige cut miner cable and water line. Mac talked to him. He got off shuttle car and pushed Mac against rib" on the disciplinary report, based upon what Swiney had told him. (Vol. II: Tr. 17.) In the disciplinary report, Smith recommended that Williamson be suspended. (Vol. II: Tr. 18.) Smith faxed the report to Lantha Potter, Jack Holbrook's secretary. (Vol. II: Tr. 17.) Later in the morning of May 14, Smith met with Holbrook, Manager of the Mines, to discuss the disciplinary report he had sent to Holbrook. (Vol. II: Tr. 20.)

Williamson returned to the No. 28 mine around 12:00 noon on May 14 to speak with Smith about the incident. (Vol. I: Tr. 87.) Williamson wanted to take Smith underground to show him where the incident occurred and explain that he could not have pushed Swiney; but they did not go down into the mine. (Vol. I: Tr. 88.) Smith told Williamson he was suspended for three days "with intent to fire." (Vol. I: Tr. 88–89.) Smith also told Williamson not to worry and to speak to Holbrook and William May, Head Human Resources Officer, on Tuesday, May 19. (Vol. I: Tr. 89.) According to Smith, sometime during this discussion, Williamson told him he would call MSHA over "some issues" he had with the mine. (Vol. II: Tr. 23.) Williamson says he left the meeting under the impression that he would not be fired. (Vol. I: Tr. 90.) Later, around 2:30 p.m., Smith spoke with Conn about what had happened the night before. (Vol. II: Tr. 188.)

At 4:07 p.m. on May 14, David Zatezalo, President of CAM Mining, and May received an e-mail from Holbrook's secretary, Lantha Potter, stating, "Attached is disciplinary report for Lige Williamson, Utility Man at Mine #28. We are asking to terminate for Insubordination. Please advise." (Vol. II: Tr. 260–61; Resp't Ex. 3.) The employee disciplinary report and the note Swiney had dictated to Norman were attached to the e-mail. (Vol. II: Tr. 252.) May called Zatezalo to discuss the e-mail. (Vol. II: Tr. 252–53.) May recommended to Zatezalo that

Williamson be terminated. (Vol. II: Tr. 253.) Holbrook signed the termination notice on May 15, 2009. The termination notice cited “insubordination” as the basis for discharge. (Resp’t Ex. 5.) Williamson’s termination was processed on the company payroll effective at 3:24 p.m. on May 15. (Resp’t Ex. 7.)

On the evening of May 15, Williamson called Smith at his home. (Vol. I: Tr. 91.) A co-worker had informed Williamson about a rumor circulating at the mine that Williamson had called MSHA in retaliation, and Williamson called Smith to assure him he had not called MSHA. (*Id.*) According to Williamson, he told Smith, “If I’ve got something to say to the man I’ve got the balls to look him in the eyes and say it.” (Vol. I: Tr. 149–50.) Smith believes that Williamson told him, “He [Smith] didn’t have the balls to fire him.” (Vol. I: Tr. 283.) Smith told him that Williamson would meet with May and Holbrook on Tuesday. (Vol. I: Tr. 91.)

Williamson received the termination notice via certified mail on May 16, 2009. (Resp’t Ex. 6.) He filed a complaint under section 105(c) of the Mine Act on May 29, 2009.

III. Principles of Law

A. Pasula-Robinette Test

Section 105(c)(1) of the Mine Act prohibits mine operators from discriminating against miners for reporting safety complaints to management.⁴ In *Sec’y of Labor ex rel. Pasula v. Consolidation Coal Co.*, the Commission set forth the elements necessary to prove a miner’s prima facie discrimination claim:

[T]he complainant . . . establishe[s] a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion.

2 FMSHRC 2786, 2799 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

⁴ 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 . . . because such miner . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator’s agent . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner . . . of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1).

If the operator's rebuttal fails and the miner meets his or her burden of persuasion, then the miner will prevail unless the operator can affirmatively defend its claim:

The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's protected activities, and (2) that he *would* have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. . . . The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he *would* have disciplined him in any event.

Pasula, 2 FMSHRC at 2799–800.

Shortly after *Pasula*, the Commission further explained:

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 in the manner indicated in the quotation from *Pasula* above. The twin burdens of producing evidence and of persuasion then shift to him with regard to those elements of affirmative defense.

Sec’y of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803, 818 n.20 (Apr. 1981).

The Commission's formulation of the *Pasula-Robinette* test was guided by the Supreme Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Pasula*, 2 FMSHRC at 2798–99. *Mt. Healthy* set forth the test for determining whether a government agency improperly took adverse action against an employee for exercising his First Amendment rights. 429 U.S. at 287. The Court concluded:

[T]he burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that his conduct was a “substantial factor” or to put it in other words, that it was a “motivating factor” in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

In applying *Mt. Healthy*, the Commission reasoned that “[a]lthough *Mt. Healthy* dealt with constitutionally protected rights, and not with statutory rights granted by Congress, we find

that *Mt. Healthy* is nevertheless instructive, particularly with respect to the need for flexibility in the allocation of burdens of persuasion, and is consistent with the 1977 Mine Act.” *Pasula*, 2 FMSHRC at 2799.

Pasula, as well as *Robinette*, recognized that the National Labor Relations Board’s (“NLRB”) *Wright Line* test for evaluating whether an employer has unlawfully discharged a worker for protected union activity is “substantially the same as the one announced in *Pasula*.” *Pasula*, 2 FMSHRC at 2800 n.15 (citation omitted). See *Robinette*, 3 FMSHRC at 818 n.20 (comparing the *Wright Line* test to the Commission’s discrimination test). The Sixth Circuit, the circuit in which this current case arises, approved the *Pasula-Robinette* framework for establishing a discrimination claim based on the Supreme Court’s approval of the *Wright Line* test. *Boich v. FMSHRC*, 719 F.2d 194, 196 (6th Cir. 1983) (discussing *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983)).

B. Miner’s Prima Facie Case

To establish a prima facie case of discrimination, the miner must “*present[] evidence sufficient to support a conclusion* that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity.” *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998) (emphasis added) (citing *Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817–18). The miner bears the burden of establishing his or her prima facie claim, and the operator may rebut it. *Driessen*, 20 FMSHRC at 328 (citing *Robinette*, 3 FMSHRC at 818 n.20).

As for the second component of the miner’s prima facie case, a court should consider (1) knowledge of protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between protected activity and adverse action; and (4) disparate treatment to determine whether the miner has proven a causal connection between protected activities and the adverse action. *Sec’y of Labor ex rel. Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

C. Miner’s Burden of Persuasion

The application of *Pasula-Robinette*, which employs *Mt. Healthy*’s burden-shifting mechanism, differs from the analysis of a Title VII employment discrimination claim. In a *Mt. Healthy*-style case, once the complainant has met his or her burden to show “sufficient evidence from which the fact finder reasonably can infer that the [complainant]’s conduct was a ‘substantial’ or ‘motivating’ factor behind [his or] her dismissal,” the defendant has the burden of showing that the complainant’s dismissal “would have occurred in any event for nondiscriminatory reasons.” *Acevedo-Diaz v. Aponte*, 1 F.3d 62, 67 (1st Cir. 1993). See *Pendley v. FMSHRC*, 601 F.3d 417, 423–24 (6th Cir. 2010) (restating the *Pasula-Robinette* test); *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 777–78 (6th Cir. 2002) (restating the *Wright Line* test).

In contrast, under Title VII, an employer need only respond to the complainant’s prima facie case by “*articulat[ing]* a legitimate, nondiscriminatory reason for its actions, a burden

which is fully satisfied if the employer submits enough evidence to raise a genuine issue of material fact.” This evidence need not persuade the fact finder. *Acevedo-Diaz*, 1 F.3d at 67 (citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)). Therefore, a Title VII case differs from those using the standard enunciated in *Mt. Healthy* because in a Title VII case, the burden of persuasion never falls on an employer. *Acevedo-Diaz*, 1 F.3d at 67.

The Commission’s recent decision in *Turner v. National Cement Co.* discusses the level of proof necessary to support a miner’s prima facie discrimination claim. 33 FMSHRC ___, slip op. at 7–8 (May 2011). In its analysis, *Turner* drew nearly exclusively from Circuit Court decisions on Title VII claims. *Id.* *Turner* did not address *Pasula*’s holding that “the complainant . . . establishe[s] a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity.” *Pasula*, 2 FMSHRC at 2799 (emphasis added). See *Turner*, 33 FMSHRC ___, slip op. at 7–8 (discussing the complainant’s burden in proving a prima facie discrimination case). In remaining silent on this point, *Turner* does not overturn the well-settled principles set forth in *Pasula*, *Robinette*, and their progeny. See *Michigan v. Thomas*, 805 F.2d 176, 184 (6th Cir. 1986) (“An administrative agency may reexamine its prior decisions and may depart from its precedents provided the departure is explicitly and rationally justified.”) (citations omitted).

D. Operator’s Business Justification for Adverse Action

The contours of the Commission’s jurisprudence for analyzing an operator’s business justification may be summarized as follows:

[T]he inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator’s actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. The Commission may not impose its own business judgment as to an operator’s actions. Further, . . . the Commission may not substitute its own justification for disciplining the miner over that offered by the operator.

Pendley, 601 F.3d at 425 (citations omitted).

IV. Further Findings of Fact, Legal Analysis, and Conclusions of Law

CAM does not dispute that Williamson’s termination constitutes adverse action.⁵ Therefore, the issues to be decided are (1) whether Williamson engaged in protected activity, and (2) whether the adverse action was motivated, at least in part, by Williamson’s protected activity,

⁵ The Secretary also contends that Williamson was harassed by Swiney after making a safety complaint and that this harassment constitutes adverse action. CAM disputes that Williamson was harassed and that any harassment constitutes adverse action. Whether Williamson was harassed by Swiney is examined in Part IV.B.2.a, *infra*.

or whether CAM would have taken the adverse action due to Williamson's unprotected activity alone.

A. Protected Activity

The Secretary contends that Williamson engaged in two forms of protected activity. First, the Secretary argues that Williamson's complaint to Swiney regarding the mine's ventilation and simultaneous operation of both right-hand and left-hand continuous miners was a safety complaint protected by the Act. Second, the Secretary argues that Williamson engaged in protected activity when he told Smith he was going to call MSHA.⁶

1. Ventilation Complaint

Williamson testified that, on April 20 or 21, 2009, he told Swiney that he (Williamson) could not properly ventilate the section because two continuous miners were simultaneously running, which is a safety hazard. (Vol. I: Tr. 35.) Williamson arrived at his conclusion that two continuous miners were running simultaneously upon seeing two shuttle cars loaded with coal (*Id.*) At the hearing before me, Williamson testified for the first time that he also heard the power box in the mine emit a whining noise, which led him to believe two continuous miners were being operated at the same time. (Vol. II: Tr. 103–04.) Williamson also testified that Swiney's response to the complaint was to give Williamson a look "like he was stupid." (Vol. I: Tr. 35; Vol. II: Tr. 119.) Despite this lack of response, Williamson never told anyone else that he was concerned about ventilation or that he believed two continuous miners were being operated at the same time. (Vol. I: Tr. 119.) Williamson was, and continues to be, unsure of the date on which he made the alleged safety complaint. In the original statement he filed with MSHA, Williamson claimed he made the complaint two weeks before he was terminated. (Gov't Ex. 3.) Williamson later testified that he made the safety complaint to Swiney on April 20 or 21, roughly ten days earlier than he initially claimed.

Williamson's testimony sets forth evidence that he reported to his supervisor, Swiney, the hazardous, simultaneous operation of two continuous miners, which is a protected activity. Though Williamson's relative uncertainty about the date of this incident at the time most proximate to its occurrence undercuts the veracity of his testimony, this relatively trivial mistake does not fatally undermine his testimony in light of the relative consistency of his testimony

⁶ In her original complaint, the Secretary did not include the claim that Williamson's conversation with Smith, in which Williamson told Smith he was going to speak to MSHA, was protected activity. This claim was raised for the first time in the Secretary's post-hearing brief. (Sec'y Br. 17.) Indeed, in making this point, the Secretary relies not on Williamson's testimony but on Smith's. (*Id.*) Williamson did not mention this statement during his recollection of his conversation with Smith. (Vol. I: Tr. 87–90.)

during the temporary reinstatement hearing and the hearing before me.⁷ This evidence is adequate to support the first element of Williamson's prima facie case.

Nevertheless, Swiney testified consistently at both the temporary reinstatement hearing and the discrimination hearing that Williamson never raised an issue involving two miners running at the same time and that Williamson failed to make any safety complaint to him. (Vol. II: Tr. 119.) Swiney is retired from CAM Mining and has no personal interest in the outcome of this matter. Most importantly, I observed that Swiney, as an older gentleman with a long career in mining, demonstrated significant difficulty hearing counsel's questions even in the relatively close quarters and quiet environment of my courtroom. *See, e.g.*, (Vol. II: Tr. 104–05, 108, 115) (direct examination); (Vol. II: Tr. 129, 131, 134, 150–52) (cross-examination). Considering these facts, as well as Swiney's candid demeanor at the hearing, I give great weight to Swiney's testimony that he did not hear Williamson's safety complaint.

Therefore, I find Swiney credibly testified that he did not hear Williamson make a ventilation complaint on or around April 20 or 21, 2009, or, at the very most, he did not understand Williamson's statement to be a safety complaint regarding the simultaneous operation of two continuous miners. This finding is consistent with Williamson's testimony that Swiney did not give Williamson a verbal response. This evidence rebuts Williamson's prima facie case by negating the necessary predicate to the conclusion that Williamson engaged in protected activity—namely that Swiney actually heard and understood Williamson.

Considering the evidence presented by CAM and my witness credibility determinations from the hearing, I determine that Williamson did not make a protected safety complaint to Swiney.⁸ I do not make this finding lightly—but it is one compelled by the unique circumstances of this case.

My conclusion on this issue naturally begs the philosophical question: If a tree falls in a forest and no one is around to hear it, does it make a sound? Here, the philosophical question translates into the following: Can Williamson's ventilation complaint exist without it being heard by Swiney? Even if no one heard the tree fall in the forest, a subsequent stroll through the woods could reveal the cracked stump and broken branches of surrounding vegetation, telltale signs of the tree's demise, thus increasing the probability that a sound occurred like those similar to other tree falls. Likewise, evidence of the traditional factors underlying a determination that

⁷ CAM argues that Williamson's testimony should not be credited because he changed his story during his discrimination hearing. CAM contends that Williamson first testified that he *saw* the two miners operating simultaneously, but he then testified that seeing two miners at the same time was impossible. (Resp't Br. 6). I do not find this argument persuasive. Williamson was clear on both direct examination and cross-examination in his belief that both miners were operating simultaneously because he saw two shuttle cars loaded with coal and heard a "roar" from the power box.

⁸ I need not decide whether the mine was actually operating two continuous miners simultaneously. The issue before me is whether Williamson engaged in protected activity—i.e., whether Williamson told Swiney that he believed two continuous miners were being operated.

the protected activity led to an adverse action—such as hostility or disparate treatment toward the complainant—could, in fact, bolster the weight of a complainant’s evidence that he or she engaged in protected activity and thus support the inferences necessary to prevail. In this case, however, my conclusion that no protected activity has occurred is further buttressed by my findings on the second element of Williamson’s prima facie case, as set forth in Part IV.B., *infra*.

2. Williamson’s Claim He Would Call MSHA

Smith recalled that, during the course of his conversation with Williamson on May 14, Williamson said he “had some issues that he was going to talk to MSHA about.” (Vol. I: Tr. 282.) Smith responded that an MSHA inspector was present at the mine that very day. (*Id.*) The next day, Williamson phoned Smith at home to inform him that he had not called MSHA.⁹ (Vol. I: Tr. 91.) In communicating to Smith that he may call MSHA, Williamson engaged in protected activity.

CAM argues that Williamson’s claim that he would call MSHA does not constitute protected activity because Williamson did not raise specific safety complaints. However, Williamson’s statement that he intended to speak to MSHA about “some issues” is tantamount to stating he was going to make a safety complaint, an activity protected under section 105(c) of the Mine Act. Moreover, Commission case law establishes that a safety complaint does not need to be specific in order to be protected under section 105(c). *See Knotts v. Tanglewood Energy Co.*, 19 FMSHRC 833, 837 (May 1997). I therefore determine that Williamson engaged in protected activity when he told Smith he was going to speak to MSHA.

B. Causal Connection

1. Knowledge of Protected Activities

Because Williamson made a protected statement to Smith, Smith had knowledge of Williamson’s protected activity.¹⁰ However, Smith did not have the authority to terminate Williamson (Vol. I: Tr. 281); instead, that authority belonged to Zatezalo, President of CAM.¹¹ (Vol. II: Tr. 252.)

⁹ Williamson claims he called Smith at home because he was informed of a rumor that he had called MSHA in retaliation for being terminated. (Vol. I: Tr. 91.) Both Smith and Williamson agree that Smith had been informed, either by Williamson himself or a co-worker, that Williamson intended to call MSHA.

¹⁰ In contrast, as discussed in this section, the weakness of the evidence underlying the second element of Williamson’s discrimination claim underscores the lack of any circumstantial evidence suggesting that Swiney even knew about Williamson’s safety complaint.

¹¹ Assuming *arguendo* that Williamson did make a protected statement to Swiney, Swiney would have had knowledge of Williamson’s protected activity but no authority to terminate Williamson.

The Commission has established that “if a supervisor has knowledge of an employee’s protected activities, harbors animus towards that activity, and influences or participates in a decision that adversely affects the employee, the courts have imputed knowledge and animus to the employer notwithstanding the actual decision-maker’s ignorance of the protected activities.” *Sec’y of Labor ex rel. Garcia v. Colorado Lava, Inc.*, 24 FMSHRC 350, 358 (Apr. 2002) (Jordan, C., concurring). *See also Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (stating the decision to terminate an employee could be tainted by a manager’s discriminatory animus, even though manager did not have authority to terminate the employee); *Garcia*, 24 FMSHRC at 356 n.6 (holding that it would be appropriate to consider imputing knowledge to an employer notwithstanding the actual decision-maker’s ignorance of the protected activities); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) (“An operator may not escape responsibility by pleading ignorance due to the division of company personnel functions.”)

Smith had influence on and participated in the decision to terminate Williamson. Swiney initiated the action that ended in Williamson’s firing by submitting a handwritten note describing the May 13 incident in the mine. (Vol. II: Tr. 207.) Based upon Swiney’s note, Smith and Swiney completed a disciplinary report, which Smith then sent to Holbrook. (Vol. II: Tr. 16–17.) Holbrook then recommended to May and Zatezalo that Williamson be terminated. (Vol. II: Tr. 260; Resp’t Ex. 3.) The disciplinary report completed by Smith and Swiney, as well as Swiney’s written note, were given to May and Zatezalo with Holbrook’s recommendation. (Vol. II: Tr. 252.) Zatezalo did not conduct any independent investigation; the decision to fire Williamson was based solely on representations and recommendations made by Swiney and Smith. (Vol. II: Tr. 253, 259.) I conclude that Smith’s knowledge of Williamson’s protected activity may be imputed up the chain of command to Zatezalo. Therefore, I determine that CAM had knowledge of Williamson’s protected activity.

2. Hostility or Animus Towards Protected Activity

a. Ventilation Complaint

The Secretary contends that Williamson was harassed by Swiney after making a safety complaint on April 20 or 21, 2009, regarding the mine’s ventilation. My evaluation of this evidence further bolsters my conclusion that Williamson has not met his burden to prove a case of discrimination.

Williamson testified that about two days after he complained about ventilation to Swiney, Swiney began referring to Williamson as “asshole.” (Vol. I: Tr. 134.) Williamson testified that Perry Norman, a fellow CAM employee, overheard Swiney call him asshole. (*Id.*) However, Norman did not recall Swiney referring to Williamson in that manner. (Vol. II: Tr. 205.) Additionally, William Gillespie, a former employee at CAM, also testified that Swiney referred to Williamson as “asshole,” but that Swiney had always done so. (Vol. I: Tr. 222.) Anthony Moore, a miner operator at CAM, testified that he thought Swiney was “always giving Lige [Williamson] a hard time” and “had it in” for Williamson. (Vol. I: Tr. 261–62.) Yet Moore did not state when Swiney started treating Williamson in this way or whether he had always acted in this manner towards Williamson. Further, other evidence demonstrates that Swiney’s behavior was not directed solely at Williamson. Moore believed Swiney was a “tough man to work for”

and that he would cuss at employees other than Williamson. (Vol. I: Tr. 256, 262.) Alex Blankenship, a shuttle car operator, also testified that Swiney cussed in the mines, but did not berate his subordinates nor cuss at any particular one. (Vol. II: Tr. 231.) Finally, Gillespie testified that most miners cursed in the mine. (Vol. I: Tr. 227.) This evidence is consistent with Swiney's testimony that although he cussed underground, he did not do so at particular miners. (Vol. II: Tr. 153–56.)

Williamson also testified that within 24 hours of complaining about the ventilation, he noticed Swiney displayed “[a] Jekyll/Hyde reverse on the attitude. He was a completely different man toward me.” (Vol. I: Tr. 161.) As evidence of this change in attitude, Williamson alleges that when Swiney moved Williamson from working as a utility man to driving a shuttle car, Swiney gave Williamson more and harder tasks than other shuttle car drivers.

However, Williamson's switch from working as a utility man to driving a shuttle car was, if not voluntary, with Williamson's approval. Williamson stated he spoke with Dusty Newsome about taking over Newsome's role as shuttle car driver. (Vol. I: Tr. 44–45.) Newsome credibly testified that he spoke with Williamson and they agreed to change jobs. Newsome stated, “I wanted a different job and he did, too. He said his knee bothered him and stuff a lot of time doing the walkaround, and we just – we okayed it and we switched jobs.” (Vol. II: Tr. 218.) If Swiney really had it in for Williamson, then he probably would not have approved a request to make Williamson's job at the mine easier.

Further, Williamson admitted the additional jobs he was asked to do were included in his job description as shuttle car driver. (Vol. I: Tr. 130.) Other CAM employees, namely Perry Norman, Dusty Newsome, and Alex Blankenship, testified that shuttle car drivers were asked to do the tasks Williamson was asked to complete. (Vol. I: Tr. 232; Vol. II: Tr. 202, 204, 219, 228.) Gillespie and Newsome both stated they were asked to build brattices, hang curtains, and shovel coal while working as shuttle car drivers. (Vol. I: Tr. 232; Vol. II: Tr. 219.)

Considering all of the evidence before me, I find that Williamson was treated no differently than any of the other miners. As a result, I conclude that neither Swiney nor CAM exhibited hostility or animus towards Williamson due to his alleged ventilation complaint.

b. Williamson's Claim He Would Call MSHA

As for Williamson's claim that he would call MSHA, Smith immediately responded to Williamson's request to speak to MSHA by informing Williamson that an MSHA official was available at the mine that day. (Vol. I: Tr. 282.) No evidence in the record demonstrates any hostility or animus towards Williamson after he told Smith he wanted to speak to MSHA. Smith continued to treat Williamson with respect; when Williamson phoned Smith at home after work hours, Smith took the call, spoke to Williamson, and repeated that Williamson should come back to the mine on Tuesday. (Vol. I: Tr. 283.) Indeed, Smith had not previously acted with hostility when Williamson made a prior safety complaint to him about miners smoking at the mine site. Moreover, I give great weight to Smith's testimony, as I found Smith to possess a calm bearing and credible demeanor, which was consistent with his testimony about his respectful interactions with and harboring no animus towards Williamson.

Most importantly, the evidence reflects Smith initially recommended that Williamson be suspended. (Vol. II Tr. 18.) Yet it was after Smith met with Holbrook on the morning of May 14, prior to Smith's meeting with Williamson (Vol. II: Tr. 19–20), that a change occurred in the recommended discipline, whereby Smith informed Williamson of his suspension "with intent to fire" (Vol. I: Tr. 88–89). Thus, the escalation in Williamson's discipline took place *before* Williamson mentioned his desire to talk to MSHA.

Considering these facts, I determine neither Smith nor CAM displayed hostility or animus towards Williamson after he engaged in the protected activity of telling Smith he had some issues to discuss with MSHA.

3. Coincidence in Time

Williamson's complaints were somewhat close in time to his termination. Williamson told Smith he wished to speak to MSHA the day before he was terminated. His alleged complaint to Swiney occurred approximately three weeks before his termination. Although the Commission does not have any hard and fast criteria, it has determined that a coincidence in time exists where the adverse action occurred two or more months after the protected activity. *See Chacon*, 3 FMSHRC 2508; *Driessen*, 20 FMSHRC 324; *Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050 (Oct. 2009). I therefore determine that a coincidence in time existed between Williamson's protected activity and the adverse action taken against him.

4. Disparate Treatment

The Commission has determined that "[t]ypical 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." *Chacon*, 3 FMSHRC at 2512. Here, no evidence was offered as to whether other employees accused of pushing a foreman in the mine were terminated. The evidence shows that CAM considered Swiney's allegation that Williamson shoved him against a mine rib when deciding to terminate Williamson. A handwritten note and disciplinary report, both detailing Swiney's allegation that Williamson shoved him against a rib, were attached to the e-mail recommending Williamson's termination to May and Zatezalo. (Vol. II: Tr. 252.) The stated reason for Williamson's termination was insubordination. (Resp't Ex. 5.) According to CAM's employee handbook, insubordination includes making assault, threats or abusive language to a supervisor. (Resp't Ex. 3.)

Additionally, Williamson admits he angrily swore at Swiney on May 13. (Vol. I: Tr. 73.) In the past, CAM has disciplined employees for swearing. Prior to Williamson's termination, Gillespie was suspended for three days for swearing at a foreman. (Vol. I: Tr. 223–24.) Kevin Blevins, a CAM employee, was removed from his position as foreman and suspended for three days after cursing at an employee. (Vol. II: Tr. 59.) Although Swiney was not disciplined for swearing back at Williamson, Williamson never made a complaint about Swiney's swearing. (Vol. I: Tr. 136.) Even though Williamson was terminated rather than suspended, Williamson

was also accused of physically pushing his foreman. Therefore, I determine that the evidence presented does not establish that Williamson suffered disparate treatment.

5. Conclusion

Considering the above four factors, I determine that Williamson has failed to prove that any adverse action taken against him was motivated by protected activity.

C. Affirmative Defense

CAM alleges as an affirmative defense that it would have terminated Williamson for unprotected activity alone. According to CAM, Williamson would have been terminated because he swore at and allegedly pushed Swiney against a rib. Here, I credit the testimony of May, the Human Resource Manager at CAM Mining since April of 2004. (Vol. II: Tr. 251.) At 4:07 p.m. on May 14, 2009, May received the e-mail from Holbrook recommending Williamson's termination. (Vol. II: Tr. 253.) May read the e-mail and the note Swiney had dictated, as well as the disciplinary report and the rules of conduct from CAM's employee handbook, which were attached to the e-mail. (*Id.*) May then recommended to Zatezalo that Williamson be terminated. (*Id.*) CAM's rules of conduct prohibit fighting, assault, threats and abusive language. (Resp't Ex. 3.) Based on Swiney's note and the disciplinary report, May believed Williamson had assaulted Swiney after swearing at him. (Vol. II: Tr. 259.) In May's opinion as Human Resource Manager, Williamson's statement to Swiney—"He was going to quit his goddamned dogging on me, and that he had been dogging me for two fucking weeks and I was tired of it and it was going to stop; it's going to stop now"—amounts to sufficient grounds for termination "in most cases." (Vol. II: Tr. 258.) CAM's evidence, specifically May's testimony, demonstrates a reasonable belief that Williamson swore at and pushed Swiney on May 13. The evidence also shows CAM believed the assault and abusive language that Williamson was alleged to have engaged in constituted grounds for termination.

In response, the Secretary criticizes CAM for failing to thoroughly examine whether Williamson actually pushed Swiney by investigating the site of the pushing incident for signs of its occurrence, as well as testing Swiney's clothing for rock dust where he was pushed. (Sec'y Br. 8, 17.) In light of Williamson's admission that he cursed at Swiney, as well as the paucity of evidence supporting Williamson's prima facie discrimination claim, CAM reached the reasonable conclusion that Williamson violated its policies and properly terminated him. Concluding otherwise in a case such as this where the evidence of discrimination is lacking would put this Commission Judge in the position of substituting his own justification for disciplining Complainant over that offered by CAM, which would contravene Commission precedent on this issue.

I conclude that CAM has established by a preponderance of the evidence that it would have taken this adverse action against Williamson for an unprotected activity alone.

D. Conclusion

Based on the reasons stated above, I conclude that the evidence in this case fails to establish Williamson's claim of discrimination under section 105(c)(1) of the Mine Act.¹²

V. ORDER

In light of the foregoing, it is hereby **ORDERED** that Complainant's discrimination claim be **DISMISSED**.

/s/ Alan G. Paez

Alan G. Paez

Administrative Law Judge

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/rar

¹² Docket No. KENT 2009-1428-D involving Williamson's temporary reinstatement proceeding remains open "pending final order on the [discrimination] complaint," which is 40 days from the date of this decision. 30 U.S.C. §§ 815(c)(2), 823(d)(1).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001

August 31, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-317
Petitioner,	:	A.C. No. 46-09062-166012-02
	:	
v.	:	
	:	
DYNAMIC ENERGY, INC.,	:	
Respondent.	:	Mine: Coal Mountain No. 1 Surface

DECISION

Appearances: Matthew R. Korn, Esq., and Jacob M. Hargraves, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, on behalf of the Secretary of Labor; James F. Bowman, Midway, West Virginia, on behalf of Dynamic Energy, Inc.

Before: Judge Paez

This case is before me upon the Secretary of Labor’s (“Secretary”) Petition for the Assessment of Civil Penalty pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815 (2006).¹ In dispute are one section 104(a) citation and two section 104(d)(2) orders issued to Respondent, Dynamic Energy, Inc. (“Dynamic”). The Mine Safety and Health Review Administration (“MSHA”) issued these orders and citation at Dynamic’s Coal Mountain No. 1 Surface operation.

I. Statement of the Case

All three of the alleged violations at issue in this case involved equipment in active use at this surface coal mine. Order No. 6615025 charges Dynamic with violating 30 C.F.R. § 77.1007(b) for failing to correct equipment defects affecting safety on its highwall driller before its use. Similarly, Citation No. 6615028 alleges that Dynamic violated 30 C.F.R. § 77.1606(c), an analogous regulation applicable to buses and other haulage equipment. Finally, in Order No. 6615029 MSHA charges Dynamic with a 30 C.F.R. § 77.404(a) violation for failure to maintain a front-end loader in safe operating condition and failure to remove the unsafe loader from service. The Secretary submits that each of these three alleged violations should be

¹ In this decision, the hearing transcript, Dynamic’s exhibits, and the Secretary’s exhibits are abbreviated as “Tr.,” “Ex. R-#,” and “Ex. S-#,” respectively.

designated as significant and substantial² (“S&S”) and as the result of Dynamic’s unwarrantable failure³ and proposes a total civil penalty of at least \$58,000.00.

Chief Judge Robert J. Lesnick assigned Docket No. 2009-316 and Docket No. 2009-317, to me on January 4, 2010. On November 30, I approved the Secretary’s Motion to Approve Settlement and Motion to Approve Partial Settlement. All three citations at issue in Docket No. 2009-316 and six citations of the nine citations and orders at issue in Docket No. 2009-317 settled. I held a hearing in South Charleston, West Virginia, on December 7, 2010. The Secretary presented the testimony of two officials from MSHA—Charles R. Bigley, Jr., a surface specialist coal mine inspector, and James Louis Angel, a mechanical engineer. (Tr. 23:17–21, 219:6–7.) Dynamic called two witnesses—Terry Garland Church, an outside contractor and the maintenance foreman at Dynamic, and James E. Miller, Dynamic’s Safety Manager. (Tr. 62:15–18, 156:22–157:1, 157:22–23.) The Secretary and Dynamic submitted post-hearing briefs on February 4, 2011, and February 5, 2011, respectively. The Secretary filed her reply brief on February 24, 2011, and Dynamic filed its reply brief on February 23, 2011.

II. Issues

Dynamic denies each of the three alleged violations. The Secretary responds that the conditions were properly cited as violations and that the allegations underlying the citation and orders were valid. In addition, the Secretary requests in her post-hearing brief that the designation of negligence in Citation No. 6615028 be modified to high negligence and that the violation be designated as having occurred as a the result of Dynamic’s unwarrantable failure to comply with the cited mandatory safety standard.⁴ Moreover, the Secretary asks that an adverse inference be drawn because of Dynamic’s missing preshift reports. Accordingly, the following issues are before me:

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

³ The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

⁴ Inspector Bigley initially designated Citation No. 6615028 as involving “moderate” negligence. (Ex. S-3.) In her Pre-hearing Report, the Secretary listed “[w]hether the condition at issue in [section] 104(a) citation no. 66105028 was the result of an unwarrantable failure based on high negligence attributable to the operator” as one of the legal issues to be litigated at trial. (Sec’y Pre-Hearing Report at 6.) At the hearing, the Secretary’s counsel asked me to find Citation No. 6615028 as an unwarrantable failure in her opening statement. (Tr. 18:5–8.) The Secretary requested in her post-hearing brief that I increase the level of negligence to “high” and designate the violation as being the result of the operator’s unwarrantable failure to comply with the cited standard based on the evidence adduced at trial. (Sec’y Br. at 8 n.1.)

(1) Whether Dynamic’s failure to maintain preshift reports regarding the portal bus and CAT Loader should result in an adverse inference; (2) whether the cited conditions were violations of the Secretary’s mandatory health or safety standards; (3) whether the Secretary’s assertions regarding the gravity of the alleged violations are supported by the record; (4) whether the Secretary’s assertions regarding Dynamic’s negligence, including unwarrantable failure, in committing the alleged violations are supported by the record; and (5) whether the civil penalties are appropriate.

For the reasons set forth below, Citation No. 6615028 is **AFFIRMED** as an S&S violation and **MODIFIED** to high negligence. Order Nos. 6615025 and 6615029 are **AFFIRMED** as S&S violations attributable to the operator’s unwarrantable failure.

III. Background and Findings of Fact

A. Dynamic’s Operation at Coal Mountain No. 1 Surface Mine

Dynamic operates Coal Mountain Mine No. 1, a surface coal mine consisting of multiple mining areas. (Tr. 31:8–10.) The mine had two primary mine sites—the “main” surface mine, known as Job 30, and the “satellite” mine, known as Job 20—that are connected by a road and share the same MSHA mine identification number. (Tr. 30:7–12, 31:8–17.) Dynamic conducted mine operations at Job 30 and contracted with Vecellio & Grogan (“V&G”) to mine Job 20. (Tr. 30:10–13, 172:20–21.)

In the course of mining Job 20, V&G employed both its own equipment and equipment that Dynamic provided. (Tr. 30:12–14, 32:25–33:4, 172:20–24.) Specifically, Dynamic provided V&G with a highwall drill. (Tr. 33:19, 172:21–22, 215:6–7.) James “Mitch” Webb was V&G’s only foreman on Job 20 mine, and he supervised both V&G and Dynamic employees. (Tr. 32:25–33:13, 173:9, 215:10.) Dynamic informed Webb which type of coal Dynamic needed; Webb then oversaw mining at the site. (Tr. 30:7–31:17, 173:17–19, 215:1–3.) Webb was “responsible for anyone and everyone that would be on that job.” (Tr. 31:2–4.) James Sloan was Dynamic’s superintendent at the Job 20 mine. (Tr. 101:12–23.) Miller was Dynamic’s safety manager at the time of the violation and generally took pictures of cited violations for future reference. (Tr. 201:16–17.)

Dynamic uses unmodified school buses purchased at auction as portal vehicles to transport miners to and from their mine sites. (Tr. 73:14–19, 91:14–15, 209:7.) Dynamic’s school buses travel on steep, narrow, and curvy roads. (Tr. 93:16–20.) The roadways are highly traveled by large and small equipment, including coal trucks and rock trucks. (Tr. 97:10–12.)

V&G operated Dynamic’s highwall drill on Job 20 to drill blast holes. (Tr. 33:19, 215:6–7; Ex. S–1.) A highwall drill is a piece of machinery used to drill vertical holes into rock below. (Tr. 34:24–35:15, 42:12–13, 54:14–18.) A typical highwall drill is flat and rectangular in shape, with a center-mounted engine and an operator cab. (Ex. S–10.) The vertical drill mast and drill steel extend through the flat body of the drill, called the deck, and drill directly down into the ground. (Tr. 34:19–20, 34:23–25, 35:9–15, 54:14–16, 181:17; Ex. S–10.) Depending on where the drill is positioned, the deck can be raised or lowered to ensure that the drill deck

remains flat. (Tr. 48:13–17, 182:15–17.) Head guides stabilize the drill head and hold the motor steady as it turns the drill steel. (Tr. 42:13–15, 55:18–19, 179:23–24.) Operators access the drill using “ladder steps.” (Tr. 181:9–11; Ex. S-10.) Dynamic’s drill had either two or three access points. (Tr. 181:14, 39:17–40:14, 56:3–12.) The drill’s “ladder steps” are constructed out of braided steel cables. (Tr. 42:8–13, 180:10–18; Ex. R-4.) A drill operator typically mounts and dismounts the drill four or five times per shift. (Tr. 47:16–18, 51:2–4.)

V&G also operated a CAT front-end loader to load overburden on Job 20. (Ex. S–6.) Loaders have dump buckets capable of lifting twenty-five to thirty tons of material, have a high center of gravity, and often operate alongside a rock truck. (Tr. 110:22–23, 111:14–20.) When the loader’s front bucket is loaded, the front tires are placed under increased pressure. (Tr. 110:19–20.) At times, the loader operated in a rocky pit. (Tr. 108:10–12, 119:10–11.)

V&G’s loader uses Superhawk tires. (Tr. 112:24–113:3.) Shandong Hawk International Rubber Company, Limited, manufactures the Superhawk tire in China, and GCR Tire Center distributes the tire to Dynamic. (Tr. 161:14–16, 224:23–225:1.) The Superhawk tire is a bias ply tire. (Tr. 225:9–11.) Bias ply tires are constructed with a steel band running around the inside of the wheel. (Tr. 228:19–22.) Plies of fiber—usually nylon—are wrapped from the sidewall around the steel band at an angle and connect to a steel band on the opposite side of the tire. (Tr. 228:19–24, 231:5–8.) The steel bands and plies hold air pressure in the tire. (Tr. 228:24–229:1.) The Superhawk tire has 30 plies, but has a 58-ply strength rating. (Tr. 225:9–11.) The loader’s tires contain approximately 98 pounds-per-square-inch of air pressure. (Tr. 229:4–5.)

B. Bigley’s September 4, 2008, Inspection of Job 20

Inspector Bigley arrived at Coal Mountain Mine No. 1 on the morning of September 4, 2008. (Tr. 29:3–7.) Webb accompanied Bigley on his inspection as the operator’s representative. (Tr. 30:4–5.) While inspecting Job 20, Bigley observed employees operating the highwall driller to drill rock. (Tr. 42:2.) Bigley noticed that the drill created an excessive amount of dust, so he performed a complete inspection on the drill. (Tr. 34:9–13.) Bigley observed “excessive head movement” and worn head guides. (Tr. 34:14–17, 42:5–8.) Bigley testified that as he dismounted the drill he noticed the cable ladder steps at the main boarding point “were almost completely broken in two.” (Tr. 35:21–23.) Bigley physically grabbed the wire strands to inspect them, but did not weight test the strands to determine if they would hold a person’s weight. (Tr. 46:22–23, 136:3–6.) The drill operator told Bigley he had notified V&G about the condition, and Webb admitted knowing the step was “damaged” and that the steps should have already been fixed. (Ex. S–2, Tr. 35:25–36:3, 124:17–19, 130:2-4.) Preshift reports from at least three shifts between September 2 and 3 characterized the wire-ladder steps as bent, but were marked as operable. (Tr. 51:21–52:10, 125:24, 128:1–9, 178:6–14; Exs. R-3, S–2, S–5.) On September 3 and 4, the preshift report indicated the head guides were defective. (Tr. 52:9–13; Ex. R-3.)

After determining the head guides and ladder steps affected safety, Bigley issued Order No. 6615025 to Dynamic for a violation of § 77.1007(b). (Tr. 44:16, 46:5–17; Ex. S–1.) In light of the number of times the drill operator might access the driller in a given day and Bigley’s

estimation that the cable ladder was likely to break, he marked the violation's gravity as reasonably likely to result in injury or illness. (Tr. 46:10–12, 48:17–24; Exs. S–1, S–2.) Moreover, if the cable ladder broke, a miner might fall up to seven feet. (Tr. 46:11–14, 48:25–49:20; Ex. S–2.) As a result, Bigley determined the injury was likely to result in lost workdays or restricted duty. (Tr. 48:25–49:6; Ex. S–1.) These factors also led Bigley to mark the citation as S&S. (Tr. 50:10–21; Ex. S–1.) Bigley assessed Dynamic's negligence as high based on his conversation with Webb. (Tr. 51:1–6, 53:10–13; Ex. S–1.) Further, Bigley's conversation with Webb and Webb's failure to barricade the ladder or shut down the drill led Bigley to designate the violation as being the result of Dynamic's unwarrantable failure to comply with the standard. (Tr. 53:14–54:6; Ex. S–1, S–2.)

At some point after the violation, V&G Safety Director Bob Kennedy took pictures of the violation and provided them to Miller, his counterpart at Dynamic. (Tr. 174:12–22, 180:8–9.) To abate the order, the operator removed the drill from service. (Tr. 48:7–9.)

C. Bigley's September 10, 2008, Inspection of Job 20

1. Portal Bus Inspection

Bigley again inspected Job 20 on September 10, 2008. (Tr. 88:6–19.) While waiting for a bus to transport him around the site, Bigley heard a bus approach. (Tr. 89:3–5.) The bus was “really loud,” which Bigley recognized as indicative of an exhaust problem. (Tr. 89:5–7.) Bigley signaled for the bus to pull over so he could inspect it. (Tr. 89:8–10.) According to Bigley, the driver told him that the exhaust had been broken off “for a long time,” that he was unable to “get [Dynamic] to fix it,” and that the exhaust fumes were “pretty bad.” (Tr. 90:5–6.) Bigley personally boarded the bus and smelled noxious exhaust fumes but did not take an air sample inside the bus. (Tr. 90:6–8, 99:25–100:2, 136:20–21, 137:7–12.) The bus did not have a muffler; the exhaust system had been cut or broken off below the driver's seat under the bus. (Tr. 90:10–12, 136:25–137:5; Ex. S–3.) Indeed, exhaust systems routinely broke off the portal buses used at this mine. (Tr. 72:9–11, 72:14–18, 100:21–101:2, 210:20–22.)

Additionally, Bigley twice observed the portal bus stop with its front wheels locked and sliding as the bus' rear wheels continued to spin. (Tr. 89:11–14, 89:19–22.) After stopping, the bus driver told Bigley he had informed his superiors about the defective brakes and thought the brakes had been fixed. (Tr. 89:16–19, 109:1–5.) As he examined the bus, Bigley observed oil soaking parts underneath the hood and found the brake fluid reservoir empty. (Tr. 90:22–91:2, 146:3–6.) He also stated the oil was “just all leaking back out” and characterized the leak as “pretty excessive.” (Tr. 91:5.)

Bigley then examined the bus' steering joint with the help of the driver. (Tr. 90:14–17.) An eighth of an inch of movement is the out-of-service criterion. (Tr. 91:23–25, 67:3–4, 144:2–19.) Bigley visually observed movement of three-eighths of an inch. (Tr. 90:15–17, 98:10–13, 106:8–13; Ex. S–3.) Bigley did not use a dial indicator to measure the amount of movement in the steering joint. (Tr. 91:19–21, 143:13–16.)

The bus's gas pedal had also been broken off completely, leaving a three-eighths of an inch round metal linkage to be depressed as an accelerator. (Tr. 91:7–11, 211:16–212:3.) Sloan, the mine superintendent, told Bigley that he had no knowledge of these conditions. (Tr. 100:17–101:11.)

After determining that the brake system, steering joint, exhaust, and gas pedal affected safety, Bigley issued Citation No. 6615028 to Dynamic for a violation of § 77.1606(c). (Tr. 92:21–93:1; Ex. S–3.) Given the brake and steering defects he observed, Bigley determined the driver's inability to control the bus made an injury reasonably likely to occur. (Tr. 97:20–98:13; Ex. S–3.) In light of the size of the other vehicles traveling the roadways at Job 20, Bigley determined that fatalities would be likely in a collision. (Tr. 99:13–22; Ex. S–3.) He found that twelve miners would be affected. (Ex. S–3.) Based on these findings, Bigley marked the citation as S&S. (Tr. 100:6; Ex. S–3.) Finally, Bigley testified that, although the bus driver told Bigley he had reported the defective brakes and the preshift reports consistently listed exhaust problems, he had no evidence that Sloan knew the bus was in "this bad of shape." (Tr. 100:24–101:11.) Thus, Bigley assessed Dynamic's negligence as moderate. (Tr. 100:17–20; Ex. S–3.) After the citation was issued, Dynamic scrapped the bus. (Tr. 103:9–10.)

2. CAT Front-End Loader Inspection

While at Job 20, Bigley also examined V&G's CAT front-end loader. As he approached the vehicle in a pit scattered with rocks, Bigley observed an "obvious" problem with one of the loaders' tires. (Tr. 107:16–20.) Bigley inspected the tire, finding "cuts going a long way around the circumference of the tire," as well as "gashes pretty deep like an inch, inch and quarter into the sidewall." (Tr. 107:20–24.) Bigley also looked at the inside of the tire and found "these same marks and more cuts across the sidewall." (Tr. 108:8–10.)

Rocks cause the tire cuts and tire wear. (Tr. 118:20–119:8, 159:21–25.) The Superhawk tire had deep, circumferential cuts and gashes to the sidewall, some of which exposed and severed three of the tire's plies. (Tr. 107:18–24, 108:8–17, 114:1–15, 166:25–167:5, 159:23–25, 169:23–171:1, 201:22–24; Ex. S–6.) Bigley observed the tire while under a load, and witnessed the tire's sidewalls flex. (Tr. 121:5–9.)

During his inspection, Bigley brought the tire to Sloan's attention. (Tr. 107:25–108:2.) Sloan agreed the tire was in poor condition, indicated that Dynamic knew the tires were defective, and told Bigley that Dynamic had taken pictures of the tire and contacted the tire company to obtain a replacement. (Tr. 108:2–6, 113:15–20, 151:18–24, 154:4–7.) Sloan also told Bigley that Dynamic had not removed it from service because Dynamic did not have another tire and that GCR had not yet visited the site to make an assessment. (Tr. 108:6–7, 152:2–4.)

In addition, Bigley observed that the loader's engine doors could not be latched shut, and the handrails on the loader's top deck were loose with missing bolts and broken welds. (Tr. 109:1–5, 121:17–122:2.) The engine doors were located within a foot to fifteen inches of the operating cab boarding steps. (Tr. 110:5–7, 170:16–19.)

Bigley determined the CAT loader's tire, steps, and engine doors violated § 77.404(a) and issued Order No. 6615029. (Tr. 109:12–14; Ex. S–6.) Given the tire's condition, Bigley believed a tire explosion could happen at any time. (Tr. 110:16–17.) In addition, if this tire blew, then the CAT loader could fall over and hit an adjacent rock truck. (Tr. 110:24–118:1, 111:14–20.) Moreover, Bigley explained, the concussive force of a tire explosion could propel a rock into other vehicles or miners. (Tr. 111:5–9.) Though fatalities were possible, Bigley found lost workdays or restricted duty to be the most likely outcome. (Tr. 116:19–117:7; Ex. S–6.) As a result, he designated the order's gravity as reasonably likely to result in injuries. (Tr. 112:11–16; Ex. S–6.) Given the "extensive" damage to the tire, the rocky pit, and the likelihood of serious injury, Bigley designated the violation as S&S. (Tr. 117:12–17; Ex. S–6.) Based on his conversation with Sloan, Bigley determined Dynamic's negligence to be high and designated it as an unwarrantable failure. (Tr. 117:21–118:15; Ex. S–6.) After being cited, Sloan immediately removed the loader from service. (Tr. 109:15–18.)

D. Credibility of the Parties' Witnesses

1. Charles R. Bigley, Jr., Surface Coal Mine Inspector, Surface Specialist, MSHA

At the time he issued citations in this case, Bigley was an MSHA surface coal mine inspector. (Tr. 23:14–24.) Bigley worked in surface coal mines for ten years as an employee and owned his own surface mining business for six years. (Tr. 25:24–26:5.) As a surface miner, Bigley surveyed, built ponds, cleared and reclaimed land, maintained and operated equipment, trained others to do so, was a certified mine foreman, and inspected steering mechanisms. (Tr. 26:8–14, 26:25–27:2, 98:18–22.) Bigley has also held his commercial driver's license ("CDL") for over-the-road trucks since 1996. (Tr. 27:10–14.)

Bigley joined MSHA as a trainee inspector in March 2007, became an inspector in March 2008, and became a surface specialist inspector in 2009. (Tr. 23:14–15, 25:6–16, 23:19–21.) Bigley spent 21 weeks as a MSHA inspector trainee in the National Mine Academy, which included classes in surface mining, haulage, prep plants, structural safety and hoisting. (Tr. 23:25–24:6.) Bigley has not received training in, nor has MSHA established, any out-of-service criteria for off-road tires. (Tr. 149:17–24, 231:22–25.) Bigley admitted he was not familiar with the Superhawk tire's construction. (Tr. 152:14–20.)

As a surface specialist, Bigley gives surface mines regular health and safety inspections to identify hazards and enforce regulations. (Tr. 24:9–12.) Bigley inspects equipment—including vehicles, and large and small mining equipment—as well as ground control, facilities and structures, and explosive areas. (Tr. 24:12–14.) Thirty-five to forty percent of his time is spent inspecting equipment. (Tr. 24:19–22.) Bigley performs approximately 30 mine inspections per year. (Tr. 24:25–25:5.)

Based on Bigley's candid testimony at the hearing and his extensive experience in surface coal mining and operation of commercial vehicles, I afford great weight to his testimony.

2. James L. Angel, Mechanical Engineer, MSHA Approval and Certification Center

Angel received his Bachelor of Science degree in mechanical engineering at the University of Dayton and began working at MSHA in 1983. (Tr. 218:2–219:10.) Since 1983, Angel has received training in mechanical aspects of mining and mining processes and has also attended industry conferences on safety, engineering, and tires. (Tr. 219:13–219:19.) Angel has extensive experience dealing with tire manufacturers through the SAE International Construction & Agricultural Council’s Tire and Rim Subcommittee. (Tr. 220:2–5.)

Angel had previously testified to tire conditions as an expert witness. (Tr. 220:6–8.) Dynamic stipulated that Angel is qualified as an expert witness to testify to the condition of the tire at issue in Order No. 6615029. (Tr. 218:10–14.) Based on Angel’s professional experience and previous expert witness experience—both of which directly deal with tire safety—I afford significant weight to Angel’s testimony.

3. James E. Miller, Safety Manager, Dynamic Energy

Miller has worked in the coal mining industry since 1970. (Tr. 156:10–12.) Miller began as a miner, with a full range of miner duties except drill operation. (Tr. 156:15–18, 157:2–5.) Miller holds an 07 miner’s card. (Tr. 158:3–4.) A miner earns an 07 card after taking a forty hour class, completing an apprenticeship, and passing a test. (Tr. 158:6–11.)

After more than twenty years as a coal miner, Miller became a surface inspector with West Virginia’s Office of Miners’ Health, Safety & Training. (Tr. 156:15–18.) As an inspector, Miller reviewed mine safety, including equipment and paperwork checks and accident investigations. (Tr. 157:10–12.) Miller also inspected off-road tires several times. (Tr. 158:16–18.) Miller worked as a surface inspector for sixteen years until he joined Dynamic as a safety manager in 2008. (Tr. 156:25–157:2, 157:6–7.) His duties at Dynamic mirrored his duties as a West Virginia surface mine inspector. (Tr. 157:25–158:1.)

Two reasons lead me to weigh Miller’s testimony less heavily than Bigley’s testimony. First, it is unclear from the record whether Miller worked in underground or surface mines. Bigley’s mining experience, conversely, was solely in surface mines. Second, although Miller served as a surface inspector for a significantly longer period than has Bigley, Miller was a state inspector rather than an MSHA inspector. Though the positions are seemingly analogous, the record is unclear whether state and federal training, regulatory standards, or inspection protocols are comparable.

Miller’s significant mining background provides a basis for understanding how mining operations and equipment work. Based on Miller’s long experience in the coal mining industry as a miner, mine inspector, and safety manager, I afford significant weight to Miller’s testimony.

4. Terry Garland Church, Maintenance Foreman, Dynamic Energy

Church is the maintenance foreman at Dynamic. (Tr. 62:15–18.) Working as a contractor through Justice Highwall Energy, Church spends one hundred percent of his time at

Dynamic. (Tr. 74:11–75:3.) Church began working in the coal industry in 1973. (Tr. 61:11–13.) Church worked in various capacities, including work as a truck driver, an equipment operator, a foreman, a production foreman, and a maintenance foreman. (Tr. 62:5–8.) Johnson also owned his own strip job and surface mines, and worked as a logger. (Tr. 61:20–24.) While working at a garage in Alexandria, Virginia, Johnson attended classes at a diesel college. (Tr. 62:10–14.)

Between fifteen and eighteen men report to Church in his capacity as the mine’s maintenance foreman. (Tr. 62:21–22.) Church schedules work, orders parts, and maintains “all” of the equipment, including the portal buses. (Tr. 62:22–25.)

As the maintenance foreman for the mine, Church may bear the brunt of any blame for maintenance failures at the mine. His opinion testimony may, therefore, have conflicting motives. I afford reasonable weight to his testimony regarding the mechanical workings of the portal bus, roadways, and maintenance procedures based on Church’s long experience as a mechanic, formal training, and position as maintenance foreman.

E. Discovery

Dynamic contested these violations on November 7, 2008. (Sec’y Br. at 1; Resp’t Mot. to Strike; Tr. 194:15–17.) The Secretary requested the preshift inspection reports for the CAT loader and portal bus through discovery, but they had already been destroyed by Dynamic. (Tr. 193:13–16, 205:3–9.) The Secretary requests that I draw an adverse inference from Dynamic’s decision to destroy those preshift reports. (Sec’y Br. at 24, 29.)

IV. Principles of Law

A. Strict Liability

The Mine Act’s regulatory regime establishes strict operator liability for the conduct of contractors and individual miners. *See Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 155 (D.C. Cir. 2006) (rejecting operator’s argument it cannot be held liable for an independent contractor’s violations because the Mine Act is a strict liability statute); *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1272 (Oct. 2010) (“Because the Mine Act is a strict liability statute, an operator is liable if a violation of a mandatory safety standard occurs, regardless of the level of fault.”) (citations omitted). The Commission has observed that “operator[] fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty.” *Asarco, Inc.*, 8 FMSHRC 1632, 1636 (Nov. 1986), *aff’d*, 868 F.2d 1195 (10th Cir. 1989).

B. Spoliation

When a party intentionally destroys evidence in its control, a judge has discretion to draw an adverse inference that the evidence destroyed would have been unfavorable to the destroying party. *Kronsich v. U.S.*, 150 F.3d 112, 126 (2d Cir. 1998). Before drawing an adverse inference, the Judge must find that the destroying party had control over the evidence and an obligation to

preserve it at the time it was destroyed. *Id.* at 126. The Commission has held that an Administrative Law Judge must address missing preshift examination reports because the operator had them within their control and should have anticipated litigation. *See IO Coal Co.*, 31 FMSHRC 1346, 1359 & n.11 (Dec. 2009).

C. Safety Standards

1. Broadly Applicable Safety Standards

The Commission has stated that broadly worded safety standards are intended to be applied in myriad contexts and measures violative conduct against “whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.” *U.S. Steel Mining Co.*, 27 FMSHRC 435, 439 (May 2005) (citing *Alabama By-Products*, 4 FMSHRC 2128, 2129 (Dec. 1982)); *see also Ideal Cement Co.*, 12 FMSHRC 2409, 2415–16 (Nov. 1995) (quoting *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987)).

MSHA announcements and policy memoranda “that were . . . publicly available or brought to the attention of the operator” are among the factors considered in a reasonably prudent person analysis. *U.S. Steel Mining Co.*, 27 FMSHRC at 442 (citing *Good*, 23 FMSHRC 995, 1005 (Sept. 2001)). Worn, broken, or non-working tires, brakes, or steering may make equipment unsafe to operate. *See* V MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 77 at 177 (2003) (“PPM”).

2. Equipment Defects Affecting Safety

To prove a § 77.1007(b) and § 77.1606(c) violation, the Secretary must establish the operator (1) used or made available for use equipment with (2) an equipment defect that (3) affects safety. *See Ideal Cement Co.*, 12 FMSHRC 2409, 2415–16 (Nov. 1995) (construing identical language to determine an equipment defect affecting safety). Equipment defects include missing as well as malfunctioning components. *Id.* Defects affecting safety may be cited based on the potential danger they pose. *See United States Steel Corp.*, 6 FMSHRC 1423, 1435 (June 1984) (approving Administrative Law Judge conclusion that a defect’s “potential consequences” supported finding that the defect affected safety); *cf. Dynatec Mining Corp.*, 23 FMSHRC 4, 12 (Jan. 2001) (finding that in light of limited repairs the operator made, potential dangers amounted to substantial evidence that “hazard to persons” existed) (citations omitted). Safety defects need not have a major or immediate effect on safety to violate the standard. *Ideal Cement*, 12 FMSHRC at 2415 (citing *Allied Chemical Corp.*, 6 FMSHRC 1854, 1858 (Aug. 1984)).

3. Safe Maintenance and Removal From Service

The Commission has stated that § 77.404(a) imposes two requirements on operators: (1) “to maintain machinery and equipment in safe operating condition” and (2) “to remove unsafe equipment from service.” *U.S. Steel Mining Co.*, 27 FMSHRC Rt 438 (citing *Peabody*

Coal Co., 1 FMSHRC 1494, 1495 (Oct. 1979). Under § 77.404(a), equipment is judged by the reasonably prudent person standard. *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1557 (Sept. 1996); *see also Steel Branch Mining*, 18 FMSHRC 6, 10–12 (Jan. 1996) (consulting manufacturer’s manual and industry standards in applying the reasonably prudent person test)

D. Significant and Substantial

A violation is S&S “if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria). The Commission has further found that “an inspector’s judgment is an important element in an S&S determination.” *Mathies*, 6 FMSHRC at 5 (citing *Nat’l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135–36 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). An evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

E. Unwarrantable Failure

In *Emery Mining*, the Commission determined that an unwarrantable failure is “aggravated conduct constituting more than ordinary negligence.” 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136 (approving the Commission’s unwarrantable failure test).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1998). 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.

V. Further Findings of Fact, Analysis, and Conclusions of Law

A. Strict Liability

In defending both orders and the citation, Dynamic suggests it is not liable for individual miners' negligent decisions regarding the equipment's operability by asserting that "[t]he negligence of rank-and-file miners is not imputable to the operator." (Resp't Reply Br. at 10) This argument, however, fundamentally misunderstands the Mine Act's strict liability regime. As the operator of the mine, Dynamic is liable for any violation at Coal Mountain No. 1 Surface Mine. *Musser Eng'g Inc.*, 32 FMSHRC at 1272. I therefore reject any argument that Dynamic cannot be cited for a violation based on an individual miner's conduct or contractor V&G's conduct.

B. The Secretary's Requests For Adverse Inferences

In her post-hearing brief, the Secretary requests that an adverse inference be drawn against Dynamic on the issue of whether the CAT loader's tire and the portal bus's brake, steering, and exhaust systems were consistently listed in preshift examination reports. (Sec'y Br. at 24, 29.) The Secretary also raised this issue during the hearing. (Tr. 193:1-194:24, 205:3-13.) The Secretary admits that operators are not required to maintain records beyond 30 days, but argues that Dynamic should have kept the reports in anticipation of litigation in light of the company's own contest of the violation. (Tr. 193:16-21; Sec'y Br. at 24 n.3, 20 & n.4.) Dynamic argues that Bigley could have collected copies of the reports when he issued the citation. (Tr. 193:24-194:11.)

Dynamic did not contest the violation until November 7, 2008, two months after the orders and citation in this case. (Tr. 194:15-17.) Moreover, Bigley did review, and testified to, the contents of some of the preshift reports. (Tr. 101:24-102:2.) At first blush, Dynamic seems justified in having destroyed the preshift reports that it is only legally required to maintain for thirty days. Under this logic, Dynamic would not have been obligated to maintain preshift reports in anticipation of litigation until November 7, well *after* the reports could legally be destroyed.

Dynamic's argument might be persuasive if it retained *no* preshift reports or other documents for longer than the thirty-day requirement. In this case, Dynamic curiously failed to preserve preshift reports for the CAT loader or portal bus but did maintain preshift reports regarding the highwall driller that it believed *supported* its arguments. Moreover, Dynamic did maintain a copy of Miller's notes from his August bus inspection, fully a month *earlier* than the preshift reports from the day of the September inspection. (Tr. 185:20-186:4; Ex. R-5.)

In light of Dynamic's unexplained and questionable selective retention of records, I determine that when Dynamic destroyed the preshift reports, it knew it had an obligation to preserve them in anticipation of litigation. I conclude, therefore, that the Secretary is entitled to

an adverse inference against Dynamic. Because operators are required to maintain preshift report records for 30 days, I further conclude that such adverse inference may only extend to 30 days prior to the day the orders and citations in these cases were written.

C. Order No. 6615025 – The Highwall Driller

1. Additional Finding of Fact - Defective Condition of the Highwall Driller's Steps

Bigley testified that the wire ladder was broken “almost completely in two” and affected safety. (Tr. 35:21–23, 44:16, 46:5–17.) According to Bigley, physical inspection is the best method to inspect the safety of these wire strands. (Tr. 46:24–47:1.) While the strand may look physically intact, Bigley explained, when physically examined, an inspector can see where they are severed. (Tr. 47:1–5.) Further, Bigley stated that it is well known in the industry that the wire strands commonly break and that the steps could break “fairly easily” through miner use. (Tr. 47:9–10, 48:21–24.) When presented with Dynamic's photograph of the wire ladder, Bigley was unable to confirm that the photographs represented the wire ladder he observed during his inspection. (Tr. 44:2–45:8.) Conversely, Miller testified that the steel cable would support the weight of a person. (Tr. 180:10–21.) Miller also indicated that even if seventy-five percent of the weight bearing mechanism were broken, he would “jump up and down on it.” (Tr. 213:19–22.)

Miller is a former West Virginia mine inspector, and his testimony is due some weight determining whether the photographic evidence matches the citation. However, Bigley credibly testified that physical examination is the best way to determine the physical integrity of the wire step. Miller's opinion—unlike Bigley—was based on his review of photographs of the step, rather than actual physical examination. Dynamic presented no evidence that either Miller or V&G's Kennedy ever physically examined the wire steps. Moreover, Dynamic did not present any evidence that the inclusion of the term “bent” in preshift examination reports reflected an examination or physical manipulation of the steps.

Dynamic presented no evidence suggesting anyone from either Dynamic or V&G had ever physically grabbed and manipulated the ladder to test its physical integrity; at most, Dynamic's photographs show a visual depiction of a part of the ladder. Bigley, on the other hand, physically inspected the ladder itself. I note that Bigley's description of the alleged violation in Citation No. 6615025 does not exactly match the photograph.

The photographic exhibits submitted in this case depict at least part of the broken ladder. (Ex. R–4.) However, the Secretary's and Dynamic's witnesses disputed what is evident in each image. Upon my own review of the photographs, I do not find anything in them to be exculpatory or inculpatory. I accordingly afford them marginal weight. Notwithstanding Miller's testimony and Dynamic's exhibits, I do not find the photographic evidence dispositive of whether the ladder steps were in defective condition. Based on the above, I find the physical integrity of the steps had been compromised such that a step was reasonably likely to break when a miner used the ladder to access the cab.

2. Violation

Bigley issued Order No. 6615025 for broken steps on the cable ladder leading to the highwall drill's operator cabin and the drill's worn head guides.⁵ Order No. 6615025 alleges a violation of 30 C.F.R. § 77.1007(b), which requires operators to correct defects affecting drilling equipment safety before the drill is used. Bigley deemed this violation to be S&S and an unwarrantable failure to comply with a mandatory safety standard. Dynamic argues that the cable ladder steps had enough wire braids intact that the ladder step was unlikely to break.

To establish a violation, the Secretary must establish that the drill was in use or available for use, that the ladder or head guides were defective, and the defect affected safety. Bigley observed a miner operating the drill when he began his inspection of the drill, establishing the first element of a violation.

The physical condition of the ladder had been compromised to the point that it was likely to break. A reasonably prudent mine operator would recognize that the ladder was defective and warranted correction. *Ideal Cement Co.*, 12 FMSHRC at 2415–16. Moreover, a reasonably prudent operator would recognize that an unexpected fall from four to seven feet affects safety because it could result in broken bones or joint sprains. *Cf. Sangravl Co.*, 33 FMSHRC ___, 2011 WL 2286880 at * 19 (May 2011) (ALJ) (finding that a five- to eight-foot fall onto concrete would “[s]urely . . . result in serious injuries.”) I therefore conclude that a violation of § 77.1007(b) occurred. *United States Steel Corp.*, 6 FMSRHC at 1434–35.

3. Gravity and S&S

As articulated above, Dynamic's violation of a mandatory safety standard establishes the first element of the *Mathies* test for an S&S violation. Even a miner who notices a defective cable ladder during a preshift examination may forget about the defect as he or she boards and disembarks from the driller. *See, e.g., Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983) (“Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall.”) The heightened possibility of an unexpected fall caused by this violation constitutes a discrete safety hazard.

The miners in this case had relatively frequent exposure to the hazard in this violation. The drill operator mounts and dismounts the drill four or five times per day. Other miners—who did not participate in the preshift examination—may access the cab to discuss work plans with the drill's operator. Though the drill does have additional points of access, a miner in the midst of drilling holes may easily forget to use them. Further, other miners consulting with the drill operator may use the access point closest to the operating cab. In addition, a fall from four to

⁵ Bigley indicated the worn head guides were unlikely to result in serious injury or illness. (Tr. 46:3–9.) However, he stated he was required to include all defects from one piece of equipment in one citation or order and accordingly judged the gravity based on the steps, which were the worse of the two defects. (Tr. 45:18–25, 46:15–17.) In light of this testimony, I have examined the violation, S&S, and unwarrantable failure issues based on the condition of the cable ladder steps.

seven feet is reasonably likely to result in injuries such as a broken bone or sprained joint. See *Sangravl Co.*, 2011 WL 2286880 at *20 (finding a violation of § 56.11001 to be S&S in part because broken bones or internal injuries were the likely result of a five- to eight-foot fall). I therefore determine that the violation resulted in a discrete safety hazard associated with a reasonable likelihood of an injury of a reasonably serious nature, which establishes the three remaining elements of the *Mathies* test for an S&S violation. I therefore conclude that this violation was S&S.

4. Negligence and Unwarrantable Failure

Bigley's testimony about his conversation with Webb is uncontroverted. Webb admitted that he knew the stairs were "damaged" and that they should have already been fixed. Webb was responsible for V&G's work at Job 20 but took mining directions from Dynamic. Moreover, the drill in operation was Dynamic's drill. I therefore conclude that Dynamic demonstrated a high degree of negligence.

Webb's admission that he knew the damaged stairs required repair is amplified by Dynamic's preshift reports recording a problem with the cable steps for at least three shifts for two days prior to the order in this case. Dynamic argues that the pre-shift reports did not list the ladder steps as "bent" on September 4, that Bigley admitted that "bent" steps differ from "broken" steps, and that "a reasonable conclusion would be that the step had been repaired." (Tr. 21:13-19, 52:15-19, 125:25-126:1; Resp't Reply br. at 3-4, 16.) As a result, Dynamic asserts, the Secretary cannot rely on the pre-shift reports as evidence of Webb's knowledge of the violation. (Tr. 21:13-19). However, Webb's statements to Bigley are telling: "Yes, yes, I know they've been writing that up. I know about those steps and I should have already had them fixed." (Tr. 36:2-3.) Moreover, Dynamic presented no evidence in support of its "reasonable conclusion" theory beyond the September 4 preshift report. Indeed, when Dynamic attempted to re-characterize Webb's statement as Webb having said that he thought it had been fixed, Bigley corrected him: "First of all, he didn't tell me that he thought it had been fixed. He said 'I know that that step was damaged and I should have already had it fixed.'" (Tr. 129:23-130:4.)⁶ I therefore conclude that a violation existed for at least three days and Dynamic had knowledge of the violation.

In addition, the operator made no effort to block off the defective steps and did not remove the driller from operation and provided no evidence that any employee ever physically manipulated the steps in a way that would have revealed severed wires. Despite the rather simple fix—blocking off the steps—I therefore conclude that Dynamic made no efforts to abate the violation. Further, Dynamic's own photographic exhibits, coupled with problems being marked on miner's preshift reports, establish that the violation was obvious. The record contains no evidence that greater efforts were necessary for compliance. Dynamic's knowledge of the violation, failure to abate the defect, and foreseeability of potential injury to miners constitute aggravated conduct more than ordinary negligence. *Spartan Mining Co.*, 30 FMSHRC 699,

⁶ Bigley also reiterated Webb's statement earlier in cross-examination, saying "[Webb] told me he knew the steps were damaged and need to be repaired and said that he should have already been repaired." (Tr. 124:17-19.)

714–15, 722–23 (Aug. 2008) (upholding unwarrantable failure findings based on supervisor’s knowledge and foreseeability of danger). I conclude that this violation did constitute an unwarrantable failure to adhere to a mandatory safety standard. Order No. 6615025 is hereby **AFFIRMED**, as written.

5. Civil Penalty

Under section 110(i) of the Mine Act, the Administrative Law Judge must consider six criteria in assessing a civil penalty: the operator’s history of previous violations, the appropriateness of the penalty relative to the size of the operator’s business, the operator’s negligence, the penalty’s effect on the operator’s ability to continue in business, the violation’s gravity, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary has submitted a report of Dynamic’s history of violations that have become final orders over a fifteen month period preceding this violation. The report consists of thirty-two violations, eight of which were assessed as S&S violations, and none of which involve the standard breached in Order No. 6615025. Nothing in the record suggests the proposed penalty amount of \$4,000 that the Secretary seeks in these proceedings is inappropriate for the size of Dynamic’s business or that it would infringe on Dynamic’s ability to remain in business. Moreover, once this order was issued, nothing suggests that Dynamic failed to make a good faith effort to achieve rapid compliance with the safety standard. Dynamic was highly negligent, and the violation exposed one miner to a reasonable risk of serious injuries. In considering all of the facts and circumstances of this matter, I hereby assess a civil penalty of \$4,000.

D. Citation No. 6615028 – The Portal Bus

1. Additional Findings of Fact - The Portal Bus

Both Church and Miller testified that the exhaust system on the portal bus was routinely broken, suggesting that the way the miners drove the bus contributed to the persistent exhaust system problems. (Tr. 72:19–73:2, 210:9–12.) Miller, however, neither trained the drivers nor prohibited aggressive drivers from operating the bus. (Tr. 207:6–22.) Indeed, no evidence demonstrates that Dynamic ever disciplined drivers for operating this equipment in a manner that Dynamic says resulted in the equipment being abused.

Moreover, Dynamic routinely uses unmodified school buses purchased at auction as portal buses. (Tr. 73:14–19, 91:14–15, 209:7). School buses are designed for use on paved roads, not the rough roads of a mine site. Church himself admitted that school buses are not designed for off-road use, but are used at Coal Mountain Mine No. 1 because they allow Dynamic to transport miners more efficiently than in an off-road vehicle. (Tr. 83:5–11.) Dynamic had an on-site Surburban, but it was reserved solely for the mine owner’s use during site visits. (Tr. 104:21–105:4.) I find, therefore, that Dynamic knew that old, unmodified school buses were not well-suited to the task for which they were used but chose to employ them in the interest of economy.

Dynamic's questioning of Inspector Bigley during cross-examination suggests that buses are designed to have passenger compartments that are sealed against the outside. (Tr. 141:18–142:6.) Yet Church testified to the contrary, indicating that Dynamic could not allow a broken-off exhaust system to remain unremedied because fumes came out of the motor and into the compartment where miners ride. (Tr. 84:5–8.) Based on the above record, I find that exhaust fumes consistently escaped into the passenger compartment of the portal bus.

Dynamic also suggests that Bigley's inspection of the steering joint was insufficient. (Resp't Br. at 7.) Here, however, Bigley's experience and Church's inconsistent testimony are determinative. Bigley has issued over thirty steering joint movement citations, and has extensive experience with performing these inspections through his CDL work. (Tr. 98:14–99:7.) Church provided no comparable details regarding his training or experience in testing the integrity of steering joints. Moreover, Church admitted he had no first-hand knowledge about the steering joint violation at issue in this case. (Tr. 82:6–7.) Church also admitted he does not use a dial indicator to determine joint wear. (Tr. 66:21–22, 81:20–82:1.) Instead, Church allows two mechanics to check the joint in precisely the same manner as Bigley does. (Tr. 66:22–67:2, 82:10–13.) Based on the record above, I determine that the steering joint was defective because it exhibited more than an eighth of an inch of movement as a result of Bigley's hand pressure test, thus meeting MSHA's out-of-service criteria.

Dynamic also suggests that the portal bus's brake system was not defective. Relying on photographs of the engine compartment, Miller and Church stated their belief that the brake reservoir contained brake fluid. (Tr. 77:7–9, 78:13–79:8, 79:22, 80:11–14.) However, unlike Bigley, neither Church nor Miller provided any testimony regarding their own physical examination of the engine compartment.

In addition, Church suggested the bus's brake system was designed to allocate sixty percent of its stopping power to the front wheels, which would cause the front brakes to catch a few seconds before the rear wheels. (Tr. 64:13–16, 75:19–23, 85:25–86:4.) Bigley, who has extensive experience performing maintenance on oversize vehicles, was unfamiliar with any such allocation of braking power. (Tr. 93:25–94:2.) According to Bigley, large vehicles employ precisely the *opposite* allocation of stopping power because locked front wheels and rolling rear wheels create a safety hazard. (Tr. 94:7–10.) Church himself admitted that front brakes locking while the rear wheels continue to roll leads to accidents. (Tr. 75:9–15.) Indeed, neither Church nor Miller anywhere explains why a large vehicle like the portal bus would logically employ such an uncommon allocation of stopping power. Based on the above, I find that the portal bus's braking system was defective.

2. Violation

Bigley issued Citation No. 6615028 for the portal bus's defective brake system, exhaust system, steering joint, and gas pedal. Order No. 6615028 alleges a violation of 30 C.F.R. § 77.1606(c), which, as stated above, requires operators to correct defects affecting haulage equipment safety before the equipment is used. Bigley deemed this violation to be S&S and

assessed moderate negligence. Dynamic argues that the Secretary has not proven the elements for any of the above cited systems.

To establish a violation, the Secretary must prove that the bus was in use or available for use, that the brake system, exhaust system, steering joint, or gas pedal was defective, and that the defect affected safety. Bigley observed a miner driving the bus when he began his inspection, establishing the first element of a violation.

Each of the above defective systems would affect the driver's ability to safely operate the bus, and a reasonably prudent mine operator would recognize these hazards warranted corrective action. *See Ideal Cement Co.*, 12 FMSHRC at 2415–16. In addition, a reasonably prudent mine operator would recognize that an out-of-control bus affects safety because a bus collision could result in fatalities to miners aboard the bus, on foot, or in other vehicles. I therefore conclude that a violation of § 77.1606(c) occurred.

3. Gravity and S&S

Dynamic's mandatory safety standard violation establishes the first element of the *Mathies* test for an S&S violation. Here, the portal bus's dismal condition affected each of the systems—the steering, the brakes, the accelerator—on which a driver relies for safe operation and avoidance of accidents. Moreover, carbon monoxide from the exhaust system is known to have a deleterious effect on human health; consistent exposure to exhaust fumes itself constitutes an additional discrete safety hazard.

The miners on board the bus in this case had relatively frequent exposure to the hazard in this violation. Dynamic uses portal buses to transport miners to and from their mine portals for every shift of every day. *See Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989) (“The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued.”) (citations omitted). It borders on a truism to say a bus crash is reasonably likely to result in serious injury or death, given that school buses do not have seat belts for passengers. I therefore determine that the violation resulted in discrete safety hazards associated with a reasonable likelihood of an injury of a reasonably serious nature. *Cf. West Sand & Gravel Co.*, 21 FMSHRC 1418, 1423 (Dec. 1999) (ALJ) (“[H]aving found that the welding truck, with diminished steering and braking capacity, operated around much heavier equipment and pedestrians, on uneven and muddy gravel surfaces, I find it reasonably likely that the truck driver could suffer serious injury from being struck by another vehicle, or hit and seriously injure a pedestrian in his path.”) This determination establishes the three remaining elements of the *Mathies* test for an S&S violation. I conclude that the violation was S&S.

4. Negligence and Unwarrantable Failure

In this case, Bigley assessed Dynamic's negligence as moderate. Bigley based his determination on his conversation with the bus driver, his review of the preshift reports, and his estimation that Sloan did not know that the bus was in such a state of disrepair. The Secretary,

however, has asked that the citation be modified to reflect high negligence and to reflect the operator's unwarrantable failure to comply with the standard. (Tr. 18:5–8; Sec'y Br. at 8 n.1.)

At the hearing, Miller and Church both indicated that the manner in which the miners drove the buses contributed to bus maintenance problems, yet Miller never took any disciplinary steps to remedy their driving practices. Further, Bigley's uncontroverted testimony about his conversation with the bus driver likewise suggests that Dynamic should have taken greater efforts to maintain the bus in safe operating condition. This evidence, coupled with Dynamic's evidence that miners were known to abuse the portal bus by driving aggressively, demonstrates a greater level of negligence than initially determined by the inspector. Consequently, Citation No. 6615028 is hereby **MODIFIED** to assess a high level of negligence.⁷

However, the Secretary did not prove that Dynamic engaged in aggravated conduct constituting more than ordinary negligence. Here, Bigley himself indicated that he had no evidence that Sloan knew the bus was in this bad of shape. Indeed, the foreman denied any knowledge of "any of these conditions" related to the bus. (Tr. 100:18–19.) Consequently, I conclude that this violation does not constitute an unwarrantable failure.

5. Civil Penalty

The Secretary originally proposed a \$23,229.00 civil penalty for this violation. (Sec'y Prop. Assessment at 2; Sec'y Pre-Hearing Report at 6.) In her post-hearing brief, the Secretary seeks a civil penalty of at least \$50,000 for this violation based on evidence adduced at trial demonstrating a high level of negligence. (Sec'y Br. at 8 n.1, 30.) Of the thirty-two violations in Dynamic's history of violations report, four involved the standard breached in Order No. 6615028. One of those violations was found to be S&S. Nothing in the record suggests that the proposed penalty of \$50,000 that the Secretary seeks is inappropriate for the size of Dynamic's business or that it would infringe on Dynamic's ability to remain in business. Dynamic did not respond to the Secretary's requests for a higher penalty although it had ample opportunity to do so. Once this citation was issued, nothing suggests that Dynamic failed to make a good faith effort to achieve rapid compliance with the safety standard. Dynamic was highly negligent, and the violation exposed at least twelve miners to a reasonable risk of death. However, Bigley himself admitted he had no evidence of Dynamic's actual knowledge. In considering all of the facts and circumstances in this matter, I hereby assess a civil penalty of \$30,000.

⁷ In her pre-hearing report, her opening statement at hearing, and her post-hearing brief, the Secretary requests that I designate the violation to be the result of Dynamic's unwarrantable failure, even though the violation was issued as a section 104(a) citation with "moderate" negligence. (Sec'y Pre-Hearing Report at 6; Tr. 18:5–8; Sec'y Br. at 8 n.1.) The Federal Rules may permit the amendment of pleadings to conform to the evidence and raise an unpleaded issue, *see* Fed. R. Civ. P. 15(b)(2). However, I need not reach this issue because I determine that the Secretary has not presented evidence of "aggravated conduct" greater than ordinary negligence.

E. Order No. 6615029 – The CAT Loader

1. Violation

Bigley issued Order No. 6615029 for the CAT loader's defective tire, engine doors, and handrails. Order No. 6615029 alleges a violation of 30 C.F.R. § 77.404(a), which requires operators to maintain machinery and equipment in safe operating condition and to remove unsafe equipment from service. Bigley deemed this violation to be S&S, occurring as a result of Dynamic's high negligence. Dynamic argues that the Secretary has not proven the CAT loader to be unsafe.

To establish a violation, the Secretary must prove that the loader's tire, engine doors, or handrails were not maintained in safe operating condition and that the loader was not removed from service.⁸ Bigley observed a miner operating the loader when he began his inspection, establishing the second element of a violation.

The first element is also established. Both the Secretary and Dynamic spent considerable effort at the hearing and in their post-hearing briefs discussing whether this tire—after being cited and removed—was unsafe. However, the CAT loader tire's considerably worn appearance *prior* to Bigley's order is sufficient to establish that the tire was in unsafe operating condition. As the PPM indicates, the presence of worn tires may indicate that a machine is not being maintained in safe operating condition. Here, circumferential cuts and gashes exposing tire plies were evident before Bigley issued his order; at no point did Dynamic claim that the tire plies were not exposed or that prior to the citation it knew how many plies could safely be exposed. The loader lifted tons of overburden, placing significant stress on the loader's front tires. In addition, the loader operated in a rocky pit; rocks cause a significant amount of damage to tires on a loader. A reasonably prudent mine operator familiar with these facts and circumstances would recognize that the potential hazard of a worn tire exploding warranted corrective action. *Cf. S&M Constr. Inc.*, 19 FMSHRC 566, 578 (Mar. 1997) (ALJ) (finding that a trailer tire with 90 pounds of air pressure and exposed nylon cords affected safety). Miller himself stated that a worn tire may be unsafe, testifying that when he checked off-road tires for safety, if it "looked bad, I would get a representative of the manufacturer to look at the tire." (Tr. 158:22–24.) Miller's testimony, as well as Sloan's admission to Bigley that he knew the tire was defective and that Dynamic was pursuing a replacement tire, support a finding that the tires were in unsafe condition. As a result, I determine that Dynamic did not maintain the CAT loader in safe operating condition. I therefore conclude that a violation of § 77.404(a) occurred.

2. Gravity and S&S

Having established Dynamic's violation of a mandatory safety standard, the first element of the *Mathies* test, I now turn to the questions of gravity and whether this violation was S&S.

⁸ The witness testimony and post-hearing briefs provide some contradictory discussion regarding the safety of the engine doors and handrails. Because I determine that the loader's tire was defective and that a reasonably prudent mine operator would have recognized the potential hazard of a worn tire exploding, thus warranting corrective action, I need not make additional factual findings regarding the safe operating condition of the engine doors or handrails.

The degraded condition of the tire resulted in a discrete safety hazard. Assuming continued operation, a rock could puncture the tire in its weakened sidewalls. With the tire placed under enormous pressure from lifting a load, an exploding tire could easily contribute to the collapse of the loader, a collision with an adjacent rock truck, or propel a rock into other vehicles or exposed miners on foot. *See Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010) (explaining that the third element of the *Mathies* test asks whether the safety hazard, rather than the violation itself, is reasonably likely to cause injury). As Bigley indicated, any of these hazards could result in serious injury or death. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278–79 (Dec. 1998) (noting the importance of an inspector's judgment in making an S&S determination). Accordingly, the hazard associated with this violation was properly cited as a reasonably likely risk of serious injury to more than one miner. I conclude that this violation created a discrete safety hazard associated with the reasonable likelihood of a reasonably serious injury. *See S&M Constr. Inc.*, 19 FMSHRC at 579 (finding a violation was S&S where a tire bulged, was missing tread, and inner cords and belts were visible). I therefore determine that this violation was S&S.

3. Negligence and Unwarrantable Failure

In this case, Bigley's testimony about his conversation with Sloan is uncontroverted. Sloan admitted he knew the tire was defective and explained that the company had contacted the manufacturer about obtaining a replacement tire. Yet before Bigley issued his order, no representative of the manufacturer or distributor ever physically inspected the tire to ensure it was safe for continued operation. (Tr. 153:2–4, 169:18–22, 191:19–22.) Based on this record, I find Sloan's admissions to Bigley establish that Dynamic knew the tire to be defective and had sought a replacement Superhawk tire from either the manufacturer or GCR prior to Bigley's September 10 citation. Further, I find that Dynamic took no steps to have any expert physically examine or ensure the safety of the tire prior to issuance of the order. I therefore conclude that Dynamic's violation demonstrated a high degree of negligence.

In addition, Dynamic destroyed preshift reports for the loader that may have demonstrated how long Dynamic had known the tires to be defective; I have drawn an adverse inference that the preshift reports would have shown the defects to have existed. Based on this inference and Sloan's statement to Bigley, I therefore conclude that Dynamic had knowledge of the violation. Given Dynamic's failure to have any tire expert physically inspect the tire and or remove the loader from operation, I conclude that Dynamic made no efforts to abate the violation. Further, Dynamic's own photographic exhibits, coupled with Sloan's statements, establish that the violation was obvious and suggest greater efforts were necessary for compliance.⁹ Here, Dynamic knew the tire to be defective and that the worn tire presented a risk

⁹ According to Dynamic, Rick Neely, a representative from the tire distributor, GCR, examined the tire after the order. (Tr. 161:17–23, 190:19–191:18.) Dynamic submitted an undated e-mail from Mr. Neely sent to a former Dynamic safety foreman, Dave Street, claiming that the Superhawk tire was sound. (Ex. R–2; Tr. 14:1–24, 164:12–18, 191:19–21.) Miller further testified regarding his post-citation discussions with Neely regarding Neely's inspection of the tire. (Tr. 165:8–168:2, 168:22–169:6.) However, neither Neely's letter nor Dynamic's testimony at hearing established Neely to be an expert in tire construction. Miller himself admitted that Neely "didn't have a whole lot of information" about the Superhawk's

(continued...)

warranting inspection, yet continued running the loader—subjecting miners to safety hazards—because it did not have a replacement tire in stock. I conclude this violation constituted an aggravated failure to adhere to a mandatory safety standard and to be aggravated conduct that is more than ordinary negligence. *Spartan Mining Co.*, 30 FMSHRC 699, 714–15, 722–23 (Aug. 2008) (upholding unwarrantable failure findings based on supervisor’s knowledge); *San Juan Coal Co.*, 29 FMSHRC 125, 134–35 (Mar. 2007) (indicating that an operator’s failure to address a violation, or subordination of abatement efforts to other work, support an unwarrantable failure finding) (citations omitted); *E. Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) (“[I]f an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence.”); see also *S&M Constr. Inc.*, 19 FMSHRC at 579 (finding aggravated conduct more than ordinary negligence where tire’s defective condition was obvious, lasted more than two days, no efforts were made to remove the tire, and the vehicle was allowed to continue in operation with the defective tire.) Accordingly, Order No. 6615029 is hereby **AFFIRMED**, as written.

4. Civil Penalty

The Secretary seeks a civil penalty of at least \$4,000 for this violation. Of the thirty-two violations in Dynamic’s history of violations report, two involved the standard breached in Order No. 6615029. Both were determined to be S&S, and one of those violations was the result of Dynamic’s unwarrantable failure to comply with the standard. Nothing in the record suggests that the Secretary’s proposed penalty of \$4,000 is inappropriate for the size of Dynamic’s business or that it would infringe on Dynamic’s ability to remain in business. Once this order was issued, nothing suggests that Dynamic failed to make a good faith effort to achieve rapid compliance with the safety standard. Dynamic was highly negligent, and the violation exposed two miners to a reasonable risk of death. In considering all of the facts and circumstances in this matter, I hereby assess a civil penalty of \$4,000.

(...continued)

construction. (Tr. 167:16–21.) MSHA Mechanical Engineer Angel, a qualified tire expert, also discussed the Superhawk tire with Neely and determined that Neely lacked an understanding of the tire’s construction. (Tr. 232:23–25.) Accordingly, I credit Angel’s testimony and afford no weight to either Neely’s e-mail or Miller’s testimony regarding his conversation with Neely.

VI. Order

In light of the foregoing, it is hereby **ORDERED** that Order Nos. 6615025 and 6615029 be **AFFIRMED** and that Citation No. 6615028 be **MODIFIED** to reflect a high level of negligence. Dynamic is **ORDERED** to pay a civil penalty of \$38,000 within 40 days of the date of this decision.

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

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 8, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2010-509
Petitioner	:	A.C. No. 46-08884-206855
v.	:	
	:	
COAL COUNTRY MINING,	:	Mine No. 58
Respondent	:	

**ORDER ON SECRETARY’S MOTION TO STRIKE
RESPONDENT’S AFFIRMATIVE DEFENSES**

Before the Court is the Secretary’s Motion to strike Respondent’s affirmative defenses. (Motion). The Motion notes that on October 14 and 15, 2009, the Respondent was an independent contractor employed by Pay Car Mining, Inc and that, during an inspection of Pay Car’s No. 58 mine, 19 citations were issued to Pay Car. Subsequently, the Secretary determined that Coal Country was jointly liable for those citations, six of which remain at issue in this docket. Essentially, Coal Country asserts that it was only a labor broker which provided employees to Pay Car but had no supervisory control over those employees. Related to that defense, Respondent asserts that the Secretary cannot cite an independent contractor where it lacks control over the mine and its equipment. Motion at 2, 3.

The Secretary notes that Coal Country was an independent contractor employed Pay Car and that, following an inspection in October 2009, MSHA determined that the Respondent was jointly liable for the alleged violations.¹ Citing *Secretary of Labor v. Bulk Transportation Services*,¹³ FMSHRC 1354 (1991), it notes that a labor broker is an independent contractor “when their employees’ or subcontractors’ work is ‘essential and closely related to the extraction process and [it] had a sufficient presence at the mine.’” The Secretary then adds that the Respondent’s degree of control over the mine or its employees does not alter the independent contractor status. Motion at 2-3, citing *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991 (1996) and *Secretary of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (2006) (“*Twentymile Coal*”). Nor, the Secretary further notes, does the fact that another operator at the mine may have more authority over employees or equipment prevent the agency from looking to multiple entities fitting the definition of an “operator” under the Mine Act. *Id.* at 3, citing *Secretary of*

¹ The Secretary’s Petition merely asserts that the Respondent was an “operator” of the mine; it provides nothing to explain the nature of the Respondent’s activities at the mine.

Labor, Mine Safety and Health Administration (MSHA) v. Old Ben Coal Co., 1 FMSHRC 1480, 1483 (1979).

Though described as a “*Motion in Opposition to the Secretary’s Motion*,” the Respondent effectively filed an *Opposition to the Secretary’s Motion* and it will be referred to as such. (“*Opposition*”). Respondent maintains that the Secretary has incorrectly characterized its defenses.

The Respondent first asserts an “*Impossibility of Compliance*” defense. It maintains that it had no control to achieve compliance with the regulations, as it lacked control over the men or machinery. Instead, its responsibilities were limited to “receiv[ing] employee hours according to time sheets forwarded to [it] by Pay Car Mining and to issue a check to the employees. The Respondent did not hire [or] fire any employees . . . the Respondent would [only] pay the employee hours and employment cost . . .” *Opposition* at 3. Further, Respondent notes that it had no “authority to discipline or sanction employees or [intervene] in the operator’s safety or MSHA approved plans.” *Id.* In sum, after citing a number of other examples of what it did *not* do at the mine, the Respondent emphasizes that its service to the mine “was bookkeeping which did not require a presence at the mine other than to deliver checks.” *Id.* at 4. Consistent with this argument, the Respondent notes that it had no production operator I.D. number issued, a fact which made sense as it was “not involved in the extraction process at all.” *Id.* at 5. Respondent adds that Pay Car settled the *same* underlying violations, for which Coal Country also has been cited, in Docket No. WEVA 2010-423.²

The Secretary filed a Reply, noting that the thrust of Respondent’s defense is that it “was merely a labor broker that performed no services at the No. 58 Mine.” Reply at 1. However, it observes that the Respondent registered with MSHA as an independent contractor, receiving a four digit identification number in that status. The Secretary adds that the Respondent must have been providing services at the mine as it applied for legal identity with MSHA under 30 C.F.R. Part 41. That Part provides that an operator includes an independent contractor “performing services” at the mine. *Id.* at 2. It then notes that the Respondent’s Articles of Incorporation describe its business as the extraction of coal. The Secretary suggests that Pay Car and the Respondent made their arrangement concerning employees in order to limit *Pay Car’s* workers’ compensation costs and that by Coal Country’s act of placing the employees on its payroll, instead of Pay Car’s, it obligated Coal Country to comply with the Mine Act. Based on these arguments, the Secretary urges that the Court strike the Respondent’s defense that mere labor brokers are precluded from liability under the Mine Act and its defense that the Secretary is precluded from citing an independent contractor that lacks control over the mine and the mine

² Further, along with its contentions, as described above, Respondent maintains there is no unity of ownership between Pay Car and Coal Country. *Id.* at 6, citing *Berwind Natural Resources*, 21 FMSHRC 41 (Dec. 16, 1999). Apart from the unhelpful incorrect cite to *Berwind*, which is at 21 FMSHRC 1284, this case is not about parent and subsidiary corporations and in any event it affirms that the Secretary may consider multiple entities as operators. Parties should take care to correctly cite references to case law both as to the source and the substance of the reference.

equipment. *Id.* at 3.

Upon consideration, the Court **GRANTS** the Secretary's Motion, but with significant caveats. In the one instance the Court is aware of in which the Commission attempted to draw lines concerning the type of mine operator covered by the Mine Act, the D.C. Circuit held that the Secretary's decisions regarding whether to cite the owner operator, an independent contractor, *or both* parties, are effectively unreviewable. *Twentymile Coal*. That Court observed that the definition of an operator encompasses "any independent contractor performing *services* or construction at [a] mine."³ *Twentymile Coal* at 152 (emphasis added). The Court of Appeals pointed out that agency action is not reviewable when such action "is committed to agency discretion by law." *Id.* at 156. That is the situation here; the Secretary's decision as to whom to prosecute is entirely within its unreviewable discretion.

The Secretary should not make too much of this ruling as, if the facts turn out to be as the Respondent contends,⁴ it will only be a Pyrrhic victory. That is because, while the Respondent fits the Act's definition of an operator, by virtue of providing "services" at the mine, if those services are entirely of an administrative or paperwork nature, as Respondent contends, then its denomination as an 'operator' may be akin to a nameplate or operator in name only and the *penalty* assessed for the alleged violations may, appropriately, be drastically reduced from the proposed assessment amounts.

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

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³ Ironically, in *Twentymile Coal* the independent contractor paid the citations; it was the Twentymile that was objecting to liability. However, that twist and distinction from this case do not alter the principles set forth by the District of Columbia Circuit.

⁴Importantly, no facts have been established at this point in time as to the nature of the Respondent's role as an operator.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N.W., SUITE 9500
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August 8, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2010-509
Petitioner	:	A.C. No. 46-08884-206855
v.	:	
	:	
COAL COUNTRY MINING,	:	Mine No. 58
Respondent	:	

ORDER ON SECRETARY’S MOTION FOR DEFAULT

The Secretary has filed a motion for default judgment “affirming the inspectors’ findings regarding gravity and negligence and the Secretary’s representations regarding the Respondent’s prior history of violations, size, ability to continue in business, and good faith abatement for Citation Nos. 8093615, 8093616, 8093619, 8098370, 8098372, and 809373; and that an Order be issued directing the Respondent to pay in full the \$3,971.00 in civil penalties assessed.”¹ Motion at 1. The Secretary notes that, per this Court’s Prehearing Order, the prehearing exchange was to have occurred by July 18, 2011. In the Motion the Secretary adds that it has made several attempts to at least discuss the possibility of settlement. In fairness, the Respondent’s representative, as related in the Secretary’s Motion, advised the Secretary that his client had closed his business and that he was “trying desperately to contact him.” *Id.* at 4.

The Secretary maintains that the failures of the Respondent’s representative to confer regarding settlement and to exchange the information for hearing, both required by the Court’s Prehearing Order, constitute bases for default. *Id.* at 5. Respondent’s representative filed its opposition to the motion. While other matters were included in the opposition, the Court notes here only facts it deems to be essential to the present motion. Essentially, the representative has provided reasons for deficiencies with its prehearing exchange requirements. As of the date of its Opposition to the motion, Respondent’s representative relates that it now has provided a list

¹ Oddly, the Secretary’s motion does not ask that the standards cited be determined to have been violated, seeking only the associated findings such as gravity and negligence, among others. As the Secretary does not ask that the violations themselves be found to have occurred, the associated findings cannot be found until after such determinations have been made. Thus, among other shortcomings in its motion, one cannot seek the imposition of the proposed penalty amounts until the violations have been found first.

of witnesses to the Secretary, that it is searching for documents requested by the Secretary and that the parties have set depositions for August 11th and 12th, 2011. The Opposition also relates that Darrell Felts, owner of Respondent Coal Country Mining, Inc., wants his opportunity for a hearing in this matter and that prior deficiencies with the prehearing order have been explained on the basis that the Respondent had abandoned his business and that difficulties in contacting Felts has been explained by the representative.

The Court agrees that default is a harsh remedy² and in that light has determined that the Respondent's representative has put forth sufficient information to establish that it would be unwarranted at least at this juncture in the proceeding. However, as the Court noted in its August 5th email to the parties, "the Respondent is advised that any failure to exchange exhibits and identify witnesses can adversely affect the evidence it will be permitted to offer at the hearing. The shorter the time before the hearing for disclosure of such information, the greater the likelihood that such evidence or witnesses may be precluded from being part of the evidentiary record. The Court's prehearing order speaks to the parties' obligations for prehearing exchanges."

Accordingly, the Secretary's Motion is DENIED. However, Respondent is particularly advised that, per 29 C.F.R. § 2700.66, failure "to comply with an order of the Judge or these rules" can result in an Order to Show Cause requiring the impacted party to demonstrate why default would not be warranted.

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

² In numerous instances, most recently in July 2011, the Commission has 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. *Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Cam Mining, LLC*, 2011 WL 3223839 (F.M.S.H.R.C.), citing *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). At least at this point in these proceedings, there is no call for a show cause order to be issued.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 15, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2010-18
Petitioner	:	A.C. No. 46-09230-197161
	:	
v.	:	Docket No. WEVA 2010-494
	:	A.C. No. 46-09230-197160
	:	
	:	Docket No. WEVA 2010-611
	:	A.C. No. 46-09230-208527
	:	
REMINGTON, LLC,	:	
Respondent	:	Mine: Winchester Mine

ORDER GRANTING IN PART AND DENYING IN PART THE SECRETARY OF LABOR’S MOTION TO COMPEL

The Petitioner, the Secretary of Labor, has moved to compel the Respondent, Remington LLC, to respond to several interrogatories in the Secretary’s first set of interrogatories and to produce certain documents requested in the Secretary’s first request for production of documents. According to the Secretary, the Respondent has objected to the interrogatories and provided incomplete information or claimed the requested information is unavailable.

The Secretary requested production of examination reports for several parts barns, examination reports for the main mine fan and all Winchester Mine examination reports from June 4, 2009 to July 18, 2009. Sec’y Mot. to Compel 6. The Respondent replied that it had been unable to locate the requested documents. The Secretary requests that I draw an adverse inference from the absence of these documents. Sec’y Mot. to Compel 9. The Respondent argues that it is under no obligation to retain the records requested by the Secretary for any period of time and that the Company generally only keeps such records for a year. Opp’n to Mot. to Compel 1.

The Company has stated it no longer has the records requested by the Secretary and I cannot order a party to produce something it does not have. Nor can I penalize the Company by drawing an adverse inference from their absence when the Secretary has failed to offer evidence the Company had an obligation under the Mine Act to maintain the requested records.

Accordingly, the Motion to Compel is **DENIED** with regard to Requests for

Production 5 and 6 in Docket No. WEVA 2010-18.

The Motion to Compel is **DENIED** with regard to Requests for Production 5, 6 and 7 and with regard to Interrogatory 6 in Docket No. WEVA 2010-494.

The Motion to Compel is **DENIED** with regard to Requests for Production 8 and 9 in Docket No. WEVA 2010-611.

The Secretary has requested verification of Respondent's responses to her interrogatories. Sec'y Mot. to Compel 6. Respondent's counsel signed its responses to the Secretary's interrogatories and to the Secretary's requests for production. The Secretary has failed to explain what additional verification is sought. Therefore, the Secretary's request is **DENIED**.

INTERROGATORIES, ANSWERS AND RULINGS

A. WEVA 2010-18

Interrogatory 2. If you are contending that the assessed penalty will have an effect on Respondent's ability to continue in business, state all the facts that support that contention.

Answer. Any civil penalty will have some impact on an operator's ability to continue in business.

The Secretary argues if the Respondent contends the penalty will effect its ability to continue in business then the Respondent must provide supporting evidence. Sec'y Mot. to Compel 4. In its responsive motion the Respondent states that it will not argue at trial that the assessed civil penalties for these citations "will be the final weight on the scale that forces it to go out of business." Opp'n to Mot. to Compel 3.

The Respondent's answer is unresponsive. It is unclear from the general statement made by the Respondent in its answer or from its responsive motion whether it contends that the penalty will effect Respondent's ability to continue in business. If the Respondent intends to argue the assessed civil penalties will affect its ability to continue in business it should provide the requested information. If the Respondent does not intend to make such a contention it should clearly state this in its answer. The Respondent is **ORDERED** to respond to the interrogatory as written.

B. WEVA 2010-611

Interrogatory 14. Identify the individual(s), including title(s), responsible for examining the continuous miner referenced in Citation # 8097554 at the Winchester Mine during the month of November 2009.

Response. Respondent does not have sufficient knowledge to respond to this interrogatory. Respondent reserves the right to supplement this response should information responsive to this request be located.

The Respondent states in its responsive motion that it searched its records, but was unable to find the requested information. Resp. Motion 4. As stated earlier, I cannot order the Respondent to disclose information it does not have. Accordingly, the Secretary's Motion to Compel is **DENIED** with respect to Interrogatory 14.

REQUESTS FOR PRODUCTION OF DOCUMENTS, RESPONSES AND RULINGS

A. WEVA 2010 - 494

Request 2. All statements taken by Respondent in relation to the contested Citations.

Response 2.

This request exceeds the scope of discovery provided for by Fed. R. Civ. P. 26(b). The request implicates the attorney-client privilege, the work product doctrine, and the self critical examination privilege. Notwithstanding this objection, without waiving it, and in a good faith effort to respond to the portion of this request that may be legitimate, respondent states that is unaware of any such statements. Respondent reserves the right to supplement this response.

The Secretary argues any privileged information should have been identified in a privilege log. Sec'y Mot. to Compel 5. The Respondent contends that the Company's employees have discussed the citations with counsel. Opp'n to Mot. to Compel 2. Respondent argues it should not be required to produce a privilege log including this information. *Id.*

The Respondent's answer is unresponsive. Respondent states in its responsive motion that the Company should not be required to provide a privilege log but has failed to make an argument in support of its position. As I stated in my July 28, 2011 order in response to a similar discovery issue, if some of the requested information is privileged the burden is on the party asserting the privilege to identify it. The information sought by the Secretary must be disclosed. The Respondent is **ORDERED** to respond to the request for production.

B. WEVA 2010-611

Request 2. All statements taken by Respondent in relation to the contested citations.

Response.

This request exceeds the scope of discovery provided for by Fed. R. Civ. P. 26(b). The request is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Moreover, it implicates the attorney-client privilege, the work product doctrine, and the self critical

examination privilege. Notwithstanding this objection, without waiving it, and in a good faith effort to respond to the portion of this interrogatory that may be legitimate, respondent states: see attached exhibits.

The Respondent is **ORDERED** to respond to the request for production for the same reasons as Request 2 in Docket No. WEVA 2010-494.

Request 7. All documents related to the training of miners at the Winchester Mine for the year of 2009.

Response.

This request exceeds the scope of discovery provided for by Fed. R. Civ. P. 26(b). The request is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Moreover, it implicates the attorney-client privilege, the work product doctrine, and the self critical examination privilege. Notwithstanding this objection, without waiving it, and in a good faith effort to respond to the portion of this request that may be legitimate, the Respondent will provide relevant training records in a supplemental filing.

The Secretary states that the training records have not been produced. The Respondent is **ORDERED** to provide the records.

All outstanding discovery must be completed for the above-captioned dockets by September 23, 2011.

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

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/ca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 19, 2011

SECRETARY OF LABOR, (MSHA)	:	TEMPORARY REINSTATEMENT
on behalf of KENNETH R. WILDER,	:	PROCEEDING
Complainant	:	
	:	Docket No. KENT 2011-1224-D
v.	:	BARB-CD-2011-06
	:	
PRIVATE INVESTIGATION AND	:	
COUNTER INTELLIGENCE	:	Abner Branch Mine
SERVICES, INC., and BLEDSOE	:	Mine ID 15-19132
COAL CORPORATION,	:	
Respondents	:	

ORDER GRANTING MOTION TO COMPEL
and
DENYING MOTION TO STRIKE

Participating Parties:

Tony Opegard, Esq., Lexington, KY, representing Kenneth R. Wilder.

Marybeth Zamer, Associate Regional Solicitor, U.S. Department of Labor, Nashville, TN, representing the Secretary of Labor (MSHA) on behalf of Kenneth R. Wilder.

John Williams, Esq., Rajkovic, Williams, Kilpatrick & True, PLLC, Lexington, KY, representing Bledsoe Coal Corporation.

Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, KY, representing PICI.

Before: Judge L. Zane Gill

Procedural Posture

After taking evidence and argument at a hearing on July 15, 2011, the Court ordered the temporary reinstatement of Kenneth R Wilder (“Wilder”), on or about July 27, 2011. In response to that order, Respondent, Private Investigation and Counter Intelligence Services, Inc, (“PICI”) served the Court and the other parties a Notice of Reinstatement, which sets forth terms which, according to PICI, satisfy the Court’s Temporary Reinstatement Order. On August 8, 2011, Counsel for Wilder filed a Response in Opposition to PICI’s Notice of Reinstatement and Motion to Compel Compliance with the Court’s July 27, 2011, Temporary Reinstatement Order. On August 11, 2011, the Associate Regional Solicitor for the U.S., Department of Labor (“ARSOL”) submitted a letter notifying the Court and the other participating parties that the Secretary of Labor was not in agreement with the terms of the Notice of Reinstatement and that she considered PICI’s actions to be unilateral and in violation of this Court’s Temporary

Reinstatement Order. On August 15, 2011, PICI filed a response to Wilder's opposition to its Notice of Reinstatement. On August 16, 2011, Bledsoe Coal Corporation ("Bledsoe") filed its response to Wilder's opposition to PICI's Notice of Reinstatement. Also on August 16, 2011, the Secretary (ARSOL) filed a Motion to Strike certain exhibit materials (a proposed agreement regarding economic reinstatement) submitted by PICI in conjunction with its August 15, 2011, response to Wilder's opposition. Finally, on August 18, 2011, Wilder filed a reply to PICI's and Bledsoe's responses to his Motion to Compel, and PICI filed a response to ARSOL's Motion to Strike.

For the reasons stated below, the Court grants Wilder's Motion to Compel Compliance and denies the Secretary's Motion to Strike.

Discussion

Wilder's Motion to Compel

The Commission's Administrative Law Judges do not have authority to order economic reinstatement absent an underlying agreement between the parties.¹ We have clear authority to order temporary reinstatement and to approve (and possibly incorporate into our orders) the terms of an economic reinstatement agreement negotiated and agreed to among the parties. 30 U.S.C. § 815(c)(2), of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act); *Sec'y, on behalf of Phillips, v. A & S Construction Co.*, 30 FMSHRC 1119, 1121 (Nov. 2008). An economic reinstatement agreement can be a means of complying with an ALJ's temporary reinstatement order, if duly negotiated and agreed to by the parties and approved by the court. As such, it is a procedure much used and approved by the Commission. *See, e.g., Sec'y on behalf of York v. BR&D Enterprises, Inc.*, 23 FMSHRC 386 (Apr. 2001). However, the parties have no right to require or impose on each other, nor does the Court have authority to impose, economic reinstatement terms that have not been negotiated and agreed to. *Sec'y of Labor, Mine Safety and Health Administration (MSHA) v. North Fork Coal Corporation*, 33 FMSHRC 589 (Mar. 2011).

In this case, as is evident in the opposing positions of the parties, there has been no negotiated agreement on terms of economic reinstatement. In the absence of such an agreement, and lacking convincing proof that the terms of the Court's Temporary Reinstatement Order have been satisfied, PICI and Bledsoe have yet to comply with the Court's order. Without Wilder's concurrence, there can be no economic reinstatement for the Court to recognize.

¹ "Economic reinstatement" is a process by which the parties negotiate and agree to contractual terms that expediently substitute, either in total or in part, for the actual temporary reinstatement ordered by the judge in his/her temporary reinstatement order in a Sec. 105(c) discrimination case. As a matter of practice and custom, the parties may request that the judge modify his/her temporary reinstatement order to incorporate the terms of the economic reinstatement negotiated by the parties. However, as implied in its name, "temporary reinstatement" is an interim mechanism, and any amounts paid to the claimant are intended to be factored into and treated as an accounting adjustment in the ultimate calculation of back pay in the final resolution of the discrimination case on its full merits.

Bledsoe and PICI were ordered to reinstate Wilder to the position he held on May 3, 2011, or to an equivalent position, at the same rate of pay and with the same hours and benefits to which he was then entitled. Bledsoe and PICI have not reinstated Wilder to the same position he held on May 3, 2011. They have not argued that their unilateral reinstatement action constitutes an equivalence,² nor have they sought the Court's approval of their action in their Notice of Reinstatement of August 1, 2011. When challenged by Wilder, Bledsoe and PICI raised the collateral equitable issues relating to windfall compensation that may become relevant at such time as the Court decides the case on its merits and includes an order of back pay, but are unripe at this point. Issues of offset and/or mitigation may be relevant to a final calculation of damages, if any, but they do not pertain at this stage of the proceeding.

Wilder's Motion to Compel compliance with the Court's Temporary Reinstatement Order is **GRANTED**. PICI and Bledsoe are directed to comply with the Temporary Reinstatement Order immediately.

The Secretary's Motion to Strike

The Secretary's Motion to Strike seeks an order striking the "proposed agreement regarding economic reinstatement" from the record in this case. It is clear from the context of the authority cited by the Secretary's representatives that a motion to strike is more appropriately directed at an offer of evidence to support a claim of liability by tending to infer a culpable state of mind. The typical scenario is a court striking evidence of settlement negotiations or immediate repairs as contrary to the public policy of favoring compromise and settlement of disputes. *See*, Fed. R. Evid. 408 and related commentary. The settlement documents attached as exhibits to the parties' submissions in this case relate to whether there was a meeting of the minds on the issue of economic reinstatement and have nothing to do with any potential liability, at least at this stage of the case.

² PICI makes a passing reference to equivalent reinstatement in its response to Wilder's opposition to the Notice of Reinstatement. However, they present no detail to support their assertion other than to offhandedly claim that Wilder is better off under their reinstatement than he would have been had he been reinstated to the position he held on May 3, 2011, "since he no longer has to drive to the Bledsoe mine site and spend money for gas in his vehicle."

The Secretary's Motion to Strike is **DENIED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of the Administrative Law Judges
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August 29, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2010-830
Petitioner,	:	A.C. No. 15-08079-210194
	:	
v.	:	
	:	
EXCEL MINING, LLC,	:	Mine: No. 3 Mine
Respondent.	:	

ORDER DENYING SECRETARY’S MOTION TO LIMIT DISCOVERY

This case is before me upon the Secretary of Labor’s (“Secretary”) Petition for the Assessment of Civil Penalty, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815. The case was assigned to me by Chief Judge Robert J. Lesnick on April 4, 2011.¹ In dispute are five section 104(a) citations issued to Respondent, Excel Mining, LLC (“Excel”), with proposed penalties of \$11,158. The Secretary is represented in this proceeding by a Conference and Litigation Representative (“CLR”) who filed a Notice of Unlimited Appearance with the petition on April 6, 2010. The CLR is authorized to “represent the Secretary in all matters in this case, including representing the Secretary at a hearing without an attorney from the Office of the Solicitor present.” (Notice of Unlimited Appearance at 1.) Excel concomitantly filed its answer to the Secretary’s petition along with a request for production of documents and a set of interrogatories on April 19, 2010. In response to these discovery requests, the Secretary filed a Motion to Limit Discovery on May 13, 2010, pursuant to Commission Procedural Rule 56(c), 29 C.F.R. § 2700.56(c).² Excel filed a Reply in Opposition to the Secretary’s motion on May 17, 2010.

A. Parties’ Arguments

The Secretary argues that permitting discovery would “cause undue delay in this proceeding, place undue burden and expense on the Secretary, and therefore not serve the public

¹ Given the more than 500 cases currently pending on my docket, my Prehearing Order issued in conjunction with the Order of Assignment on April 4, 2011, specifically ordered the moving party to alert my office if the case contained any outstanding motions. The Secretary failed in this respect, as her motion was educed during a routine review of the case file.

² In proceedings before Commission Judges, parties may obtain discovery, *inter alia*, through interrogatories and requests for production of documents. 29 C.F.R. 2700.56(a). Parties from whom discovery is sought may move to limit discovery to prevent undue delay or “to protect a party or person from oppression or undue burden or expense.” 29 C.F.R. § 2700.56(c).

interest in having these cases resolved expeditiously.” (Sec’y Mot. at 1–2.) According to her motion, answering Excel’s discovery requests would impose an undue burden on the Secretary. (*Id.* at 2.) The Secretary suggests that Excel will suffer no prejudice if the case proceeded to a hearing without discovery because she has “already offered to provide copies of the inspector’s notes along with all other related and non-privileged information available.” (*Id.* at 3.) In response, Excel contends that the Secretary has presented “no particular or specific facts to meet her burden of showing good cause for limiting discovery, but relies on conclusory statements and should be denied summarily.” (Resp’t Reply at 1.) Excel also points out several misrepresentations in the Secretary’s motion, which are discussed below in more detail.

B. Commission Procedural Rule 10(c)

Commission Procedural Rule 10(c) states that moving parties (1) “shall confer or make reasonable efforts to confer with other parties” prior to filing any non-dispositive motion, and (2) “shall state in the motion if any other party opposes or does not oppose the motion.” 29 C.F.R. § 2700.10(c). Here, the Secretary’s motion to limit discovery fails on both counts. First, the Secretary’s motion includes no statement regarding Excel’s opposition. Second, although the Secretary suggested during settlement negotiations that Excel accept inspection field notes “in lieu of formal discovery,” the Secretary “never consulted with Excel regarding the potential filing of this motion.” (Resp’t Reply at 1 n.1, Exhibit 2.) Such failures contravene Commission Procedural Rule 10(c).

Although the requirements contained in Commission Procedural Rule 10(c) may appear to be minor or overly formalistic, they serve a constructive purpose. The rule forces parties to communicate prior to filing a discovery motion, which typically results in an amicable resolution of the discovery dispute without the need for court intervention. Since the filing of the Secretary’s motion, the parties have been at a stalemate for more than a year with no energies exerted towards either settling this case or positioning it for hearing. Compliance with the rule might have avoided this unfortunate result.

C. Other Errors and Deficiencies in the Motion

Although the Secretary’s failure to comply with Commission Procedural Rule 10(c) is sufficient grounds to deny her motion, I am troubled by the motion’s repeated factual inaccuracies and paucity of legal analysis. First, the Secretary alleges she “already offered to provide copies of the inspector’s notes along with all other related and non-privileged information available.” (Sec’y Mot. at 3.) Although the Secretary’s April 22, 2010 e-mail offered copies of the inspector’s notes in lieu of formal discovery during settlement negotiations, the offer made no mention of all other related and non-privileged information. (Resp’t Reply at 1 n.1, Exhibit 2.) The Secretary fails to include any specifics regarding a subsequent offer, if any, to provide such additional information.

Second, the Secretary claims Excel requested 115 interrogatory responses and twenty-five answers to produce documents through discovery. (Sec’y Mot. at 2.) However, the

Secretary's own appendix to her motion makes plain the extent of this misrepresentation. Even counting subparts, Excel in fact propounded just thirty-three interrogatories and made five requests for documents. (Sec'y Mot. at Attachment A.)

Third, the Secretary alleges that "[l]imiting discovery and requiring the [R]espondent to exchange relevant and non-privileged evidence places no additional burden on [R]espondent and would enhance the opportunity for settlement." (Sec'y Mot at. 3.) Yet the record reveals that the Secretary has filed no document or interrogatory requests with Excel, so no basis exists for "requiring [Excel] to exchange relevant and non-privileged evidence." (*Id.*; Resp't Reply. at 9.) The Secretary's assertion is misplaced and premature at best.

Finally, the Secretary's legal analysis of how limiting discovery would prevent undue delay or protect the Secretary from oppression or undue burden relies almost entirely on conclusory statements. The motion cites no circuit court or Commission precedent—not even a previous Administrative Law Judge order—offering an interpretation of Commission Procedural Rule 10(c)'s undue delay or undue burden or expense standards.

D. Discussion

Based on the above, it appears the CLR replicated the body of a motion from a previous case. While reliance on a previously prepared motion or pleading may be a reality of efficient modern legal practice, litigants remain responsible for ensuring the facts asserted in the "template" actually conform with the facts involved in the case at bar. Commission Procedural Rule 1(b) states that the Federal Rules of Civil Procedure guide Administrative Law Judges "so far as practicable" on "any procedural question" that the Mine Act, the Administrative Procedure Act, and the Commission's own rules do not regulate. 29 C.F.R. § 2700.1(b). Looking to Federal Rules of Civil Procedure 11 and 26 as a guide, representatives are responsible for ensuring the accuracy of their pleadings and responses to discovery requests, and may be liable for sanctions for failure to comply. *See* FED. R. CIV. P. 11(a), (c) and (d); FED. R. CIV. P. 26(g). Without a doubt, legal pleadings and legal analysis cannot, and should not, be paint by numbers.

Perhaps most troubling is that a CLR filed this motion with apparently no legal supervision. The Commission's rules permit non-attorneys to practice before it, *see* 29 C.F.R. § 2700.3(b), and CLR's undoubtedly play a crucial role in efficiently managing the Secretary's caseload. However, an attorney—mindful of his or her duties as an officer of the court—would not have made the multiplicity of factual misrepresentations found in the Secretary's motion. Moreover, I do not believe the Secretary intended for CLR program personnel to make substantive legal arguments like those so thinly analyzed in this motion without attorney supervision. Nor should the Secretary permit a CLR to appear at a hearing without an attorney if the motion before me is indicative of the work product to be expected.

Inaccurate, misleading, and poorly researched pleadings waste the time and resources of parties and Commission Judges alike. Inexperience or unfamiliarity is no excuse. *Cf. Hays v. Sony Corp.*, 847 F.2d 412, 418–19 (7th Cir. 1988) (suggesting that Rule 11 requires a lawyer lacking expertise in an area of law either to associate with a lawyer who does or to "bone up" in recognition that a lack of experience may make error more likely). The Secretary treads too

closely to the precipice if she allows CLR's to practice in this manner.³ She is reminded that Commission Procedural Rule 80(a) states “[i]ndividuals practicing before . . . Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States” —this includes CLR's.

The Secretary should examine or reconsider the appropriate level of attorney supervision applied to CLR's to ensure such error-laden motions do not become MSHA's standard practice.⁴

For the reasons articulated above, the Secretary's motion to limit discovery is hereby **DENIED**. The parties are on notice that the requirements of my April 4, 2011, Prehearing Order, are still in effect.

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

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/pjb

³ To the extent an attorney ostensibly “supervised” the CLR's submission of the motion in this case, such attorney would be well-advised to consider analogous provisions in the Federal Rules, which permit courts to consider whether “other attorneys” and government agencies should be held accountable for an improper pleading. *See* FED. R. CIV. P. 11(c)(1) (advisory committee notes).

⁴ I have this day denied a similar discovery motion filed in Docket No. KENT 2010-928, a case involving the same CLR and operator's counsel and which contained many of the same types of errors and misrepresentations. The Secretary should ensure these types of motions from CLR's do not become a pattern.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001

August 31, 2011

MAMMOTH COAL CO.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2009-888-R
	:	Citation No. 8076518; 02/25/2009
v.	:	
	:	Docket No. WEVA 2009-889-R
	:	Order No. 8076519; 02/25/2009
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2009-894-R
ADMINISTRATION (MSHA),	:	Order No. 8076638; 03/02/2009
Respondent	:	
	:	Mine: Mammoth No. 2 Gas
	:	Mine ID 46-09108
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-1295
Petitioner	:	A.C. No. 46-09108-179898-01
	:	
v.	:	
	:	
	:	
MAMMOTH COAL CO.,	:	Mine: Mammoth No. 2 Gas
Respondent	:	

ORDER DENYING MOTION
TO WITHDRAW CONTESTS
AND
NOTICE OF HEARING SITE

These matters are scheduled for hearing on September 13, 2011, in the vicinity of Charleston, West Virginia. The proceedings involve contested 104(d)(1) Citation No. 8076518 and 104(d)(1) Order No. 8076519 concerning blocked escapeways. The Secretary originally proposed a total civil penalty of \$133,000.00 consisting of \$63,000.00 for Citation No. 8076518 and \$70,000.00 for Order No. 8076519. The Secretary subsequently filed a motion to amend her

petition for assessment of civil penalty to allege flagrant violations pursuant to Section 110(b)(2) of the Mine Act as amended by the Mine Improvement and New Emergency Response Act of 2006 (“the Act”), 30 U.S.C. § 820(b)(2).¹ The Secretary sought to modify her petition by proposing to increase the total civil penalties, from \$133,000.00 to \$335,200.00, for Citation No. 8076518 and Order No. 8076519. The Secretary’s request to modify her petition for civil penalty was granted on June 3, 2011.

On August 23, 2011, Mammoth Coal Company (“Mammoth”) filed a “Notice of Withdrawal of Penalty Contest and Motion for Final Order” that I construe as a motion to dismiss these proceedings. In support of its motion, Mammoth relies on its August 18, 2011, payment of the \$133,000.00 civil penalty initially proposed by the Secretary in her original petition. The Secretary opposes Mammoth’s motion.

The initial petition seeking to impose a civil penalty of \$133,000.00 was superceded by the June 3, 2011, grant of the Secretary’s motion to amend the petition to reflect a total proposed civil penalty of \$335,200.00 for violations the Secretary now alleges are flagrant. Consequently, Mammoth seeks, in effect, to withdraw its contests of the initial civil penalty petition based on payment of a proposed civil penalty that is no longer in effect. Consequently, in the absence of Mammoth’s withdrawal of its contest of the modified petition seeking payment of \$335,200.00, these matters must proceed to hearing.²

Accordingly, **IT IS ORDERED** that Mammoth’s motion to dismiss these proceedings **IS DENIED**. In view of the above, these captioned proceedings will proceed to hearing on the merits at **9:00 a.m.**, on **Tuesday, September 13, 2011**, at the following location:

U.S. Federal Courthouse
Room B 6200
300 Virginia Street
Charleston, West Virginia

¹ Section 110(b)(2) of the Act provides that a mine operator who commits a violation deemed to be “flagrant” may be assessed a civil penalty of not more than \$220,000. Section 110(b)(2) defines “flagrant” as “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.”

² If not refunded, Mammoth’s payment of \$133,000.00 may be credited to the ultimate civil penalty, if any, imposed in this matter.

As discussed during a telephone conference on August 26, 2011, **IT IS FURTHER ORDERED** that the parties complete discovery and exchange witness lists with a brief synopsis of the anticipated testimony with each other and the undersigned on or before September 2, 2011.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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